

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 18

WCC No. 2019-4545

STEPHEN J. SWAN

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner claims he suffered a compensable lung injury when he inhaled crystalized mineral dust in the course of his mining job on February 1, 2017. In the alternative, Petitioner claims he has a compensable occupational disease as a result of his occupation as a miner and that his last injurious exposure to the hazard of his lung disease occurred when he was working for Respondent's insured. Respondent argues that Petitioner failed to prove a compensable injury because he lacks both objective medical evidence of an injury and an expert medical opinion that an exposure on February 1, 2017, was the primary cause of his lung condition. Respondent also argues that Petitioner failed to prove a compensable occupational disease because he lacks an expert medical opinion that his lifetime of occupational exposure was the major contributing cause of his lung condition and because its insured is not the employer of last injurious exposure.

Held: Petitioner does not have a compensable injury because, although he has objective medical evidence of a lung condition, he did not carry his burden of proving by a preponderance of the evidence that an alleged exposure to crystalized mineral dust on February 1, 2017, was the primary cause of his cumulative lung condition. Petitioner does not have a compensable occupational disease because he did not carry his burden of proving by a preponderance of the evidence that his lifetime of occupational exposure was the major contributing cause of his lung condition. Moreover, Petitioner, who was exposed to dust while working for a subsequent employer, did not carry his burden of

proving that his employment with Respondent's insured involved any exposure to a noxious substance, let alone his last injurious exposure.

¶ 1 The trial in this matter was held on September 26, 2019, in Helena, Montana. Petitioner Stephen J. Swan was present and was represented by Bernard J. Everett. Charles G. Adams represented Respondent Montana State Fund (State Fund). Kevin Wallace, claims adjuster, was also present on behalf of State Fund.

¶ 2 Exhibits: The Court admitted Exhibits 1 through 13 without objection. State Fund withdrew Exhibit 14.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Swan and Gyorgy Mundruczo, MD, into evidence. Swan and his wife, Corrine Swan, were sworn and testified at trial.

¶ 4 Issues Presented: This Court restates the issues set forth in the Pretrial Order as follows:¹

Issue One: Did Stephen Swan suffer a compensable injury arising from and in the course of his employment with Groundhog Mining and Milling, LLC on February 1, 2017, for which State Fund is liable?

Issue Two: Did Stephen Swan suffer a compensable occupational disease for which State Fund is liable?

FINDINGS OF FACT

¶ 5 This Court finds the following facts by a preponderance of the evidence.

¶ 6 Over the course of his 30-plus-year career as a miner,² Swan has worked in the presence of a number of different types of rock dust. Sometimes he inhaled this dust because he was not wearing his respirator.

¹ This Court has separated Issue 1 of the Pretrial Order, as to whether Swan "suffered an injury or occupational disease to his lungs on February 1, 2017," into restated Issues One and Two. This Court does not address Issues Two, Three, and Four of the Pretrial Order, as to liability for subsequent exposures, because they are not relevant in a case involving the initial assignment of liability, like Swan's. See ¶ 62 *infra*. This Court does not formally address Issue Five of the Pretrial Order, as to whether "the Interwest employment was the type to potentially cause an occupational disease," because it is not relevant in light of the way this Court resolved restated Issue Two. This Court incorporates Issue Six of the Pretrial Order, as to whether Swan "is entitled to wage loss and medical benefits for his February 1, 2017, lung injury or occupational disease," in restated Issues One and Two. This Court does not address Issue Seven of the Pretrial Order, as to whether Swan "is permanently totally disabled as the result of his February 1, 2017, lung injury or occupational disease," because it is not relevant in light of the way this Court resolved restated Issue Two.

² Swan did similar, if not the same, types of work, including heavy labor, drilling, and operating equipment, at other sites in addition to mines, but he primarily did underground mining.

¶ 7 Before the incident giving rise to his claim, Swan's wife never observed him having lung problems. Swan would mention a cough to N.M. Campbell, MD, his family doctor, about once a year, almost always in conjunction with a sinus infection. However, according to his medical records, Swan had not reported other problems with his lungs to his doctors.

¶ 8 In early 2017, Swan was working for Groundhog Mining and Milling, LLC (Groundhog), rehabbing an old copper mine in Madison County. He was not having any breathing or sinus problems.

¶ 9 On February 1, 2017, Swan was working in an escape raise that was full of a blue substance resembling crystallized minerals. At his deposition, Swan testified about his respirator use:

Q. . . . So I guess my question was, at what point did you put on your respirator on that day in particular?

A. That day I believe I had the respirator on all day.

When asked whether there were days before that that he did not have his respirator on all day, Swan testified that he did not wear a respirator every time he walked into the mine; just the day before, he had not worn a respirator when putting together a drill deck for the core drillers, or when going into the escape raise to see what he would have to do to make it safe. Swan explained, "You can't avoid dust at all times unless you were to wear a respirator at all times and that is not something that you do."

¶ 10 State Fund's attorney revisited Swan's respirator use at trial. However, Swan's testimony was not congruous with his deposition testimony; he testified:

Q. . . . I want to make sure I'm clear on this. On February 1, 2017, my understanding is that you had your respirator on all day. Right?

