

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 33

WCC No. 2002-0700

MONTANA STATE FUND

Petitioner

vs.

CARL MURRAY and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

Respondent/Claimant and

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

AFFIRMED 04/19/05

[Montana State Fund v. Murray, 2005 MT 97 \(No. 04-576\)](#)

Summary: The claimant suffered bilateral knee injuries in 1967 and 1974 which required removal of part or all of the cartilage of his knees. However, he continued to be physically active both in the jobs he performed and in his recreational activities. In 1982 he went to work for MSE Technology Applications, Incorporated (MSE) in Butte, initially as a security guard and mailman. He continued to work for MSE over the next eighteen and a half years. Much of his work involved standing on concrete or asphalt. From 1993 to 2000 the claimant suffered several painful episodes of knee pain, swelling, and effusion in connection with some of his non-employment, recreational activities, however, prior to 2000 he recovered quickly from the specific events. By 1996 it was clear that bilateral knee replacements were inevitable as his knees continued to degenerate. After being told in December of 2000 that his work at MSE contributed to his condition and his need for surgery, the claimant filed an occupational disease claim. An occupational medicine physician examined him at the request of the Department of Labor and Industry and agreed that the condition of his knees was significantly aggravated by his employment with MSE, however, after his deposition was taken the physician was presented with and answered written questions by the insurers regarding the cause of claimant's condition; he replied that his condition was not directly or "proximally" caused by his work at MSE. The question before the Court is whether his bilateral knee condition and his need for surgery is compensable under the Montana Occupational Disease Act.

Held: The claimant's bilateral knee condition is compensable if his work significantly aggravated a preexisting condition. *Polk v. Planet Ins. Co.*, 287 Mont. 79, 951 P.2d 1015 (1997). The evidence establishes that his work in fact significantly aggravated his preexisting bilateral knee condition and led to or accelerated his need for knee replacement surgery, therefore, he is entitled to the indemnity and medical benefits available under the Occupational Disease Act. The insurer at risk during the claimant's last occupational exposure is liable.

Topics:

Limitations Periods: Claim Filing. Under the 1999 version of the Montana Occupational Disease Act, the period for filing a written claim for compensation does not commence running until the claimant is aware that his medical condition is attributable to his work. § 39-72-403, MCA (1999-2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-72-403, MCA (1999-2003). Under the 1999 version of the Montana Occupational Disease Act, the period for filing a written claim for compensation does not commence running until the claimant is aware that his medical condition is attributable to his work. § 39-72-403, MCA (1999-2003).

Evidence: Objections - Timeliness. An objection to medical records and other documents authored by a medical provider must be made within the time provided in Rule 24.5.317 and the scheduling order whether or not the record or document fits within the meaning of a business record under Rule 803(6), Mont. R. Evid.

Constitutions, Statutes, Rules, and Regulations: Montana Workers' Compensation Court Rules: Rule 24.5.317. An objection to medical records and other documents authored by a medical provider must be made within the time provided in Rule 24.5.317 and the scheduling order whether or not the record or document fits within the meaning of a business record under Rule 803(6), Mont. R. Evid.

Evidence: Hearsay: Generally. An objection to medical records and other documents authored by a medical provider must be made within the time provided in Rule 24.5.317 and the scheduling order whether or not the record or document fits within the meaning of a business record under Rule 803(6), Mont. R. Evid.

Evidence: Hearsay: Exceptions. An objection to medical records and other documents authored by a medical provider must be made within the time provided in Rule 24.5.317 and the scheduling order whether or not the record or document fits within the meaning of a business record under Rule 803(6), Mont. R. Evid.

Evidence: Objections: Timeliness. An objection to medical records and other documents authored by a medical provider must be made within the time provided in Rule 24.5.317 and the scheduling order whether or not the record or document fits within the meaning of a business record under Rule 803(6), Mont. R. Evid.

Occupational Disease: Proximate Cause. Aggravations of preexisting conditions are compensable under the Montana Occupational Disease Act. § 39-72-706, MCA (1989-2003).

Occupational Disease: Proximate Cause. The Montana Occupational Disease Act does not require that occupational exposures be the principal or substantial cause of the condition, only that the "occupational factors significantly aggravated a preexisting condition." § 39-72-408, MCA (1971-1999); *Polk v. Planet Ins. Co.*, 287 Mont. 79, 951 P.2d 1015 (1997).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-72-706 MCA (1989-2003). Aggravations of preexisting conditions are compensable under the Montana Occupational Disease Act. § 39-72-706, MCA (1989-2003).

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Occupational Disease: Proximate Cause. The fact that the claimant's recreational activities may have contributed to his preexisting bilateral knee condition does not preclude a finding of an occupational disease where the evidence establishes that the claimant's work significantly and materially aggravated his underlying condition.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-72-706 MCA (1989-2003). The fact that the claimant's recreational activities may have contributed to his preexisting bilateral knee condition does not preclude a finding of an occupational disease where the evidence establishes that the claimant's work significantly and materially aggravated his underlying condition.

