

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 19

WCC No. 9611-7642

DONALD BAUMGARTNER

Petitioner

vs.

LIBERTY NORTHWEST

Respondent/Insurer for

RIVERSIDE HEALTH CARE CENTER

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 39-year old CNA filed first report regarding low back pain that increased in intensity during one work shift. No specific incident was reported. The insurer accepted liability for the low-back condition as an injury, paying some benefits. Claimant was diagnosed with degenerative disc disease and treated conservatively. An IME physician recommended against his return to CNA work. She opined claimant suffered from an occupational disease, but attributed 40% of his problem to non-work related factors including obesity, smoking, and the general aging process. The insurer did not dispute the IME physician's opinion, but argued claimant should be estopped from seeking occupational disease benefits where the claim was accepted and compensated as an injury. The parties stipulated that if claimant cannot return to work as a CNA, his minimum hourly wage loss is \$1.50.

Held: Estoppel is an affirmative defense that must be plead by the insurer. Where the defense was not plead and does not appear in the pretrial order, the insurer cannot raise it at trial. Moreover, the estoppel defense is meritless where claimant did not mislead the insurer. He completed a claim form used for both injuries and occupational diseases and the insurer accepted the claim as an injury. Claimant is entitled to benefits under section 39-72-405(2), MCA (1995), where the parties agree claimant suffers from an occupational disease, the employer terminated his employment based on doctor's advice he could no longer perform the work, and the parties stipulated he suffered a wage loss. Although claimant's wage loss would amount to \$10,000, the maximum amount that may be

awarded under section 39-72-405, MCA (1995) in little more than three years, the Court awarded only \$6,000 in light of section 39-71-706, MCA (1995), based on the IME physician's apportionment of only 60% of the causation of claimant's condition to work.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-405, MCA (1995). 39-year old former certified nurses aide is entitled to benefits under section 39-72-405(2), MCA (1995), where the parties agree his low back condition constitutes an occupational disease, the employer terminated his employment based on doctor's advice he could no longer perform the work, and the parties stipulated he suffered a wage loss. Although it would take little more than three years for claimant's wage loss to reach \$10,000, the maximum amount that may be awarded under the statute, the Court awarded only \$6,000 in light of the apportionment provision of section 39-71-706, MCA (1995), based on the IME physician's apportionment of only 60% of the causation of claimant's condition to work.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-706, MCA (1995). Although it would take little more than three years for occupational disease claimant's wage loss to reach \$10,000, meaning he would ordinarily qualify for the maximum indemnity award under section 39-72-405, MCA (1995), the Court applied the apportionment provisions of section 39-71-706, MCA (1995) to an award under section 405. Where medical evidence attributed only 60% of the causation of claimant's low back condition to work, he was awarded \$6,000.

Estoppel and Waiver: Equitable Estoppel. Estoppel is an affirmative defense that must be plead by the insurer. Where the defense was not plead and does not appear in the pretrial order, the insurer cannot raise it at trial to argue claimant cannot recover for an occupational disease where it accepted liability for his condition as an injury. Moreover, the estoppel defense is meritless where claimant did not mislead the insurer into accepting liability for his condition as an injury.

Occupational Disease: Apportionment. Although it would take little more than three years for occupational disease claimant's wage loss to reach \$10,000, meaning he would ordinarily qualify for the maximum indemnity award under section 39-72-405, MCA (1995), the Court applied the apportionment provisions of section 39-71-706, MCA (1995) to an award under section 405. Where medical evidence attributed only 60% of the causation of claimant's low back condition to work, he was awarded \$6,000.

Occupational Disease: Indemnity (39-72-405) Awards. 39-year old former certified nurses aide is entitled to benefits under section 39-72-405(2), MCA (1995),

where the parties agree his low back condition constitutes an occupational disease, the employer terminated his employment based on doctor's advice he could no longer perform the work, and the parties stipulated he suffered a wage loss. Although it would take little more than three years for claimant's wage loss to reach \$10,000, the maximum amount that may be awarded under the statute, the Court awarded only \$6,000 in light of the apportionment provision of section 39-71-706, MCA (1995), based on the IME physician's apportionment of only 60% of the causation of claimant's condition to work.

