

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 23

WCC No. 9506-7336

DUANE ERICKSON

Appellant

vs.

CHAMPION INTERNATIONAL

Respondent.

ORDER ON APPEAL

Summary: Claimant appealed DOL hearing officer's decision he was not suffering from an occupational disease.

Held: WCC reversed and remanded the DOL decision where it rested on the opinion of a doctor who applied an incorrect understanding of the law of occupational disease and workers' compensation. The doctor opined that claimant's knee condition was not an occupational disease because not all mill workers develop similar knee conditions. This ignored the settled principle that an employer takes a worker as it finds him, making the fact that non-susceptible or non-predisposed workers would not be affected by working conditions irrelevant to a determination whether an occupational disease exists in a particular worker. Where claimant's argument that insurer failed to reject or deny his claim within 30 days was not raised in the agency proceeding, it will not be considered on appeal. Fact that claimant was pro se in the agency does not allow him to raise issues on appeal not raised below.

Topics:

Causation: Medical Condition. WCC reversed and remanded DOL decision that claimant did not suffer from an occupational disease where the decision rested on the opinion of a doctor who applied an incorrect understanding of the law. The doctor opined that claimant's knee condition was not an occupational disease because not all mill workers develop similar knee conditions, ignoring the settled principle that an employer takes a worker as it finds him, making the fact that non-susceptible or non-predisposed workers would not be affected by working

conditions irrelevant to a determination whether an occupational disease exists in a particular worker.

Causation: Medical Condition. The fact that claimant's underlying condition would ultimately have been totally disabling due to a natural progression of an underlying condition does not preclude compensation where the disability was hastened by a work-related injury or conditions.

Claimants: Pre-existing Conditions. WCC reversed and remanded DOL decision that claimant did not suffer from an occupational disease where the decision rested on the opinion of a doctor who applied an incorrect understanding of the law. The doctor opined that claimant's knee condition was not an occupational disease because not all mill workers develop similar knee conditions, ignoring the settled principle that an employer takes a worker as it finds him, making the fact that non-susceptible or non-predisposed workers would not be affected by working conditions irrelevant to a determination whether an occupational disease exists in a particular worker.

Claimants: Pre-existing Conditions. The fact that claimant's underlying condition would ultimately have been totally disabling due to a natural progression of an underlying condition does not preclude compensation where the disability was hastened by a work-related injury or conditions.

Occupational Disease: Proximate Cause. WCC reversed and remanded DOL decision that claimant did not suffer from an occupational disease where the decision rested on the opinion of a doctor who applied an incorrect understanding of the law. The doctor opined that claimant's knee condition was not an occupational disease because not all mill workers develop similar knee conditions, ignoring the settled principle that an employer takes a worker as it finds him, making the fact that non-susceptible or non-predisposed workers would not be affected by working conditions irrelevant to a determination whether an occupational disease exists in a particular worker.

Occupational Disease: Proximate Cause. The fact that claimant's underlying condition would ultimately have been totally disabling due to a natural progression of an underlying condition does not preclude compensation where the disability was hastened by a work-related injury or conditions.

Occupational Disease: Subsequent Disease. WCC reversed and remanded DOL decision that claimant did not suffer from an occupational disease where the decision rested on the opinion of a doctor who applied an incorrect understanding of the law. The doctor opined that claimant's knee condition was not an occupational disease because not all mill workers develop similar knee conditions,

ignoring the settled principle that an employer takes a worker as it finds him, making the fact that non-susceptible or non-predisposed workers would not be affected by working conditions irrelevant to a determination whether an occupational disease exists in a particular worker.

Occupational Disease: Subsequent Disease. The fact that claimant's underlying condition would ultimately have been totally disabling due to a natural progression of an underlying condition does not preclude compensation where the disability was hastened by a work-related injury or conditions.

Pro Se. Where claimant's argument that insurer failed to reject or deny his claim within 30 days was not raised in the agency proceeding, it will not be considered by the WCC on appeal. Fact that claimant was pro se in the agency does not allow him to raise issues on appeal not raised below. "While pro se litigants may be given a certain amount of latitude in their proceedings, they may not proceed in such a fashion as to abuse the judicial process, prejudicing the opposing party's interests as well as other litigant's access to the judicial system." *Federal Land Bank of Spokane v. Heidema*, 224 Mont. 64, 68, 727 P.2d 1336, 1338 (1986).