Occupational Disease: Causation. The Montana Occupational Disease Act does not require that occupational exposures be the principal or substantial cause of the condition, only that the "occupational factors significantly aggravated a preexisting condition." § 39-72-408, MCA (1971-1999); *Polk v. Planet Ins. Co.*, 287 Mont. 79, 951 P.2d 1015 (1997).

Occupational Disease: Insurer Liable. Under the last injurious exposure rule, the insurer at risk during the claimant's last injurious exposure at work prior to the first diagnosis of an occupational disease or the date the claimant knew or should have known he was suffering from an occupational disease is liable for the disease. The length of time the insurer was at risk is irrelevant to determining its liability.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-72-303 MCA (1993-2003). Under the last injurious exposure rule, the insurer at risk during the claimant's last injurious exposure at work prior to the first diagnosis of an occupational disease or the date the claimant knew or should have known he was suffering from an occupational disease is liable for the

disease. The length of time the insurer was at risk is irrelevant to determining its liability.

¶1 The trial in this matter was held in Helena, Montana, on March 16 , 2004. Petitioner, Montana State Fund, was represented by Mr. Thomas E. Martello. Claimant, Carl Murray, was present and represented by Mr. Bernard J. Everett. Respondent, Indemnity Insurance Company of North America, was represented by Mr. Leo S. Ward.

¶2 Exhibits: Exhibits 1, 2, and 4 were admitted without an objection. Exhibit 3 - a post-deposition letter of Dr. Gary M. Rapaport in response to questions of counsel for the insurers - was admitted over the objection of the claimant since the objection was untimely. A further explanation of my ruling is set out in the Conclusions of Law section of this decision.

¶3 Witnesses and Depositions: The claimant was the sole witness at trial. In addition, the parties submitted the depositions of the claimant and Drs. Gary M. Rapaport, Nicholas Blavatsky, and Michael T. Gallagher.

¶4 Issues Presented: The Court restates the issues as follows:

¶4a Whether the claimant's occupational disease claim is timely.

¶4b If the claim is timely, whether the claimant is suffering from an occupational disease of his knees and, if so, which insurer is liable for his condition.

(Pretrial Order at 2.)

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

FINDINGS OF FACT

¶6 The claimant is fifty-eight years old.

¶7 The claimant was a wholly credible witness.

¶8 Since trial testimony covered much of what was in the claimant's deposition, I have not cited to it. Nor have I cited to the trial testimony since no transcript of the trial has been prepared.

¶9 Over the years, the claimant has engaged in a number of jobs and occupations. Many involved physical labor. I summarize them as follows:

¶9a While in high school the claimant worked for a drug store stocking shelves.

¶9b During the summers of 1964 and 1965 the claimant worked for the Forest Service on fire lookout and doing some construction work, primarily digging.

¶9c From approximately 1965 through 1967, while attending college, the claimant worked approximately one weekend a month for the Anaconda Company in Butte. He did various jobs, some of which involved digging with a shovel, and others lifting heavy timbers.

¶9d During the summer of 1966 the claimant worked as a roughneck for a drilling company.

¶9e During 1997 the claimant worked full time for approximately six months on a geological survey team, a job that required walking six to twenty miles daily.

¶9f In 1968 the claimant worked at the Butte airport fueling airplanes.

¶9g In 1970 he worked as an underground miner for approximately four to six months. The job involved drilling, blasting, and timbering.

¶9h From February 1970 to June 1974 the claimant worked full time as a janitor for the University of Montana, but only during the school months (approximately nine months a year). His primary responsibility was to clean floors.

¶9i During the summers of 1972 and 1973 the claimant worked for the Bureau of Mines in the capacity of a soil sampler and straw boss.

¶9j From September of 1974 through the summer of 1975 the claimant worked as a janitor for Hennessey's Department Store, primarily cleaning floors.

¶9k In 1975 the claimant also worked in the Arbiter Plant in Anaconda for a period of four to five months. While some of the work involved very heavy lifting, much of it did not.

¶9l From the summer of 1975 until January 1996 the claimant worked as a draftsman for Montana Power Company. The position was sedentary.

¶9m In 1976 the claimant joined the United States Army and underwent special forces training. His training was rigorous and included hiking with a pack of 70 to 100 pounds and parachute jumps. He parachuted approximately 14 times. He had no bad landings. He was discharged in late 1976 or 1977 after being injured in an explosion and transferred to a regular unit.

¶9n Beginning in August 1977 the claimant worked as a full-time cabinet assembler for approximately a year. His job required him to stand on concrete during his entire work shift.

¶9o Beginning in 1978 he worked for seventeen months as a computer board assembler for IBM. The job was sedentary or light and he was seated at a table to do his work.

¶9p From mid-1979 to October 1981 the claimant worked as a repairman of televisions, stereos, refrigerators, and freezers. The work involved some heavy lifting.

¶9q In 1981 the claimant started a business cutting and selling firewood. He also cut posts and poles through 1983. He had a partner who left in 1983. After 1983 until 2000 he continued to cut firewood for his own use and to give to needy families.

¶9r The claimant began working for MSE Technology Applications, Incorporated (MSE) in July 1982. MSE is a defense contractor and also engages in research in magneto hydrodynamics.