Pleading: Affirmative Defenses. Estoppel is an affirmative defense that must be plead by the insurer. Where the defense was not plead and does not appear in the pretrial order, the insurer cannot raise it at trial to argue claimant cannot recover for an occupational disease where it accepted liability for his condition as an injury. Moreover, the estoppel defense is meritless where claimant did not mislead the insurer into accepting liability for his condition as an injury.

The trial in this matter was held in Missoula, Montana, on January 23, 1997. Petitioner, Donald Baumgartner (claimant), was present and represented by Mr. Rex Palmer. Respondent, Liberty Northwest (Liberty), was represented by Mr. Larry W. Jones.

Exhibits: Exhibits 1 through 10 were admitted without objection.

Witnesses and Depositions: Claimant and Sandy Scholl were sworn and testified. In addition, the parties submitted the deposition of Dana M. Headapohl, M.D., for the Court's consideration. No transcript of the trial has been prepared.

Issue Presented: The sole issue presented for determination is whether claimant is entitled to an award under section 39-72-405, MCA, and if so, in what amount.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 39 years of age. He has worked as a certified nurse's aide (CNA) for approximately 16 years.
2. On August 15, 1995, the claimant was working as a CNA for Riverside Health Care Center (Riverside) in Missoula, Montana. He was working full time and earning \$6.50 an hour. (Ex. 1.)
3. On August 15, 1995, claimant experienced the onset of low-back pain while at work.
4. At that time, Riverside was insured by Liberty.

5. On August 15, 1995, claimant filled out Riverside's incident report describing the onset of pain as follows:

Some pain in lower back in A.M. Increase in afternoon. Now feels like lower back is tingling or on fire. No known origina origin of beginning, of where pain started or why.

(Ex. 2 at 2.)

6. As a result of claimant's back pain, a First Report of Occupational Injury or Occupational Disease (First Report) was completed and submitted to Liberty. (Ex. 1.) A representative of Riverside signed the completed report on August 17, 1995, and claimant signed it on August 18, 1995.

7. The First Report was prepared on a form supplied by Liberty. The form was captioned as set out in Finding 6.

8. The First Report filed on behalf of claimant included the following description of the onset of claimant's back pain:

While working, low back began to hurt, increasing in intensity throughout shift. Filled out incident report. On 8/17/95 called Dr. Burtons [sic] office and made appt for evaluation, scheduled Mon Aug 21. R. Advised. **No specific incident caused injury. Employee has hx [history] of back complaints documented by incident reports,** and - - has seen Drs. Huson [sic] & Peschel in the past for this. Employee is vague for any specific accident incident.

(*Id.*; emphasis added.)

9. Dr. James R. Burton, an orthopedic surgeon, examined claimant on August 21, 1995. His office note reflects the following history:

. . . Patient is employed at Riverside Health Care Center. He has worked there 4.5 years. Onset of burning sensations across the entire lower lumbar area and posterior cervical spine since 08/15/1995.

He had done no particular lifting or other traumatic even [sic] prior to that. Back in February or March of 1994, patient had a burning sensation in his lumbar spine while lifting an oxygen tank. He missed two weeks of work at that time. He saw Dr. Peschel who gave him a back brace (elastic binder) which helped him quite a bit.

(Ex. 2 at 13.) Dr. Burton diagnosed "[l]ikely degenerative disc disease at L3-4" and prescribed Prednisone, Flexeril, and physical therapy. (*Id.*)

10. On August 31, 1995, Liberty accepted liability for claimant's low-back condition and forwarded claimant a check for temporary total disability benefits. (Ex. 10.) Liberty

accepted the claim as an injury compensable under the Workers' Compensation Act. (*Id.*; Trial Test. of Sandy Scholl.)

11. On September 12, 1995, Dr. Burton released claimant to return to "lighter capacity duty for one week and then gradually add heavier work for two weeks until he is at his job of injury." (Ex. 2 at 14.) However, Dr. Burton went on to qualify his release, saying, "However, I told the patient that since his condition is rather chronic in nature he should consider [a] vocational change." (*Id.*)

12. On September 20, 1995, Dr. Burton responded to a Work Release/physical Limitations Request sent to him by Liberty. He restricted claimant to light/medium work and indicated that the restriction was permanent. (*Id.* at 12.)

13. Claimant attempted to return to work at Riverside on September 6, 1995. (*Id.* at 3; Trial Test. of claimant.) However, he experienced renewed back pain and worked only four hours. (Ex. 2 at 3.) Thereafter, he did not return to work for Riverside.