This is an appeal from a decision of the Department of Labor and Industry denying appellant's claim that he suffers from an occupational disease involving both of his knees. Appellant, Duane Erickson (claimant), argues that the Findings of Fact, Conclusions of Law, and Order entered by the Department's hearing officer "violate controlling statutory provisions, were made upon unlawful procedure, and were clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record." (Appellant's Initial Brief at 1.)

The appeal has been fully briefed. In addition the parties presented oral argument on February 22, 1996. At the end of the argument the matter was deemed submitted and it is now ready for decision.

Record on Appeal

The record on appeal consists of a sworn statement of the claimant, who was not represented by counsel during the proceeding below, a deposition of Dr. Robert Seim, 11 exhibits, and a transcript of the hearing. The only testimony presented at hearing was that of the claimant and it was very brief. Since the record is not voluminous, the Court will not specifically cite to the record except where essential to its determination or not specifically reflected in the hearing officer's findings of fact.

Factual and Procedural Background

Claimant is a 63 year old electrician. He worked for Champion and its predecessor company at its Libby, Montana, lumber mill from November of 1954 until April of 1993.

Claimant has a long history of knee problems. In the 1950's he sprained his right knee on several occasions. (Ex. 1.) In July 1959 he twisted his right knee at work. Dr. Woodrow Nelson diagnosed an articular spur and a tear of the lateral collateral ligament. He performed surgery which involved "[r]emoval of osteoma and repair of lateral collateral ligament, removal of hypertrophic synovial fat." (*Id.*) Claimant was off work for recuperation and received workers' compensation benefits during that time. After his convalescence he returned to work at the mill.

He testified that his right knee was "good" over the next five years but by 1967 he was experiencing right knee pain and sought medical care. (Erickson Dep. at 12.) On March 9, 1967, radiologist Dr. William J. Little reviewed x-ray films of the right knee and reported:

Films of the right knee show marked narrowing of the lateral half of the joint space with sclerosis at the articular surface of the lateral tibial plateau and the lateral femoral condyle and some spur formation present. I am unable to see any loose body in the joint space nor can I see osteochondritis dissecans. The stress views suggest some widening of the medial half of the joint space when compared to the left.

IMPRESSION: Old narrowed lateral half of the joint space of the right knee with secondary degenerative changes. No loose bodies seen. There appears to be some weakness of the medial collateral ligament and slight opening of the medial half of the joint space on stress views.

(Ex. 3.) Claimant could not recall any specific treatment being prescribed at that time.

Sometime circa 1967 to 1969 claimant also began experiencing left knee pain. Claimant felt that his left knee problems arose as a result of his favoring his right knee. For example, when kneeling he put his weight on his left knee.

Thereafter, both knees continued to symptomatically deteriorate. Claimant attributed the deterioration to his kneeling and running up and down stairs at work. (Erickson Dep. at 17.)

By 1984 the condition of the claimant's right knee had deteriorated to the point that he once more sought surgical relief. Dr. Edward L. Lester performed arthroscopic surgery on the right knee, doing a partial meniscectomy. (A meniscectomy is the surgical removal of part of the cartilage of the knee.) In his operative note, Dr. Lester noted "significant lateral compartment degenerative changes . . . [and] significant pain, especially posteriorly." (Ex. 4.)

In finding of fact 11, the hearing officer finds with regard to the 1984 surgery:

11. The December 1994 [sic] surgery was paid through the employer's group medical plan. Mr. Erickson did not submit the bills to the State Fund as he inquired and was informed the file from the 1959 injury had been lost. While attributing the

deterioration of his condition to be from his continuing work with the employer, **he was of the opinion the actual source of his knee problems stemmed from the 1959 injury.** (*Depo. of Erickson* pp. 18 @ 525, 20 @ 1522, 24 @ 823, 25 @ 1217, 26 @ 110 and 29 @ 215.) [Emphasis added.]

(Findings of Fact, Conclusion of Law, and Order at 5.) While the bolded language is not erroneous per se, further elaboration is necessary. The testimony cited by the hearing officer reflects claimant's belief that his knee problems, at least with regard to his right knee, *originated* with his 1959 knee injury. However, claimant's testimony further reflects his belief that his working conditions over the years had further aggravated his condition. For example, he testified:

Q. At that point in time by 1984, was it your feeling that these problems were the natural result of your 1959 industrial injury?

A. Like I said, that is when it all started.

Q. Do you think that it was aggravated by that time by your efforts in the work place?

A. Yes, I do. [Emphasis added.]

(*Erickson Dep.* at 20.)

