IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 45

WCC No. 9601-7477

LIBERTY NORTHWEST INSURANCE CORPORATION

Petitioner/Insurer for

STIMSON LUMBER COMPANY

Employer

vs.

CHAMPION INTERNATIONAL CORPORATION

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 60 year old millwright injured his back in 1992 while working for Champion, which was self-insured. Eventually released to work without restrictions, he returned to work, though his job became primarily light duty carpentry work following an angioplasty. When the mill was sold to Stimson, claimant was hired and eventually returned to heavier millwright duties. He testified his back pain worsened until he could no longer perform his job. Dr. Michael Sousa, an orthopedic surgeon, took him off any work at Stimson. Although Champion had accepted liability for claimant's 1992 injury, it denied liability when claimant resumed medical care in 1994. Claimant filed an occupational disease claim with Liberty, which insured Stimson. Liberty accepted liability under a reservation of rights and now seeks determination that Champion is liable for claimant's condition, relying in large part upon the opinion of a medical panel chaired by Dr. Dana Headapohl, an occupational and environmental medicine specialist, who initially testified that claimant suffered a temporary aggravation of a pre-existing condition while working for Stimson, without permanent aggravation. Dr. Headapohl did concede, however, that there was a significant increase in claimant's symptoms while he worked for Stimson, with those symptoms surpassing his tolerance threshold.

Held: Based on the "last injurious exposure" language of section 39-72-303(1), MCA, in *Caekaert v. State Compensation Insurance Fund,* 268 Mont. 105, 885 P.2d 495 (1994), the Montana Supreme Court extended the subsequent injury rule to a subsequent occupational disease for which the initial insurer was liable. This case then turns on

whether claimant's work at Stimson materially and significantly aggravated his underlying low-back condition. If his current condition were merely a recurrence resulting from his 1992 injury, or merely the result of a natural progression of his preexisting condition, then Champion would remain liable. While the initial testimony of both Drs. Sousa and Headapohl supported Liberty's position, their later testimony confirmed claimant's own testimony that his work at Stimson caused material and significant deterioration of his low-back condition and caused his disability. (**Note:** this decision was affirmed by the Montana Supreme Court in *Liberty Northwest v. Stimson Lumber Company*, 285 Mont. 76, 945 P.2d 433 (1997).

Topics:

Causation: Medical Condition. Based on the "last injurious exposure" language of section 39-72-303(1), MCA, in *Caekaert v. State Compensation Insurance Fund*, 268 Mont. 105, 885 P.2d 495 (1994), the Montana Supreme Court extended the subsequent injury rule to a subsequent occupational disease for which the initial insurer was liable. This case turns on whether claimant, a millwright who injured his back in 1992, materially and significantly aggravated his condition by subsequent work at the same mill under a different employing entity, with a different insurer. If his current condition were merely a recurrence resulting from his 1992 injury, or merely the result of a natural progression of his preexisting condition, then the first insurer would remain liable. The Court was persuaded, however, by testimony of two doctors and the claimant, that his subsequent work caused material and significant deterioration of his low-back condition and caused his disability. (**Note:** this decision was affirmed by the Montana Supreme Court in Liberty Northwest v. Stimson Lumber Company, 285 Mont. 76, 945 P.2d 433 (1997).

Occupational Disease: Last Injurious Exposure. Based on the "last injurious exposure" language of section 39-72-303(1), MCA, in *Caekaert v. State Compensation Insurance Fund*, 268 Mont. 105, 885 P.2d 495 (1994), the Montana Supreme Court extended the subsequent injury rule to a subsequent occupational disease for which the initial insurer was liable. This case turns on whether claimant, a millwright who injured his back in 1992, materially and significantly aggravated his condition by subsequent work at the same mill under a different employing entity, with a different insurer. If his current condition were merely a recurrence resulting from his 1992 injury, or merely the result of a natural progression of his preexisting condition, then the first insurer would remain liable. The Court was persuaded, however, by testimony of two doctors and the claimant, that his subsequent work caused material and significant deterioration of his low-back condition and caused his disability. (**Note**: this decision was affirmed by the Montana Supreme Court in Liberty Northwest v. Stimson Lumber Company, 285 Mont. 76, 945 P.2d 433 (1997).