¶9s The claimant initially worked as a security guard and mailman. In 1983 he became a full-time security guard and continued in that position until August of 1989. He split his time walking a beat and at a security station. He worked a substantial amount of overtime.

¶9t From August 1989 until he retired on January 12, 2001, the claimant worked as a tool room attendant, issuing and repairing tools for other MSE employees. He worked in a warehouse with a concrete floor and spent most of his day standing or walking. He continued to work substantial overtime hours until approximately 1994 when his overtime hours were cut back. During his last two years of employment he was provided with an ergonomic mat to stand on but that was provided at his request for insulation from the cold concrete floor. During that same time period his time spent sitting also increased to approximately half his work shift. (Claimant's Dep. at 82.)

¶9u While employed by MSE, most of the claimant's walking and standing were either on concrete or asphalt.

¶10 Over the years the claimant has engaged in physically demanding recreational activities. I summarize the significant ones as follows:

¶10a Since high school, he has participated in both judo and karate, including some competition. He has been an instructor in martial arts.

¶10b He did obstacle course training with German Shepherds for approximately fourteen years. He also trained tracking dogs for a time.

¶10c He engaged in weight lifting from the time he was a teenager until 1992. His weight lifting regimen included squats.

¶10d He trained sled dogs from 1990 onward and raced them in 1992 and 1993.

¶11 Over the years the claimant has suffered a number of knee injuries:

¶11a In 1967 the claimant suffered an injury to his left knee while competing in the Junior Olympics Judo. Based on the claimant's description, it appears he tore

the meniscus of the knee and underwent a meniscectomy (removal of the cartilage of the knee).

¶11b In 1974 the claimant was involved in a motorcycle accident and injured his left knee. Based on the claimant's testimony, it appears that he tore the meniscus of that knee and underwent a meniscectomy (removal of the cartilage) of the right knee at that time.

¶11c Between 1991 and 1996 the claimant suffered three knee strains while working with his sled dogs. In December 1991 the claimant suffered a right knee strain while working with his sled dogs. While it appears that he reported the event to his family physician, he did not seek follow-up care. (Ex. 1 at 27.) In 1993 the claimant suffered another right knee strain, again while working with his sled dogs. Then in December 1996 the claimant hurt his right knee once more when he fell on ice and was off work for a short time. (Ex. 1 at 26, 36, 90.) At that time he had his knee drained and a steroid injection. (*Id.*) Two weeks later, his acute knee episode had largely resolved. (*Id.* at 88-89.) However, in a letter to the claimant's family physician, Dr. Gallagher noted that there were "not a lot of good options left besides total knee replacement." (*Id.* at 88.)

¶12 After 1996 the claimant suffered periodic flareups of pain and swelling in his right knee:

¶12a In August 1997 the claimant suffered a painful flareup involving his right knee. Dr. Gallagher, an orthopedic surgeon, examined him on August 5, 1997, and wrote that the claimant's right knee was "killing him." (*Id.* at 25.) He x-rayed both knees and noted "[s]ignificant bone on bone changes in both medical compartments of his knees; osteophytes on lateral femur on both sides; patellofemoral arthrosis." (*Id.*) "Arthrosis" in the context used by Dr. Gallagher is a generic description for "degenerative disease of a joint," in this case the knee. (See Merriam-Webster Medical Dictionary.) Dr. Gallagher's office note indicates that the claimant's degenerative condition was due to the prior surgeries which had excised the cartilage (meniscuses) of his knees. (Ex. 1 at 25.) Treatment was a steroid injection into the knee. (*Id.*)

¶12b On January 7, 1998, the claimant suffered another painful episode involving his right knee. (*Id.* at 24.) At that time his knee was swollen. (*Id.*) Dr. Gallagher noted the probability of future knee replacement and also prescribed an unloading brace for the claimant's right knee. (*Id.*) In his deposition Dr. Gallagher testified that he was trying to get the claimant "as far down the line as we can before he needs to have his knee replaced, because that is where this is headed. You can see it right from the get-go." (Gallagher Dep. at 14-15.) Nonetheless, Dr. Gallagher felt that the claimant was still "functioning at a fairly high level" and experienced problems only when he overdid. (*Id.* at 16.)

¶12c On December 20, 1999, the claimant had a painful and swollen right knee. (Ex. 1 at 23.) He was treated with another steroid injection into the knee. (*Id.*)

¶13 In November or early December 1999 the claimant twisted his left knee while chasing one of his dogs. Dr. Gallagher evaluated him on December 20, 1999, and injected his right knee with Depo-Medrol. (*Id.*)

¶14 On December 26, 2000, the claimant woke up with a very swollen and painful left knee which was twisted in his blankets. He tried to get out of bed, putting his weight on his right leg, which then collapsed. He saw Dr. Nicholas Blavatsky, an orthopedic surgeon, the next day. (Blavatsky Dep. at 6.) Dr. Blavatsky aspirated the claimant's knee. (*Id.* at 8.) He also reviewed the claimant's old x-rays at that time and noted that the degenerative osteoarthritis of his knees made the claimant a candidate for total knee replacement. (*Id.* at 7, 9.) He broached the subject of reconstructive surgery, i.e., "knee replacements." (*Id.* at 9.)