In 1989 knee pain again drove claimant to a doctor. On June 8, 1989, he was seen by Dr. Randall Sechrest. He reported pain in both knees, worse in the left. He further reported that approximately three months prior he had experienced the onset of tenderness in the calf of his right leg and swelling of his right knee. Dr. Sechrest recorded that x-rays showed "4+ degenerative compartment of the R lateral knee and 2+ degenerative process in the L medial knee." He predicted that claimant would "most likely require a prosthesis when the symptoms become unbearable." In the short term he recommended cortisone injections of the knee. He further suggested that claimant consider a "high tibial osteotomy . . . to gain 4-5 years time before this knee wears out completely from DJD [degenerative joint disease]." (Ex. 5.)

Over the years, claimant's degenerating knees caused him to reduce his outside physical activity. His recreational activities, including fishing, hiking, and walking, declined.

On August 11, 1992, claimant suffered a back injury at work. (*Erickson Dep.* at 31-32.) In April of 1993, he ceased working on account of the injury and began receiving total disability benefits. He was still on total disability at the time of his deposition on July 7, 1994. (*Id.* at 32, 37.)

Claimant has not asserted that he further injured his knees on August 11, 1992. (*Id.* at 36.) His knees had continued to hurt after 1989. Following his 1992 injury they continued to deteriorate. (*Id.*)

In January 1994, the claimant filed a claim regarding his knees. He described the onset of his condition as:

Constant use of knees (bending, kneeling & stair climbing) resulted in excessive breakdown of knee structure.

(Ex. 7.) Sometime thereafter claimant underwent a knee replacement of his *left* knee. He seeks medical benefits for treatment of both knees.

The claim was treated as one for occupational disease and referred to the Department of Labor and Industry. The Department designated Dr. Robert J. Seim, an orthopedic surgeon and a member of the Occupational Disease Panel, to examine claimant.

Dr. Seim examined claimant on April 1, 1994. In his report to the Department he diagnosed "primary degenerative arthritis of the right knee with changes within the medial compartment, lesser changes within the patella and lateral compartment" and "primary degenerative arthritis of the [left] knee." (Ex. 6 at 2-3.) Addressing the occupational contribution to these conditions, he said:

The patient is not suffering from an occupational disease with either knee. The right knee injury was secondary to an industrial accident fracture. The patient has not aggravated, prolonged or accelerated his problems from outside activities. He may have aggravated the primary arthritis of his right knee in his job related activities.

(*Id.* at 3.)

On April 11, 1994, the Department issued an Order Referring Copy of Medical Reports to Parties. The Order directed the parties' attention to Dr. Seim's report and concluded that the claim should be denied. (A copy of the Department's Order is contained in the Department file but is not separately designated as an exhibit.)

Neither party thereafter requested a second evaluation as permitted by section 39-72-602(2)(b), MCA (1993). Claimant, however, requested a hearing. In preparation for the hearing, both claimant and Dr. Seim were deposed.

Dr. Seim testified that claimant's right knee condition was "secondary to the [1959] industrial accident, residual of the industrial accident." (Seim Dep. at 9.) He further opined that while claimant's subsequent work activities could have aggravated claimant's "symptoms," those activities did not aggravate the condition of his right knee. (*Id.* at 11.) Regarding the left knee, Dr. Seim opined, "Left knee has primary degenerative arthritis and that his symptoms were aggravated by the work." (*Id.* at 12.) In answer to later questions he

repeated that claimant's work "aggravated the symptoms" and said that the joint replacement was *primarily* due to underlying arthritis rather than any aggravation from work activities. (*Id.*) Dr. Seim distinguished between aggravations which cause or increase symptomatology and aggravations of the underlying physical condition. (*Id.* at 8-9.)

The hearing took place on November 29, 1994, by telephone. Claimant gave very brief testimony and was examined by counsel for Champion. The depositions of claimant and Dr. Seim, along with nine exhibits, were additionally submitted to the hearing officer for his consideration.

On June 2, 1995, the hearing officer issued his Findings of Fact, Conclusions of Law, and Order. Noting the presumption of correctness statutorily afforded medical panel reports in occupational disease cases, § 39-72-610(1), MCA, the hearing officer placed the burden on claimant to overcome Dr. Seim's determination by a preponderance of the evidence. The hearing officer then found that claimant did not overcome the presumption.