Occupational Disease: Subsequent Disease. Based on the "last injurious exposure" language of section 39-72-303(1), MCA, in *Caekaert v. State Compensation Insurance*

Fund, 268 Mont. 105, 885 P.2d 495 (1994), the Montana Supreme Court extended the subsequent injury rule to a subsequent occupational disease for which the initial insurer was liable. This case turns on whether claimant, a millwright who injured his back in 1992, materially and significantly aggravated his condition by subsequent work at the same mill under a different employing entity, with a different insurer. If his current condition were merely a recurrence resulting from his 1992 injury, or merely the result of a natural progression of his preexisting condition, then the first insurer would remain liable. The Court was persuaded, however, by testimony of two doctors and the claimant, that his subsequent work caused material and significant deterioration of his low-back condition and caused his disability. (**Note:** this decision was affirmed by the Montana Supreme Court in Liberty Northwest v. Stimson Lumber Company, 285 Mont. 76, 945 P.2d 433 (1997).

This case came on for trial in Missoula on April 22, 1996. Petitioner, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones. Respondent, Champion International Corporation (Champion), was represented by Mr. Bradley J. Luck. The claimant in this matter, Ronald Deschamps (claimant), was present with his attorney, Mr. Rex Palmer. However, claimant is not a party to this proceeding and his attorney did not participate in the trial.

Exhibits 1 through 21 were admitted by stipulation. Claimant and Dr. Dana Headapohl testified. The parties also submitted the depositions of claimant and Dr. Michael A. Sousa. The matter was then deemed submitted.

Issue: The sole issue in this case is which insurer is responsible for claimant's bad back. Liberty is presently paying claimant benefits under the Occupational Disease Act but asserts that Champion, which is the insurer at risk for a prior injury, is liable for the benefits. Liberty seeks a determination that Champion is liable for prospective benefits and an order requiring Champion to reimburse Liberty for the benefits Liberty has paid to date.

Citations to the Record: Dr. Sousa's deposition and specific exhibits are cited in the following findings of fact, however, where the finding is based on the trial testimony of Dr. Headapohl and Mr. Deschamps or on Mr. Deschamps' deposition, no citation is provided. Trial testimony is not specifically cited because no transcript has been prepared. Mr. Deschamps' deposition is not cited because much of his deposition testimony overlaps his trial testimony.

* * * * * *

Having considered the exhibits, depositions, trial testimony, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 60 years old.

2. Claimant worked for Champion at its Bonner, Montana mill for approximately 16 years. He worked for Champion until Champion sold the Bonner mill to Stimson Lumber in November 1993.

3. During 14 of his years at Champion, claimant worked as a millwright, repairing machinery at the Bonner mill. He used welders, torches and various tools in his job. In 1990 his duties were decreased following an angioplasty procedure. Thereafter, he principally did carpentry work even though he continued to be classified and paid as a millwright.

4. On March 30, 1992, claimant injured his back while working for Champion. He was lifting a box from sawhorses to a work bench when he experienced a "hot shock-like feeling." (Deschamps Dep. Ex. 1.) Within two hours he began having pain in his lower back and right leg. (*Id*.) At trial he described his pain as located in his lower back and buttocks and extending down the front of his right leg to just below the knee.

5. At the time of the injury, Champion was self-insured. It received notice of the injury and accepted liability for it.

6. Following his 1992 injury, the claimant initially sought treatment from a chiropractor. He was then treated in the emergency room on April 7, 1992. The ER physician referred claimant to Dr. David C. Westphal, a family practitioner.

7. Dr. Westphal referred the claimant to Dr. Michael A. Sousa, an orthopedic surgeon who had previously treated claimant. Dr. Sousa examined claimant on May 19, 1992 and thereafter treated him for his back. (Ex. 1 at 85; Sousa Dep. at 7.)

8. In a May 19, 1992 letter to Dr. Westphal, Dr. Sousa reported the results of his examination of that day. According to the letter, claimant provided the following history:

Mr. Deschamps as you know was injured when he was lifting and twisting a box that he was working on while working in maintenance at the Bonner mill. The patient twisted his back, felt the gradual onset of increasing pain, and by the end of the day could barely walk. He developed numbness in both legs, the right worse than the left, primarily along the inside of the thigh and upper leg region. The patient has had a gradual decrease in pain over the past few weeks but still reports numbness and a feeling of weakness with pain on twisting his low back. The pain is worse with activities and walking tends to aggravate him.

(Ex. 1 at 85.) Dr. Sousa's impression on that date was "a low back injury, a herniated nucleus pulposus which is of a minor nature on MRI scanning." (*Id*.) In his deposition Dr. Sousa said that the MRI finding of disk bulge or herniation was of "questionable clinical significance." (Sousa Dep. at 7.) He referred claimant to Dr. Gary D. Cooney, a neurologist, for further studies, and prescribed a course of physical therapy. (Ex. 1 at 86.)

