IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 50

WCC No. 2002-0700

MONTANA STATE FUND

Petitioner

vs.

CARL MURRAY and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

Respondent/Claimant and

Respondent/Insurer.

ORDER DENYING MOTION FOR RECONSIDERATION

APPEALED 7/15/04

Summary: Montana State Fund requests reconsideration of my decision in 2004 MTWCC 33, arguing in effect that the Court's finding concerning an occupational disease is not supported by substantial evidence and that any liability should rest on an earlier insurer.

Held: The motion for reconsideration is denied. Substantial medical evidence, including the opinions and testimony of a physician who conducted an independent occupational disease evaluation, supports the Court's finding that the claimant's bad knees were materially aggravated by occupational factors, specifically standing on hard surfaces, over a period of years.

Topics:

> **Procedure: Post-trial: Motion for Reconsideration.** Motion for reconsideration will be denied where the findings entered by the Court are supported by the evidence and the law compels the result reached in the decision.

¶1 The Montana State Fund (State Fund) moves for reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment issued April 6, 2004. In that decision I found that the claimant is suffering from an occupational disease and that the State Fund, as the last insurer providing coverage during his work exposure, is liable for his condition.

¶2 The State Fund specifically objects to paragraph 15 of the Findings of Fact. That paragraph reads:

> ¶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.

State Fund argues that the finding is unsupported, citing testimony by Dr. Blavatsky to the effect that when he first saw the claimant he did not take "an extensive work history" from the claimant and relied principally on Dr. Rapaport's report for details regarding claimant's work and non-work activities. (Blavatsky Dep. at 23-24, 32-35.)

¶3 While the State Fund accurately cites Dr. Blavatsky's testimony, it misses the point made in paragraph 15. The paragraph concerns the claimant's awareness of an occupational disease. The point is that Dr. Blavatsky discussed with the claimant the fact that his job entailed standing on concrete and that such standing contributed to his knee condition. The discussion constituted the first time the claimant was made aware of a possible relationship between his knee problems and his occupation. The claimant testified directly as to the conversation and I credited his testimony. Dr. Blavatsky was not specifically asked about the conversation or his knowledge of the claimant's standing on concrete. His testimony that he did not take an extensive history concerning the claimant's work and duties does not show that he was unaware of the claimant standing on concrete at work for long periods of time. The State Fund's argument is unpersuasive.

¶4 The State Fund takes issue with paragraph 22 as well. That paragraph reads:

> ¶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). [FN omitted.]

It urges that the finding disregards a medical record that the claimant got "dinged" immediately prior to seeing Dr. Blavatsky and that Dr. Gallagher's testimony must be read as affirmatively opining that the claimant suffered a non work-related injury to his knee immediately prior to his seeing Dr. Blavatsky.

¶5 State Fund's reading of Dr. Gallagher's testimony is unsupported. The following was his testimony concerning causation due to a new incident:

> Q. But given what he had for preexisting conditions, the type of work he did before he started with MSE, what would be your opinion with respect to his ultimate knee replacements, whether that was, as you had indicated previously, predestined as early as you saw him in 1996 - - would it be your opinion that the type of activities that he engaged in, both work and hobby, were the reasons for his knee replacements and not his work at MSE Technologies?
>
> A. You want me to give you an expert opinion about Carl Murray's life and whether or not he got hurt at MSE caused his major problem? Is that the crux of your question?
>
> Q. Well, let me restate it - -
>
> A. Okay.
>
> Q. - - because that was a pretty convoluted question.
>
> The - - what I would ask you to answer is: Within a reasonable degree of medical probability - -
>
> A. More medically probable than not, you mean?
>
> Q. Yeah. - - in your opinion, based upon your treatment, based upon your review of the medicals, based upon your review of the depositions and what I've outlined with respect to his work history and everything, would it be your medical opinion that the activities predating his employment at MSE Technologies is what ultimately led to his total knee replacement?
>
> MR. EVERETT: To which I object. That's really - - that's not relevant.
>
> THE WITNESS: You now, I guess if you're asking me for my medical opinion, I would say that Carl was functioning at a fairly high level for a number of years, 1996 through 2000, when I treated him, seeing me once, maybe twice a year, getting a shot of cortisone, doing all the things that you talked about, chopping wood, getting posts, running dogs, and doing fairly well.