A. Yes, most of the day. I'd take it off when I was measuring for timber and stuff, yes.

Q. Okay. So when you -- that blue crystal was disrupted, though, you had it on, right?

A. It was throughout the day all day long when it was being disrupted. No matter what I did it was being disrupted.

Q. Well, okay. Let's just make sure I'm clear on this, because I believe -- did you have your respirator on all day?

A. Yes, except for when I was measuring for timber, putting my head into places that I couldn't get through there to look and see what I had to do, how much rock was behind the timber and stuff.

In sum, Swan agreed that he would "have a respirator on when the conditions warrant[ed] it, but it wasn't always possible."

¶ 11 As the day of February 1, 2017, went on, Swan developed back, neck, and shoulder pain while he was working and left before the end of his shift. That night, Swan began experiencing shortness of breath and tightness in his chest.

¶ 12 Although he still was not feeling well, after several weeks of treatment in Montana for what his doctors thought was an infection, Swan was released to return to work.

¶ 13 He began working on a retaining wall project for a hydroelectric plant in Utah. Swan worked on the project through late February 2017 with Groundhog and from early March 2017 with a company doing the same type of work, called Interwest Specialties (Interwest). During this time with Interwest, Swan was working, at least half-the-time, in dusty conditions, although he continued wearing his respirator and knew it was working because “[he] was not coughing up dirt materials or blowing it out of [his] nose.” Simultaneously, Swan was weaning off Prednisone. However, the condition of Swan’s lungs only got worse.

¶ 14 On March 22, 2017, Swan was working in an area that was not dusty. His boss at Interwest sent him home because he was feeling poorly. That evening, Swan was taken to the hospital by ambulance and admitted for hypoxic respiratory failure. During his hospitalization, Swan was intubated for several days. He was discharged on March 27, 2017, with instructions to get pulmonary function testing due to the hazards inherent in his occupation.

¶ 15 On April 3, 2017, Swan had a chest CT, which suggested ground-glass opacities (GGOs), fibrosis, and reticulonodular infiltrates in an upper lobe predominant distribution, all characteristics of interstitial lung disease.

¶ 16 Pulmonologist Gyorgy Mundruczo, MD, first saw Swan on April 20, 2017, documenting in his history that Swan had been a miner for decades, that his exposures included “various hard rock dust that is mined for gold, silver, zinc, lead and copper,” and that he “has been wearing a respirator at work (but not throughout his career).” Dr. Mundruczo further noted in his assessment that Swan had “likely occupational lung disease and an acute event leading to severe hypoxic respiratory failure.” Swan’s chest x-ray that day showed increased markings but no other parenchymal abnormalities. His pulmonary function tests were normal, “though [Swan’s] FEV1/FVC ratio [was] increased,” which can indicate restriction. Dr. Mundruczo characterized the examination as benign and diagnosed Swan with “dyspnea on exertion.” He prescribed Prednisone to reduce inflammation in Swan’s lungs.

¶ 17 On April 24, 2017, Swan filed a First Report of Injury or Occupational Disease with State Fund. He identified a February 1, 2017, injury to his lungs, in the nature of an “illness” from dust and crystallized minerals, and attached a description, reading, in pertinent part, as follows:

Due to the [February 1, 2017,] incident listed below and after speaking with my physician, all the Utah Physicians and Respiratory Therapist[s] (on my case in the hospital) and the pulmonary specialist, it is believed that my working in the mine is what caused the chronic inflammation in my lungs which lead to hospitalization

¶ 18 Over the following weeks, Swan's condition improved, but his symptoms came back when he reduced his Prednisone. After this happened several times, and in concert with Swan's pulmonary function tests, Dr. Mundruczo determined that Swan had obstructive lung disease.

¶ 19 On his June 1, 2017, medical note, Dr. Mundruczo revised his assessment that Swan had "likely" occupational lung disease to "possible" occupational lung disease, which he kept in his records for the rest of Swan's treatment. Swan had a repeat chest CT that day, which showed "[n]o evidence of pulmonary fibrosis" but "[s]everal tiny pulmonary nodules."

¶ 20 On June 28, 2017, State Fund denied Swan's claim. State Fund contended that Swan suffered an occupational disease rather than an injury, and that it was not the insurer for the employer in whose employment Swan was last injuriously exposed.

¶ 21 Swan continued working for Interwest until December of 2017. Between March and December, he supervised a hospital project in Richfield, Utah, which did not expose him to dust, and was a laborer and equipment operator on two dusty highway projects, one by Kingman, Arizona, which involved two days of drilling, and one in Hoback Junction, Wyoming, which also involved some drilling, although he put his respirator on before he drilled on highway jobs because he knew that with dry drilling, it was going to get dusty.

¶ 22 In early 2018, after helping a friend clean out his chimney, Swan suffered an exacerbation of his obstructive lung disease. Dr. Mundruczo also diagnosed him with possible asthma and peripheral eosinophilia, which Dr. Mundruczo explained is an elevated number of eosinophils, a type of white blood cell in the peripheral blood that can be associated with, among other conditions, allergies, asthma, medications, parasitic infections and malignancies. Dr. Mundruczo further explained that "eosinophilia can perpetuate symptoms associated with obstructive lung disease, and they are characteristically quite responsive to steroids."

