

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 37

WCC No. 9612-7675

ROBERT CHEETHAM, JR.

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

HAWKEYE CONSTRUCTION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 51-year old heavy equipment and crane operator suffered an aortic dissection after spending 20 to 30 minutes trying to start a gas powered pump, requiring 50 to 70 pulls on a cord similar to those on lawn mowers. Two physicians, a cardiologist and a family practitioner, testified the dissection was precipitated by claimant's strenuous work, which significantly raised his blood pressure. They opined the work contributed 51% or more to the dissection when compared to claimant's pre-existing aortic disease.

Held: The general criteria for a compensable injury under section 39-71-119(2), MCA (1995) are met where an usual strain at work caused claimant internal physical harm, verified by objective medical findings. In cases of cardiovascular incidents, section 39-71-119(5)(a), MCA (1995), permits compensation "only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition," with "primary cause" defined as "a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition." Here, two physicians credibly testified the specific condition suffered by claimant, aortic dissection, was more than 50% attributable to claimant's episode of high blood pressure, which in turn was caused by strenuous work activities. The condition is compensable.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-119(5)(a), MCA (1995). 51-year old heavy equipment and crane

operator suffered an aortic dissection after spending 20 to 30 minutes trying to start a gas powered pump, requiring 50 to 70 pulls on a cord similar to those on lawn mowers. The general criteria for a compensable injury under section 39-71-119(2), MCA (1995) are met where an usual strain at work caused claimant internal physical harm, verified by objective medical findings. In cases of cardiovascular incidents, section 39-71-119(5)(a), MCA (1995), permits compensation "only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition," with "primary cause" defined as "a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition." Where two physicians, one a cardiologist, credibly testified claimant's aortic dissection was more than 50% attributable to his episode of high blood pressure, which in turn was caused by strenuous work activities, the condition is compensable.

Injury and Accident: Causation. 51-year old heavy equipment and crane operator suffered an aortic dissection after spending 20 to 30 minutes trying to start a gas powered pump, requiring 50 to 70 pulls on a cord similar to those on lawn mowers. The general criteria for a compensable injury under section 39-71-119(2), MCA (1995) are met where an usual strain at work caused claimant internal physical harm, verified by objective medical findings. In cases of cardiovascular incidents, section 39-71-119(5)(a), MCA (1995), permits compensation "only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition," with "primary cause" defined as "a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition." Where two physicians, one a cardiologist, credibly testified claimant's aortic dissection was more than 50% attributable to his episode of high blood pressure, which in turn was caused by strenuous work activities, the condition is compensable.

Injury and Accident: Primary Cause. 51-year old heavy equipment and crane operator suffered an aortic dissection after spending 20 to 30 minutes trying to start a gas powered pump, requiring 50 to 70 pulls on a cord similar to those on lawn mowers. The general criteria for a compensable injury under section 39-71-119(2), MCA (1995) are met where an usual strain at work caused claimant internal physical harm, verified by objective medical findings. In cases of cardiovascular incidents, section 39-71-119(5)(a), MCA (1995), permits compensation "only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition," with "primary cause" defined as "a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition." Where two physicians, one a cardiologist, credibly testified claimant's aortic dissection was more than 50% attributable to his episode of high

blood pressure, which in turn was caused by strenuous work activities, the condition is compensable.

Injury and Accident: Unexpected Strain or Injury. 51-year old heavy equipment and crane operator suffered an aortic dissection after spending 20 to 30 minutes trying to start a gas powered pump, requiring 50 to 70 pulls on a cord similar to those on lawn mowers. The general criteria for a compensable injury under section 39-71-119(2), MCA (1995) are met where an usual strain at work caused claimant internal physical harm, verified by objective medical findings. In cases of cardiovascular incidents, section 39-71-119(5)(a), MCA (1995), permits compensation "only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition," with "primary cause" defined as "a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition." Where two physicians, one a cardiologist, credibly testified claimant's aortic dissection was more than 50% attributable to his episode of high blood pressure, which in turn was caused by strenuous work activities, the condition is compensable.

