**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2005 MTWCC 21**

**WCC No. 2004-1127**

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**IN THE MATTER OF MOLLIE R. TELLES**

**TRAVELERS PROPERTY & CASUALTY COMPANY OF AMERICA**

**Petitioner/Insurer**

**vs.**

**ROYAL INSURANCE COMPANY OF AMERICA**

**Respondent/Insurer.**

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DECISION AND SUMMARY JUDGMENT

**Summary:** The claimant developed carpal tunnel syndrome as a result of her employment but was not diagnosed with the condition until after her employment had ended. The employer's insurer at the time she was diagnosed accepted liability for her carpal tunnel syndrome claim under a reservation of rights, then petitioned the Court for indemnification from the insurer which insured the employer during the period of the claimant's employment.

**Held:** An insurer which insures an employer after the claimant ceased working for the employer is not liable for an occupational disease arising during the employment. Section 39-72-303, MCA (2001-2003), which governs liability as between two insurers insuring a single employer, applies only where both insurers provided coverage while the claimant was actually employed by the employer.

**Topics:**

> **Occupational Disease: Insurer Liable.** Section 39-72-303(2), MCA (2001-2003), which governs liability between two insurers for the same employer, is inapplicable to an insurer which did not insure the employer while the claimant was employed. It has application only where the employer was insured by two or more different insurers while the claimant was employed.

**Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-72-303, MCA (2001-2003).** Section 39-72-303, MCA (2001-2003), which governs liability between two insurers for the same employer, is inapplicable to an insurer which did not insure the employer while the claimant was employed. It has application only where the employer was insured by two or more different insurers while the claimant was employed.

**Summary Judgment: Motion for Summary Judgment.** Summary judgment may be granted to a non-moving party where the parties agree on the essential facts and the issue is one of law.

¶1 This is a dispute between two insurers – Travelers Property & Casualty Company of America (Travelers) and Royal Insurance Company of America (Royal) – as to which of them is liable for the claimant's occupational disease. Royal moves for summary judgment.

## Undisputed Material Facts

¶2 The parties agree on the facts material and essential to Royal's motion for summary judgment. Those undisputed facts are as follows:

¶2a The claimant, Mollie R. Telles, worked at Stream International/Selectron (Stream International) from January 29, 2001, until August 15, 2003.

¶2b On August 15, 2003, and for some time prior to that date, Stream International was insured by Royal.

¶2c In 2002 the claimant filed a claim with respect to degenerative arthritis of her neck and upper back. Royal, which insured Stream International at the time, accepted liability for her claim.

¶2d On September 19, 2003, after she left her employment, the claimant was diagnosed as suffering from probable carpal tunnel syndrome (CTS).

¶2e Royal ceased insuring Stream International as of October 1, 2003. Travelers began insuring Stream International on that same date.

¶2f On October 24, 2003, the claimant was definitively diagnosed with CTS. The claimant's physician informed her that her CTS was related to her employment with Stream International.

¶2g In October 2003, the claimant filed a claim with respect to her CTS. Travelers, which insured Stream International at the time the claim was filed, accepted her claim under a reservation of rights.

¶2h Travelers thereafter brought the present petition seeking a determination that Royal is liable for the claimant's CTS.

¶2i In its response to the petition and in its briefs regarding summary judgment, Royal does not deny that the claimant's CTS is an occupational disease related to her employment with Stream International.

## Discussion

¶3 Summary judgment is appropriate where undisputed facts demonstrate that a party is entitled to judgment as a matter of law. *Lewis v. Nine Mile Mines, Inc.,* 268 Mont. 336, 340, 886 P.2d 912, 914 (1994). In this case, the parties agree on the essential facts. The issue separating them concerns statutory interpretation.

¶4 The statute involved is section 39-72-303, MCA (2001-2003), which provides in relevant part:

> **39-72-303. Which employer liable.** (1) Where 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.
>
> (2) When there is more than one insurer and only one employer at the time the employee was injuriously exposed to the hazard of the disease, the liability rests with the insurer providing coverage at the earlier of:
>
> (a) the time the occupational disease was first diagnosed by a treating physician or medical panel; or
>
> (b) the time the employee knew or should have known that the condition was the result of an occupational disease.

Royal urges that under section 32-72-303(2), MCA (2001-2003), Travelers was the insurer at risk at the time the claimant's CTS was first diagnosed and is therefore liable for the claim.

¶5 Royal misreads the statute. Subsection (2) applies where "there is **more than one insurer <u>and</u>** only one employer **<u>at the time</u> the employee was injuriously exposed to the hazard of the disease** . . . ." (Emphasis added.) The qualifying language "at the time the employee was injuriously exposed" applies to both "more than one insurer" and "only one employer" since those terms are in the conjunctive and the qualifying language makes sense only if applied to both. If the qualifying language applied only to "one employer," the

subsection would not apply to a situation where a claimant had a second job, even if the second job did not involve an injurious exposure, a result that makes no sense. The subsection makes sense only if the language is construed as applying where the employer responsible for the injurious exposure is insured by two different insurers during the period of the injurious exposure. Thus, subsection (2) has no application to a situation where, as here, the employer becomes insured by another insurer **after** the last injurious exposure. Travelers did not insure the employer at any time during the claimant's injurious exposure, or indeed at any time during the claimant's employment; hence, it is not liable for her CTS.

¶6 The next question is whether the Court can grant summary judgment to Travelers in light of its failure to file a cross-motion seeking summary judgment in its favor.[1] While I did not find any Montana case directly on point, WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 2720, concludes that where the moving party has had ample opportunity to identify disputed facts and the material facts are admittedly undisputed, "[t]he weight of authority . . . is that summary judgment may be rendered in favor of the opposing party even though the opponent has made no formal cross-motion under Rule 56." Since the issue in this case is a legal, not a factual one, Travelers is entitled to summary judgment.

¶7 As a final matter, the Court notes that in its petition Travelers requested attorney fees. Attorney fees are available to claimants where insurers have unreasonably denied or delayed benefits. §§ 39-71-611, -612, MCA (2001-2003). They are not available to an insurer seeking indemnification from another insurer. *Montana Contractor Compensation Fund v. Liberty Northwest Ins. Corp.*, 2002 MTWCC 28. Therefore, in entering judgment for Travelers, its request for attorney fees must be summarily denied.

## JUDGMENT

¶8 For the foregoing reasons, judgment is hereby entered finding Royal Insurance Company of America liable for the claimant's carpal tunnel syndrome. Royal shall indemnify and reimburse Travelers Property & Casualty Company of America for all reasonable benefits it has paid to the claimant on account of her carpal tunnel syndrome.

¶9 The Court makes no determination as to the amount due Travelers as it has not been requested to do so at this time. If the parties are unable to agree on the amount, then they may request the Court to make the determination.

¶10 Travelers is entitled to costs. It is not entitled to attorney fees.

¶11 This JUDGMENT is certified as final for purposed of appeal.

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[1]In its brief opposing Royal's motion, Travelers argues that the Court can grant it summary judgment without a formal motion.

DATED in Helena, Montana, this 22nd day of April, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Thomas A. Marra
Mr. David M. Sandler
Submitted: March 29, 2005