IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 24

WCC No. 9910-8335

DONALD ERDMANN

Petitioner

vs.

STONE CONTAINER CORPORATION

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 67-year-old claimant had worked for paper mill for twenty-six years before retiring in 1991 on advice of psychiatrist treating him for depression related to back pain and leukemia. He now claims benefits relating to hearing loss, contending that hearing loss was a "factor" in his retirement, though not mentioned at the time of retirement. Self-insured employer argued claimant was not prevented from working due to hearing loss, presenting evidence of policies and practices designed to prevent hearing damage which would permit claimant to have continued working if he desired.

Held: Under section 39-72-405, MCA (1991, 1993), claimant must establish both that it was medically inadvisable for him to continue employment and that he suffered a wage loss in order to be entitled to benefits described in that section. He is not entitled to benefits where he did not convince the WCC that it was medically inadvisable for him to return to work on account of hearing problem. WCC also did not credit claimant's testimony that he retired in part because of hearing problem.

Topics:

Constitution, Statutes, Regulations and Rules: Montana Code: 39-72-405, MCA (1991, 1993). Where credible evidence demonstrated that retired claimant alleging hearing loss could safely return to work using ear protection devices, he is not entitled to statutory benefits available to occupational disease claimants for whom it is "medically inadvisable" to return to work.

Medical Conditions: Deafness. Where credible evidence demonstrated that retired claimant alleging hearing loss could safely return to work using ear protection

devices, he is not entitled to statutory benefits available to occupational disease claimants for whom it is "medically inadvisable" to return to work.

Occupational Disease: Indemnity (39-72-405) Awards. Where credible evidence demonstrated that retired claimant alleging hearing loss could safely return to work using ear protection devices, he is not entitled to statutory benefits available to occupational disease claimants for whom it is "medically inadvisable" to return to work.

¶1 The trial in this matter was held on January 25, 2000, in Helena, Montana. Petitioner, Donald Erdmann (claimant), was present and represented by Mr. Richard J. Martin. Respondent, Stone Container Corporation (Stone Container), was represented by Mr. Peter J. Stokstad. A transcript of the trial has not been prepared.

¶2 Witnesses and Deposition: The claimant and Steve Hess testified at trial. In addition, the deposition of Michael J. Dixon, M.D., was submitted for the Court's consideration.

¶3 Exhibits: Exhibits 1 through 10 were admitted without objection.

¶4 Issues: The issues, as stated by the parties in the Pretrial Order, are as follows:

1. Whether Petitioner suffered a wage loss as a result of his occupational disease?
2. Whether Petitioner is entitled to a non-disabling award as provided under § 39-72-405 M.C.A.?
3. Whether Petitioner's hearing loss should be apportioned pursuant to § 39-72-706 M.C.A., and if so, what is the correct apportionment?

(Pretrial Order at 2.)

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

FINDINGS OF FACT

¶6 Claimant is presently 67 years old. He has a GED.

¶7 Claimant worked for Stone Container and it's predecessors[(1)] at its Missoula paper mill for twenty-six years. He worked as an "instrument man." In that capacity he monitored and repaired controls, including sensors and transmitters in the plant's operating areas.

¶8 Much of claimant's time was spent in a closed-in control room near the operating area. The control room was quiet and ear protection was not needed.

¶9 However, noise levels in the operating area were high. Steve Hess (Hess), the current Safety Manager for the Missoula mill, testified that the noise level in the operating area is 85 decibels or greater. It is 93 decibels on the operating floor and 107 decibels inside the dryer

and press section. The highest decibel level in the plant is 125 decibels, but that level occurs only when steam is released. According to Hess, that occurs only every month or two. Claimant testified that when steam releases occurred they could occur every ten minutes for up to two or three hours until the problem (over-pressurization) was resolved. There is also a siren that goes off on the floor when a machine malfunctions. Hess did not know the decibel level of the siren but said that the siren sounded only for a very short period of time.