Medical Conditions (by specific condition): Aortic Dissection. 51-year old heavy equipment and crane operator suffered an aortic dissection after spending 20 to 30 minutes trying to start a gas powered pump, requiring 50 to 70 pulls on a cord similar to those on lawn mowers. The general criteria for a compensable injury under section 39-71-119(2), MCA (1995) are met where an usual strain at work caused claimant internal physical harm, verified by objective medical findings. In cases of cardiovascular incidents, section 39-71-119(5)(a), MCA (1995), permits compensation "only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition," with "primary cause" defined as "a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition." Where two physicians, one a cardiologist, credibly testified claimant's aortic dissection was more than 50% attributable to his episode of high blood pressure, which in turn was caused by strenuous work activities, the condition is compensable.

The trial in this matter was held on March 19, 1997, in Kalispell, Montana. Petitioner, Robert Cheetham, Jr. (claimant), was present and represented by Mr. David W. Lauridsen. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones. No trial transcript has been prepared.

Exhibits: Exhibits 1 through 3 were admitted without objection.

Witnesses and Depositions: Claimant, his wife (Ingeborg Cheetham), and Dr. Keith R. Weeks were sworn and testified. The parties also agreed to the Court's consideration of the

depositions of claimant, Dr. John N. Kalbfleisch, Dr. Keith R. Weeks, claimant's mother (Lois Cheetham), claimant's father (Robert Cheetham, Sr.), and Dr. Stephen P. Hiro.

Issues Presented: The issues presented for decision as restated by the Court are:

1. Whether claimant's employment was the primary cause of a dissecting aortic aneurysm he suffered on August 7, 1996. § 39-71-119(5), MCA (1995).
2. Whether claimant is entitled to attorney fees.

At trial, claimant withdrew his request for a penalty.

* * * * *

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

Findings of Fact

1. Claimant is 51 years old, is married to Ingeborg Cheetham, and lives in West Glacier, Montana.
2. Claimant's occupation is as a heavy equipment and crane operator.
3. On August 7, 1996, claimant was working as a heavy equipment operator for Hawkeye Construction (Hawkeye). On that day, Hawkeye was engaged in constructing oil containment ditches around transformers of an electric substation in Bigfork, Montana. The purpose of the ditches was to catch and contain any oil leaking from the transformers. To assure containment, the ditch was sprayed with a foam type, impermeable material. To assure that the ditch was in fact impermeable, Hawkeye was required to fill the ditches with water to check for leaks.
4. On August 7th, claimant and other Hawkeye employees were checking for leaks by pumping water into the ditch from the adjacent Flathead River. Another employee was having difficulty starting one of the pumps, which was gas powered, and flooded the engine. Claimant went to help.
5. Claimant attempted to start the pump by placing one of his feet on the pump and pulling the starter cord upward, much as one would do when starting a lawnmower. He pulled the cord between 50 and 70 times over the next 20 to 30 minutes, finally starting the pump.
6. The foregoing occurred at approximately noon. The temperature was in the neighborhood of 100 degrees Fahrenheit.
7. As claimant stood up from his efforts he felt lightheaded, felt tightness in his chest, and began having difficulty breathing.

8. Claimant managed to call his physician, Dr. John Kalbfleisch, who felt he was having a heart attack. A hospital helicopter was dispatched to pick up claimant.

9. Claimant was helicoptered to Kalispell Regional Hospital, where Dr. Keith P. Weeks, a cardiologist, diagnosed an aortic aneurysm. (Ex. 3 at 1-2.) Claimant was then transported to St. Patrick Hospital in Missoula, where Dr. Stephen P. Hiro, who is board certified in cardiothoracic surgery, diagnosed an "[a]cute dissection of the ascending aorta with moderate aortic insufficiency." (Ex. 3 at 45.) Dr. Hiro operated, resecting the aorta (operatively removing a portion of it) and inserting a dacron aortic graft. (*Id.* at 45- 47.)

10. For the technically curious, aortic dissection is described in a medical article set out as Exhibit 2. In simple terms, it is a tear in the inner wall of the aorta, which allows hemorrhage of blood into the medial layer of the vessel, thereby compromising circulation and frequently causing death. Approximately 2,000 cases occur annually in the United States, so it is an uncommon condition. (Ex. 2 at 3.)

11. At the time claimant's aortic dissection occurred, Hawkeye was insured by Liberty.

12. Claimant submitted a claim for compensation to Liberty alleging that his condition was work related. (Ex. 1.) Liberty denied the claim.