9. Claimant underwent a course of physical therapy from May 22, 1992 through June 24, 1992. (Ex. 10 at 2-7.)

10. Dr. Sousa examined claimant again on June 4, 1992, and noted some improvement but nothing dramatic. (Ex. 1 at 12.) Claimant was experiencing pain in his hips and buttocks and "some pain going down to his knees." (Sousa Dep. at 8.) Dr. Sousa prescribed a course of epidural steroid injections. (*Id*.)

11. A physical therapy note of June 24, 1992, indicates by that date the claimant's condition had substantially improved. (Ex. 10 at 2.) The note said, "Overall [claimant is] doing fairly well." (*Id*.) It further noted that "[m]ost of [the] discomfort now is light tingling sensation into left leg along the medial border with occasional slight back ache." (*Id*.) Dr. Sousa's note of the next day, June 25, 1992, indicates that claimant had "only slight discomfort" and that "most of his pain is gone." (Ex. 1 at 10.)

12. Claimant was off work due to his back pain from April 2, 1992, until sometime in July 1992. On July 9, 1992, Dr. Sousa unconditionally released him to return to work in both millwright and millwright/carpenter positions. (Exs. 2 and 3.)

13. Upon his return to work claimant continued to experience some pain and discomfort. On July 21, 1992, Dr. Sousa noted that claimant "is able to work but has some irritation and pain." (Ex. 1 at 10.) Claimant continued working but took analgesic for his pain.

14. Over the next few months claimant continued to be seen periodically by Dr. Sousa for his back and also an elbow condition. With respect to his back, on November 17, 1992, Dr. Sousa reported that while claimant was "currently able to continue to work" he was "still having some pain on forward flexion and extension type lifting." (*Id*.) He noted that claimant had been lifting sheetrock and bags of concrete at work. (*Id*.)

15. On January 28, 1993, Dr. Sousa concluded that claimant had reached maximum medical improvement and gave claimant a 10% whole person impairment rating. (Ex. 1 at 73.) Although he concluded that claimant had reached MMI, he also noted:

Ron has been able to work but has to wear a back brace, has continued to take non-steroidal anti-inflammatory medicines on an intermittent basis, and has required some injections of cortical steroid medication.

(*Id*.)

16. On March 2, 1993, Dr. Sousa noted that claimant's "back pain is much better at this point" and that his elbows were his primary problem. (Ex. 1 at 9.) But on March 30, 1993, claimant was complaining of increased back pain. (*Id*.)

17. Following the March 30, 1993 visit, claimant did not return to Dr. Sousa until March 3, 1994, almost a year later. (Ex. 1 at 8.) Claimant testified that his leg pain had resolved but

that he still had some back pain after March 30, 1993. He did not seek further treatment because he was aware of the pending sale of the mill and intended to apply for a job with the new mill owners. He did not want his back injury to preclude new employment. Although claimant's memory was imperfect, the Court found him to be a credible witness, and accepts his testimony on this and other points.

18. Claimant worked continuously for Champion from July 1992 until the mill was sold in November 1993. During that time he was not performing the full duties of a millwright, rather he was doing light carpentry work. In reviewing the exhibits it appears that his job during that time was more properly characterized as a millwright/carpenter (Ex. 3) even though his title and pay had not changed. As previously mentioned, his shift to lighter-duty carpentry work occurred following an angioplasty in 1990.

19. On November 3, 1993, claimant underwent a pre-employment physical examination at the request of Stimson. In response to questions put to him at that time he told the examining doctor of his prior back injury but indicated that his back pain had resolved. (Ex. 10 at 19-20.) After physical examination the examiner approved him for unrestricted work.

20. Claimant testified that he was never pain free following his 1992 injury, although his leg pain did resolve. He was still suffering from low-back and intermittent buttock pain when he took the pre-employment physical but misrepresented his condition to the examining physician so he would be found physically able to go to work for Stimson.

21. Claimant was hired by Stimson and immediately went to work for the new company. As with Champion, he was classified and paid as a millwright. However, initially at Stimson he continued to perform lighter-duty carpentry work and he worked five days a week, eight hours a day, as he had for Champion.

