IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 68

WCC No. 2003-0833

BRUCE FUSS

Petitioner

vs.

INSURANCE COMPANY OF NORTH AMERICA and

VALOR INSURANCE COMPANY, INCORPORATED

Respondents/Insurers.

DECISION AND ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary: Claimant in 1998 was determined to have an Occupational disease involving throat and airway problems. Insurance Company of North America (ICNA) was the insurer and did not contest the determination. Four years later claimant was hospitalized for, among other things, throat and respiratory problems. ICNA, however, denied liability, indicating the claimant's illness had been aggravated by subsequent work for the same employer, which it no longer insured, hence the subsequent insurer (Valor) should be liable. Claimant then filed a claim with Valor, which denied liability. He then petitioned the Court, joining both insurers. Now he moves for summary judgment holding ICNA liable. ICNA responds that 1) the physician diagnosing the occupational disease in 1998 had incomplete information and was mistaken; 2) the claimant's present condition is unrelated to his 1998 condition; and/or 3) Valor should be liable since his condition worsened on its watch.

Held: Valor is liable only if the claimant is suffering from a new and different disease. ICNA continues to be liable for claimant's 1998 condition and any progression of and sequella to that condition. It is too late for it to challenge the OD determination. As to causation, a review of medical records indicate there is a factual dispute as to whether claimant's current medical problems are related to his 1998 disease, hence, summary judgment is inappropriate.

Topics:

Summary judgment: General. Although disputed facts preclude summary judgment, the Court may determine issues of law when ruling on a motion for summary judgment.

Summary judgment: Disputed Facts. Where medical records are extensive and do not on their face establish an uncontroverted link between a claimant's current condition and his previously diagnosed occupational disease, summary judgment is inappropriate.

Occupational Disease: Last Injurious Exposure. Where a claimant is diagnosed with an occupational disease, the insurer at risk at the time of that diagnosis is liable for, and continues to be liable for, the disease even though the disease is materially aggravated by claimant's work for the same employer, at least where the aggravation occurs during a subsequent insurer's watch.

Occupational Disease: Subsequent Disease. An insurer liable for an occupational disease is not liable for a subsequent new and different disease. However, where a claimant is diagnosed with an occupational disease, the insurer at risk at the time of that diagnosis is liable for, and continues to be liable for, the disease even though the disease is materially aggravated by claimant's work for the same employer and the aggravation occurs during a subsequent insurer's watch.

Occupational Disease: Liability for an occupational disease extends only to the disease and conditions and sequella that are caused and related to the occupational disease.

¶1 The matter before the Court is claimant's motion for partial summary judgment. Claimant asks the Court to find that Insurance Company of North America (ICNA), one of two respondent insurers in this case, is liable for claimant's current medical problems which are primarily respiratory in nature.

Undisputed Facts

¶2 During 1997 and 1998, claimant was employed as a janitor at two businesses - 4B's Crossroads and Truckers Express, Inc. The two employers were affiliated and, during 1997, 1998, and parts of 1999, were both insured by ICNA, which at that time was known as Cigna but hereinafter referred to as ICNA. (Petitioner's Statement of Uncontroverted Facts, ¶ 1, Ex. A; ICNA's Response to Petition, ¶ IF.) ICNA ceased providing coverage for 4B's Crossroads on July 1, 1999, and for Truckers Express, Inc. on August 1, 1999. (ICNA's Response to Petition, ¶ IF.)

¶3 During 1997 the claimant developed hoarseness and loss of voice. (Ex. A and B to respondent's Statement of Uncontroverted Facts.) On March 27, 1998, a representative of both employers wrote to ICNA reporting the claim and enclosing a First Report listing Truckers Express, Inc. as the employer. (Petitioner's Statement of Uncontroverted Facts, ¶ 5, Exs. A, B.) The letter stated it would be "acceptable for this occupational disease to be

handled through the Truckers Express account" and noted the employer did not question the claim. (*Id.*, ¶ 5, 6, Ex. A, B.)