¶ 23 In mid-2018, Dr. Mundruczo observed that Swan's spirometry was "compatible with a combined obstructive and restrictive disorder" and that "his respiratory issues [were] mostly related to asthma/obstructive lung disease."

¶ 24 In his December 13, 2018, medical notes, Dr. Mundruczo noted that Swan had yet to return to baseline following his exacerbation. He also referred Swan to Michael C. DiCello, MD, of Allergy and Asthma Consultants of Montana, for evaluation of his eosinophilia because he believed it could be driving Swan's "symptoms and his disease."

¶ 25 On February 4, 2019, Swan filed a Petition for Trial, alleging that he suffered an industrial injury or an occupational disease, and that he is permanently totally disabled as a result.

¶ 26 On February 18, 2019, Dr. Mundruczo responded to written questions from Swan's attorney. He checked "YES" in response to Swan's question as to whether it is "more likely than not that Mr. Swan's lung condition is an occupational disease." As to what caused Swan's lung condition, Dr. Mundruczo wrote that, although "[t]he exact mechanism by which [Swan] developed his lung disease [wa]s unclear, . . . the [illegible] (timing) of the onset of his symptoms suggest[ed] an occupational exposure being the culprit of his lung disease."

¶ 27 Dr. Mundruczo further wrote that Swan had not yet reached maximum medical improvement (MMI) from his February 1, 2017, exposure. And, he was steroid-dependent; when he came off steroids, his symptoms returned, and when he was on steroids, his symptoms were only somewhat, though not completely, controlled.

¶ 28 As of September 26, 2019, Swan had only worked a total of one week since leaving Interwest in December 2017, that being a stint in the Fall of 2018 driving a potato truck for Foth Farms in Townsend. Although that driving was along a dusty road, Swan drove with the windows up.

Medical Testimony

¶ 29 In his deposition on June 17, 2019, Swan's attorney had the following exchange with Dr. Mundruczo:

Q. So I want to make sure that I understand correctly. It is more likely than not that Mr. Swan has respiratory problems . . . as a result of his occupation as a miner?

A. Yes.

Q. In February of 2017, he was exposed to something, some crystals that he inhaled in a mine, copper mine, that resulted in his having to be hospitalized in Townsend, Montana?

A. Yes.

Q. And he never reached maximum medical improvement after that point before he was hospitalized in Utah?

A. Correct.

Q. We don't know what he was exposed to in Utah and you don't know whether or not that caused any aggravation of his preexisting condition; is that correct?

A. Yes.

¶ 30 Dr. Mundruczo opined that Swan “developed a lung disease here in Montana” and that “in Utah, basically, his preexisting lung condition worsened.” He explained that “[t]hat may have worsened as a result of additional exposure to dust particles or rock, rock dust or what not.” But Dr. Mundruczo testified that another possible explanation for Swan’s worsening condition in Utah was that it was “a result of weaning this . . . short course of steroids and this condition was kind of self-perpetuating to an extent.” Dr. Mundruczo was clear, though, that he “[did] not feel that the Utah exposure was the primary event.” Rather, he “[felt] it was just maybe a trigger for [Swan’s] exacerbation.”

¶ 31 Dr. Mundruczo did not think that Swan’s sinus issue or eosinophilia were connected to his “occupational exposure.” However, he opined that the chronic cough, interstitial lung disease, and obstructive lung disease were. He explained that a person typically develops Swan’s lung condition from either asthma, smoking, or occupational exposure. Because Dr. Mundruczo “[felt] that the pattern of [Swan’s] medical issues relating to his lungs . . . [did] not follow classic asthma,” and because Swan “never was a smoker,”³ Dr. Mundruczo “suspect[ed] that he may have occupational lung disease.”

¶ 32 When asked, specifically, “[W]ould work around dislodged or disrupted rock either through blasting or drilling or a dusty environment be the type of work that could cause or aggravate [Swan’s lung] condition,” Dr. Mundruczo answered, “Yes,” but then elaborated, “I mean it depends on – I mean it really depends on the type of dust so there is, you know, biologically-active and kind of inactive compounds in, you know, in particles that are inhaled so some are more inflammatory and more damaging than others.” Although Dr. Mundruczo did not know what substances Swan inhaled, he testified:

So in this particular case, my opinion has been and is that more likely than not, his lung disease is related to inhalation of some substance that caused his lungs to get inflamed and kind of exhibit – initially, I think the process that caused low oxygen and kind of the described ground-glass opacities and I think as it evolved and kind of stabilized in a way or just progressed, it turned into more of an obstructive process.

Put more succinctly, he testified that, more likely than not, Swan’s inhalation of “a noxious substance” caused “severe inflammation” that “with treatment subsided,” but then “evolved into an obstructive lung disease.” As to how this could have occurred, Dr. Mundruczo explained: “[T]he way I rationalized that is that the original severe

³ Although Swan did smoke for a time, he quit over 35 years ago.

inflammation subsided but the – possibly the inhaled substance may have remained in his system and caused some changes in his airways leading to narrowing of the airways and inflammation.”