Standard of Review

Section 39-72-612(2), MCA, sets forth the standard of review applicable to this appeal. It provides:

(2) Appeals from a final determination of the department must be made to the workers' compensation judge within 30 days after the department has issued its final determination. The judge, after a hearing held pursuant to 39-71-2903 and 39-71-2904, shall make a final determination concerning the claimant's claim. The judge may overrule the department only on the basis that the department's determination is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

We note here the reference in the section to 39-71-2903 and 39-71-2904, MCA. The hearing contemplated by section 39-71-2903, MCA, is one "in accordance with the appropriate provisions of the Montana Administrative Procedure Act [MAPA]." Under MAPA the reviewing Court is precluded from conducting an evidentiary hearing and must review the

matter on the record of the administrative agency. § 2-4-704(1), MCA. If warranted the Court may remand the matter to the agency for the submission of additional evidence but may not itself hear the additional evidence. § 2-4-703, MCA. Section 39-71-2904, MCA, provides that any appeal from a decision of the Workers' Compensation Court is to the Supreme Court.

The grounds set forth in subparagraphs (a), (d) and (e) of section 39-72-612(2), MCA, are involved in this appeal. Under (a) and (d), the Court's review is plenary since conclusions of law must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 803 P.2d 601 (1990). When reviewing a decision under the clearly erroneous standard of subparagraph (e), the hearing officer's findings of fact may be overturned on judicial review only where they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 827 P.2d 85, (1992). The Court will not reweigh the evidence; the findings and conclusions of the fact-finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. Semitool, Inc.*, 252 Mont. 286, 289, 829 P.2d 1, 3 (1992). However, in this case all of the medical evidence was submitted by way of deposition and medical records. The standard of review is therefore broader. "Where crucial testimony is taken by deposition, the court will examine findings more closely, as it is in as good a position as the lower court to assess such evidence." *Stangler v. Anderson Meyers Drilling Co.*, 229 Mont. 251, 255, 746 P.2d 99, 101 (1987).

Discussion

Claimant advances two arguments in support of his request for reversal of the decision below. First, he argues that the insurer failed to accept or deny his claim within 30 days as required by section 39-71-606, MCA. Second, he asserts that the substantive determination was erroneous because the evidence presented at hearing conclusively demonstrates that his knee condition was aggravated by his work.

1. Notice Issue.

Section 39-71-606(1), MCA, provides:

(1) Every insurer under any plan for the payment of workers' compensation benefits **shall**, within 30 days of receipt of a claim for compensation, either accept or deny the claim, and if denied shall inform the claimant and the **department** in writing of such denial. [Emphasis added.]

The requirement has been in the law since 1973. 1973 Montana Laws, ch. 477, § 1.

Citing *Haag v. Montana School Groups Ins. Authority*, 906 P.2d 693 (Mont. 1995), claimant asserts that Champion failed to give notice to the Department within 30 days and is therefore liable for the claim as a matter of law. In *Haag* the Supreme Court addressed the

effect of the failure of an insurer to accept or reject a workers' compensation claim within the 30 days specified by section 39-71-606(1), MCA. It held that such failure amounted to an acceptance *as a matter of law*.

Section 39-71-606, MCA, is part of the Montana Workers' Compensation Act. For purposes of the present appeal, and without deciding the matter, the Court assumes that the provision is procedural and is made applicable to occupational disease cases pursuant to section 39-72-402(1), MCA. The latter section provides:

(1) Except as otherwise provided in this chapter, the practice and procedure prescribed in the Workers' Compensation Act applies to all proceedings under this chapter.

The Court also assumes for present purposes that the *Haag* decision, which involved an insurer's failure to notify the *claimant* within 30 days, will be extended to an insurer's failure to timely notify the *Department*.

Nonetheless, the claimant's argument fails because it was not raised in the proceeding below. As a general rule, courts will not consider issues raised for the first time on appeal. *Bengala v. Conservative Sav. Bank*, 250 Mont. 101, 108, 818 P.2d 371, 375 (Mont. 1991). Moreover, section 2-4-702 (1)(b), MCA, expressly precludes consideration of issues raised for the first time on judicial review. The section provides:

(1) (b) A party who proceeds before an agency under the terms of a particular statute may not be precluded from questioning the validity of that statute on judicial review, **but the party may not raise any other question not raised before the agency unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency.** [Emphasis added.]