¶15 In December 2000 Dr. Blavatsky told the claimant that standing on concrete while working at MSE contributed to his degenerative knee condition. This is the first time that the claimant was aware that occupational factors might be contributing to his knee condition.

¶16 On January 8, 2001, the claimant filled out and submitted a First Report of Injury or Occupational Disease for bilateral knee pain and swelling. (Uncontested Fact 3.) He listed the injury date as December 26, 2000.

¶17 On January 30, 2001, the claimant underwent knee replacements in both knees. (Ex. 1 at 42-43.)

¶18 Meanwhile, on January 12, 2001, the claimant resigned his employment with MSE, because he had been given notice that his job was being phased out and also knew he was going to undergo knee replacements. He was given the option of retiring and elected that option.

¶19 MSE was insured by the Insurance Company of North America (ICNA) from April 15, 1992 to April 15, 1995, and again from April 16, 1996 through September 30, 2000. From and after October 1, 2000, it was insured by the Montana State Fund (State Fund). (Uncontested Facts 1-2.)

¶20 The claimant's written claim was submitted to the State Fund on January 8, 2001. It began paying benefits under a reservation of rights pursuant to section 39-71-608, MCA. On July 20, 2001, it denied liability. It thereafter brought the present action for declaratory judgment to determine liability.

¶21 Three physicians testified by deposition in this matter: Dr. Gallagher, who treated the claimant since 1997, Dr. Blavatsky, who did the claimant's knee replacements; and Dr. Rapaport, who conducted an occupational disease evaluation at the request of the Department of Labor and Industry (Department). Both Drs. Gallagher and Blavatsky are orthopedic surgeons. Dr. Blavatsky specializes in knee replacements. Dr. Rapaport specializes in occupational medicine.

¶22 Dr. Gallagher testified that the claimant's initial knee injuries were the ultimate cause of his knee replacements. After noting that his work and recreational activities over the years "probably had something to do with it," he said:

But I think his major problem was he got dinged - and I don't even know the exact - I wasn't involved when he did get injured, but my understanding is he had some type of injury which kind of - that he never really got over and necessitated those operations.

(Gallagher Dep. at 28.) When asked about the contribution of the claimant's work at MSE, he replied, "I wasn't involved at that point in his treatment at all. That's all been taken care of by my partner, Nick Blavatsky, and I would defer to Nick's judgment on that." (*Id.* at 29.) He noted that he was not familiar with the claimant's MSE job duties and had no opinion concerning the role his MSE employment may have played in his knee condition. (*Id.* at 37.) He simply noted that at the time he first saw the claimant his knees were already "worn out" (*id.* at 40), but despite that fact the claimant continued to function at a very high level until late 2000. (*Id.* at 38).⁽¹⁾

¶23 Dr. Blavatsky opined that the claimant's walking and standing on hard surfaces during his work for MSE over the years was a significant contributor to his degenerative knee condition and assessed the contribution at thirty percent. (Blavatsky Dep. at 21, 27, 29.) He conceded that claimant's old knee injuries were "huge initiating factors in his osteoarthritis" (*id.* at 27) but testified that "in all fairness, work-related activities have some measure" (*id.* at 29), which he put at thirty percent. When asked about the role of walking and standing on concrete, he testified:

A. It's been shown that that kind of activity over repeated intervals - - it may be years on end - - can exacerbate that condition. And it's been shown in people that are diesel mechanics and waitresses and other occupations that have this kind of problem, that they tend to develop osteoarthritic changes more so than counterparts that are not on hard surfaces like that.

(Blavatsky Dep. at 13.)

¶24 Dr. Blavatsky also addressed whether the claimant suffered a new injury in December 2000 when he awoke with blankets wrapped around his left leg. He said the incident did not precipitate the need for his surgery. (*Id.* at 35.)

¶25 At the request of the Department of Labor and Industry, Dr. Rapaport evaluated the claimant with respect to his occupational disease claim. Dr. Rapaport is an occupational disease specialist, however, he is not board certified in that specialty. His evaluation was done on August 21, 2001. In his deposition, Dr. Rapaport had no independent recall of his evaluation. (Rapaport Dep. at 8.) Thus, his report, which is found at Exhibit 4, sets out his findings and opinions.

¶26 In that report, Dr. Rapaport notes the claimant's 1967 and 1974 knee surgeries and removal of his knee cartilage. He also notes the claimant's dog sledding and recreational activity which he says contributed to the degeneration of the claimant's knees. He then renders the following opinions:

Although no specific occupational injury is noted in the medical history or medical records, it does appear that Mr. Murray was required to continually walk, bend, lift, and climb on concrete surfaces which may have contributed in part to the degenerative joint disease.

It does appear that the condition may reflect in part the result of occupational activities, although a significant component of the condition is apparent on the basis of preexistent injuries in 1967 and 1974, with surgical care at that time. Additionally, dog sledding activities and recreational activities to include hunting have contributed to the advancement of the degeneration.