14. At the time of trial, claimant was working for Opportunity Resources doing janitorial type work at the Missoula City Hall. (Trial Test.) He works approximately 20 hours a week and earns \$4.51 per hour.

15. On October 9, 1995, Dr. Dana Headapohl performed an independent medical evaluation at the request of Liberty. (Ex. 2 at 36; Headapohl Dep. at 6.) Dr. Headapohl is board certified in occupational and environmental medicine.

16. Dr. Headapohl reviewed claimant's medical records, including records for low-back pain in February and November of 1994 and January, April, and August of 1995. (Ex. 2 at 36.) She took an extensive medical history from claimant, reporting his back symptoms as follows:

Current Symptoms: Mr. Baumgartner describes a constant throbbing, aching pain in the left lower back radiating into the right lower back intermittently. He rates the pain at a level of 7 to 8 on the visual analog scale. He denies bowel or bladder problems. He says he occasionally has intermittent pain and needle sensation in the low back and sometimes has pain radiating down the posterior aspects of the thighs but not going below the knees. This radiation is not associated with any specific activity. He also describes some bilateral trapezius muscle tenderness which he feels was related to work-hardening activities. He describes this as an achy, throbby sensation which has essentially resolved. He has treated his symptoms with warm and cold packs to the lower back b.i.d. He does only minimal exercising consisting of stretching. He is currently taking 600 mg of Ibuprofen twice a day with some relief.

(*Id.* at 37.) Finally, she performed a physical examination of claimant.

17. Dr. Headapohl's impression of claimant's low back was:

Degenerative disc disease L4/5. Mild levoscoliosis of the lumbar spine. Recurrent low back pain without radicular symptoms, myofascial in nature.

(*Id.* at 41.) She opined that claimant had "reached maximum medical healing from the injury of August 15, 1995" and that claimant's "degenerative disc disease did not result from the injury in August." (*Id.*) She said that he should be restricted to light to sedentary jobs due to a "combination of obesity, deconditioning and low back vulnerability." (*Id.*) Finally, she concluded, "[h]e is not compatible with his time-of-injury job, that of the CNA." (*Id.*)

18. During her deposition, Dr. Headapohl confirmed her opinion that any specific exacerbation that claimant may have suffered on August 15, 1995, had resolved. (Headapohl Dep. at 9.) However, she also testified that claimant has "underlying mechanical osseous condition of the back which renders him vulnerable to exacerbations" and that "60 percent of his problem [his underlying condition] was occupationally related and 40 percent secondary to non work [sic] related factors including obesity and smoking, and the general aging processes." (*Id.* at 8, 11.) She explained the basis for her apportionment, as follows:

What I will say is this, I'll try to break it into the way I think about it. If he were in a sedentary job but became overweight, deconditioned and continued to smoke, one would expect a certain amount of degenerative disk disease on that basis alone.

Given that condition in addition to his job, one would expect a higher amount of disk degeneration just based on the mechanical forces that the back would be subjected to in the course of that kind of heavy labor, where you're working with patients, not inanimate objects that may shift weight or be awkward to lift or maneuver in other ways.

So in my opinion, the job tasks themselves contribute a percentage. And the preexisting factors contribute a percentage. I would expect him, without a heavy laboring position, to have developed degenerative disk disease just based on the fact that he smoked, which decreases the ability of the body to deliver oxygen to the disk itself, because there's basal constriction going on in that area.

The obesity which provides mechanical forces on the low back, particularly if the individual's deconditioned, that would tend to contribute to degenerative disk disease, so a combination.

(Headapohl Dep. at 22-23.)

19. At trial Liberty did not dispute Dr. Headapohl's testimony that claimant suffers from an occupational disease or from her apportionment opinion. Counsel for Liberty agreed that,

should the Court find claimant is not estopped from pursuing an occupational disease claim, then it agrees that he in fact suffers from an occupational disease which contributes 60% to his condition. Counsel for claimant represented that claimant does not dispute the apportionment. The parties are bound by the agreements and concessions they made in open Court. Thus, in accordance with Dr. Headapohl's opinions and counsels' representations, I find that claimant suffers from an occupational disease which is responsible for 60% of his degenerative low-back disease.