¶ 33 Dr. Mundruczo testified that he would not recommend that Swan be around dusty environments, including drilling and blasting activities. He further testified that Swan “needs to be extremely proactive preventing inhaling any air that is . . . dusty or . . . has pollen or any type of – I mean other than the purest air, I think, is potentially . . . detrimental to him.” Still, Dr. Mundruczo explained that he is “not concerned about [Swan] having . . . impending hypoxic respiratory failure again, unless he has some sort of like a flare-up of this disease or a new exposure or something or maybe something as simple as a pneumonia.”

Resolution of Main Facts

¶ 34 Swan’s lung condition is established by objective medical evidence, including:

¶ 34a chest CTs showing “GGOs,” “fibrosis,” “reticulonodular infiltrates in an upper lobe predominant distribution,” and “several tiny pulmonary nodules”;

¶ 34b a chest x-ray showing “increased markings”; and

¶ 34c spirometry tests showing an increased FEV1/FVC ratio.

¶ 35 This Court is not convinced that Swan’s alleged occupational exposure on February 1, 2017, was the primary cause under § 39-71-119(5)(b), MCA, i.e., responsible for more than 50% of Swan’s cumulative condition, because Dr. Mundruczo neither testified that it was, nor did he give an apportionment opinion. Swan never asked him to opine as to the primary cause of his lung condition; thus, Dr. Mundruczo never offered an opinion on that question. Dr. Mundruczo made assertions and gave opinions suggesting that the cause of Swan’s lung disease was “an occupational exposure,” on February 1, 2017.⁴ He also at least implied that Swan had an asymptomatic preexisting occupational lung condition before the alleged exposure on February 1, 2017.⁵ However, as discussed below, medical testimony that identifies **a** cause of a pulmonary disease, or even several causes, is not sufficient under § 39-71-119(5)(b), MCA; the medical testimony that is required is that which identifies the **primary** cause. And Swan did not elicit testimony from Dr. Mundruczo as to which — the alleged exposure on February 1, 2017, or Swan’s

⁴ Dr. Mundruczo initially wrote in comments to Swan, that although “[t]he exact mechanism by which he developed his lung disease is unclear, . . . the [illegible] (timing) of the onset of his symptoms suggest [sic] an occupational exposure being the culprit of his lung disease.” Likewise, Dr. Mundruczo later testified that, “more likely than not, [Swan’s] lung disease is related to inhalation of some substance,” which this Court infers, through context, was the crystallized mineral dust to which he was allegedly exposed on February 1, 2017.

⁵ Dr. Mundruczo checked “YES” in response to Swan’s written question as to whether it is “more likely than not that Mr. Swan’s lung condition is an occupational disease,” and later testified that “[i]t is more likely than not that Mr. Swan has respiratory problems . . . as a result of his occupation as a miner.”

previous exposures — he thought was the primary cause of Swan’s post-February 1, 2017, lung condition.

¶ 36 Moreover, even for the causation opinions he gave, Dr. Mundruczo did not have an adequate foundation to convince this Court that Swan’s alleged exposure on February 1, 2017, was sufficient to be the primary cause of his lung condition. Because Swan testified inconsistently as to whether he wore his respirator the whole day on February 1, 2017, this Court is not convinced that Swan actually inhaled the crystallized mineral dust.⁶ At his deposition, Swan was asked at what point on February 1, 2017, he put on his respirator. He answered, “That day I believe I had the respirator on all day.” At trial, however, Swan testified that, although “[he] had [his] respirator on all day” on February 1, 2017, he did not wear it “on [his] face all day.” In particular, he testified that he took his respirator off “when [he] was measuring for timber and stuff,” and breathed in “dust and other mining minerals, materials” in the mine at times. As a result of Swan’s inconsistent testimony, this Court is not convinced that Swan breathed in a sufficient amount of the unknown substance to cause an injury.

¶ 37 In addition, because Swan did not introduce evidence of what substance he allegedly inhaled, this Court is not convinced that the substance was capable of causing his lung condition.⁷ Although Dr. Mundruczo testified that working in a dusty environment could have caused Swan’s condition, he clarified that “it really depend[ed] on the type of dust” as some “particles that are inhaled . . . are more inflammatory and more damaging than others.” Nevertheless, Dr. Mundruczo did not know what the substance was and this Court is convinced that he determined it was “noxious” from the timing of the onset of Swan’s symptoms alone. Indeed, Dr. Mundruczo acknowledged that this was his approach when, writing to Swan’s attorney on February 18, 2019, he opined that although “[t]he exact mechanism by which [Swan] developed his lung disease is unclear, . . . the [illegible] (timing) of the onset of his symptoms suggest[ed] an occupational exposure being the culprit” However, this Court has previously ruled that a temporal relationship between an injury and the onset of symptoms, without more, is not sufficient to prove causation.⁸ Because Dr. Mundruczo did not know what the substance Swan allegedly inhaled was, he did not have an adequate foundation to opine that it was a cause of Swan’s lung condition.