He was - - the writing was on the wall. His knees were going to need to be replaced eventually some day. And when that was, was when he just couldn't take it anymore or when he had a significant enough of an injury where his knee kind of got knocked over the edge to a point where he couldn't function at the high level that he was functioning at.

So, you know, for me to say more medically probable than not, I would say Carl had a lot of arthritis in his knees, was functioning at a very high level for three or four years when I knew him. He had intermittent cortical steroid shots. For what his knees looked like on X-rays, doing fairly well. So I would say that probably had something to do with it.

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.

Q. Okay. Do you know what - - what is your understanding as far as the injury, or anything, that would be related to his employment at MSE?

A. Minimal. 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.

Q. Does your file reflect a December 26 office note?

A. What date and what year would that be? December - -

Q. Twenty-six - - I'm sorry. That's what - - and maybe it's just as easy. Why don't you take a look. I'm referring to Deposition Exhibit 8 to the deposition of Carl Murray.

A. Yeah. That looks like Kirwan Webb.

A note that was generated at Express Care; is that right?

Q. Correct. Yeah. Yep.

A. February 21 in the emergency room at Express - - or at the emergency and treatment center at Express Care. I don't know if I have that note in my records. You know, it wouldn't be unusual for me not to have it, actually. I can look at yours, I guess.

Q. I was asking Carl what it was that he was describing here, and then on Page 139 and 140 of his deposition, he explained it to me.

See here, beginning on Line 5, I indicated that I was handing him Deposition Exhibit 8?

A. Um-hum. Correct.

Q. Would you read that down to - - onto Page 140, Line 2.

MR. EVERETT: I assume you want him to read it to himself.

MR. MARTELLO: Yeah, please.

THE WITNESS: You asked him a lot shorter questions.

MR. EVERETT: But his answers were much longer. It's just the opposite.

MR. WARD: We're trying to get around that part, the long answer part.

THE WITNESS: About the getting hurt with the blankets, is that far enough?

Q. (By Mr. Martello) Yeah. Yeah. I wanted to get your take on that.

What I gathered from that was this was pretty close to the time that he left his employment with MSE.

Is it your take on that, as it was mine, that - - he had injured his knee somehow by twisting his leg in blankets in bed?

A. It sounds like he had been out hunting and he woke up the next day and his knee was problematic and painful for him, and that he says he assumed that he had probably twisted his knee in the blankets and injured it. I mean, that's how I read it, I guess.

Q. Okay. All right. The part that I was wondering here, it says, quote: I assume, because of what I had been told before by Dr. Gallagher, that I possibly twisted it in the blankets.

Do you have any idea what he's referring to there?

A. Got me. I never talked to Carl about blankets or injuring your knees with blankets. Maybe he might be referring to the fact that his knees have been irritated. You know, but that's a long - -

When is that - - is that February 2001? Is that - - is that Exhibit 8?

MR. WARD: Yes.

THE WITNESS: Is that the thing that you gave me, Exhibit 8?

Q. (By Mr. Martello) Here. Yes. Right there.

A. It says he twisted his knee while walking his dog or something here, doesn't it?

He twisted his knee, persistent pain for about a month. I don't know - - I don't see anything about blankets, though.

Q. Yeah. And I think he was trying to - - he was trying to clarify. And that's what he was describing, because he said he thinks the doctor got it wrong.

A. Three days of pain. Seeing Dr. - - he's already seeing Nick. It looks like they got him up to see Nick, Nick Blavatsky, the next day. It looks like he had a lot of arthritis in his knee on his X-ray that day, too.

Yeah. So, I don't know where the blankets are coming from. Sorry. I can't help you.

Q. Let me just take a look at this file.

A. Sure. Yep. Yep.

MR. MARTELLO: Off the record.

(A discussion was held off the record.)

Q. (By Mr. Martello) Doctor, looking at a 12/27, 2000, note of Dr. Blavatsky, does that appear to relate to - - there's a mentioning of a twisting injury to that what [sic] we've been talking about.