22. Claimant testified that after working for Stimson for approximately a year, his job duties changed, although his classification and pay did not. He was put to work "chasing whistles." Whenever a machine broke down and repair was needed, a whistle blew in the mill to summon a millwright. Thus, claimant returned to true millwright duties, performing heavier work than he had been performing since 1990.

23. He further testified that while working over a two-year period for Stimson, his back pain gradually worsened until he could no longer perform his job. He said that when he started work for Stimson he was able to perform the duties of a millwright but that over time his pain increased and his consumption of over-the-counter analgesics increased until ultimately he could no longer work.

24. A review of medical records indicate that claimant's time frames are inaccurate and claimant testified at trial that he has memory problems. A report by Dr. Richard C. Dewey, who examined claimant on April 19, 1994, states that claimant had been performing light-carpentry work for Champion but since going to work for Stimson had been doing "pipe

fitting and heavy millwright work." (Ex. 10 at 26.) The records also indicate that after September 1994, claimant was off work for several months and when working was performing sedentary or light duties. In view of claimant's admitted problems, which I believe are genuine, I find that the medical records more accurately reflect his employment history at Stimson and that claimant began performing heavy-duty millwright work shortly after going to work for Stimson.

25. Medical records and Dr. Sousa's testimony show that claimant once more sought medical care for his back in March of 1994, approximately four months after going to work for Stimson. Dr. Sousa saw claimant on March 3, 1994, for both low-back pain and epicondylitis of his elbows. (Ex. 1 at 8.) (Epicondylitis is an "inflammation of the epicondyle or of the tissues adjoining the epicondyle of the humerus [upper arm bone]" and is sometimes called "tennis elbow." Dorland's Illustrated Medical Dictionary, 27th Ed. (1985).) The epicondylitis arose while claimant was working for Champion. (Ex. 1 at 59.) However, the condition significantly worsened after he went to work for Stimson and ultimately required surgery on September 12, 1994. (Ex. 1 at 55.)

26. On March 3, 1994, claimant complained of "intermittent back pain with some radiation into the hip", especially when "sitting and rising from a sitting position." Dr. Sousa recommended that claimant follow a stretching program and wear his back brace at all times. He also prescribed Tylenol #3 (Tylenol with Codeine.) (Ex. 1 at 8.)

27. Claimant continued to complain of pain and sought a refill of the Tylenol #3 prescription on March 30, 1994. (*Id*.)

28. On April 1, 1994, Dr. Sousa referred claimant to Dr. Richard Dewey, a neuro-surgeon, for a surgical consultation. (Ex. 1 at 69.) In his referral Dr. Sousa noted that claimant "has been finding it harder and harder to sit and perform his work . . . ." (*Id*.) He also noted that in his examination of March 3, 1994, "there were findings of increasing leg pain and more and more difficulty in performing his usual job." (*Id*.)

29. Dr. Dewey examined claimant on April 18, 1994. It was apparent from claimant's testimony that he and Dr. Dewey did not hit it off. The Court surmises that claimant's dissatisfaction with the examination was due to Dr. Dewey's lecturing him about his smoking. (Ex. 1 at 68.) In any event, Dr. Dewey's report reflects claimant's complaint of "persistent pain in his low back, periodic symptoms in the left leg and in the right groin." Thus, by this time, leg symptoms had returned. Nonetheless, Dr. Dewey found no indication for surgery and recommended a stretching program. (*Id*. at 67.)

30. Dr. Sousa saw claimant again on April 26, 1994. His office note confirms a return of "right leg radiation pain." (Ex. 1 at 7.) It also confirms that claimant was "working much harder at Stimson Lumber than previously at Champion." (*Id*.) Dr. Sousa prescribed a series of epidural steroid injections. (*Id*.)

31. Dr. Sousa reexamined claimant, finding that the epidural steroid injections had provided "some help" but noting that claimant "still has quite severe back pain after working hard at the mill." (Ex. 1 at 63.)

32. On August 5, 1994, Dr. Sousa took claimant off work. (Ex. 1 at 62.) In a letter to a claims adjuster for Champion he explained that claimant had "severe epicondylitis and severe back pain" and that over the previous three months he had been working with pain "despite epidural steroid injections, anti-inflammatory medications, elbow injections, etc." (*Id*.)

33. Dr. Sousa performed medial and lateral epicondylar tendon releases and fasciectomy's on September 12, 1994. (Ex. 1 at 55.) The surgery was on the left arm only. (*Id*.)

34. Claimant was released for sedentary work on October 31, 1994. (Ex. 1 at 51.)

35. He was released for light-carpentry work on November 16, 1994. (Ex. 1 at 48-49.) It does not appear that he has ever been released for medium or heavy work.