¶ 38 This Court is also not convinced that Swan’s lifetime of employment in mining was the major contributing cause of his lung condition under § 39-71-407(12)(b) and (16),

⁶ See, e.g., *Holmquist v. Travelers Ins. Co.*, 1992 WL 430350, at *4 (Case No. 9112-6326, Mont. Work. Comp. Ct.) (discounting claimant’s testimony “[b]ecause of the inconsistencies in claimant’s testimony at his depositions and two weeks later at trial”).

⁷ See, e.g., *Haines v. Mont. Univ. Sys. Self-Funded Workers’ Comp. Program*, 2015 MTWCC 9, ¶¶ 62, 66, 68, 77 (finding doctor’s opinion lacked credibility and persuasiveness where he was the only expert tying claimant’s peripheral neuropathy to chemical exposure at work and he could not identify the specific chemical involved).

⁸ See *Pasha v. Nat’l Union Fire of Pittsburgh*, 1997 MTWCC 5, ¶¶ 56-63.

MCA, because Swan did not elicit a medical opinion as to the major contributing cause of his lung condition. At his deposition, Dr. Mundruczo testified that people typically develop Swan's lung condition from either asthma, smoking, or occupational exposure. While he determined that Swan may have "occupational lung disease" because his lung issues did not follow "classic asthma" and because he "never was a smoker," Dr. Mundruczo's medical notes show that he thought Swan's respiratory issues were, in part, a result of asthma, and that Swan had been a smoker, albeit many years ago. Moreover, Dr. Mundruczo never ruled out eosinophilia as a cause of Swan's lung condition. Dr. Mundruczo's December 13, 2018, medical notes indicate that he believed eosinophilia, which he opined was not connected to Swan's "occupational exposure," could be driving Swan's "symptoms and his disease." Indeed, that concern is what prompted Dr. Mundruczo to send Swan to see the allergist. However, the record contains no allergy records, and no further notes from Dr. Mundruczo. As discussed below, medical testimony that identifies **a** cause, or even several causes, of a disease is not sufficient to prove an occupational disease; the medical testimony that is required is that which identifies the **major contributing** cause.

¶ 39 Moreover, even for the causation opinions that Swan proffered in support of his occupational disease claim, Dr. Mundruczo did not have an adequate foundation to convince this Court that Swan's lifetime of employment in mining was sufficient to be the major contributing cause of his lung condition. Dr. Mundruczo did not explain how much rock dust a person would need to inhale, or how long or often a person would need to inhale it, in order to cause a lung disease. And Swan did not explain how long or often he had worked without a respirator in dusty conditions over his career, and thus did not prove the extent of his actual inhalation of rock dust. Nor could Dr. Mundruczo simply conclude, without evidentiary support, that long-time miners of Swan's ilk inevitably suffer exposure-based occupational lung disease.⁹ As a result, Swan did not introduce sufficient evidence to convince this Court that he inhaled enough rock dust throughout his career to have caused Swan's lung condition.

¶ 40 Even if Swan had proven that his lung condition was a compensable occupational disease, however, he failed to convince this Court that his last injurious exposure occurred while he was working for Groundhog. Swan worked with Interwest after he worked at Groundhog. He did the same type of work, including dry drilling, which is a particularly dusty endeavor, for both employers. Although Swan put his respirator on before dry drilling, he had additional exposures to rock dust while working for Interwest. If the unknown substances to which Swan was exposed throughout his mining career were sufficient to cause his lung condition, then the working conditions at Interwest were

⁹ See *Warboys v. Liberty Nw. Ins. Corp.*, 2020 MTWCC 5, ¶¶ 27, 50 (ruling that doctor's opinion, that claimant had asbestos-related pleural thickening, was not convincing where doctor's only explanation for being able to read claimant's CT scan, showing "nonspecific thickening of the lining of the pleura," as asbestos-related was that claimant had been exposed to Libby asbestos and he was "knowledgeable about what [a physician] would expect to find in Libby").

the type and kind of conditions that could have caused his lung condition. Therefore, Swan's employment with Groundhog would not be his last injurious exposure.

CONCLUSIONS OF LAW

¶ 41 This case is governed by the 2015 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Swan's alleged industrial accident¹⁰ and at the time he filed his claim for an alleged occupational disease.¹¹

Issue One: Did Stephen Swan suffer a compensable injury arising from and in the course of his employment with Groundhog Mining and Milling, LLC on February 1, 2017, for which State Fund is liable?

¶ 42 Section 39-71-119, MCA, states, in relevant part:

(1) "Injury" or "injured" means:

(a) internal or external physical harm to the body that is established by objective medical findings;

. . . .

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

. . . .

(5)(a) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition.

(b) "Primary cause", as used in subsection (5)(a), means a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition.

¹⁰ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

¹¹ Generally, the law in effect when a claimant files his claim, or on his last day of work, whichever is earlier, governs an occupational disease claim. *Hardgrove v. Transp. Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citing *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996)); *Bouldin v. Liberty Nw. Ins. Corp.*, 1997 MTWCC 8. *But see Nelson v. Cenex, Inc.*, 2008 MT 108, ¶¶ 30, 33, 342 Mont. 371, 181 P.3d 619 (Worker's later employment was irrelevant to his hazardous exposure and occupational disease, and the court therefore applied the Occupational Disease Act in effect on the date in which the period of employment which included his last injurious exposure ended.).

