IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 58

WCC No. 9912-8384

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Petitioner

vs.

SCOTT GRINER

Claimant

and

SENTRY INSURANCE MUTUAL COMPANY

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant suffered a work-related, right-sided L5-S1 herniated disk in 1995. He underwent a microdiskectomy, reached maximum medical healing (MMI) following the surgery, and returned to work in March 1996. In January 1998 he was diagnosed as suffering from a left-sided L4-5 herniated disk. Amelioratory surgery was performed but as of May 18, 2000, he had not reached MMI with respect to the surgery. His surgeon, who treated and operated on him for both herniations, opined that the L4-5 herniated disk was a new condition caused by claimant's post-1995 work, especially heavy lifting. The surgeon and another physician who treated claimant for two months in early 1998 acknowledged that the 1995 injury predisposed claimant to further injury. The 1998 insurer alleges that the 1995 insurer is liable for the condition.

Held: The 1998 insurer is liable. The L4-5 herniated disk was a new condition and was not caused by the 1995 injury or condition. The fact that the 1995 injury may have in some way predisposed claimant to a subsequent injury does not constitute proof that it caused the subsequent injury or condition.

Topics:

> **Injury and Accident: Aggravation: Occupational Disease.** The fact that claimant is "predisposed" to further injury as a result of a prior injury does not constitute a direct link back to the prior injury. Predisposition does not equate to causation. It

has long been the rule that employer (and its insurer) takes its employees as it finds them, with all their infirmities and predispositions.

Injury and Accident: Aggravation: Occupational Disease. In alleged subsequent injury (aggravation) cases, the following rules apply:

[1] An insurer which is liable for a work-related injury continues to be liable for complications and aggravations of that injury until claimant reaches maximum medical improvement.

[2] Where a claimant has reached maximum medical improvement with respect to a prior work-related injury, the insurer for that injury nonetheless remains liable for medical expenses and disability benefits that are a direct and natural result of the original injury or which are a consequence of the natural progression of the injury or condition.

[3] Where a claimant has reached maximum medical improvement with respect to a prior work-related injury and suffers a new work-related trauma or traumas, or some other harmful work-related exposure affecting his preexisting injury or condition, the insurer at risk at the time of the subsequent trauma(s) or exposure is liable for resulting medical expenses and disability benefits if the trauma(s) or exposure materially and substantially aggravated the preexisting injury or condition.

The second and third rules are different sides of the same coin.

Injury and Accident: Aggravation: Occupational Disease. A new and distinct injury or disease is not subject to the subsequent injury (aggravation) rules and is the responsibility of the insurer at risk when the new injury occurs.

Occupational Disease: Disease. Heavy labor, which over a period of time causes harm, constitutes an occupational disease. § 39-72-102(10) (1997).

Occupational Disease: Proximate Cause. Where medical testimony establishes that heavy labor caused harm the proximate cause requirement of the Occupational Disease Act is satisfied. § 39-72-408 (1997).

Occupational Disease: Proximate Cause. In cases where claimant suffered a prior work-related injury or occupational disease involving the condition, a subsequent insurer is liable for an aggravation of the prior condition if and only if the subsequent work exposure was different from or in excess of ordinary, everyday activities typically occurring outside the job. § 39-72-408(4), MCA (1997).

Injury and Accident: Aggravation: Occupational Disease. In cases where claimant suffered a prior work-related injury or occupational disease involving the condition, a subsequent insurer is liable for an aggravation of the prior condition if

and only if the subsequent work exposure was different from or in excess of ordinary, everyday activities typically occurring outside the job. § 39-72-408(4), MCA.

Occupational Disease: Last Injurious Exposure. In cases where claimant suffered a prior work-related injury or occupational disease involving the condition, a subsequent insurer is liable for an aggravation of the prior condition if and only if the subsequent work exposure was different from or in excess of ordinary, everyday activities typically occurring outside the job. § 39-72-408(4), MCA (1997).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-102(10), MCA (1997). Heavy labor, which over a period of time causes harm, constitutes an occupational disease.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-408, MCA (1997). Where medical testimony establishes that heavy labor caused harm the proximate cause requirement of the Occupational Disease Act is satisfied. § 39-72-408 (1997).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-408, MCA (1997). In cases where claimant suffered a prior work-related injury or occupational disease involving the condition, a subsequent insurer is liable for an aggravation of the prior condition if and only if the subsequent work exposure was different from or in excess of ordinary, everyday activities typically occurring outside the job. § 39-72-408(4), MCA.