Mr. EVERETT: Well, I think you're asking the doctor to speculate as to what Dr. Blavatsky is thinking about.

MR. MARTELLO: And that's a good objection.

Q. (By Mr. Martello) What does that note indicate to you why Dr. Blavatsky was seeing him on that date?

A. It looks like his knees hurt.

Q. Does it mention any sort of an injury or just that its [sic] a continuation of - -

A. Presents for evaluation having twisted his left knee, experienced severe discomfort, is what the history reads.

MR. MARTELLO: I don't think I have any more questions at this point.

(Gallagher Dep. at 26-33.)

As can be seen from the above testimony, Dr. Gallagher clearly felt that the claimant's prior injuries from years before predisposed him to knee replacement, a conclusion I certainly agree with. He did not opine that a specific new injury precipitated the immediate need for surgery.

¶6 State Fund urges that the Court "relied almost exclusively on deposition testimony from Dr. Blavatsky." (Brief in Support of Motion for Reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment at 5.) Even if that were true, it is for the Court to weigh the opinions of physicians, and, as I noted in ¶ 21 of my opinion, Dr. Blavatsky

specializes in knee replacements, a fact that gives some additional weight to his opinions. Moreover, I did not rely exclusively on Dr. Blavatsky's opinions. I also relied on the initial opinions and testimony of Dr. Rapaport who performed an occupational disease evaluation at the behest of the Department of Labor and Industry. Dr. Rapaport found that the claimant's occupation contributed thirty to forty percent to his condition. (Findings of Fact, Conclusions of Law and Judgment, ¶¶ 25-29.)

¶7 State Fund also argues that claimant's knee replacements were inevitable in 1996 when Dr. Gallagher first saw the claimant. Dr. Gallagher's testimony lends some support to that contention and so does Dr. Rapaport's testimony. Dr. Rapaport testified that as of 1996 the claimant was destined for knee surgery independent of any further injuries. (*Id.,* ¶ 29.) This testimony is contrary to the State Fund's argument that the claimant suffered a new, material injury around the time he saw Dr. Blavatsky. It also overlooks the fact that the occupational factors identified by both Dr. Blavatsky and Dr. Rapaport did not suddenly arise after 1996 but were ongoing for many years prior to that time. I summarized the situation in paragraph 34 of my decision, as follows:

> ¶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. [Citation omitted.] 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.

¶8 I think the rub in this case is that I held the State Fund liable for the occupational disease even though it is apparent from my findings and the testimony of Dr. Gallagher and Dr. Rapaport that surgery was inevitable as of 1996, long before the State Fund was at risk. Thus, the most significant occupational exposure was prior to 1996.

¶9 I agree that in all fairness the liability in this case should fall upon the shoulders of Indemnity Insurance Company of North America (Indemnity Insurance) rather than the State Fund. However, as noted in paragraph 49 in my Conclusions of Law, the liability in this case is dictated by section 39-72-303(2), MCA (1993-2003), 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.

The section is very specific and I must follow it even though it violates my sense of fairness under the facts of this case.

¶10 State Fund urges that subsection (2) renders Indemnity Insurance liable since it was clear in 1996 that the claimant would some day require knee replacements. However, the section does not rest on knowledge that the claimant suffers from a medical condition or that future medical care will be needed. It specifically states that liability is determined as of the time the "occupational disease was first diagnosed by a treating physician or medical panel." While the claimant certainly suffered from bad knees in 1996, an occupational disease was not diagnosed at that time and there is no evidence of medical opinions indicating that occupational factors had aggravated his knee injuries occurring in 1967 and 1974. The occupational disease diagnosis did not come until the employer was insured by the State Fund. Similarly, there is no evidence that the claimant was aware his bad knees had been aggravated by occupational factors until the State Fund was the at-risk insurer.

ORDER

¶11 I therefore reaffirm my Findings of Fact, Conclusions of Law and Judgment. The State Fund's Motion for Reconsideration is **denied**.

DATED in Helena, Montana, this 8th day of June, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Thomas E. Martello
Mr. Bernard J. Everett

Mr. Leo S. Ward
Submitted: May 10, 2004