¶ 43 Section 39-71-407, MCA, provides, in pertinent part:

(3)(a) An insurer is liable for an injury, as defined in 39-71-119, only if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or
(ii) a claimed injury has occurred and aggravated a preexisting condition.

(b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.

.....

(10) An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury.

¶ 44 Section 39-71-116(22), MCA, states, “[o]bjective medical findings’ means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.”

¶ 45 In *Ford v. Sentry Casualty Co.*, the Montana Supreme Court held that under the 1995-present version of these statutes, claimants have the burden of proving an injury with objective medical findings and causation with medical expertise or opinion.¹² With respect to the medical expertise or opinion, the court held that, while doctors may not utter the words “more probable than not” when connecting the injury to the accident, “the probative force of the opinion is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis.”¹³

¶ 46 Swan argues that he suffered an industrial injury on February 1, 2017, when he inhaled a blue crystalized mineral material while he was working for Groundhog. He argues that State Fund, as Groundhog’s insurer, is liable because objective medical evidence establishes that he suffered an injury to his lungs, and medical opinion, uncontested by State Fund, establishes that his February 1, 2017, exposure was the cause.

¶ 47 State Fund contends that Swan has presented no objective medical evidence that he sustained a work-related injury on February 1, 2017, and no medical opinion that an occupational exposure that day was the primary cause of his lung condition.

¹² *Ford*, ¶¶ 44-49.

¹³ *Ford*, ¶ 42 (citations omitted) (internal quotation marks omitted).

¶ 48 Swan has not met his burden of proving that he has a compensable injury. Although, as this Court found above, there is objective medical evidence of Swan's lung condition, this Court is not convinced that an alleged occupational exposure on February 1, 2017, was the primary cause, i.e., responsible for more than 50%, of Swan's cumulative condition, under § 39-71-119(5), MCA, and *Cheetham v. Liberty Northwest Ins. Corp.*¹⁴

¶ 49 In *Cheetham*, this Court addressed the "primary cause" requirement for conditions such as lung diseases in § 39-71-119(5), MCA, as amended in 1995.¹⁵ Cheetham became ill while working strenuously in hot weather. At the hospital, he was diagnosed with an aortic dissection, which is a tear in the inner wall of the aorta and compromises circulation.¹⁶ This Court explained that, under § 39-71-119(5)(a), MCA, the claimant must "pro[ve] that the industrial accident was the primary cause of claimant's cumulative condition."¹⁷ This Court also explained that, under § 39-71-119(5)(b), MCA, the claimant must prove with a physician's "apportionment opinions" that the accident contributed at least 51% to the condition.¹⁸ Based on these provisions, this Court ruled that Cheetham's aortic dissection was a compensable injury, even though his hypertension had made him susceptible to it. This Court relied on the apportionment opinions of two physicians, each of whom testified that Cheetham's overexertion at work contributed 51% or more to the dissection when compared to his preexisting aortic disease.¹⁹

¶ 50 Because this Court found that Swan failed to elicit an apportionment opinion from Dr. Mundruczo, as required by § 39-71-119(5), MCA, and *Cheetham*, and that he did not have an adequate foundation to give the causation opinions he gave on a more-probable-than-not basis, Swan did not meet his burden of proving that he has a compensable injury.

¶ 51 Swan's arguments that he should prevail against State Fund because Dr. Mundruczo's opinions were "uncontested" is not helpful to his case. Swan still bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.²⁰ As this Court concluded above, Swan failed to elicit opinions from Dr. Mundruczo that were sufficient to convince this Court that Swan suffered a compensable injury under § 39-71-119(5)(a), (b), MCA.

¹⁴ 1997 MTWCC 37.

¹⁵ 1997 MTWCC 37. See also *Mize v. Mont. State Fund*, 2020 MTWCC 7, ¶ 100. For the Montana Supreme Court's interpretation of the prior version of § 39-71-119(5), MCA, see *Gaumer v. Mont. Dep't of Highways*, 243 Mont. 414, 795 P.2d 77 (1990) (interpreting the 1987-1993 version of the subsection).

¹⁶ *Cheetham*, Findings of Fact, ¶¶ 9-10.

¹⁷ *Cheetham*, Conclusions of Law, 2 (citations omitted).

¹⁸ *Cheetham*, Conclusions of Law, 2.

¹⁹ *Cheetham*, Findings of Fact, ¶¶ 18-19, Conclusions of Law, 2.

²⁰ *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

¶ 52 Accordingly, State Fund is not liable for injury benefits under § 39-71-407(1), MCA.

Issue Two: Did Stephen Swan suffer a compensable occupational disease for which State Fund is liable?