¶4 On June 1, 1998, ICNA denied the claim. It informed claimant that "the information we have received indicates that your condition cannot be directly related to your occupation." (Petitioner's Statement of Uncontroverted Facts, ¶ 9, Ex. F.) Nonetheless, the insurer referred the claim for evaluation by the statutory Occupational Disease Panel. (*Id.*)

¶5 On August 4, 1998, Dr. Dana Headapohl performed an Independent Medical Examination on referral from the Department of Labor and Industry ("Department"). (Petitioner's Statement of Uncontroverted Facts, ¶ 11; ICNA's Opposition to Partial Summary Judgment, ¶ 1, Ex. 1.) She concluded:

In response to the specific occupational disease questions:

Mr. Fuss has pre-existent atopy[(1)] as manifested by asthma as a very young child and positive allergy testing to a variety of exposures. However, he had been asymptomatic until high occupational dust exposures in the fall of 1997.

His upper airway irritation, nasal and sinus congestion and dysphonia meet the proximate causation criteria for occupational disease.

He continues to work at his job in a modified capacity. He should be able to continue his job with the use of a dust mask and a HEPA filter vacuum cleaner.

Allergy shots for dust mites and pollen (likely contaminants in the dust at work) is recommended on an ongoing basis.

With regard to apportionment, 50% of his symptoms are occupationally related and 50% for his underlying pre-existent atopic condition.

(Ex. 1 to ICNA's Opposition to Partial Summary Judgment.) I note here that the occupationally related symptoms addressed by Dr. Headapohl were "upper airway irritation, nasal and sinus congestion and dysphonia," and nothing more. "Dysphonia" is "defective use of voice." (Encyclopedia Britannica Dictionary 2003, Ultimate Reference Suite DVD.)

¶6 Based on Dr. Headapohl's report, on September 9, 1998, the Department issued an Order of Determination concluding that "claimant is suffering from an occupational disease and is entitled to benefits under the Occupational Disease Act." (Petitioner's Statement of Uncontroverted Facts, ¶ 11, Ex. G.) The Department determined that claimant was entitled to fifty percent of his "total disability benefits **if they [sic] suffer a total wage loss as a result of the occupational disease"** and also entitled to "**medical and hospital expenses directly related to their [sic] occupational disease**." (*Id.;* emphasis added.)

¶7 ICNA did not appeal the Department's Order of Determination and paid various benefits relating to claimant's condition. (Petitioner's Statement of Uncontroverted Facts, ¶ 12.)

¶8 In 2002, claimant submitted bills relating to a hospitalization during May 2002. The hospitalization was related at least in part to a respiratory illness. (Petitioner's Statement of Uncontroverted Facts, ¶ 13, 14; ICNA's Opposition to Partial Summary Judgment, ¶ 31.) Claimant demanded ICNA pay for the hospitalization.

¶9 ICNA denied liability for the 2002 hospitalization based on its determination that the hospitalization was "unrelated to your Occupational Disease of September of 1997." (Petitioner's Statement of Uncontroverted Facts, ¶ 14, Ex. H.) Apparently, its adjuster believed claimant's employment subsequent to 1997 and 1998 aggravated his condition and relieved ICNA of further liability. At least the adjuster wrote:

The limited medical records I have been able to review indicate that you experienced a significant material worsening of your respiratory condition as a result of your employment at the 4B's Crossroads on May 20, 2002."

(*Id*.)

¶10 During May 2002, claimant was working for the same employer as in 1997 and 1998, however, by that time the employer was insured by Valor Insurance Company (Valor), which is also a respondent in this action. A claim for benefits was submitted to Valor; it has denied liability. (Petition for Hearing, ¶ 5, 12; Valor's Response to Petition, Uncontested Facts.) The pending summary judgment motion does not ask for relief against Valor and it has not participated in the briefing.

Discussion

I. The Parties' Contentions

¶11 Claimant asks the Court to broadly find that ICNA is "liable for the respiratory problems which are the subject of this action." (Petitioner's Brief in Support of Motion for Partial Summary Judgment at 2; Petitioner's Statement of Uncontroverted Facts, ¶ 15, 16.) He alleges he has not worked "since July 2002 as a direct result of his condition and he has been awarded Social Security Disability benefits." (Petition for Hearing, ¶ 10.)

¶12 In moving for summary judgment, claimant relies on section 39-72-303, (2), MCA (1997), which provides:

(2) When there is more than one insurer and only one employer at the time the employee was injuriously exposed to the hazard of the disease, the liability rests with the insurer providing coverage at the earlier of:
(a) the time the occupational disease was first diagnosed by a treating physician or medical panel; or

(b) the time the employee knew or should have known that the condition was the result of an occupational disease.