Cases Discussed: *Caekaert v. State Compensation Ins. Fund,* 268 Mont. 105, 885 P.2d 495 (1994). *Caekaert* holds that the insurer liable for a prior work-related occupational disease is not liable for a second, post-MMI injurious exposure which "materially or substantially contributed" to the condition requiring treatment or giving rise to disability.

Cases Discussed: *Liberty Northwest Ins. Corp. v. Champion International Corp.,* 285 Mont. 76, 945 P.2d 433 (1997). *Liberty Northwest Ins. Corp. v. Champion International Corp.,* extends the last injurious exposure rule of *Caekaert v. State Compensation Ins. Fund, 268 Mont. 105, 885 P.2d 495 (1994*), to an injury-subsequent disease situation. *Champion* is fully reconcilable with other subsequent injury and subsequent disease cases.

¶1 This matter is submitted for decision upon two depositions of Scott Griner, the first taken August 26, 1998 (Griner Dep. I) and the second on May 2, 2000 (Griner Dep. II); two depositions of Dr. James P. Murphy, the first taken January 12, 1999 (Murphy Dep. I) and the second on May 2, 2000 (Murphy Dep. II); a deposition of Dr. Richard Dewey (Dewey Dep.); the exhibits to the various depositions; and the briefs of the parties.

Issue

¶2 I phrase the issue presented as: Which of the two insurers in this case is liable for claimant's surgery for a herniated disk at the L4-5 level and for his resultant disability?

FINDINGS OF FACT

¶3 The claimant herein is Scott Griner (claimant), who is 31 years old. He is a high school graduate and since high school has worked at various jobs.

¶4 In 1994 claimant went to work for Herbergers in Butte, Montana. Herbergers is a department store.

¶5 Claimant was hired as a receiving clerk and initially worked part time. By December 1994 he was working full time.

¶6 As a receiving clerk, claimant unloaded merchandise from incoming trucks. (Griner Dep. II at 20.) The merchandise was delivered in boxes. The boxes averaged 30 pounds but some weighed up to 100 pounds. (*Id*. at 21-22.) Claimant typically lifted and carried the boxes from the trucks to the receiving area of the store. (*Id*. at 22.)

¶7 In June 1995, claimant was transferred to a maintenance job. That job required him to clean the store and to move racks, tables, and displays. (*Id*. at 9-10.) Some tables and racks weighed up to 200 pounds, requiring two workers to move them. (*Id*. at 23.) Cleaning and maintenance tasks included sweeping and scrubbing floors, changing lights, and painting. (Griner Dep. I at 3.) The job involved a lot of bending, stooping, and kneeling. (Griner Dep. II at 22.)

¶8 On August 27, 1995, claimant injured his back while working. He was lifting a large laundry hamper of the type used in hospitals but used by Herbergers for trash. He was lifting the hamper into a garbage dumpster. (*Id*. at 10.) Usually two workers lifted the hamper, but on the night of the injury he was lifting it alone. (*Id*.) He twisted during the lift and felt extreme pain in his back. (*Id*. at 10, 12.) He fell to the ground and lay there for 45 minutes before he was able to get up. (*Id*. at 10-11.) He was unable to finish his work shift and went home. (*Id*.) He was off work until March 1996.

¶9 At the time of the August 27, 1995 incident, Sentry Insurance Mutual Company (Sentry) insured Herbergers. The incident was reported to Sentry and it accepted liability for the injury. (Pleadings.)

¶10 Following his injury, the claimant experienced back pain, pain in both legs, and a loss of feeling in his right leg. (Griner Dep. II at 10-16.) He was referred to Dr. Richard Dewey, a Missoula neurosurgeon, who diagnosed a right-sided disk herniation at the L5-S1 level. (Dewey Dep. at 7.)

¶11 Dr. Dewey initially treated claimant conservatively, prescribing physical therapy and stretching exercises. (*Id*. at 8.) Claimant's condition did not improve. (*Id*. at 8-9.) Dr. Dewey then recommended surgery. On November 2, 1995, he performed a micro-diskectomy at the L5-S1 level. (*Id*. at 15-16.)

¶12 Claimant's leg pain and numbness subsided following the surgery and on March 11, 1996, Dr. Dewey declared him at MMI and released him to return to work without restrictions. (Dewey Dep. at 17.) Claimant returned to work shortly thereafter. (Griner Dep. II at 17.)