¶ 53 Because Swan was allegedly exposed to the hazard of his condition through his employment with successive employers, this Court employs a two-step analysis.²¹

¶ 54 First, this Court must determine whether Swan has a compensable occupational disease. An “occupational disease” is defined as “harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift.”²² To establish that he has a compensable occupational disease, the claimant must set forth objective medical evidence of his occupational disease, and prove that “the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease.”²³ In this context, “major contributing cause” means “a cause that is the leading cause contributing to the result when compared to all other contributing causes.”²⁴ The major contributing cause standard applies not to any specific employer but rather to the employee’s lifetime of employment, which is compared to non-occupational contributing causes.²⁵

¶ 55 If the claimant has a compensable occupational disease, the second step is for this Court to determine which insurer is liable. Under the last injurious exposure rule, “[w]hen compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.”²⁶ The claimant is not required to prove the degree to which working conditions with each employer actually caused the occupational disease to attribute initial liability. Under the “potentially causal” standard set forth in *Liberty Northwest Ins. Corp. v. Montana State Fund (In re: Mitchell)*, the claimant need only prove that the working conditions during the employment at which the last injurious exposure

²¹ *Rosling v. Associated Loggers Exch.*, 2019 MTWCC 5, ¶ 87 (“Under established Montana law, the first step is to determine whether [decedent] had a compensable OD under §§ 39-71-116(23)(a) and -407(12) and (16), MCA (2011), which is determined by his lifetime of employment, and not a particular employer. If he had a compensable OD, the second step is to determine which employer is liable under § 39-71-407(13), MCA (2011), which sets forth the last injurious exposure rule.”).

²² § 39-71-116(23)(a), MCA.

²³ § 39-71-407(12)(a), (b), MCA.

²⁴ § 39-71-407(16), MCA.

²⁵ *Rosling*, ¶ 88 (citation omitted). See *Liberty Nw. Ins. Corp. v. Mont. State Fund (In re Mitchell)*, 2009 MT 386, ¶¶ 9-10, 353 Mont. 299, 219 P.3d 1267.

²⁶ § 39-71-407(13), MCA.

was alleged to occur were the type and kind of conditions that could have caused the occupational disease.²⁷

¶ 56 Swan argues, “This is not a case of ‘recurrence’ of a lung disease that would trigger analysis of the last injurious exposure statute” because he “was still receiving care for and had not reached MMI for the lung injury he suffered on February 1, 2017.” He cites *Montana State Fund v. Liberty Northwest Ins. Corp. (In re Wiard)*,²⁸ *Burglund v. Liberty Mutual Fire Ins. Co.*,²⁹ and *Montana Contractor Compensation Fund v. Liberty Northwest Ins. Corp. (In re Rusco)*³⁰ in support of his position. Nevertheless, he argues, even were the last injurious exposure rule to apply, “State Fund has provided no medical evidence to support an argument, let alone a determination, the [sic] Stephen Swan’s work for Interwest Specialties in March, 2017, caused a ‘material aggravation’ of his underlying lung condition as would be required to shift liability to Interwest.”

¶ 57 State Fund argues that “There is no diagnosis of occupational lung disease as a direct result of Petitioner’s alleged exposure on February 1, 2017 and Petitioner has not met the burden of proof to show that any alleged occupational disease was the direct result of exposure during his employment with Groundhog.” State Fund further argues that, “Under the applicable case law, Groundhog was not a last exposure that was the type and kind which could cause the condition.” Rather, it contends that Interwest was the employer of last injurious exposure. Moreover, State Fund argues that once Swan proves that he has an occupational disease, “the burden shifts to the last potentially liable insurer to prove that it is not liable for the claim.”³¹ And since State Fund is not the last potentially liable insurer, it has no burden of proof with respect to this issue.

¶ 58 Swan has not met his burden of proving that he has a compensable occupational disease. As this Court found above, there is objective medical evidence of Swan’s lung condition. However, this Court is not convinced that Swan’s lifetime of employment in mining was the major contributing cause of his lung condition under § 39-71-407(12)(b) and (16), MCA, and *Montana State Fund v. Grande*.³²

¶ 59 In *Grande*, the Montana Supreme Court discussed the meaning of “major contributing cause” as set forth in § 39-71-407(12)(b) and (16), MCA.³³ As did other

²⁷ *In re Mitchell*, ¶ 24.

²⁸ 2018 MT 188, ¶ 27, 392 Mont. 221, 425 P.3d 646.

²⁹ 286 Mont. 134, 950 P.2d 1371 (1997).

³⁰ 2003 MTWCC 10.

³¹ *Wommack v. Nat’l Farmers Union Prop. & Cas.*, 2017 MTWCC 8, ¶ 78 (citing *In re: Abfalder v. Nationwide Mut. Fire Ins. Co.*, 2003 MT 180, ¶ 16, 316 Mont. 415, 75 P.3d 1246).

³² 2012 MT 67, 364 Mont. 333, 274 P.3d 728.