He argues that since his condition was diagnosed during ICNA's coverage, ICNA remains liable, under section 39-72-303(2), MCA (1997), for his medical treatment and disability benefits. He also argues that by failing to appeal the Department of Labor's September 9, 1998 Order of Determination, ICNA "accepted" his occupational disease claim and, under *Bouldin v. Liberty*, WCC No. 9604-7536 (1996), cannot now challenge causation or shift liability to Valor.

¶13 In opposition, ICNA contends that Dr. Headapohl's occupational disease determination in 1998 was flawed because she did not have a complete medical history of the claimant. It further argues that claimant's present medical condition and alleged disability are not related to any occupational disease for which it is liable. Finally, in the alternative, it argues that if the claimant's medical condition is related to an occupational disease then Valor is liable for his condition since his condition materially worsened during its coverage of his employer.

II. Summary Judgment Standards

¶14 Summary judgment is particularly disfavored in this Court, Rule 24.5.329(b), especially in view of the fact that trials are conducted on an expedited basis. Moreover, "[s]ummary judgment is an extreme remedy which should not be a substitute for a trial on the merits if a material factual controversy exists." *Oens v. Employee Benefits Ins. Co.*, 2003 MTWCC 40, ¶ 5. "All reasonable inferences which can be drawn from the evidence presented should be drawn in favor of the nonmoving party." *Id.; Delaware v. K-Decorators, Inc.,* 1999 MT 13, ¶ 55, 293 Mont. 97, 973 P.2d 818.

¶15 In cases involving medical issues, summary judgment is especially inappropriate where the motion is based on medical records and those records provide conflicting opinions concerning medical matters at issue in the case or the Court would be required to draw inferences that are better addressed by direct medical testimony and opinion. *See Oens*, supra. On the other hand, where legal issues are interlaced with the medical issues, it is appropriate for the Court to resolve those legal issues which can be resolved without determining factual issues.

III. ICNA's Liability

¶16 The Department issued its Order of Determination on September 9, 1998. Based on Dr. Headapohl's report, the Order determined that claimant suffered from an occupational disease. Under Section 39-72-611, MCA (1997)[(2)], which governed occupational disease claims during the latter half of 1997 and throughout 1998, ICNA was required to request a hearing if it contested the determination. The section provided:

39-72-611. Hearing on determination -- when. Upon the department's own motion or if a claimant or an insurer requests that a hearing be held by the department prior to the time the department issues its final determination concerning the claimant's entitlement to occupational disease benefits, the department shall hold a hearing.

The Order specifically notified ICNA of its right to a hearing and the requirement that it file a request for hearing within twenty days. (Ex. G to Statement of Uncontroverted Facts.) ICNA did not appeal the Order (Statement of Uncontroverted Facts, ¶ 12), thus the Order became final. It is far too late to now appeal or contest the Department's determination, thus ICNA's lengthy assertion that Dr. Headapohl's opinions were based on incomplete or incorrect medical history is unavailing. Those arguments should have been made in a timely appeal of the Department's Order. In sum, unless otherwise relieved of liability for reasons discussed below, ICNA is liable for the conditions identified as occupational diseases by Dr. Headapohl, as well as for any progression of those conditions, for any sequellae from those conditions, and for other medical conditions resulting from the conditions.

¶17 ICNA may be relieved of liability if the claimant's occupational disease was materially and permanently aggravated by a subsequent industrial injury. ICNA, however, has not identified any new injury which might relieve it of liability.

¶18 ICNA *does* contend that if the claimant's condition is part of his original occupational disease, then his subsequent exposures at work "materially substantially, and permanently aggravated" his condition. (Insurance Company of North America's Brief in Opposition to Partial Summary Judgment at 13-14.) On this basis, ICNA would shift any liability to Valor, which insured claimant's employer in 2002, when claimant experienced significant respiratory and other problems.

¶19 To shift liability to Valor, however, ICNA must demonstrate that claimant suffered a *new and different* occupational disease while Valor was at risk. It is not enough that the occupational disease for which ICNA is otherwise liable worsened during Valor's watch, or even that his work under Valor's watch materially aggravated his underlying disease. I so held in *Abfalder v. Travelers Indemnity Company of Illinois,* 2002 MTWCC 99, wherein I said:

Nationwide's argument that the original disease ended upon claimant reaching MMI in 1995 and that a new disease began thereafter makes little sense in the context of this case. Since the disease was a continuous process involving repetitive trauma, under that theory the claimant would reach MMI at the end of each day and a new occupational disease would commence the next morning.