36. The Court cannot ascertain the date on which claimant returned to work for Stimson but according to a December 20, 1994 letter of Dr. Sousa, by that time claimant was working as a light carpenter. (Ex. 1 at 45.) In the letter the doctor also noted that claimant now carried an additional diagnosis of carpal tunnel syndrome. (*Id*.)

37. On January 19, 1995, Dr. Sousa wrote another letter in which he again noted that claimant had returned to work as a light carpenter. (Ex. 1 at 43.) In the letter he said that carpal tunnel did not preclude claimant from returning to his job as a millwright but the left forearm and back pain did. (*Id*.)

38. On January 27, 1995, claimant was taken off work for carpal tunnel surgery. We do not have the records of this surgery so further information is lacking.

39. Sometime after January 27, 1995, but prior to June 22, 1995, claimant returned to work. (Ex. 1 at 2.) However, on June 8, 1995, Dr. Sousa again took him off work, this time due to increased low-back pain and an onset of cervical pain. (*Id*.) A report of Dr. Lennard S. Wilson, who conducted a neurological evaluation of claimant on June 20, 1995, suggests that claimant had returned to work in late May 1995. (Ex. 10 at 76.)

40. On June 22, 1995, Dr. Sousa wrote Cynthia Bean, a claims examiner for Liberty, that claimant should be "considered somewhat chronically disabled as the result of chronic back problems." (Ex. 1 at 36.) He said that he could "not totally rule out even sedentary or light work flaring up his back." (*Id*.)

41. On June 26, 1995, Dr. Sousa confirmed that claimant could not return to work as a millwright and that at best he might be capable of sedentary work. (Ex. 1 at 34.)

42. On November 21, 1995, Dr. Sousa wrote that claimant could not return to any job at Stimson. (Ex. 1 at 15.)

43. Claimant has not returned to work since June 8, 1995.

44. Even though claimant has not worked for the past year, his low-back pain has not remitted. He continues to experience more pain than he was experiencing when he ceased working for Champion in 1993.

45. Martin D. Cheatle, Ph.D., conducted a psychological examination of claimant on January 17, 1996, and concluded that his pain complaints are genuine. (Ex. 10 at 81.) He found no overt signs of symptom magnification. (*Id*.)

Insurance History

46. As found previously, Champion accepted liability for claimant's 1992 injury and paid both compensation and medical benefits. However, upon claimant's resumption of care in March of 1994, it denied further liability for his low-back condition. (Ex. 8 at 1.) On May 10, 1994, Champion wrote to claimant. In the letter it asserted that claimant was "currently suffering from an occupational disease which would be the liability of your current employer, Stimson Lumber." (*Id*.) It recommended he submit future medical bills to Stimson's carrier. (*Id*.)

47. Thereafter, on October 12, 1994, claimant submitted a claim to Stimson. However, in the claim he attributed his low-back condition to his injury at Champion. (See Order Denying Summary Judgment at 2.)

48. Liberty initially accepted the new claim under the Occupational Disease Act but with a reservation of rights. (*Id*.) Thereafter, on January 23, 1995, it accepted the claim without reservation. (*Id*. at 3.) Still later, Liberty attempted to disavow its acceptance (*id*. at 4) but has continued to pay benefits while seeking a determination that Champion is responsible for claimant's low-back condition and that Liberty is entitled to indemnification for the compensation and medical benefits it has paid.

Medical Opinions

49. In his written reports and letters, Dr. Sousa provided somewhat conflicting opinions concerning the cause of claimant's post-1993 low-back symptoms. On May 12, 1994, he wrote that both jobs contributed to his condition:

There is, I think, a **joint liability** at the minimum with regard to this patient's claim in that he has underlying problems relating to Champion International employment with **ongoing aggravation secondary to the job at Stimson Lumber.**

This patient's initial or insighting [sic] problem though is the result of his on-the-job injury which occurred while he was working for Champion International.

(Ex. 1 at 64; emphasis added.) On June 22, 1995, he wrote to Cynthia Bean, a claims examiner for Liberty:

Mr. Deschamps is continuing to have severe back flare-ups. His pain is radiating up to his neck and is continuing to worsen as part of the natural progression of his disease **sustained in the injury while employed at Champion International**.