No excuse is offered for claimant's failure to present the issue below. The fact that he was proceeding pro sé is not good cause. "While pro sé litigants may be given a certain amount of latitude in their proceedings, they may not proceed in such a fashion as to abuse the judicial process, prejudicing the opposing party's interests as well as other litigants' access to the judicial system." *Federal Land Bank of Spokane v. Heidema*, 224 Mont. 64, 68, 727 P.2d 1336, 1338 (1986). Permitting a pro sé claimant to raise new issues on appeal would undermine the administrative and judicial process. No longer would issues have to be raised in the forum below. The opposing party would be left guessing as to what issues a claimant might raise later on. The opposing party would have to anticipate and present the evidence necessary to rebut hidden issues. In this case the claimant argues that the insurer is liable because the record below does not *affirmatively* show that the insurer gave timely notice to the Department. But why should such evidence be part of the record if the issue was never raised?

Finding no good excuse for the failure to raise the notice issue below, Champion is not estopped from contesting liability in this case.

2. Substantive Determination.

Claimant next argues that Dr. Seim's testimony establishes, as a matter of law, that claimant suffers from an occupational disease and is entitled to compensation. He relies on the doctor's testimony that the claimant's work aggravated his "symptoms." Champion argues that such evidence is insufficient as a matter of law and entitles it to judgment.

Claimant bears the burden of proof in this case. Section 39-72-609, MCA, provides that the report of the medical panel "is prima facie evidence as to the matters contained in the report." Section 39-72-610(1), MCA, provides that "there is a rebuttable presumption that the report of the medical panel and any medical examination reports by members of the medical panel are correct." The Montana Rules of Evidence govern the effect of a rebuttable presumption, providing:

(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

Rule 301(b)(2), Mont.R.Evid. In reaching his decision, the hearing officer found that claimant had not overcome the presumption of correctness which is applicable to Dr. Seim's opinion.

If that were all that were involved in this case, then affirmance would be facile and quick. However, the matter is far more complex.

Under the Occupational Disease Act, the medical panel procedures have special significance. The Department, not the parties, appoints the panel members responsible for examining a claimant and reporting on his or her condition. § 39-72-602(2)(a), MCA. The panel members are appointed on account of their expertise in occupational disease. § 39-72-601, MCA. Thus, members of the medical panel are beholden to no one and are expected to act as neutral, objective experts.

In reaching their determinations panel members must follow the legal criteria set forth in the ODA and in case law precedents. If a panel member fails to properly apply or respect those legal criteria, then his or her determination may be erroneous. In this case the testimony of Dr. Seim shows that he applied an incorrect legal standard in reaching his opinions.

In prefacing his opinions, Dr. Seim expressly stated that one of the bases of his opinions is the fact that most workers do not develop bad knees when doing the type of work claimant

did. He testified that, in addition to work conditions, an underlying condition or predisposition must be present. When asked whether claimant's work caused "any additional actual physical damage to the right knee" or whether his condition was the result of a "natural progression of the degeneration following the '59 injury," Dr. Seim replied:

A: You're asking a loaded question. And there's several ways to answer that. The general deal is -- I don't know all the things he did in the mill, but I have grown up in sawmills and millwrights doing that myself, so I have some idea of the demands of the job. **Generally something else has to be underlying for a person working in a sawmill with millwright or what he's doing, for that to be the cause of the arthritis. Otherwise everybody would get arthritis that works in the mill that does that job. We don't see that. We see some people get it. There's something else that has to be underlying.** In this case, he has two things. He had a previous injury of the right knee. He appears, by history with this other knee, that he probably had some -- he's somewhat prone to having primary degenerative arthritis.

(Seim Dep. at 10-11; emphasis added.) It was with this caveat that Dr. Seim then gave his opinion that claimant's work merely aggravated his symptoms, not his condition.

Later on, Dr. Seim gave a similar response to a question put to him by claimant's wife, who was assisting claimant in the deposition:

Mrs. Erickson: I wondered if being on your knees all those years as an electrician, taking motors in and out, if that causes or promotes what he has developed in his knees?

A: As I said earlier, generally not, **because we see people that do this type of work all the time. The thing that people who are on their knees, whether electricians, plumbers, carpet layers, is they get chronic bursitis, which is thickening of the tissue in the front of the knees and soreness, but do not get x-ray changes that he has in his knees. And it's our experience -- we know from experience what people get and all the hundreds of millwrights running around Western Montana, they don't get degenerative arthritis of the knees *unless they have something else going on.* Otherwise, it would be a high incidence.**

(Seim Dep. at 15-16; bolding and italics added for emphasis.)