2002 MTWCC 99 at ¶ 53. On appeal, the Supreme Court affirmed my reasoning and held that where the claimant's employer has two or more insurers during the employment, "liability rests with the insurer providing coverage at the earlier of the time the occupational

disease was first diagnosed or the time the employee knew or should have known that the condition was the result of an occupational disease." *In re: Abfalder,* 2003 MT 180, ¶ 14. Here, not only was the disease diagnosed during ICNA's watch but ICNA was determined liable for the disease.

¶20 However, an insurer's liability only extends to conditions and disability arising as a result of the occupational disease. *See Anderson v. Zurich American Ins. Co.*, 2003 MTWCC 45, ¶ 37; *Markovich v. Helmsman Management Services,* 2003 MTWCC 4, *Hand v. Royal Ins. Company of America,* 2002 MTWCC 65, ¶ 32. "Causation is an essential element to benefit entitlement." *Hash v. Montana Silversmith*, 256 Mont. 252, 257, 846 P.2d 981, 983 (1993); and see *Caekaert v. State Compensation Mut. Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495, 499 (1994). Hence, ICNA can avoid liability if it can show that claimant is suffering from a condition unrelated to the original condition diagnosed by Dr. Headapohl, i.e, if it can show that claimant's condition from 2002 and onward is unrelated to the condition diagnosed in 1998 as an occupational disease.

¶21 Bouldin v. Liberty, WCC No. 9604-7536 (1996), cited by the claimant as authority for holding ICNA liable without a factual inquiry into causation is distinguishable. There, "counsel for Liberty conceded during oral argument that [claimant's] current condition is the same condition for which it initially accepted liability. It is not alleging that she is now suffering from some different, unrelated condition." Here, ICNA argues, among other things, that claimant's present condition is not the same condition for which it was determined liable in 1998. The Court is aware that the claimant will produce medical evidence that the present condition *is* the same condition, but the issue on summary judgment is whether he has demonstrated an uncontroverted connection between claimant's more recent condition and the 1998 condition for which ICNA is liable.

IV. Causal Connection

¶22 After reviewing the medical records submitted in connection with the motion for summary judgment, I cannot find a causal connection *on an undisputed basis*. While claimant's Reply Brief attempts to portray the evidence as so clear as to establish liability as a matter of law, I am not persuaded. A report from a Pulmonology Consultation in the Community Medical Center on May 30, 2002, indicates claimant was "wheezing" and diagnosed bronchitis, as well as hypothyroidism and tremor. (ICNA's Opposition to Motion for Summary Judgment, Ex. 32.) The three conditions listed in the doctor's diagnosis were not part of Dr. Headapohl's occupational disease diagnosis, and their relationship to the conditions she diagnosed in 1998, is not patently clear.

¶23 Other records suggest that some of the claimant's current medical problems may result from factors other than the claimant's industrial exposure. For instance, some records suggest that some of the claimant's difficulties may be due to anxiety and depression. (ICNA's Opposition to Partial Summary Judgment, ¶ 25-30; Ex. 25.)

¶24 The Court is faced with potentially complex questions of causation turning on the facts of the particular case. S*ee generally, Liberty Mutual Fire Ins. Co. v. Griner*, 2001 MTWCC 58; *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund*, 2001 MTWCC 56. While claimant may ultimately prevail at trial, this case is not an appropriate one for summary judgment.

ORDER

¶25 The motion for partial summary judgment is **denied**.

Dated in Helena, Montana, this 25th day of November, 2003.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. Rex Palmer - U.S. Mail & FAX
Mr. Leo S. Ward - U.S. Mail & FAX
Mr. Joe C. Maynard - U.S. Mail & FAX
Submitted: November 5, 2003

1. "Atopic" is defined as prone to allergies or characterized by allergy. See Medical Dictionary at www.medicinenet.com.

2. The 1997 version of the Occupational Disease Act was in effect at the time the claimant's disease arose and his claim was filed and processed. Hence, procedural provisions are controlling with respect to the administrative proceedings which resulted in the Department's Order.