¶13 At the time he returned to work, claimant still had some back pain, however, his leg pain had completely resolved. (*Id*. at 23-24; 77.) His back pain never did completely subside. (*Id*. at 23-25.) He worked more carefully and some tasks took him more time. He testified that where floor buffing might have taken him 20 minutes prior to his injury it took him 40 minutes after he returned to work from his surgery. (*Id*. at 29.)

¶14 Approximately a month after he returned to work, claimant was promoted to maintenance manager. (*Id*. at 18.) Most of his work was still hands-on maintenance jobs (*id*. at 18-19), but he also supervised four or five other maintenance workers. (Griner Dep. I at 4). While he still did some work in receiving, he estimated that it only amounted to approximately 45 minutes or 5% of his job each day. (Griner Dep. II at 18, 20.)

¶15 Later on, a new store manager changed receiving procedures. While still requiring maintenance workers to help unload trucks, he also required one maintenance worker to help get the merchandise to the floor, thus increasing the maintenance work done by the other maintenance workers, including claimant. (Griner Dep. II at 21.)

¶16 As noted earlier in paragraph 12, claimant had no leg pain when he returned to work in March 1996. However, by August 1996, he was again having leg pain. (*Id*. at 77-78.) The pain, however, affected different parts of his legs. In January 1997, his pain was over the bilateral area of his low back, but not in his buttocks, and in the back of his right thigh. (Griner Dep. I at 5-8; Griner Dep. I Exs. 1 and 2.) By August of 1997, his pain included a larger bilateral area of his lower back and upper buttock but not his lower buttocks, the backs of both thighs and calves, the fronts of both thighs, and the ankle of the right leg. (*Id*.) As a comparison will show, the affected areas, other than the low back, were very different in January and August 1997 than on November 1, 1995.

¶17 In August 1997, the claimant did some home deliveries of heavy fitness equipment. (Griner Dep. I at 10.) He testified that it was at that time that his pain went into his calves and expanded to the front of his thighs. (*Id*.)

¶18 On January 11, 1998, claimant experienced excruciating back pain while standing in his living room at home; he collapsed onto the floor. (Griner Dep. II at 34-35.) He described it as like "someone came up and hit me in the back with a baseball bat." (*Id*. at 37.) Thirty

minutes earlier he had bent over and picked up a piece of gift wrap; he could not recall any other physical activity immediately preceding his collapse. (*Id*. at 35.) However, he also noted that his back and leg pain had been gradually increasing over the months prior to the incident, especially since October 1997. (*Id*. at 30, 33, 77.)

¶19 Following his collapse, claimant was treated in the emergency room at St. James' Hospital in Butte. (*Id.* at 37; Dewey Dep. Ex. 1 at 81.) He was seen in follow-up by Dr. James Murphy, an orthopaedic surgeon. (Murphy Dep. I at 2-3.) Dr. Murphy ordered an MRI, which was done on January 23, 1998. (Murphy Dep. II at 12; Dewey Dep. Ex. 1 at 80.) The MRI disclosed a herniated disk at the L4-5 level, which is the level above the L5-S1 level where the claimant's previous herniated disk had occurred. (*Id.*) The herniated disk was on the left side whereas the prior herniated disk had been on the right side.

¶20 Claimant returned to Dr. Dewey's care in April 1998. (Dewey Dep. at 20.) Dr. Dewey agreed that claimant had a left-sided herniated disk at the L4-5 level. (*Id.* at 21.) Dr. Dewey's records indicate that claimant's left leg pain was significant and "exquisite".

¶21 On May 27, 1998, Dr. Dewey performed another microdiskectomy, this time at the L4-5 level and on the left side. (Dewey Dep. Ex. 1 at 93.) Dr. Dewey's operative report notes that claimant's primary symptom was "exquisite left leg pain" and that he was "having no right-sided symptoms." (*Id.*)

¶22 Following his May 27, 1998 surgery, claimant suffered an infection and underwent additional surgeries. (Dewey Dep. at 28-29.) As of the date of Dr. Dewey's deposition (May 18, 2000), claimant had not reached MMI with respect to his 1998 surgery.

¶23 Further discussion of claimant's 1998 medical treatment is unnecessary. The issue presented in this case is whether his L4-5 herniated disk, his surgery for that condition, and his resultant disability are the responsibility of Sentry or Liberty.