(*Id*. at 36; emphasis added.) On August 9, 1995, he wrote:

This is pursuant to the claim of Mr. Ron Deschamps employed with Stimson Lumbar [sic] Company. He has an **occupational disease** of low back pain with concomitant cervical pain and upper extremity problems.

(*Id*. at 32; emphasis added.)

50. In response to direct examination by Liberty's attorney, Dr. Sousa provided answers supporting its theory that claimant's current low-back condition is due to his 1992 injury.

a. Initially, Dr. Sousa confirmed that claimant has underlying degenerative disk disease dating back to at least 1982. (Sousa Dep. at 10.) X-rays taken at that time showed spurring and disk space narrowing. Those x-rays, however, did not extend to the lower lumbar region. (*Id*.)

b. Next, he confirmed that claimant had reached MMI with respect to his 1992 injury at least by March 2, 1993. (*Id*. at 17.)

c. Third, he testified that assuming claimant continued to suffer pain after he last saw him in March 1993, his pain is consistent with the injury at Champion being the cause. (*Id*.)

d. Fourth, he agreed that the June 22, 1995 letter to Bean "substantially" reflected his current opinions. However, he qualified his answer by pointing out, "I cannot rule out other aggravating circumstances that are not reflected in my record or questioning of Mr. Deschamps." (*Id*. at 20.)

e. Finally, at the end of his direct examination, he provided the following opinion:

Q. If Mr. Deschamps stopped working at Stimson, as he testified, I think it was in the spring of '95 he said he stopped working there because of low back pain, and in your opinion was the cause of that low back pain the injuries he suffered at Champion in March of 1992?

. . . .

A. Well, my letter states that he has back pain, neck pain, epicondylitis, all of which were adding to his disability to perform his usual work. So if you want to just refer to the chronic back pain, based upon my record of him not having sustained any intermediary injuries, *then I would have to say that it's consistent with a progression of problems that he had emanating from his 1992 injury.*

(Sousa Dep. at 21; italics added.)

51. However, Dr. Sousa's answers to questions put to him on cross-examination supported Champion's theory that claimant's work for Stimson permanently aggravated his underlying low-back condition. He testified as follows:

a. As of July 1992, claimant was "relatively asymptomatic" but still suffering discomfort which increased with greater activity. He was capable of working with a back brace and was released to return to work. (Sousa Dep. at 26.)

b. As of January 1993, he had reached MMI, however, he was still suffering from some pain and his pain increased if he overdid it. (*Id*. at 28-29.)

c. Between March 1992 and November 1993, claimant's condition was mildly symptomatic but stable.

d. Claimant's employment at Stimson "clinically" and "significantly" changed his condition, causing a permanent progression of his muscle spasm, pain and discomfort, and, ultimately disability from continued employment as a millwright. Dr. Sousa testified as follows:

Q. With the records you do have, though, from going back to work in July of '92 through the end of March of '93, he was stable, intermittently symptomatic, but seemed to be progressing fine?"

A. Yes.

Q. On April 1, 1994, which is the next time you saw Mr. Deschamps, it appears that there were several positive tests in your physical examination?

A. Yes.

Q. Since those positives weren't mentioned in any of those previous examination notes we've talked about, I presume that his condition had clinically changed by April 1, 1994?

A. Yes.

(Sousa Dep. at 34.)

Q. It appears that Mr. Deschamps' back got continually worse from the time you saw him in April of 1994 up through the time that he was taken off work and put on total disability in April of 1995. Is that consistent with your understanding?

A. Yes.

. . . .

Q. Now, you had released him for that millwright position at Champion in 1992, St. Pat's had released him for that same position at Stimson, and he worked in that for 18 months. It

was you who finally indicated that he could no longer handle the physical requirements of that position in 1995; is that correct?

A. Yes.

Q. I presume that a logical conclusion, then, is that his back condition had changed and his capabilities had changed dramatically since November 1993?

A. Yes.

. . . .

If you mean to say that, as I stated in the letter, that I felt that the condition started with his Champion International employment injury and was aggravated and ongoing secondary to his work as a millwright at Stimson, then I would have to say, yes, that would be my impression.

(*Id*. at 38-39.)

Q. And that work at Stimson permanently aggravated that underlying condition?

A. You want me to say a simple or long answer, yes, you know. And the short answer, it may have happened even if he weren't working. However, he was working and doing heavy labor and [it] was definitely an aggravation of the underlying condition.

(*Id*. at 40.)