Insofar as work activities have been in part contributory to the advanced degeneration, an occupational disease could be identified to exist with acceleration and aggravation of a pre-existent condition, to be worsened in part by employment activities, is noted to be present. Apportionment of the condition would clearly be indicated with apportionment of work activities relating to 30% to 40% of the condition. Non-work related activities including recreational and dog sledding activities, as well as previous injuries with previous surgery, re non-work contributions to the advanced arthritis.

(Ex. 4 at 4.) During his deposition, he reaffirmed his opinion that the claimant's work activities contributed to the degeneration of the claimant's knees. (Rapaport Dep. at 18.) He noted that walking and standing for six to eight hours a day at work likely aggravated his knee condition. (*Id.* at 21.)

¶27 In a follow-up letter to Pat Hunt, a claims adjuster for the State Fund, Dr. Rapaport clarified that his attributing a worsening of the claimant's condition to occupational factors was based on the claimant's employment in the long term and not just upon his last four months of work. (Rapaport Dep. Ex. 4.)

¶28 During his deposition Dr. Rapaport was quizzed about whether his opinions would change if the claimant did not stand and walk at work as much as six to eight hours a day and did other strenuous outside activities, such as gathering firewood. Dr. Rapaport repeatedly emphasized that his apportionment (thirty to forty percent) was not scientific and that it was a rough estimate of the contribution of his employment versus his other non employment activities. Nowhere in his deposition did he indicate that further information would reduce the occupational component to zero.

¶29 Dr. Rapaport also testified that the exacerbations the claimant suffered in 1996 did not lead to the need for surgery in that knee replacement was already inevitable in 1996, independent of any further traumatic insults. (Rapaport Dep. at 45-46.)

¶30 Subsequent to Dr. Rapaport's deposition, counsel for the insurers sent a copy of the deposition of the claimant to Dr. Rapaport for his review, along with a letter requesting that he answer a series of questions concerning causation. In essence, counsel were requesting him to reconsider and supplement his deposition testimony. In his responses Dr. Rapaport did not say that claimant's employment did not contribute in any way to his knee condition but he did say that

Mr. Murray's exposure outside of employment at the MSE Technologies Company was significant, likely producing aggravation and acceleration of the degenerative joint disease. Documentation of heavy lifting and physically demanding occupational and recreational activities is clearly noted to include military service and parachute training.

(Ex. 3 at 2.) In relying on this opinion, the insurers overlook the fact that military service is an occupational factor, as is the claimant's heavy lifting while working for other employers, such as the Anaconda Company. The fact that such activities were done for an employer *other than MSE* is immaterial to determining the occupational component of the disease so long as his MSE employment materially contributed to his condition.

¶31 In his post-deposition letter, Dr. Rapaport also indicated that the claimant's work at MSE did not "direct[ly]" and did not "proximally" cause the claimant's need for surgery and further stated that "Mr. Murray's need for arthroplasties were a specific result of the accelerated and advanced degeneration of the knees, independent of his specific work at the MSE Technologies Company." (*Id.* at 2-3.)

¶32 Significantly, Dr. Rapaport does not say he was misled as to the extent of the claimant's walking and standing at MSE, or his other work for MSE. Moreover, the claimant's testimony clearly establishes that he spent long hours walking and standing, especially before 1994 when he worked a significant amount of overtime hours. Dr. Rapaport does not explain in his letter how he could previously have found that these MSE activities led to significant, accelerated degeneration of the claimant's knees and then find that they were insignificant.

¶33 I am loathe to give any weight to Dr. Rapaport's post-deposition opinion letter. His letter is not a medical record kept in the ordinary course of business: it was specifically prepared at the request of counsel for purposes of trial. Moreover, it is not under oath, was not subject to cross-examination, and was in reply to carefully framed written questions of counsel. The letter was admitted only because the claimant failed to timely object to it. I did provide claimant's counsel an opportunity to either have Dr. Rapaport testify at trial or submit to a further deposition; he did not take advantage of that opportunity. But it seems to me that where a medical deposition has been taken, and counsel for some parties are unhappy with the doctor's opinions because they believe the doctor did not have all of the facts, the burden is on them to reconvene the deposition or call the doctor as a witness at trial. I give little weight to Dr. Rapaport's post-deposition letter.

¶34 In contrast, I have the sworn testimony of Dr. Blavatsky, who testified that the claimant's walking and standing on hard surfaces during his work for MSE over the years was a significant contributor to his degenerative knee condition and assessed the contribution at thirty percent. (See ¶ 23.) Dr. Blavatsky is an orthopedic surgeon specializing in knee replacements. His speciality is more particular to the claimant's knee condition and he is also board certified. I give his testimony the greater weight against the post-deposition letter of Dr. Rapaport and find that the claimant's work at MSE significantly contributed to the claimant's knee condition and his need for surgery. While the claimant's 1967 and 1974 meniscectomies made the claimant susceptible to the degenerative knee disease by eliminating the cushioning within the knee, Dr.