Dr. Seim also failed to indicate whether the "symptom aggravation" he believed occurred on account of claimant's work was a **permanent exacerbation** of symptoms or merely a series of **temporary symptom flareups which subsided when claimant quit working**. His failure to be more specific on this point is important when addressing claimant's argument that Dr. Seim's testimony regarding symptom aggravation establishes, as a matter of law, that he suffers an occupational disease.

Since its amendment in 1987, the ODA has defined "occupational disease" as follows:

"Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift. The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity.

§ 39-72-102(10), MCA (1987). As set forth in the section, an occupational disease must meet the injury definition set forth in section 39-71-119(1), MCA, which is part of the WCA. The latter section provides:

(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. [Emphasis added.]

The difference between the two acts is the WCA requires that the harm occur in a single day or workshift, § 39-71-119(2)(d), MCA, while the ODA applies to harm which develops over a longer term.

Thus, where, over a period longer than one day or a single work shift, a worker's employment causes physical harm, as established by objective medical findings, the resulting condition is an occupational disease within the meaning of the ODA.

Aggravations of preexisting conditions or diseases are compensable under the ODA. Section 39-72-706(1), MCA, provides in relevant part:

[I]f 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.]

Thus, as under the WCA, the employer and its insurer take the worker as they find him, with all of his underlying conditions, diseases, weaknesses, and predispositions. The fact that a prior injury caused some disability does not preclude the finding of an occupational disease where the physical activities at work accelerate further degeneration of the underlying condition and thereby cause additional disability, although the ultimate

disability must be apportioned pursuant to section 39-72-706(1), MCA. *Nelson v. Semitool, Inc.*, 252 Mont. 286, 829 P.2d 1 (1992). Personal sensitivity or predisposition does not bar or affect recovery under the ODA.

"[I]f a disease is caused by the conditions of employment and these conditions carry with them a risk of incurring the disease greater than that which prevails in employment and living conditions in general, then such disease is an occupational disease within the scope of our act. **Compensation is not to be barred because the risk is not generally recognized or because only those unusually susceptible or predisposed to a given disease will contract it.**

Greger v. United Prestress, Inc., 180 Mont. 348, 356, 590 P.2d 1121, 1125-26 (1979) (quoting from *Aleutian Homes v. Fischer*, 418 P.2d 769, 778 (Alaska 1966) (emphasis added)).

In *Greger* the claimant was allergic to chromium. He was exposed to chromium while working with concrete at work. The chromium was present in the concrete. As a result, he suffered contact dermatitis on his legs and hands. Finding that the work-related exposure triggered the allergic dermatitis, the Court adopted "the majority rule which holds that when an individual allergy is aggravated by work experience in the ordinary course of work, the result is an occupational disease." 180 Mont. at 354, 590 P.2d at 1124. Finding that the claimant's "employment conditions cause him to have a reaction to the cement due to his personal sensitivity," the Supreme Court affirmed a finding that the claimant was suffering from an occupational disease. 180 Mont. at 356, 590 P.2d at 1126.

In *Nelson* the Court reached a similar result with respect to a degenerative low-back condition. Claimant in that case suffered a low-back injury while working for the United States Postal Service between 1964 and 1969. His injury required spinal surgery, including fusion of some of the lumbar vertebrae. *Id.* Claimant was then off work until 1978, when he returned to other employment. He continued to receive partial benefits. *Id.* In 1982, he went to work for Semitool, Inc., and continued working there in a heavy labor capacity until 1988 when he was unable to continue working on account of back problems that had progressively worsened. He filed an occupational disease claim and was ultimately referred to three panel physicians for their opinions. One physician opined that he was suffering an occupational disease on account of his work at Semitool. The other two reached the contrary conclusion. The hearing officer appointed by the Department to resolve the dispute concluded that claimant was in fact suffering from an occupational disease but apportioned only 50% of his disability to his occupation.

The Workers' Compensation Court affirmed the hearing officer's finding and on further appeal the Supreme Court also affirmed the finding. In its decision the Supreme Court noted that all of the doctors agreed that claimant was suffering from spinal stenosis and that it was unlikely he would have developed that condition but for his earlier industrial accident. Nonetheless, they held that there was sufficient evidence to support the finding

that claimant's work activities accelerated the stenosis. That acceleration constituted a compensable occupational disease.

Thus, the fact that non-susceptible or non-predisposed workers would not be affected by the working conditions is irrelevant to a determination concerning whether an occupational disease exists.

