

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 37

WCC No. 9511-7446

STATE COMPENSATION INSURANCE FUND,

Insurer/Appellant,

vs.

TOWN PUMP, INCORPORATED,

Employer/Respondent,

RICHARD JOHN OLESKY,

Claimant.

RICHARD JOHN OLESKY,

Claimant/Appellant,

vs.

TOWN PUMP, INCORPORATED,

Employer/Respondent,

STATE COMPENSATION INSURANCE FUND,

Insurer.

ORDER ON APPEAL

Summary: Both State Fund and claimant appealed from Department's determinations in occupational disease case. State Fund argued its insured, Pizza Hut, was not liable for claimant's right shoulder condition and that liability should be placed on claimant's subsequent employer, Town Pump, under the "last injurious exposure" rule set out at section 39-71-303, MCA. Claimant argued hearing officer erred in adopting physician's apportionment of 10% to nonoccupational factors and in applying apportionment to medical benefits.

Held: Substantial evidence supports Department's determination that State Fund is liable for occupational disease benefits where the medical record (with one exception)

consistently points toward development of claimant's right shoulder condition while he worked at Pizza Hut, with the subsequent work at Town Pump not representing a material or substantial aggravation of his condition. The one physician attributing the problem to work at Town Pump based his determination on a detailed statement of claimant about that work, the focus of which was not consistent with the bulk of the information in the medical record. While section 39-71-303, MCA, places liability for an occupational disease on "the employer in whose employment the employee was last injuriously exposed to the hazard of the disease," the proper inquiry is whether the risks of the second employment in fact caused further injury of a non-trivial nature, not whether that employment could have impacted his condition. The Department erred, however, in adopting one physician's attribution of 10% of the occupational disease to non-occupational factors where the physician conceded he was "not aware of any specific nonoccupational disease or infirmity which contributes to his current symptoms." Reference to a family history of arthritis which "may" contribute to his condition is not sufficient. In any event, apportionment of medical benefits is contrary to law, see, *Davis v. Liberty Northwest Insurance Corp.*, WCC No, 9312-6974 (9/6/94), even if this were a proper case for apportionment.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated:

Section 39-71-303, MCA. Substantial evidence supports Department's determination that State Fund is liable for occupational disease benefits where the medical record (with one exception) consistently points toward development of claimant's right shoulder condition while he worked at Pizza Hut, with the subsequent work at Town Pump not representing a material or substantial aggravation of his condition. The one physician attributing the problem to work at Town Pump based his determination on a detailed statement of claimant about that work, the focus of which was not consistent with the bulk of the information in the medical record. While section 39-71-303, MCA, places liability for an occupational disease on "the employer in whose employment the employee was last injuriously exposed to the hazard of the disease," the proper inquiry is whether the risks of the second employment in fact caused further injury of a non-trivial nature, not whether that employment could have impacted his condition.

Occupational Disease: Apportionment. The Department erred in adopting one physician's attribution of 10% of a shoulder-related occupational disease to non-occupational factors where the physician conceded he was "not aware of any specific nonoccupational disease or infirmity which contributes to his current symptoms." Reference to a family history of arthritis which "may" contribute to his condition is not sufficient.

Occupational Disease: Apportionment. Apportionment of medical benefits is contrary to law, see, *Davis v. Liberty Northwest Insurance Corp.*, WCC No, 9312-6974 (9/6/94), even if this were a proper case for apportionment.

Occupational Disease: Last Injurious Exposure. Substantial evidence supports Department's determination that State Fund is liable for occupational disease benefits where the medical record (with one exception) consistently points toward development of claimant's right shoulder condition while he worked at Pizza Hut, with the subsequent work at Town Pump not representing a material or substantial aggravation of his condition. The one physician attributing the problem to work at Town Pump based his determination on a detailed statement of claimant about that work, the focus of which was not consistent with the bulk of the information in the medical record. While section 39-71-303, MCA, places liability for an occupational disease on "the employer in whose employment the employee was last injuriously exposed to the hazard of the disease," the proper inquiry is whether the risks of the second employment in fact caused further injury of a non-trivial nature, not whether that employment could have impacted his condition.