20. Dr. Headapohl further testified that claimant should not be working as a CNA on account of the heavy lifting required by that job. (*Id.* at 13-14.) When asked by counsel for Liberty if she had an opinion concerning whether claimant was capable of performing CNA work prior to August 15, 1995, she said:

Yes. And it's complicated because of the addition of ADA. My advice to him as a physician would be that the CNA position is a fairly strenuous position, and given his back condition, I would not recommend it. ADA however, precludes exclusion of individuals on the basis of potential risk unless it's an immediate risk. So **my advice as a physician to him would be that he avoid that kind of heavy physical labor.**

(*Id.*) In answer to further questions put to her by counsel for claimant, she said:

Well, I guess I would say this; my recommendations are just that in my opinion he is not compatible with heavy work given the condition of his spine. There are many people with his spine condition who continue to work in heavy labor. So while I would want him to seek a lighter duty job, there are others who would not consider that mandatory. I believe that that's medically prudent for him not to continue in a heavy labor position.

(*Id.* at 28-29.)

21. Dr. Headapohl's opinion is reasoned and persuasive. I find that while claimant's medical condition does not make it "impossible" for him to work as a CNA it nonetheless is medically inadvisable for him to do so.

22. The parties have stipulated that if claimant cannot return to work as a CNA then he has a minimum hourly wage loss of \$1.50.

CONCLUSIONS OF LAW

1. Liberty contends that claimant is estopped from seeking benefits under the Occupational Disease Act (ODA) because his claim was accepted as compensable under the Workers' Compensation Act (WCA). Liberty did not raise this contention in its initial response or the Pretrial Order. Since estoppel is an affirmative defense, Rule 8(c), Mont. R. Civ. P., ⁽¹⁾ it must be raised in the response and may not be raised for the first time at trial.

See *Haag v. Montana Schools Group Ins. Authority*, 274 Mont. 109, 115, 906 P.2d 693, 697 (1995).

Moreover, an estoppel defense in this case is meritless. Liberty must prove six elements to establish an equitable estoppel. *Dagel v. City of Great Falls*, 250 Mont. 224, 234, 819 P.2d 186, 192-93 (1991). They are as follows:

'(1) there must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts; (2) these facts must be known to the party estopped at the time of his conduct, or at [250 Mont. 235] least the circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him; (4) the conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under the circumstances that it is both natural and probable that it will be so acted upon; (5) the conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it, and (6) he must in fact act upon it in such a manner as to change his position for the worse.' (Citations omitted.)

Id. (quoting from *Sweet v. Colborn School Supply*, 296 Mont. 367, 372-73, 639 P.2d 521, 524 (1982)). Liberty has failed to show that it was misled by the claim or that it was unaware of the truth regarding the matter, thus it has failed to establish element 2. The claim form does not designate the claim as one for workers' compensation benefits. It is a combined form allowing claims under both the ODA and the WCA. Claimant did not describe any specific incident recognizable under the WCA, as required by section 39-71-119(2), MCA (1995).⁽²⁾ The claim expressly indicates that claimant could not identify any specific accident. Thus, claimant's position in this case is wholly consistent with his claim of an occupational disease. Liberty's decision to accept the claim under the WCA rather than the ODA was not the fault of the claimant.

Moreover, even if claimant suffered an exacerbation of his condition on account of a specific incident occurring on August 15, 1995, Dr. Headapohl's testimony establishes that such exacerbation was temporary. Thus, Liberty remains liable for occupational disease preexisting any event on August 15, 1995.

2. Since the parties agree that claimant suffers from an occupational disease, claimant is entitled to benefits under section 39-72-405(2), MCA (1995), if he can otherwise meet the requirements of the section. The subsection provides:

(2) When an employee in employment on or after January 1, 1959, because the employee has an occupational disease incurred in and caused by the employment that is not yet disabling, is discharged or transferred from the employment in which the employee is engaged or when the employee ceases employment and it is in fact,

as determined by the medical panel, inadvisable for the employee on account of a nondisabling occupational disease to continue in employment and the employee suffers wage loss by reason of the discharge, transfer, or cessation, compensation may be paid, not exceeding \$10,000, by an agreement between the insurer and the claimant. If the parties fail to reach an agreement, the mediation procedures in Title 39, chapter 71, part 24, must be followed.

Based on his physician's determination that he could no longer perform the duties of a CNA, Riverside terminated claimant's employment as of December 27, 1995, writing:

I have been informed by our insurance carrier, Liberty Northwest, that your physicians have found you no longer able to perform the physically challenging role of a Certified Nursing Assistant.