¶24 Initially, there is no question that claimant had reached MMI prior to the L4-5 herniation. Therefore, the Court must determine whether, on the one hand, the new herniation was the consequence of the natural progression of claimant's original 1995 back injury or, on the other hand, claimant suffered either a new condition or a material and substantial aggravation on account of his post-1995 work. *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund,* 2001 MTWCC 56.

¶25 Opinions concerning causation were expressed by both Dr. Murphy and Dr. Dewey.

¶26 Dr. Murphy treated claimant for only a short time following his January 1998 collapse. He saw claimant from January 12, 1998 to March 30, 1998. (Murphy Dep. I at 2.) He did not treat claimant for his 1995 injury and much of his testimony concerning causation was in terms of possibility and predisposition. (*Id.* at 6-7; Murphy Dep. II at 11, 19-20, 27, 29, 33-35.) His ultimate opinion was that in 1995 the claimant injured his longitudinal ligament,

that this injury "predisposed Mr. Griner to further potential injury to his back" (*id.* at 40), and that the acute pain claimant suffered in January 1998 "was the result of a gradual deterioration caused by the wear-and-tear of performing his normal job duties." (*Id. at* 41.)

¶27 Dr. Dewey treated claimant for both the 1995 injury and the 1998 herniation at the L4-5 level. He is a practicing neurosurgeon. (Dewey Dep. at 5.) He performed surgeries for both the 1995 injury and the 1998 herniation and provided follow-up care. There is nothing in the record to indicate that Dr. Murphy has better medical qualifications or experience than Dr. Dewey as to the matters at issue in this case. Dr. Dewey's opinions were based on far greater first-hand knowledge than were Dr. Murphy's. They carry more weight than those of Dr. Murphy and are persuasive. Therefore, I do not attempt to further evaluate or reconcile Dr. Murphy's opinions.

¶28 Dr. Dewey agreed that claimant's 1995 injury and resultant surgery weakened his back and made him more susceptible to future injury. (*Id.* 11-13, 24-26.) However, he also opined that the claimant's L4-5 herniated disk was a new, separate condition attributable to claimant's post-1995 injury work activities, especially heavy lifting, although not to any specific incident at work. (*Id*. at 20-22). With respect to claimant's predisposition to a new injury, Dr. Dewey noted that claimant's 1995 injury was not the only predisposing factor: He identified familial history (presumably meaning genetic inheritance) and smoking as other possible factors predisposing claimant to back problems, including his first injury. (*Id*. at 25, 33.) He explained the difference between predisposition and cause and effect, as follows:

> A. What I'm saying is it's impossible to relate directly the injury of 1995 to the injury of 1998. But the presence of one predisposes to the other. The direct predisposition would have to do with weakening of the spine. The concurrent predisposition would be due to the familial underlying predisposition. And I suppose that was a poor way to say it. But I can't say which is important and which - - but they both play a role there. They are two separate events, though. One is on the right side at L5-S1, the other one is on the left side at L4-5.
>
> Q. If you have a back problem like Mr. Griner had at one level and it's on the right side, does that mean that any subsequent back problems you have are also going to be on the right side?
>
> A. Again, it's more likely for there to be recurrent problems at the same spot that was surgically weakened. But there are a number of cases of patients who have had multiple ruptured disks at separate sides and locations. And these are patients who are discopaths. They are predisposed to have injury to their spine for a number of reasons, we can't tell why.
>
> Q. This predisposition to having spinal, that's not a work-related thing, that's a

genetic thing?

A. Well, as I said before, this is most probably related to a familial predisposition, may have something to do with his smoking. Certainly that doesn't make it any better. But I don't - - I can't say that - - this isn't black and white. There aren't any arrows pointing from cause and effect. There is an association.

(Dewey Dep. at 25-26.)

¶29 Dr. Dewey's testimony provides a clear and unequivocal link between claimant's post-1995 work, especially lifting, and his L4-5 herniated disk. He specifically opined that the L4-5 herniation was a new injury. While his testimony, as well as that of Dr. Murphy, establishes that the 1995 injury may have predisposed claimant to future low-back injuries, it also establishes that there may have been other equally predisposing factors, such as genetic predisposition and a history of smoking. There is no credible evidence that, absent some new trauma or activity exceeding normal, everyday activity, the 1998 L4-5 left-sided disk injury was a probable or likely consequence of the 1995 L5-S1 injury.