This is an occupational disease case. The parties do not dispute that claimant suffers from an occupational disease involving his right shoulder. However, they disagree as to which employer and insurer are responsible for the disease. They also disagree as to whether any part of his disease should be apportioned to nonoccupational factors.

A hearing officer for the Department of Labor and Industry held that Pizza Hut and its insurer, the State Compensation Insurance Fund, are responsible for the disease and that 10% of claimant's disease is attributable to nonoccupational factors. The hearing officer further held that medical benefits, as well as compensation benefits, must be reduced by that 10%.

The State Fund appeals, contending that Town Pump, which is self-insured, is responsible for the disease under the "last injurious exposure rule." (state fund's initial brief at 4-5.) Claimant appeals from the apportionment of liability, contending that the 10% factor is unsupported and should not in any event be applied to medical benefits.

After considering the record below, and the arguments of the parties, I find the hearing officer's determination that the State Fund is liable for claimant's disease is supported by substantial evidence. However, the 10% apportionment factor is unsupported and cannot in any event be applied to medical benefits.

Record on Appeal

The record on appeal consists of the claimant's sworn statement taken on January 28, 1993, the deposition of the claimant taken on November 15, 1994, the deposition of Dr. Dana Headapohl, twenty-three exhibits, and a transcript of the hearing.

The Facts

Claimant is 58 years old. His prior work history and education are not pertinent to the decision in this case and are omitted from this discussion.

Claimant suffers from chronic impingement of his right shoulder with an underlying rotator cuff tear. His condition has been verified by medical imaging and surgery; there is no real dispute concerning the nature of his medical condition.

There is a dispute, however, over which employer and insurer are liable for his condition. Between June 15, 1990 and September 15, 1991, claimant worked for two different employers. He

worked as an assistant manager for Pizza Hut in Glasgow, Montana, from June 15, 1990 through June 15, 1991. From June 17, 1991 until September 15, 1991, he worked for Town Pump in Columbus, Montana. He has not worked since then. This work history is important because claimant's right shoulder condition arose during the time of these two employments. Prior to 1990 he had never had problems with his right shoulder.

Claimant has a congenital left arm weakness and his left arm is shorter than his right. He is unable to do any overhead lifting with the left arm.

At Pizza Hut the claimant was required to lift cooked and uncooked pizzas above shoulder level. He used pliers to lift the pizzas, which were in pans. Due to his preexisting left arm weakness, he used his right arm. He was also required to lift five-gallon containers of pizza sauce and pizza dough weighing up to 50 pounds.

Claimant left Pizza Hut for a better paying position at Town Pump in Columbus, Montana. His right shoulder was not a factor in his change of employment.

At Town Pump, claimant was a probationary, restaurant supervisor-trainee. His employment began during the busy summer season and initially required heavy lifting. The hearing officer summarized his duties as follows:

18. The claimant worked at the Columbus Town Pump during the busy summer season. This is a 24-hour restaurant/truck-stop adjacent to the interstate. . . . He was required to work from 50 to 65 hours a week, but paid for 40. Early in his tenure at Town Pump his job demanded heavy lifting despite his right arm pain and supervising around seven people a shift. When the claimant started, the "helter-skelter" or unkempt condition of the food storage areas and twice weekly food deliveries necessitated reorganizing the coolers, freezer and regular rotation of stock. Staples which had to be lifted and hung above shoulder-level included 100 pound bags of potatoes and onions. Sides of beef as packaged weighed up to 90 pounds. Cases of one, five, and ten gallon containers, such as pie filling, cooking oil, and sausage mix, respectively, also entailed significant lifting with some stock

stored on overhead shelves. Used oil had to be carried outside in five gallon containers and dumped into a container above shoulder level.

(Findings of Fact; Conclusions of Law; Final Order at 8-9; and see also the two and one-half page job description found at Ex. 21 at 19-21.) The claimant was able to perform the lifting tasks, however, during his employment at Town Pump he began asking for help with lifting and his heavy lifting responsibilities declined or ended. (Findings 17 and 18.)

Claimant regularly worked 50 to 65 hours a week at Town Pump. He was asked to work even more hours but refused to do so. (Findings 18 and 19.) He then received an unfavorable performance review and was offered a lesser paying position as a prep or fry cook. He refused the offer, quit work, and began drawing unemployment benefits. (Ex. 21 at 26-27.)