Blavatsky's testimony persuades me that they did not make knee replacement surgery inevitable and that further degeneration was the result of the claimant's post-meniscectomy activities, including his work at MSE. Absent the claimant's vigorous lifestyle, his heavy lifting both at work and play, and his extensive standing and walking, much of that at work, he may not have ultimately needed knee replacements, or the need for such replacements may have been significantly delayed. As Dr. Rapaport indicated in his deposition, it is impossible to scientifically sort out the relative contributions of work and nonwork activities; the proportions can only be estimated.

¶35 The claimant has also requested an award of attorney fees and a penalty. Both require proof that the insurer acted unreasonably in denying or delaying benefits. §§ 39-71-611, -612, and -2907, MCA (1999). I find that the insurers in this case have not acted unreasonably. They have raised significant and difficult factual and legal issues regarding liability. Moreover, I note that the State Fund initially paid benefits under a reservation of rights, which is a very reasonable way to handle claims which raise the sorts of factual and legal issues raised in this case.

CONCLUSIONS OF LAW

¶36 This case is governed by the 1999 version of the Montana Occupational Disease Act (ODA) since that was the law in effect at the time the claimant learned he was suffering from an occupational disease and submitted his claim. *Fellenberg v. Transportation Ins. Co.*, 2004 MTWCC 29, ¶¶ 35-36 and see *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

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

¶38 Initially, the State Fund has raised a statute of limitations defense, urging that the claim in this case was untimely. As I indicated at trial, the defense is without merit. Section 39-72-403, MCA (1999-2003), provides in relevant part;

39-72-403. Time when claims must be presented. . . .

(3) When a claimant seeks benefits under this chapter, the claimant's claims for benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the **claimant knew or should have known that the claimant's condition resulted from an occupational disease**. When a beneficiary seeks benefits under this chapter, claims for death benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the beneficiaries knew or should have known that the decedent's death was related to an occupational disease.
[Emphasis added.]

There is no evidence that prior to December 2000 the claimant was aware he might be suffering from an occupational disease. (¶ 15.) He filed a claim a month after learning his work contributed to his condition. (¶ 16.) That claim was timely.

¶39 I therefore consider whether the claimant is suffering from an occupational disease. "Occupational disease" is defined in section 39-72-102(10), MCA (1991-2003), as follows:

(10) "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.

The occupational disease definition encompasses aggravations of preexisting conditions. Section 39-72-706, MCA (1989-2003), provides in relevant part:

Aggravation. (1) If an occupational disease is aggravated by any other disease or infirmity not itself compensable **or if 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.]

The aggravation provision is a reflection of the longstanding rule that employers take their workers as they find them, with all their underlying ailments, and that a traumatic event or unusual strain which lights up, accelerates, or aggravates an underlying condition is compensable. *Birnie v. U.S. Gypsum Co.*, 134 Mont. 39, 45, 328 P.2d 133, 136 (1958); *see also, Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992), *and Hash v. Montana Silversmith*, 248 Mont. 155, 158, 810 P.2d 1174, 1175 (1991). "The rule is that when preexisting diseases are aggravated by an injury and disabilities result, such disabilities are to be treated and considered as the result of the injury." *Strandberg v. Reber Co.*, 179 Mont. 173, 175, 587 P.2d 18, 19 (1978). An employer takes an employee subject to the employee's physical condition as he finds him with or without preexisting conditions. *See Schieno v. City of Billings* (1984), 210 Mont. 457, 683 P.2d 953, 955.

¶40 The test for determining liability in this case is set out in *Polk v. Planet Ins. Co.*, 287 Mont. 79, 951 P.2d 1015 (1997), a case which none of the parties cited in their proposed findings of fact and conclusions of law. *Polk* was an occupational disease case in which the claimant alleged that his respiratory disease, which resulted in his loss of half of his lung function, was attributable to an occupational disease. The claimant had a long history of cigarette smoking and a good part of his respiratory disease was ascribed to that history.

¶41 In determining that the claimant's occupational exposure aggravated his lung disease, the Supreme Court started with the proximate causation requirement set out in section 39-72-408, MCA, of the ODA. That requirement, which is materially unchanged since the *Polk* decision,⁽²⁾ is as follows:

39-72-408. Proximate causation -- determination by treating physician. (1)
Occupational diseases are considered to arise out of the employment if:

(a) there is a direct causal connection between the conditions under which the work is performed and the occupational disease;

(b) 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;

(c) the disease can be fairly traced to the employment as the proximate cause;

(d) the disease comes from a hazard to which workers would not have been equally exposed outside of the employment. [Amended 2001.]

In applying the proximate cause standard, the Court took into consideration provisions and case law which provide for compensation for aggravations of preexisting conditions. The Court then rejected an argument that to satisfy the proximate cause requirements of section 39-72-408, MCA, the claimant must show that occupational factors were the sole or even the "substantial" cause of his condition; the test instead "is whether occupational factors significantly aggravated a preexisting condition." 287 Mont. at 85, 951 P.2d 1018. [\(3\)](#)

¶42 I note that **none** of the questions posed to Dr. Rapaport in the post-trial letter to him (see ¶¶ 27, 31) ask him the very question that must be answered under *Polk*. Thus, Dr. Rapaport's post-deposition opinions, which I have already found are not entitled to weight, do not address the crucial question in this case.