¶10 Hess testified as to permissible decibel levels under regulations of the Occupational Health and Safety Administration (OSHA). Regulations require hearing protection at 85 decibels and above but the requirement is based on a time weighted average. For example, short term exposure to 90 decibels without hearing protection may be acceptable. However, he testified that it is plant policy to require hearing protection in all areas of the plant other than the control room and offices. The ear protection provided consisted of both ear plugs and ear muffs.

¶11 Hess agreed that industrial noise can cause hearing loss and that the louder the noise and longer the time of exposure, the greater the risk of hearing loss.

¶12 The Court gleans from claimant's testimony that in earlier years he did not use ear protection, or at least did not do so consistently. During the last few years of employment -- he said the last 1/3 of employment -- good hearing protection was available and he used it. He tried the ear plugs but found the ear muffs more convenient and eventually used them exclusively. He used the ear protection in the operating area of the mill and took it off when in the control room.

¶13 In the early 1990s claimant experienced significant health problems unrelated to his hearing. He had leukemia and a bad back, which apparently led to depression or other psychological reaction. In 1991 Dr. William Stratford, a psychiatrist, told him to "hang it up," and he did. He retired on June 14, 1991, at 59 years of age, and has not worked since. He testified that he could have continued working if he had not had medical problems.

¶14 Claimant testified that his hearing loss did not cause him to retire but was a "factor" in his decision, his leukemia being a much bigger factor. I do not find his testimony concerning the role of his hearing loss credible and find that it played no role. He testified that he was aware at the time of his retirement that he had some hearing loss but he did not seek further evaluation of loss until 1995. (Ex. 8.) He did not seek further medical advice until October 1997 (ex. 5). In his application for social security disability benefits he did not mention hearing loss.

¶15 In September 1994, claimant called the nurse at the paper mill and told her he had suffered a hearing loss while working at the plant. She filled out an Employer's First Report of Notice of Occupational Injury or Occupational Disease. (Ex. 2.) On April 6, 1995,

claimant filled out a Claim for Compensation stating he suffered a hearing loss because of "No Hearing protection For many years or warning of danger of hearing Loss." (Ex. 1; *sic*.)

¶16 Claimant was examined on October 6, 1997, by Dr. J. A. Schvaneveldt, who apparently is an otolaryngologist (ear, nose, and throat specialist). (Ex. 5 at 2.) The doctor tested his hearing, or at least had it tested. (*Id*. at 4.) He found that claimant had a 20% binaural (both ears) hearing loss, which translated into a 10% loss when adjusted for age. (*Id*. at 1.) He was doubtful that a hearing aid would improve his hearing due to the severity of hearing loss in the high tones. (*Id*. at 2.)

¶17 Dr. Schvaneveldt reexamined claimant on May 29, 1999. At that time, he felt that claimant would benefit from a trial of a digital hearing aid. (Ex. 5 at 5-6.) With respect to effect of the hearing loss on claimant's ability to work, Dr. Schvaneveldt said, "I find no reason why he cannot return to work with hearing protection." (*Id*. at 5.)

¶18 In 1999 the Department of Labor and Industry referred claimant to Dr. Michael J. Dixon, who is an otolaryngologist, for a medical panel evaluation. Dr. Dixon had claimant tested by Darla Gilder, an audiologist. (Ex. 6 at 5-7.) Her testing confirmed that he suffers from significant hearing loss. (*Id*.) Dr. Dixon found that his hearing loss was a consequence of employment but opined that unspecified non-occupational factors had contributed to his hearing loss. (*Id*. at 3-4.) He apportioned 60% to 65% of hearing loss to occupational factors.

¶19 Dr. Dixon further found that claimant is able to work in his Stone Container job despite his hearing loss. In his report, he wrote:

- It is my opinion that the patient [claimant] is able to perform his previous work.

- Despite his noise exposure with hearing loss and tinnitus the patient is not unable to perform any type of work.