Q. Isn't it more probable than not, then, Doctor, given all the information you have, including the testimony of Mr. Deschamps, your releasing him from work, his progression rather than regression while he was working for Champion, his release without restriction to begin work with Stimson, your findings that were clinically different in April of 1994 after beginning work with Stimson and the degeneration of his condition after that, isn't it medically more probable than not that this underlying condition caused by the industrial injury at Champion was permanently aggravated by the work activities over the 18 months as a millwright at Stimson?

A. I think that there are some people that would progress even if they weren't involved in heavy labor. But as he was in heavy labor, and I have no reports of any other accidents or injuries which occurred outside of the workplace, I would have to say that working, continuing to work as a millwright, in a 59-year-old man with a back condition, aggravated and led to some permanent findings, at least based upon my last assessment.

Q. And because of his pre-existing condition, his spine was in a weaker state?

A. Basically, the spine of a 60-year old man, you know, and just doing heavy work. But, yes, his back was not a normal back and would not be considered a normal back. It would be

considered a normal back for a 59-year-old man, but maybe we were remiss in recommending that he go back to work.

However, patient wanted to work. He had the capabilities learned and experience and that were [sic] valuable to a corporation such as Stimson. At the time of his assessments, he was doing well and was therefore released to return to that work.

Q. So with that weakened event, it's more probable than not that 18 months as a millwright caused a permanent aggravation of the underlying condition?

A. You know, his condition and complaints would be consistent with a permanent aggravation. A lot of what we see and our interpretation is -- that's dependent upon what Mr. Deschamps says. So if he is speaking truthfully, then I would have no quarrel with the comments that you just made.

(*Id*. at 42-44.)

Q. And it is a fact that where you would release him for work at Champion given his condition at those times, after 18 months at Stimson you took him off the job because he could not handle the work as a millwright?

A. Right.. . . .

Q. And there was a progression of the condition while he worked for Stimson?

A. Well, let's put it this way, he had more muscle spasm, pain, discomfort and a feeling of inability to handle the work.

Q. And so based on all of these facts, it's more probable than not from a clinical standpoint, that 18 months of millwright work at Stimson permanently aggravated that underlying condition, if we talk about probabilities?

A. Permanent, it means -- if that means up to this time. I'm not sure what the future holds for him. He could get better. But it has -- it's gone on for a period of time of more than six months and a year and it's more likely than not that it's going to continue.

Q. And it's more probable than not that he would attribute that change in condition, change in ability to work, to the 18 months of millwright work at Stimson?

A. Something definitely happened in the interim, so, you know, there's a probable relationship there.

(*Id*. at 46-47.)

Q. Finally, just so we're clear, and it will be clarified for the record, Mr. Jones talked to you about a letter that attributed the condition to a natural continuation of the pre-existing

condition. Your answers to my questions took into account what was in your file, the other information and all of those facts that we have talked about today?

A. Yes.

Q. Are you comfortable that you've clarified the situation?

A. If your question is, that I was not clear on my response to Mr. Jones and the subsequent information pointed out to me, other findings relating to an aggravation of the condition at Stimson, then I was -- I would say certainly there is some progression of symptoms with aggravation while employed by Stimson as a millwright.

(*Id*. at 48.) It is plain from Dr. Sousa's responses to questions put to him in cross-examination that once he considered all of the information available concerning claimant, and assumed claimant to be truthful (which the Court has found to be the case), he was of the opinion that more likely than not claimant's employment at Stimson had caused a significant, permanent progression of his condition to the point of disability, and that even after claimant ceased working for Stimson his back condition did not rebound to its pre-Stimson state.

52. Dr. Dana Headapohl, who specializes in occupational and environmental medicine, chaired a medical panel that conducted an independent medical examination of claimant to determine if he was suffering from an occupational disease. The request for the examination was made directly by Liberty; the medical panel procedures of the Occupational Disease Act were not invoked and the Department of Labor did not designate the panel.

53. In a consensus report the panel found that while working for Stimson the claimant could "possibly" have suffered a "temporary aggravation of an underlying and pre-existing condition." (Ex. 10 at 47.) The panel further opined that claimant should not return to work as a millwright due to his "general back condition, not because of specific injuries." (*Id. at* 48.)

54. Dr. Headapohl testified at trial that her review of medical records and history suggested that claimant suffered a temporary aggravation of symptoms while working for Stimson and that there was no evidence of a permanent aggravation of his back condition.