Similarly, the fact that the claimant's underlying condition would ultimately have been totally disabling due to a natural progression of an underlying condition does not preclude compensation where disability is hastened by a work-related injury or conditions. In *Shepard v. Midland Foods, Inc.*, 205 Mont. 146, 666 P.2d 758 (1983), the claimant had "disaster knees" due to a life of heavy lifting both at work and recreationally. Claimant was hired by Midland Foods in 1973. By 1977 he was walking with a limp. On February 14, 1980, he slipped and fell, twisting and striking his left knee. After a period of recuperation he returned to work, then quit because he could not tolerate the pain. His attending physician testified that irrespective of the slip and fall, claimant's preexisting "knee deterioration would have resulted in his forced retirement within a short period." 205 Mont. at 151, 666 P.2d at 761. There was also evidence that his degenerative arthritis of his knees preexisted his employment with Midland.

Nonetheless, the Supreme Court held that claimant was entitled to compensation. Noting the treating physician's opinion that claimant's work acted as an "accelerant," the Court held he was entitled to compensation on account of both the micro-trauma he suffered over the years of his employment by Midland and the 1980 industrial accident. Reversing the Workers' Compensation Court's finding that his condition was due to factors other than work, it noted:

[U]nchallenged medical evidence establishes that the pre-existing condition was aggravated and the degeneration and breakdown were accelerated by the many small traumas to his knees caused by Mr. Shepard's work with Midland and also by his February 14, 1980 industrial accident.

205 Mont. at 154, 666 P.2d at 762. While *Shepard* is a workers' compensation rather than an occupational disease case, the aggravation rule applies to both types of cases.

Dr. Seim overlooked these controlling legal principles when rendering his opinions. It is apparent from his prefatory statement made in response to questions calling for his opinions, as well as his reply to the question by claimant's wife, that his opinions were based on an understanding that the occupational disease definition does not cover work-related diseases or conditions which are contracted only by susceptible or predisposed individuals. The relevant inquiry should have been whether the claimant's work conditions aggravated, accelerated, contributed to, or intensified claimant's condition in view of his predisposition. *Nelson*, 252 Mont. at 289-290, 829 P.2d at 3; *Gaffney v. Industrial Accident*

Board, 129 Mont. 394, 402, 287 P.2d 256, 260 (1955); *Ridenour v. Equity Supply Co.*, 204 Mont. 473, 481, 665 P.2d 783, 788 (1983); *Shepard v. Midland Foods, Inc.*, 205 Mont. 146, 152- 54, 666 P.2d 758, 761-62 (1983). By failing to apply the proper standard, Dr. Seim's opinions, as well as the final decision, were tainted. That taint amounted to an error of law.

In reaching the foregoing conclusion, I intend no criticism of Dr. Seim. Workers' compensation and occupational disease laws are often technical. The legal standards set forth in the laws may not comport with medical definitions or usual medical analysis. Indeed, because of the technicality of these areas of law, a specialized bar of attorneys who focus significant parts of their practices on workers' compensation and occupational disease matters has developed in Montana. The responsibility for assuring that medical testimony addresses the applicable legal standards rests on the shoulders of those attorneys and the courts, who must articulate the legal standards for physicians to follow.

Nor by my determination do I mean to criticize Champion's attorney, who went to great depths to assure that claimant received a fair hearing. Despite best efforts, mistakes are made, oversights occur, and new legal analyses unfold. Even this Court is sometimes in error and must answer to the ultimate direction of the Supreme Court.

Claimant argues that Dr. Seim's opinion concerning symptom aggravation proves that he has an occupational disease. Respondent, on its part, contends that symptom aggravation is insufficient because it does not constitute "physical harm."

Respondent is correct in asserting that the ODA requires proof of physical harm. As discussed earlier, the definition of occupational disease expressly incorporates the criteria of section 39-71-119(1), MCA, which requires proof of physical harm. The physical harm requirement, however, is not new. It has been in the WCA since at least 1961. 1961 Montana Laws, ch. 162, § 6 and see annotations to § 39-71-119, MCA.

The Supreme Court has not specifically interpreted the physical harm requirement. However, discussion in *Varela v. Exxon*, 237 Mont 300, 306, 773 P.2d 299, 303 (1989), suggests that pain caused by an event otherwise meeting the injury definition may constitute physical harm. In that case the claimant returned to work after his leg was amputated. Upon his return to work, he experienced irritation to his stump and fell twice. As a result, he experienced severe pain and was unable to continue working. After quoting the 1985 injury definition, which contained a physical harm requirement, the Supreme Court affirmed a finding that claimant suffered a new, compensable injury.