13. Aortic dissection occurs in persons that have a preexisting degeneration of the media (middle wall)⁽¹⁾ of the aorta. (Ex. 2; Weeks Dep. at 29; Hiro Dep. at 15.) "Degeneration of the aortic media is believed to be a prerequisite for the development of aortic dissection." (Ex. 2 at 4.) A tear then occurs in the inner wall (intima) of the vessel, allowing hemorrhage into the media. (Ex. 2; Weeks Dep. at 8-9; Hiro Dep. at 12-13.)

14. There are two mechanisms involved in the actual dissection. (Ex. 2 at 3; Weeks Dep at 28; Hiro Dep. at 12.) The physicians treating claimant were unable to determine which mechanism occurred in claimant, thus further discussion of the mechanisms is unnecessary.

15. Weakening of the media is due to genetic disease, such as Marfan syndrome, and/or chronic high blood pressure. (Ex. 2 at 4; Weeks Dep. at 17; Kalbfleisch Dep. at 17; Hiro Dep. at 11, 18-20.) Dr. Hiro testified that "the overwhelming reason to have dissection in America is long-standing hypertension." (Hiro Dep. at 21.) On the other hand, the aortas of most hypertensive persons do not dissect. (See Weeks Dep. at 20 and Finding 10.)

16. Three doctors testified regarding causation of the claimant's condition. Dr. Weeks testified by deposition and also at trial. Both Dr. Kalbfleisch and Dr. Hiro testified by deposition. As previously stated, Dr. Weeks is a cardiologist and Dr. Hiro is a cardiothoracic surgeon. Dr. Kalbfleisch is a family practitioner.

17. Dr. Hiro and Dr. Weeks agreed that claimant suffered from aortic degeneration which contributed to his dissection. (Weeks Dep. at 17, 30, 31; Hiro Dep. at 10.) Dr. Weeks felt it

was likely due in part to genetic factors. (Weeks Dep. at 17, 36.) Dr. Hiro opined that his "best assumption" was that, despite a lack of medically documented long-term hypertension, it was due to long-standing hypertension (Hiro Dep. at 23.) Both agreed that the preexisting degeneration made him susceptible to aortic dissection. (Weeks Dep. at 17; Hiro Dep. at 19-21 and *passim*.)

18. Both Dr. Weeks and Dr. Kalbfleisch testified that, in their medical opinions, the August 7th aortic dissection was precipitated by claimant's strenuous attempts to start the pump engine, which significantly raised claimant's blood pressure. (Weeks Dep. at 18, 31; Kalbfleisch Dep. at 15.) Dr. Weeks testified:

Q. What is the impact of exertion, this heavy work we were talking about, on the dissected aorta?

A. Well, when you do exercise such as what he was doing, you know, you raise your blood pressure. And this -- You increase the stress on that wall of the aorta. So that's clearly associated with doing those kinds of things. It is much like if you are lifting a 300-pound weight; you really increase your blood pressure.

(Weeks Dep. at 18.) Both Dr. Weeks and Dr. Kalbfleisch further opined that claimant's work that day contributed 51% or more to the dissection when compared to claimant's preexisting aortic disease. (Weeks Dep. at 21-23, 35, 38; Kalbfleisch Dep. at 15.)

19. While Dr. Weeks pointed out there is no precise scientific way to prove the role of exertion in the dissection, or measure the relative contributions, in percentages, of claimant's preexisting disease and his claimant's work on August 7th, or to make such determinations with 100% assurance, he was firm in his conclusion that to a reasonable degree of medical probability claimant's work on the 7th contributed 51% or more to the dissection. He based his opinion on his clinical experience and training. Specifically, he testified:

Q. We need your opinion as to whether the work exertion was the primary cause. Again, that means that the work he was doing is responsible -- And I know this is difficult for you to answer -- for more than fifty percent of the physical condition.

A. Sure. I don't like giving long answers, but at this point we get to be redundant when we give these depositions, and it's because they never ask anybody about these laws. But we are scientist[s], to some extent, and there is no way to give a hundred percent. So you end up saying it is our guess.

Q. To a reasonable degree of medical certainty.

A. So, yes, he has a preexisting disease; there's no question about that. Did that cause his problems? It caused part of the problem.