³³ 2012 MT 67, 364 Mont. 333, 274 P.3d 728. *Grande* involved the 2009 Workers’ Compensation Act, but the sections at issue are substantially similar in the 2015 version. See also *Rosling*, ¶¶ 92-98.

members of his family, Grande suffered from rheumatoid arthritis and osteoarthritis.³⁴ Several experts testified that the cause of these diseases is unknown; Grande's treating physician testified that there is likely a genetic component.³⁵ But she opined that his lifetime of work as a truck driver, which required constant use of his hands and repetitive, firm gripping and twisting, aggravated and accelerated the progression of his condition.³⁶ She also opined that Grande's job duties, when compared to other contributing causes, were the leading cause of the worsening and accelerating of his arthritis because he repetitively used his hands while working more than in his activities of daily living.³⁷ Grande's arthritis progressed to the point that he could no longer work as a truck driver.³⁸ This Court ruled that Grande suffered from a compensable occupational disease.³⁹

¶ 60 The Supreme Court affirmed, explaining that under the definition of "major contributing cause," *all* contributing factors must be considered in determining whether a condition qualifies as an occupational disease.⁴⁰ The Supreme Court rejected State Fund's argument that "leading cause" means more than 50%. The Supreme Court stated: "The WCC pointed out that just as a horse can 'lead' a race by a nose, a 'leading cause' under the statute is that cause which ranks first among all causes 'contributing to the result'—i.e., the condition for which benefits are sought regardless of the respective percentages of multiple contributing causes."⁴¹

¶ 61 Because this Court found that Dr. Mundruczo did not consider all of the contributing causes or weigh them against one another, as required by § 39-71-407(12)(b) and (16), MCA, and *Grande*, and that he did not have an adequate foundation to give the causation opinions he gave on a more-probable-than-not basis, Swan did not meet his burden of proving that he has a compensable occupational disease.

¶ 62 Swan's argument about the last injurious exposure rule and his reliance on *In re Wiard*, *Burglund*, and *In re Rusco* in support of his position are unavailing because Montana courts apply different versions of the rule in different contexts.⁴² Swan is correct that "recurrence" cases — i.e., cases in which "an OD has already been diagnosed, liability for the OD has been determined, and the question is whether a recurrence of the OD condition is attributable to the original employer or is attributable to a second employer

³⁴ *Grande*, ¶ 12.

³⁵ *Grande*, ¶ 41.

³⁶ *Grande*, ¶¶ 8, 9, 16, 41.

³⁷ *Grande*, ¶ 42.

³⁸ *Grande*, ¶¶ 14, 15.

³⁹ *Grande*, ¶ 18.

⁴⁰ *Grande*, ¶¶ 34-35 (citing § 39-71-407(13), MCA (2009)).

⁴¹ *Grande*, ¶ 40.

⁴² See *In re Mitchell*, ¶ 24.

based on an intervening exposure to the hazard of the OD⁴³ — can involve application of one version of the last injurious exposure rule⁴⁴ and that Swan’s is not a recurrence case.⁴⁵ However, “cases in which the issue is the initial liability for an OD claim for a claimant who has worked for successive employers, and was arguably exposed to the hazard of the OD at each employment,”⁴⁶ like Swan’s, involve application of another version of the rule.⁴⁷ As detailed above, the Montana Supreme Court has held that, in the latter-type cases, “ ‘the claimant must present objective medical evidence demonstrating that he has an OD and that the working conditions during the employment at which the last injurious exposure was alleged to occur, were the type and kind of conditions which could have caused the OD.’ ”⁴⁸ And as this Court found above, Swan failed to meet his burden of proof that his lung condition is an occupational disease or that, if it were, Swan’s employment at Groundhog involved any exposure to a noxious substance, let alone his last injurious exposure.

¶ 63 Accordingly, State Fund is not liable for occupational disease benefits under § 39-71-407(11), MCA.

JUDGMENT

¶ 64 Swan did not prove that he suffered an injury on February 1, 2017, nor that he is suffering from an occupational disease for which State Fund is liable; thus, State Fund is not liable for any benefits under the Workers’ Compensation Act.

¶ 65 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

⁴³ *In re Mitchell*, ¶ 24.

⁴⁴ Under that version, the initial insurer is liable if the worker never reached MMI for the original condition or if the recurrence of the condition is a direct and natural result of the original; the second insurer is liable if the worker reached MMI for the original condition and the subsequent industrial exposure materially aggravated the worker’s condition. See, e.g., *Caekaert v. State Comp. Mut. Ins. Fund*, 268 Mont. 105, 885 P.2d 495 (1994); *Lanes v. Mont. State Fund*, 2008 MT 306, 346 Mont. 10, 192 P.3d 1145.

⁴⁵ Since Swan’s case involves the initial assignment of liability, it is not a “recurrence” case. Thus, Swan’s alternative argument, that State Fund failed to prove that a material aggravation of his underlying condition occurred while he was working for Interwest, and therefore cannot shift liability to that company’s insurer, is not applicable. See *In re Mitchell*, ¶ 17 (explaining that the Supreme Court’s holding in *Caekaert*, “that for the last injurious exposure rule to apply there must be evidence of a second injury or injurious exposure that materially or substantially contributed to Caekaert’s second set of carpal tunnel symptoms,” was “limited to the situation where a compensable OD has already been established with respect to an insurer” (citations omitted)).

⁴⁶ *Rosling*, ¶ 104 (citing *In re Mitchell*, ¶¶ 19, 24).

⁴⁷ See *Rosling*, ¶ 104 (quoting *In re Mitchell*, ¶ 24).

⁴⁸ *Rosling*, ¶ 104 (quoting *In re Mitchell*, ¶ 24).

DATED this 11th day of September, 2020.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Bernard J. Everett
Charles G. Adams

Submitted: September 26, 2019