CONCLUSIONS OF LAW

¶30 This Court previously issued an Order Construing Reservation of Rights, 2000 MTWCC 69, in this case. That order held that a reservation of rights letter issued by Liberty reserved Liberty's right to argue that liability for claimant's medical condition and disability properly belongs to Sentry. The letter did not reserve a right to dispute liability in the event the Court finds that Sentry is not liable. That ruling is affirmed here. However, the facts as found above also demonstrate that liability properly rests in any event with Liberty under the Occupational Disease Act.

¶31 In the recent case of *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund,* 2001 MTWCC 56, I undertook a comprehensive review of cases regarding subsequent injuries or occupational disease where one or the other of two insurers is liable for claimant's condition or disability, the only question being which one. In my decision, I determined whichever insurer the claimant accuses as liable for his or her condition bears the burden of proving that the other insurer is liable. I further determined that the law concerning subsequent injury or disease is clear. I will not regurgitate my analysis from that case since the reader can access and read the decision. But distilled to their essence, the following rules apply:

[1] An insurer which is liable for a work-related injury continues to be liable for complications and aggravations of that injury until claimant reaches maximum medical improvement.

[2] Where a claimant has reached maximum medical improvement with respect to a prior work-related injury, the insurer for that injury nonetheless remains liable for

medical expenses and disability benefits that are a direct and natural result of the original injury or which are a consequence of the natural progression of the injury or condition.

[3] Where a claimant has reached maximum medical improvement with respect to a prior work-related injury and suffers a new work-related trauma or traumas, or some other harmful work-related exposure, affecting his preexisting injury or condition, the insurer at risk at the time of the subsequent trauma(s) or exposure is liable for resulting medical expenses and disability benefits if the trauma(s) or exposure materially and substantially aggravated the preexisting injury or condition.

¶32 The second and third rules are simply different units on the same measuring tape. Put another way, they are different sides of the same coin. If a subsequent work-related trauma or exposure materially and substantially aggravates the preexisting injury or exposure, then the condition and disability are *not* the direct and natural result of the first injury or the consequence of a natural progression. The obverse is also true.

¶33 In this case, there is no disputing that claimant reached MMI following his 1995 injury. Therefore, I need only consider, as a factual matter, whether claimant's 1998 left- sided herniated disk at the L4-5 is a direct and natural result of his 1995 injury or a consequence of a natural progression of that injury.

¶34 Dr. Dewey's testimony established that the claimant's post-1995 work substantially and materially contributed to his L4-5 herniated disk. Moreover, his testimony indicates that the L4-5 herniated disk was a distinct new condition, not just an aggravation of a pre-existing condition, thus taking it out of the aggravation rule altogether. The subsequent injury and disease rule, as discussed in *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund,* and argued in this case, applies only to aggravations of pre-existing injuries and conditions. It has no application to new injuries.

¶35 Based upon Dr. Murphy's testimony, Liberty argues that the 1995 injury, and resulting surgery, did in fact weaken claimant's back so as to cause the 1998 L4-5 herniation. In particular, it relies on Dr. Murphy's opinion that "after disc surgery at L5-S1, the forces transmitted across the disc above are greater and there is a greater chance that you may herniate the disc above." (Murphy Dep. at 19.) The insurer also highlights Dr. Murphy's "opinion that [Griner] probably injured the posterior longitudinal ligament back in 1995 and it has degenerated to the point where the disc has herniated." (Murphy Dep. at 18.) As noted previously, I find Dr. Dewey's testimony more persuasive than Dr. Murphy's. While I do not totally discount Dr. Murphy's testimony about the possibility of ligament weakening and, more generally, increased force transmittal after the claimant's first surgery, I am not persuaded that the weakening and change in forces did anymore than make claimant more susceptible to future injury.

¶36 The fact that claimant was "predisposed" to further injury as a result of his prior 1995 injury, does not constitute a direct link back to the prior injury. Predisposition does not equate to causation. It has long been the rule that an employer (and its insurer) takes its employees as it finds them, with all their infirmities and predispositions. The rule is set out in *Larson v. Cigna Ins. Co.,* 271 Mont. 98, 894 P.2d 327, (1995):

> [I]t was (and is) well established in Montana that an employer takes his employee subject to the employee's physical condition at the time of the employment; compensation laws are not made solely for the protection of employees in normal physical condition, but for those who are not super physical specimens.

271 Mont. at 103, 894 P.2d at 330 (citations omitted).

¶37 Moreover, as Dr. Dewey noted, all sorts of things may predispose an individual to injury. Predisposition simply means that the predisposed individual is more likely to suffer an injury in response to specific trauma or exposure than is an individual who does not have the predisposing factors. Thus, a smoker may be more likely to suffer a back injury than a non-smoker. In this case, claimant's genetic inheritance and smoking history, as well as his 1995 injury, may have predisposed him to further back injuries. Indeed, smoking and genetics may have predisposed him to his first back injury.