And, yes, he has an entity that -- If you have pulled a lawn mower and it wouldn't start, that's a huge job. You want to kill it after a few minutes. And everyone would agree to that problem. That's a really, really hard thing to do for twenty minutes. And those of us that have done that, you know, knows it's a hard job.

So if you are asking if any -- to say, though - Well, in the end, what I'm saying as to what is the cause of this, and you should get different answers, and I'm sure you will, as to what the cause is, if he wouldn't have been pulling on that cord, he wouldn't have had this problem. And if he wouldn't have had hypertension, he might not have had the problem. So you have both of them.

As a clinician, I have been very consistent in my answers in these depositions, which number five to ten, not many; I don't know what many is. But -- And I have always said that the cause of doing something while they are doing it on the job is more than fifty percent.

But you are asking a scientific question in which there is no clear answer. But my short answer is yes, it's more than fifty percent in this case. But there is no way to prove that in a definitive way.

Q. And that's to a reasonable degree of medical certainty based on your training and what you know and understand?

A. Yeah. And I have been very consistent on that. I think the law is written wrong.

....

Q. One last area and then we will have to let you go. The opinion regarding whether work was 51 percent of more the cause of the dissection --

A. Right.

Q. -- can you think of any scientific studies that would support that opinion?

A. That's my argument with your book.

Q. Exactly.

A. Neither way, you know. It's a subjective, and that's what I have to give. I think I'm pretty consistent in this, that this is subjective.

....

Q. (By Mr. Jones) So your opinion that fifty-one percent or more of the dissection is work related has no scientific studies to support it; it's based on your training and experience and judgment, correct?

A. Yeah. My answer is, and I don't mean to be long winded, but it is that we don't know either way scientifically. So it is a subjective opinion.

(Weeks Dep. at 21-23, 35, 38.)

20. Exhibit 2, which is a medical article recognized as authoritative by both Drs. Weeks and Hiro, provides some support for the proposition that exertion may in some cases precipitate an aortic dissection. The article notes one study which found an association between strenuous physical exertion and emotional stress and the onset of dissection in 14% of the cases studied.

21. Dr. Hiro was unable to opine that exertion was a 51% contributing cause to claimant's dissection. However, he agreed that claimant's work on August 7th elevated his blood pressure and acknowledged that the exertion may well have been the immediate trigger for the dissection. He testified:

Q. Okay. Returning now to this definition of primary cause, here we have a degenerated media in the artery. We have admittedly a high level of physical exertion with increased high blood pressure. Would you agree we have at least two causes that led then to the dissection?

A. I have a bit of a hard time necessarily equating acute hypertension with a dissection, although temporally, if it occurred, but you know, so many of our patients that we see don't have an episode of acute hypertension that we know of. They don't have an acute physical exertion that leads to a dissection.

....

Q. So do you have an opinion under that standard of primary cause as to which of these two events; the degenerated medial wall or the pulling on the cord on the motor would be the primary cause as is defined there in the statute?

A. Well, the way I look at it is that if you have a normal aorta, you could pull on a chain for ten hours and you wouldn't dissect your aorta. But if you have the subset of an aortic wall degeneration and that occurs presumably from his long standing hypertension, and not only ten minutes of doing that, but maybe one pull may have done it, or maybe just driving home from work may have done it. So I guess my opinion would be that the cause of the dissection would be more related to his chronic degeneration of the aorta.

....

Q. If what he says is true, that he's out in 90, almost near a hundred degree temperature reefing on this engine for 15 to 20 minutes before the symptoms come on, don't you feel that it's more likely than not -- Let me first ask you; Dr. Weeks

indicated that that type of exertion would elevate one's blood pressure to over 200, would you agree with that?

A. I think it all depends on the person. A fit person who's got no history of hypertension, it may not put it up that high. But someone who has a history of hypertension, especially who's not been treated, it may elevate even higher than that. It may elevate up to 300.