We currently have no job positions available that you are eligible for. Because of this I am informing you that your employment at Riverside has been terminated.

(Ex. 2 at 1.)

Thus, the requirement that claimant be discharged or transferred from his employment is satisfied.

The requirement for a medical panel determination of the inadvisability of claimant continuing to work at his previous employment is not met. However, Liberty did not list among its contentions, nor did it argue, that the medical panel provision is applicable to this case. The Court will not raise the issue *sua sponte*. Even if a medical panel addressed the matter, such determination would not be conclusive and could not deprive either party of his or its day in court. Therefore, the issue is not jurisdictional and it is not appropriate for the Court to raise it.

Dr. Headapohl is a member of the Occupational Disease Panel, although she was not designated by the Department of Labor and Industry to perform a panel evaluation of claimant. Nonetheless, she did examine claimant and concluded that it is medically inadvisable for claimant to return to his time-of-injury job. Her only hesitation in absolutely restricting him from returning to his job was based on legal requirements arising from the Americans with Disabilities Act (ADA). She also acknowledged that some persons with claimant's condition continue to perform heavy labor.

Under section 39-72-405, MCA (1995), the standard for an award is whether it is "inadvisable for the employee on account of a nondisabling occupational disease to continue in employment." The statute does not require a finding that it is "physically impossible" for claimant to return to work. Dr. Headapohl's testimony establishes that claimant's occupational disease makes it inadvisable for him to return to work as a CNA, thus satisfying the section.

3. Since claimant has established his eligibility for an award under section 39-72-405, MCA (1995), and the parties cannot agree on the amount of the award, the Court must determine the amount. § 39-71-2401(1) and -2411(c), MCA. The parties have stipulated that claimant has a wage loss of \$1.50 an hour. That amounts to an annual loss of \$3,128.40. Thus, in little more than three years, claimant's wage loss will amount to \$10,000, which is the maximum award available under section 39-72-405.

Liberty argues, however, that any award must be apportioned pursuant to section 39-72-706(1), MCA (1995), which provides:

39-72-706. Aggravation. (1) If an occupational disease is aggravated by any other disease or infirmity not itself compensable or if disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, **the compensation payable under this chapter** must be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease as a causative factor bears to all the causes of such disability or death. [Emphasis added.]

Section 39-72-706(1), MCA, applies to any award made under section 39-72-405(2), MCA. Section 39-72-405(2), MCA, expressly provides that the payment thereunder is "compensation." It says that "**compensation** may be paid, not exceeding \$10,000." The statutes are plain on their faces and must be applied as written. *Russette v. Chippewa Cree Hous. Auth.*, 265 Mont. 90, 93-94, 874 P.2d 1217, 1219 (1994). Since any award to claimant is "compensation", section 39-72-706(1), MCA, requires that it must be reduced by the percentage attributable to non-occupational factors, i.e., by 40%.

As claimant points out, apportioning awards under section 39-72-405(2), MCA, may lead to anomalies. (Petitioner's Response to Respondent's Post-trial Briefs at 4.) In his example, two workers both suffering from disease 50% attributable to non-occupational factors, one of whom suffers a wage loss of \$15,000 and the other a wage loss of \$20,000, would both receive \$5,000. However, the anomaly cannot be helped. To carry the examples a step further, if the awards are not apportioned, two workers having \$20,000 wage losses, one of whose disease is 50% attributable to his occupation and the other whose disease is 100% attributable to his occupation, would both receive identical awards of \$10,000. A worker with a \$100,000 wage loss and no apportionment would similarly only receive \$10,000. In any event, the Court must apply the plain language of the statute requiring that any compensation otherwise payable to a claimant be reduced by the percentage attributable to non-occupational factors.

JUDGMENT

1. Pursuant to section 39-72-405(2), MCA (1995), Liberty shall pay claimant the sum of \$6,000.
2. Claimant is entitled to costs in an amount to be determined by this Court. Claimant shall submit his memorandum of costs within 10 days of this decision. Liberty shall then have 10 days in which to file its objections, if any. The Court will then assess the costs.
3. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.
4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

DATED in Helena, Montana, this 14th day of April, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Rex Palmer

Mr. Larry W. Jones

Submitted: April 2, 1997

1. Rule 8(c) provides:

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, **estoppel**, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation. [Emphasis added.]

2. Section 39-71-119(2), MCA (1995), provides:

(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