¶43 Having mentioned Dr. Rapaport's post-deposition opinions, I digress and turn to my ruling admitting it into evidence. The claimant objected to Dr. Rapaport's post-deposition opinions, which are set out in a September 4, 2003 letter to counsel for the insurers, on hearsay grounds. Indeed it is hearsay, since it is an out-of-court statement offered for the truth of the matters contained therein. Rule 801(c), Mont. R. Evid. The question is whether it is a medical record prepared in the usual course of business. Rule 803(6), Mont. R. Evid. provides:

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The letter was not made "at or near the time" of any opinions or diagnosis formed by Dr. Rapaport or at the time of his examination of the claimant. The letter was not one kept

in the regular course of business. Indeed, it was prepared specifically in connection with litigation. Thus, the letter is inadmissible under the Montana Rules of Evidence.

¶44 However, many such letters are introduced into evidence without objection in proceedings before this Court, *at least where authored prior to any deposition*. The routine lack of objections to such letters is understandable. Both sides have the opportunity to depose the authors, or to call the authors to testify at trial. Both sides proffer such letters and freely admitting them avoids tit-for-tat evidentiary disputes. Therefore, to avert the sort of last minute objection made by the claimant in this case, this Court's rules specifically require that any objection to a medical document, including letters of the sort authored by Dr. Rapaport, be made early on in the proceedings. Rule 24.5.317 provides:

MEDICAL RECORDS (1) "Medical records" for purposes of this rule includes all medical notes, reports, test results, correspondence and other written records or materials regularly maintained by any medical provider as a part of the provider's records or file. **The term shall also include all reports, correspondence and other documents authored by any medical provider.**(2) Within the time set by the scheduling or other order of the court, the parties shall exchange all medical records in their possession relating to the claimant's work-related medical conditions, other than records of professional consultants who have not examined the claimant and will not be witnesses at trial and whose records the party does not intend to offer into evidence. Failure to exchange any medical record by the exchange deadline shall preclude its use at trial except by stipulation of the parties or order of the court for good cause.

(3) Any party who intends to object to the authenticity or genuineness of any medical record, to its admissibility pursuant to Rule 803(6) Mont. R. Evid., or to its admissibility on any ground other than relevancy, shall make such objection in writing. All objections to medical records shall identify each medical record to which an objection is made and the particular objections to the record. The objections shall be served upon the adverse party within such time fixed by the scheduling or other order of the court. Failure to object to a medical record in the manner and within the time specified by this rule shall be deemed a waiver of any objection to the record, other than on relevancy grounds, and shall constitute an admission by the party that the record is authentic and admissible under the Mont. R. Evid. and the Rules of the Workers' Compensation Court.

(4) Where a timely objection to a medical record is served, the record shall nonetheless be admitted, however, the party objecting to the record is entitled to call the medical provider or, if the objection is to the authenticity of the record, the custodian of the record as a witness either at trial or by deposition and to cross-examine the witness. [Emphasis added.]

As can be seen from the bolded language in subsection (1), the rule concerning objections to medical records extends to virtually any document authored by a medical provider. The comprehensive nature of the rule was intentional and adopted with the advice and approval of the Court's Rules Committee to avoid the very sort of dispute which has arisen in the present case. A timely objection forces the proffering party to

either take a deposition, bring the medical provider to trial, or forgo the evidence. Thus, last minute evidentiary disputes over medical documents are avoided.

¶45 The claimant's objection to Dr. Rapaport's September 4, 2003 letter was made about the time of the pretrial conference and long after the deadline set in the scheduling order for any objection. Accordingly, I overruled the objection. However, recognizing that the claimant's counsel, who appears infrequently in workers' compensation matters and is not a member of the Court's Rules Committee, may not have fully absorbed the scope of Rule 24.5.317, I gave him the opportunity to examine Dr. Rapaport at trial or conduct a post-trial, supplementary deposition. Counsel declined that opportunity. Given my own evaluation of Dr. Rapaport's letter, I am neither surprised by nor critical of his decision.

¶46 I return now to the question of whether the claimant is suffering from an occupational disease. As I have already stated, the question I must answer "is whether occupational factors significantly aggravated a preexisting condition." *Polk*, 287 Mont. at 85, 951 P.2d 1018. The testimony of Dr. Blavatsky indicated that the claimant's knee replacement surgery was not inevitable on account of his 1967 and 1974 meniscectomies. Rather, his ultimate need for knee replacement surgery was determined by his subsequent activities. The claimant's subsequent activities included recreational activities, such as dog sledding, and weight lifting, which certainly contributed to his degenerative knee disease. However, his activities also included heavy lifting in occupational capacities and his standing and walking on hard surfaces while employed by MSE. His most significant periods of walking and standing on hard surfaces was between 1982 and 1994 - a period of nearly thirteen years - when he worked a significant amount of overtime hours and did so standing or walking on hard surfaces. His overtime ended in 1994 but by 1996, his inevitable need for knee replacements was already apparent. Both Dr. Blavatsky and Dr. Rapaport indicated in their testimony that the claimant's standing and walking on hard surfaces was a significant contributor to his degenerative condition and his need for surgery. Unquestionably, the claimant's recreational activities contributed to his condition. But *Polk* does not require that his work for MSE be the sole or even the substantial aggravating factor, only that it be a significant one. The claimant has carried his burden of proof in that regard.