(*Id*. at 3.) A requirement of hearing protection at work is implicit in Dr. Dixon's opinion that claimant can return to his previous work.

¶20 Thus, both Dr. Schvaneveldt and Dr. Dixon agree that claimant's hearing loss does not preclude him from returning to work provided he wears hearing protection. Claimant has provided no medical evidence contradicting their opinions.

¶21 Claimant asserted at trial that he would not be adequately protected if he returned to work because when he needed to talk to others in the operating area he had to lift the ear flap of his muffs, thereby exposing him to noise. I find his testimony unpersuasive, first because he has presented no medical evidence indicating that a brief exposure as he

described is significant to his hearing or health. Second, I find persuasive and credible the testimony of Steve Hess that employees were typically able to effectively communicate on the floor by standing next to each other and speaking close to the ear, and could go to the control room for any longer discussions.

¶22 I therefore find that claimant's occupational hearing loss did not and does not preclude him from returning to his job at Stone Container. I need not consider his further contention challenging Dr. Dixon's apportionment between occupational and non-occupational factors.

¶23 The insurer's denial of benefits in this case was reasonable.

CONCLUSIONS OF LAW

¶24 This Court has jurisdiction over the claimant's occupational disease claim. § 39-72-602 (2)(c), MCA (1999).

¶25 The claimant's substantive entitlement to benefits is governed by either the 1991 or 1993 version of the Occupational Disease Act. *Cf. Debra Kastens v. State Compensation Ins. Fund*, 1998 MTWCC 41, ¶ 17 (1991 statute of limitations on occupational disease claims commences running when claimant is totally disabled and aware that his total disability is due to an occupational disease). The 1993 statute of limitations is identical to the 1991 version considered in *Kastens,* as are the critical provisions governing benefits.

¶26 The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶27 Claimant is not seeking either temporary or total disability benefits, rather he seeks benefits under section 39-72-405, MCA (1991, 1993). Subsection (2) of the 1991 version provides:

> (2) When any employee in employment on or after January 1, 1959, because he has an occupational disease incurred in and caused by such employment which is not yet disabling, is discharged or transferred from the employment in which he is engaged or when he ceases his employment and it is in fact, as determined by the medical panel, inadvisable for him on account of a nondisabling occupational disease to continue in employment and he suffers wage loss by reason of the discharge, transfer, or cessation, the department may allow compensation on account thereof as it considers just, not exceeding $10,000.

Subsection (2) of the 1993 version 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.

Under both versions claimant must establish both that it is medically inadvisable for him to continue his prior employment and that he suffered a wage loss. He has presented no medical evidence supporting his argument that he cannot return to his job at Stone Container. To the contrary, the medical evidence established that he can return to work with ear protection and other evidence demonstrates that adequate ear protection was and is available. Claimant has failed to satisfy the requirements for an award under section 39-72-405, MCA.

¶28 Claimant is not entitled to attorney fees or a penalty. The sections cited by claimant for his request - §§ 39-71-612 and -2907, MCA (1997)[(2)] - require a finding of unreasonable conduct on the part of the insurer. In this case the insurer's denial of benefits was not unreasonable.

¶29 Claimant is not entitled to costs.

JUDGMENT

¶30 Claimant is not entitled to an award under section 39-72-405, MCA, or to attorney fees, a penalty, or costs. His petition is **dismissed with prejudice**.

¶31 This JUDGMENT is certified as final for purposes of appeal.

¶32 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 18th day of April, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Mr. Peter J. Stokstad
Submitted: January 25, 2000

1. The Missoula paper mill has changed hands since claimant commenced work. At the time he started work it was owned by Waldorf. Thereafter it was owned by Hoerner-Waldorf, Champion, and Stone Container.

2. The Court need not determine whether, or which version of, the sections are applicable. It is sufficient that claimant is not entitled to attorney fees or a penalty under the cited sections.