¶38 Of course, the claimant must demonstrate that he in fact suffered a compensable injury, aggravation, or disease, otherwise he is not entitled to compensation for his condition. In this case, the evidence presented fully supports a finding that claimant's L4-5 herniated disk is an occupational disease. An occupational disease is defined as follows:

> (1) "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, MCA (1997). Dr. Dewey's testimony shows that the L4-5 condition was attributable to claimant's employment and that it was due to events occurring on more than a single day.

¶39 The evidence further shows that the proximate cause requirement of the Occupational Disease Act is also met. Section 39-72-408, MCA (1997), provides:

> **39-72-408. 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.

Ordinary folk do not lift 100 pounds on a regular basis. Ordinary folk, unless they are engaged in a laboring occupation, do not consistently engage in mopping, buffing, lifting, bending, and climbing of the sort claimant did everyday. This **is not** a case where the evidence suggests, much less supports, a finding that claimant, as a result of his 1995 injury, would have naturally and inevitably suffered a L4-5 herniated disk irrespective of his post-1995 job-related lifting and labor. This **is** a case where the evidence shows that the strenuous nature of claimant's job caused a new condition.

¶40 Liberty argues that Montana law requires a new *injury*, as opposed to an occupational disease, for liability to shift to a subsequent insurer. Its argument is contradicted by *Caekaert v. State Compensation Ins. Fund,* 268 Mont. 105, 885 P.2d 495 (1994), which held that the insurer liable for a prior work-related occupational disease is not liable for a second, post-MMI injurious exposure which "materially or substantially contributed" to the condition requiring treatment or giving rise to disability. In *Liberty Northwest Ins. Corp. v. Champion International Corp.,* 285 Mont. 76, 945 P.2d 433 (1997), the Supreme Court applied *the* last injurious exposure rule to an injury-subsequent disease situation. Liberty argues that *Champion* is an aberration, inconsistent with other aggravation cases, but, as explained fully in *Liberty Northwest Insurance Corporation v. State Compensation Insurance Fund*, 2001 MTWCC 56, particularly paragraphs 49-50, *Champion* is fully reconcilable with other cases.

¶41 What Liberty's arguments fail to recognize is the distinction between degeneration of the sort that occurs naturally as the result of ordinary life activities, on the one hand, and degeneration that is caused by work exposures or traumas which are **not** part of ordinary, everyday activities. It has overlooked the proximate cause requirement applicable in occupational disease cases. That requirement is spelled out in a series of five tests in section 39-72-408, MCA. The proximate cause requirement applies whether or not an occupational disease occurs subsequent to a prior injury or a prior disease. Subsection (4) of section 39-72-408, MCA, requires that "the disease does not come from a hazard to which workmen would have been equally exposed outside of the employment." Stating the same principle from the obverse angle, if work exposure which triggers or aggravates a condition is one which occurs with regularity outside the workplace the condition does not

constitute a compensable occupational disease. *Compare Romero v. Liberty Mutual Fire Ins. Co. and State Compensation Insurance Fund*, 2001 MTWCC 5 (medical evidence established that *any* activity requiring claimant to use her arms would have led to deterioration of her condition) *with Liberty Northwest Insurance Corporation v. State Compensation Insurance Fund*, 2001 MTWCC 56 (medical evidence demonstrated that truck driver's reherniation of disk was unlikely to have happened had claimant continued light-duty work and not switched to truck driving). As I noted in the latter decision, if these distinctions are kept in mind, prior decisions from both the Supreme Court and this Court are consistent and reconcilable.

¶42 In summary, I conclude that the facts, as found, show that after claimant returned to work in March 1996 his work caused a new and distinct condition which constitutes an occupational disease. The evidence is not evenly balanced, thus the burden of proof does not play a part in my decision and I need not consider it further.

JUDGMENT

¶43 Liberty Mutual Fire Insurance Company is liable for claimant's medical care and disability resulting from the L4-5 disk herniation which was diagnosed in January 1998.

¶44 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

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

¶46 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 9th day of November, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. William J. Mattix
Mr. Kelly M. Wills
Mr. Robert J. Whelan
Mr. Larry W. Jones (Courtesy Copy)
Mr. David Sandler (Courtesy Copy)
Submitted: May 30, 2001