¶47 I therefore find and conclude that the claimant's work at MSE was a significant factor in his degenerative knee disease and his need for knee replacement surgery.

¶48 I have considered whether any of the specific exacerbations the claimant has suffered since his employment with MSE constitutes a material aggravation of his condition such that MSE and its insurers are relieved of liability. See *Burglund v. Liberty Mutual Fire Ins. Co.*, 286 Mont. 134, 950 P.2d 1371 (1997). I start by noting that as of 1996 the die was cast concerning the claimant's need for knee replacement surgery. From the time of his commencing work for MSE until 1996, there are only two exacerbations of the claimant's knee condition. One was in December 1991 when he suffered a right knee strain while working with his sled dogs. There was no follow-up care and the event appears to be insignificant. The next medical care was in 1993 when the claimant suffered another right knee strain, again while working with his sled dogs. His knee complaints at that time resolved and there was no further need for treatment

until December 1996 when the claimant hurt his right knee once more. However, by that time the die was already cast regarding his need for future surgery as to **both** knees. Moreover, there is no evidence that the specific nonwork incidents from 1991 onward materially accelerated or caused the claimant's need for surgery.

¶49 Finally, I consider liability as between the State Fund and ICNA. Liability is governed by section 39-72-303, MCA (1993-2003), which provides in relevant part:

Which employer liable. (1) Where compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.

(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.

Under both subsection (1) and subsection (2) the State Fund is liable. Under subsection (1) the State Fund is liable because it insured MSE during the period when the claimant was "last injuriously exposed." The injurious exposure was the claimant's standing and walking on hard surfaces, and he continued those activities until the time of his retirement. Under subsection (2), the State Fund is still liable since an occupational disease since claimant was unaware he suffered from an occupational disease until it was diagnosed in December 2000. At that time, his exposure was continuing and the State Fund was at risk.

¶50 My positing of liability on the State Fund may seem unfair, and I agree it is in light of the fact that the claimant was destined for knee replacements in 1996, long before the State Fund insured MSE. But section 39-72-303, MCA (1993-2003), provides a "clear bright line"⁽⁴⁾ concerning liability. The line may be unfortunate but it is clear.

¶51 The claimant has also requested an award of attorney fees and a penalty. Both require proof that the insurer acted unreasonably in denying or delaying benefits. §§ 39-71-611, -612, and -2907, MCA (1999). The claimant has failed to persuade me that the insurers unreasonably challenged his claim.

¶52 Since the claimant has prevailed, he is entitled to his costs.

JUDGMENT

¶53 The claimant is suffering from an occupational disease which significantly aggravated an underlying condition of both of his knees. Since the State Fund insured the claimant's employer at the time the disease was discovered and the claimant first

became aware of it, the State Fund is liable for his disease, including disability and medical expenses attributable to his knee replacements.

¶54 I make no determination as to the specific benefits due the claimant as I have not been requested to do so. The parties should be able to agree on the benefits due. However, in case they are unable to agree, I reserve jurisdiction to make that determination.

¶55 The claimant is not entitled to attorney fees or a penalty, however, he is entitled to his costs and shall file a memorandum of costs in accordance with this Court's rules.

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

¶57 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 6th day of April, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Thomas E. Martello
Mr. Bernard J. Everett
Mr. Leo S. Ward
Submitted: March 16, 2004

1. Concerning his treatment of the claimant between 1997 and 2000, Dr. Gallagher said:

A. He did very well actually. And he would come and get a cortisone shot once a year. Shit, if I had everybody that got a worn out knee that was functioning at that high of a level, I would have an easy practice.

(*Id.* at 38.)

2. The *Polk* decision involved application of the 1993 version of the ODA. At that time, section 39-72-408, MCA (1971-1999), provided in relevant part:

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.

287 Mont. at 83-84, 951 P.2d 1017-18.

3. The Court's analysis is more fully set out below:

Planet argues that the aggravation statute does not relieve the claimant of the burden of proving proximate cause, but that Polk is still required to prove a direct causal connection between the work-related factors and his resulting condition. We agree with Planet that the aggravation statute, § 39-72-706, MCA, does not circumvent the proximate cause requirement of § 39-72-408, MCA. However, Planet contends that to prove proximate cause, Polk must show that occupational exposures were a substantial contributing factor to his health problem.

In light of the proximate cause statute and the aggravation statute, we agree with the Workers' Compensation Court that "occupational aggravations of preexisting nonoccupational diseases are compensable, as are occupational diseases which are aggravated by non-occupational factors." As we held in *Ridenour*, the test for compensability under the Act is whether occupational factors significantly aggravated a preexisting condition, not whether occupational factors played the major or most significant role in causing the claimant's resulting disease.

287 Mont. at 84-5, 951 P.2d 1018.

4. For the "clear bright line" language, I give credit here to attorney Larry W. Jones, who constantly urges me to draw "clear bright lines" for insurers to follow in adjusting claims.