Q. Well, isn't that the type of blood pressure elevation that could cause a dissection in someone with a diseased aorta?

A. Yes, it could cause a dissection in someone with a diseased aorta but without a diseased aorta, it wouldn't cause a dissection --

Q. Right.

A. -- no matter how high his blood pressure was, I don't think.

Q. And by the history, is that your opinion what happened here to a reasonable degree of medical certainty?

A. I think it may very well have been what happened here, but I don't think -- And again, this is your realm, not my realm. Your realm is what's more responsible; is it the fact that he has a diseased aorta to start off with more responsible for the process occurring or whether it's this initial inciting event. My contention would be that you can't have dissection unless you have the long standing chronic changes in the aorta.

(Hiro Dep. at 23-24, 26, 32-33.)

22. Dr. Hiro was no more qualified than Drs. Weeks or Kalbfleisch to render an opinion on causation. He noted that as a surgeon he thinks of dissections in terms of "trying to correct the problem, not necessarily the etiology of it." (Hiro Dep. at 12; see *also id.* at 31-32.) .

23. After considering all of the medical testimony and the medical article on aortic dissection, I am persuaded that the claimant's exertion at work on August 7, 1996, precipitated or triggered his aortic dissection. While the dissection would not have occurred absent his underlying degeneration of the aortic media, I am further persuaded that the actual dissection is 51% attributable to his overexertion and is therefore compensable.

24. Liberty's denial of this claim was not unreasonable. The compensability of the claim was reasonably debatable and the case presents difficult medical and legal questions.

CONCLUSIONS OF LAW

1. The 1995 version of the Workers' Compensation Act applies in this case. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

2. Section 39-71-119, MCA (1995), specifies the criteria which must be met for a work-related injury to be compensable. The general criteria which must be met are set out in the first two subsections, as follows:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

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

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

(c) death.

(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.

All of the criteria are met. Claimant suffered internal physical harm and that harm was verified by objective medical findings. At the time of the incident he was engaged in unusually strenuous activity over a period of approximately 20 continuous minutes on a single day. An identifiable part of the body -- the aorta -- was affected.

In cases of cardiovascular incidents, section 39-71-119, MCA (1995), sets out some additional criteria that must be met for the incident to be compensable. Subsection (5) provides:

(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.

The first paragraph -- subsection (5)(a) -- has been in the Act since 1987. 1987 Montana Laws, ch. 464, § 3. However, as originally enacted in 1987, the subsection used the word

"harm" instead of the word "condition." The latter word was substituted into the section in 1995. 1995 Montana Laws, ch. 243, § 6.

The Montana Supreme Court interpreted subsection 5(a) in *Gaumer v. Montana Department of Highways*, 243 Mont. 414, 795 P.2d 77 (1990). As already noted, at the time of the decision, the section used the word "harm" rather than "condition," reading:

(5) 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 harm in relation to other factors contributing to the physical harm.

Focusing on the word "harm," as then used in the section, the Court concluded that the harm referred to in the statute was the specific harm resulting from the industrial accident and not the claimant's "cumulative condition." The Court reasoned as follows:

The insurer contends that a plain reading of the statute requires the claimant to prove by a preponderance of the evidence that the harm of her chronic obstructive pulmonary disease was primarily caused by her exposure at work in relation to other factors contributing to that harm. This contention assumes that the term "physical harm" in the statute refers to the claimants [sic] cumulative present condition. If claimant were required to prove that her cumulative health condition was caused primarily by her exposure at work her burden would be impossible. Thus, to accept the insurer's contention would render subsection (5) of the statute meaningless, because a claimant with pre-existing cardiovascular, pulmonary, or respiratory problems suddenly aggravated by a traumatic accident at work could never meet this burden. Also, the legislature did not clearly set forth the meaning of the term "harm" as used in the statute. The statute does define an injury as "physical harm to the body" and defines an injury as an event caused by an accident. It follows that for a claim to be compensable the physical harm required by the statute is not the claimant's cumulative present condition but is that harm which results primarily from the accident at the workplace.

Id. at 419, 795 P.2d at 80.

Gaumer was decided before the substitution of "condition" for "harm" and thus provided the historical antecedent to the revision. In substituting the word "condition" for harm, the legislature plainly intended to effect a change in the subsection, and by the use of the word condition, plainly intended to require proof that the industrial accident was the primary cause of claimant's cumulative condition. There appears no alternative construction: construing the subsection in accordance with *Gaumer* would render the amendment meaningless, and is disfavored. *Foster v. Kovich*, 207 Mont. 139, 144, 673 P.2d 1239, 1243 (1983) (holding here is a presumption that the legislature, in adopting an amendment to a

statute, intended to make some change in existing law) (citing *Montana Milk Control Board v. Community Creamery Co.*, 139 Mont. 523, 366 P.2d 151 (1961)). The Court cannot conceive of any alternative constructions.