55. However, upon further examination by counsel for Champion, Dr. Headapohl confirmed that claimant's work at Stimson caused an increase in his perceived symptoms and that the increase in symptoms led to Dr. Sousa taking him off work. She acknowledged that with increased back symptoms, such as claimant exhibited in this case, it is more likely than not the treating physician will take a worker off work even though there is no concrete evidence that the underlying structural or physical condition has changed. She agreed that claimant's work at Stimson affected claimant's symptoms and his "compatibility" with his

job, but qualified her agreement by pointing out that other factors, including motivation, were involved. She pointed out that there was no objective evidence of further physical damage but agreed that his back condition is worse now than it was just prior to claimant going to work for Stimson. She testified that claimant's back continued to degenerate after 1992 during his employment with Champion and Stimson, and that the rate of degeneration may "have slightly increased" as a result of his heavier duties at Stimson. Ultimately, she agreed that during claimant's employment with Stimson there was a "significant" increase in his symptoms that surpassed his tolerance threshold. She attributed the increase not only to his employment but also to polyarthralgias, a degenerating condition of his upper-extremities. In her opinion, while the Stimson employment was a contributor, the other factors were more important.

56. Dr. Headapohl confirmed that the job of millwright is a heavy-duty one.

57. Both doctors agree, and I find, that during claimant's employment with Stimson his low-back pain increased significantly. The claimant was unable to tolerate the increased pain and the pain became disabling, causing Dr. Sousa to take him off work.

58. The increase in pain was permanent. Removal of claimant from the work force has not alleviated his increased pain level; his pain has not returned to pre-Stimson levels.

59. Based on all of the medical testimony, and claimant's description of his increased symptoms after being transferred back to a millwright position, I find that claimant's work at Stimson accelerated and significantly aggravated his preexisting degenerative back condition. While other factors, including other medical conditions, may have contributed to his overall perception of his pain, his work at Stimson was a significant factor in his increasing pain and, ultimately, his inability to work.

CONCLUSIONS OF LAW

1. It has long been the law that once an injured worker has reached maximum medical improvement, the insurer liable for that industrial injury is not liable for subsequent industrial injuries or conditions. *Belton v. Carlson Transport,* 202 Mont. 384, 389, 658 P.2d 405, 408 (1983). Based on the "last injurious exposure" language of section 39-72-303(1), MCA, in *Caekaert v. State Compensation Ins. Fund*, 268 Mont. 105, 885 P.2d 495 (1994), the Montana Supreme Court extended the subsequent injury rule to a subsequent occupational disease which materially or substantially contributes to the condition for which the first or initial insurer was liable. Thus, the crux of the inquiry in the present case is whether claimant's work at Stimson materially and significantly aggravated his underlying low-back condition. If his current condition is merely a recurrence resulting from his 1992 injury, or is merely the result of a natural progression of his preexisting condition, then Champion remains liable for his condition. *Id*.

While the initial testimony of both Drs. Sousa and Headapohl support Liberty's position that claimant does not suffer from an occupational disease materially affecting his low back, their later testimony supported Champion's position that claimant's work at Stimson accelerated his low-back disease, caused it to symptomatically deteriorate and ultimately caused disability, and I have so found in the foregoing findings of fact.

The change in claimant's condition was both material and significant: Prior to going to work for Stimson the claimant's pain did not preclude him from working as a millwright or a carpenter, whereas after his Stimson employment his baseline pain increased to the point that he is now permanently disabled from employment in either position. The medical evidence, especially that of Dr. Sousa, who was the claimant's treating physician, preponderates in favor of a conclusion that the deterioration of claimant's back while working for Stimson was not the mere result of a natural progression of his underlying condition. Dr. Sousa was convinced that something further happened as a result of claimant's employment at Stimson. While Dr. Headapohl gave the Stimson employment less significance, there is nothing in the nature of the conflict in testimony that would allow the Court to disregard the usual rule that the treating physician's opinion should be given greater weight. *Snyder v. San Francisco Feed & Grain,* 230 Mont 16, 27, 748 P.2d 924, 931 (1988). The test set forth in *Caekaert* has been met.

2. Liberty, which has accepted claimant's back condition as an occupational disease and paid him benefits, is not entitled to indemnification from Champion.

JUDGMENT

1. Liberty Northwest Insurance Corporation is not entitled to indemnification from Champion International Corporation for benefits it has paid, and continues to pay, to Ronald Deschamps.

2. The petition is **dismissed with prejudice**.

3. This JUDGMENT is certified as final.

Dated in Helena, Montana, this 25th day of June, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Larry W. Jones
Mr. Bradley J. Luck
Submitted: April 22, 1996