The Supreme Court has also held that pain may be disabling where it is so severe that a claimant is unable to endure it while working. *Robins v. Anaconda Aluminum Co.*, 175 Mont. 514, 521-22, 575 P.2d 67, 72 (1978). Ultimately, pain, if that is what Dr. Seim was referring to, is a physical sensation, albeit one which has psychological components.

However, we cannot ascertain from Dr. Seim's deposition whether the symptom aggravation was temporary or permanent in nature. If temporary, i.e., wholly resolving after the work activities ceased, putting an occupational disease label on claimant's condition does not benefit him since he would have no benefit entitlement other than for acute episodes while working. See *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 341-42, 777 P.2d 862, 867-68 (1989). It does not appear that he is seeking benefits for such episodes.

We need not answer here whether mere symptom aggravation would satisfy the "objective medical findings" requirement of section 39-71-119(1), MCA. There is no question in this case that there are objective medical findings of claimant's knee condition. If claimant's work accelerated the physical deterioration in his knees, a matter not addressed by Dr. Seim, then the objective medical findings requirement is met whether or not a mere aggravation of symptoms without further physical deterioration would satisfy the requirement.

3. Relief.

Since the Department's determination was based on an error of law, this case must be remanded for a new hearing. During oral argument, counsel for Champion urged that any remand be limited to reopening Dr. Seim's deposition so he can provide opinions based on the proper standard. That would preclude claimant from presenting witnesses to bolster his claim.

Such limitation might at first glance appear a fair one in light of claimant's failure to present any independent evidence at the hearing below. However, since the decision below was based on an error of law, claimant must be afforded an opportunity to reply to testimony which is predicated on the correct standard. A new hearing must therefore be granted without limiting the evidence to that which may be given by Dr. Seim.

In addressing the aggravation issue on remand, the proximate causation requirements of section 39-72-408, MCA, should be addressed. The section provides:

Proximate causation. Occupational diseases shall be deemed to arise out of the employment only if:

- (1) there is a direct causal connection between the conditions under which the work is performed and the occupational disease;
- (2) the disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
- (3) the disease can be fairly traced to the employment as the proximate cause;
- (4) the disease does not come from a hazard to which workmen would have been equally exposed outside of the employment;

(5) the disease is incidental to the character of the business and not independent of the relation of employer and employee.

The first three of these criteria are facets of the ultimate inquiry into whether the claimant's work conditions aggravated, accelerated, contributed to, or intensified claimant's condition. Thus, in this case they are intertwined with the aggravation inquiry.

The fourth and fifth criteria were considered in *Hughes v. Department of Labor and Industry*, 253 Mont. 499, 833 P.2d 1099 (1992). In that case the claimant suffered a severe form of atopic dermatitis. Her condition was aggravated by changes in temperature, dust and air flow. The medical evidence at trial demonstrated that her outbreaks at work did not leave her more susceptible to future outbreaks.

In seeking occupational disease benefits, Ms. Hughes alleged that environmental factors at work, especially extensive travel in heated and air conditioned vehicles, aggravated her condition. The Department rejected her claim. On appeal to the Supreme Court, that finding was affirmed. Noting that the environmental factors aggravating claimant's condition were "not indigenous to her employment," the Court concluded that "Ms. Hughes cannot satisfy the proximate cause standards" of the ODA. It pointed out that "temperature fluctuations, air flow, wind and dust are common to everyone."

Pursuant to *Hughes*, the medical witnesses should address, and the hearing officer should determine, whether the conditions to which claimant was exposed at work were conditions to which he was equally exposed to outside of work or which are inherent in all employment.

The notice issue has been finally determined and is not an issue which may be relitigated on remand.

ORDER

For the reasons set forth in the foregoing discussion, IT IS HEREBY ORDERED that

1. The decision of the Department of Labor's hearing officer is **reversed**. This case is **remanded** for a **new hearing** in accordance with the discussion.
2. This Order is certified as final for purposes of appeal.
3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

DATED in Helena, Montana, this 12th day of March, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Tom L. Lewis

Mr. Bradley J. Luck

Ms. Christine L. Noland

Mr. Brian McCullough - Zip Mail

Submitted Date: February 22, 1996