On the other hand, this Court is cognizant of the Supreme Court's statement in *Gaumer* concerning the impossibility of proving primary cause if a claimant is required to prove that the industrial accident was the primary cause of her overall condition. The legislature apparently felt otherwise, and I am persuaded that the statement merits reexamination.

In amending subsection (5), the legislature added the requirement that the claimant prove that the accident "is responsible for more than 50% of the physical condition." § 39-71-119(5)(b), MCA (1995). While apportionment and percentage allocations have until present been foreign to the Montana Workers' Compensation Act, they have been part of the Occupational Disease Act since 1959. Specifically, section 39-72-706, MCA, provides for apportionment between occupational and non-occupational factors in determining the benefits due on account of an occupational disease. I conclude that in amending section 39-71-119(5), MCA, the legislature intended that a similar allocation be done. In the case of the amendment, however, the allocation determines compensability, i.e., no compensation if the accident contributed 50% or less to the condition, rather than the amount of compensation.

Apportioning among causative factors does not require absolute certainty, scientific precision, or laboratory verification. Indeed, any of these three requirements would render apportionment impossible and apportionment statutes meaningless. Human beings do not live in a laboratory. It has been the Court's experience in reviewing and adjudicating occupational disease cases that apportionment opinions are based on the physician's clinical experience and judgment, not on any scientific yardstick. Indeed, subsection (5)(b) specifically calls for such determination "to a reasonable degree of medical certainty," which means only more medically likely than not.

In this case, two physicians testified that to a reasonable degree of medical certainty, the aortic dissection the claimant suffered was triggered by an episode of high blood pressure, which in turn was caused by claimant's strenuous work pulling the cord on the pump engine over a 20 to 30-minute period. Their opinions find some support even in Dr. Hiro's testimony that the claimant's work on August 7th "may very well" have triggered the dissection on that day. (Hiro Dep. at 33.) Indeed, Dr. Hiro's reluctance to reach the conclusions reached by the other doctors appears to be philosophically rooted. He pointed out that the causation issue appears to be more in the legal than the medical realm. Addressing one of the lawyers, he said:

Your realm is what's more responsible; is it the fact that he has a diseased aorta to start off with more responsible for the process occurring or whether it's this initial

inciting event. My contention would be that you can't have dissection unless you have the long standing chronic changes in the aorta.

(Hiro Dep. at 33.) The flip side of Dr. Hiro's contention is that the dissection would not have occurred at the place and time it did but for the claimant's overexertion. The dilemma this created is, where you have two coalescing "but fors," which is the predominant cause? The legislature deferred to physicians for the answer. Two physicians testified persuasively that the predominant factor, on a greater than 50% basis, was the overexertion. Thus, the requirements of section 39-71-119(5), MCA (1995), have been met and claimant's aortic dissection is compensable.

Claimant withdrew his request for a penalty at the time of trial. However, he did not withdraw his request for attorney fees. Attorney fees may be awarded only upon a finding that the insurer's denial of the claim was unreasonable. § 39-71-611, MCA (1995). Since I have found the issues in this case are reasonably debatable, since Dr. Hiro's opinions provide support for the insurer's position, the request for attorney fees is denied.

JUDGMENT

1. The claimant's strenuous work on August 7, 1996, in the course and scope of his employment with Hawkeye Construction was the primary cause of his aortic dissection. His injury (the aortic dissection) is compensable and the insurer shall pay appropriate temporary total and medical benefits.
2. No determination is made concerning the amount of benefits payable as that amount was not an issue. The Court retains continuing jurisdiction to resolve any dispute that may arise between the parties concerning the amount.
3. Claimant is not entitled to attorney fees.
4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. 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.

DATED in Helena, Montana, this 11th day of June, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. David W. Lauridsen

Mr. Larry W. Jones

Submitted Date: March 19, 1997

1. The aorta wall consists of three layers. The innermost layer is the intim. The middle is the media. The outermost part of the wall is the adventitia. (Ex. 2 at 3.)