While employed by Pizza Hut, claimant did not specifically seek treatment for his shoulder condition. However, he attributes the onset of his condition to the repetitive lifting of pizzas. His claim is supported by a medical record for treatment of an unrelated condition. On May 6, 1991, while still working for Pizza Hut, he had a ganglion cyst removed from his right wrist. At that time he advised the Veterans' Administration doctor treating him that for the preceding three or four months he had been experiencing radiating pain in his right arm. (Tr. at 33; Ex. 21 at 36.) Although we are not further informed as to the cause of the pain, and therefore cannot rule out the ganglion as the cause, the report is consistent with claimant's later reports, and his testimony, which the hearing officer found credible, that his right shoulder and arm pain arose while he was employed at Pizza Hut. Claimant testified that the VA doctor indicated it was "probably tendinitis of the muscles." (Olesky Dep. at 14.)

On August 13, 1991, the claimant reported to a VA physician that "my shoulder R [right] has gotten worse." (Ex. 21-38.) Apparently referring to the May 6, 1991 medical exam, he further reported that in a prior VA visit the doctor had "said it was inflamed Tendons & put me on Ibuprofen but, it didn't help a bit." (*Id.*) In another VA visit on September 17, 1991, the claimant made a similar report. (Ex. 21 at 26, 27.)

In December of 1991, Dr. Stanley of the VA diagnosed a probable rotator cuff tear. The diagnosis was verified by an x-ray on January 16, 1992. (*Id.* at 43.)

At some time in the latter part of 1991 or early 1992, the claimant filed his first claim for compensation. The claim was filed with the State Fund, which insured Pizza Hut. The record contains a claim dated February 13, 1992, as well as a claim dated August 30, 1991. The later claim is date stamped as received in July of 1992. (Exs. 12 and 14.) There is some evidence that the initial claim was lost by either the State Fund or the mediator and that the claim received in July of 1992 was intended to replace the original, lost one.

In any event, on March 11, 1992, the State Fund initiated benefits under a reservation of rights. (Ex. 3.)

Between January 1992 and July 1992, claimant continued to be treated for his shoulder pain at various VA hospitals. Dr. Murdock, a VA physician, examined claimant in July 1992. The doctor's notes contain reference to the claimant's job at Pizza Hut but no mention of his Town Pump work. His impressions were:

IMPRESSION: This 55 year old male has a confusing picture. It is apparent to me that there are possible contributing factors to his complaints. First of all, he does have a rotator cuff tear which was diagnosed on the arthrogram performed in January 1992 which can be contributing to his problems at this time. Additionally, he does have a positive impingement sign and palpable tenderness over the AC joint. . . . It is my impression and [sic] some of his problems could be related to repetitive motions at the job site but I cannot rule out other etiologies.

(Ex. 21 at 6-7.)

The State Fund then arranged for an independent medical examination by Dr. Jerome Stewart. Dr. Stewart examined claimant on May 6, 1992. (Ex. 21 at 3.) He determined that the claimant had not reached maximum medical improvement but commented, "[H]e does not have a great deal of limitation or pain." (*Id.* 21 at 4; emphasis added.) Dr. Stewart's impression was that claimant suffered from tendinitis of the right shoulder. He recommended moderate exercise, physical therapy and anti-inflammatory medication, with which the doctor believed "the problem in the shoulder should resolve." (*Id.*)

Dr. Stewart's report to the State Fund indicated that, by history, claimant "injured his shoulder at Pizza Hut by repeatedly lifting the pan of the pizzas to a 90 degree level and putting them in the oven. He states that this started over a number of months and culminated on May 27, 1991, by lifting the pan of pizza caused pain and discomfort in his right shoulder." (*Id.* at 3.) Notwithstanding that report, by letter dated May 14, 1992, the State Fund terminated benefits effective 14 days thereafter. (Ex. 7.) The termination was based on State Fund's determination that claimant had not reported an injury within 30 days. In a July 24, 1992 letter, the State Fund advised claimant that he also did not qualify for occupational disease benefits because he did not seek treatment for his shoulder condition until August 1991, and, "It would, therefore, appear that Town Pump would be the employer of last exposure since you did not seek medical attention until August 1991." (Ex. 8.) The letter suggested that claimant pursue a claim against Town Pump.

We do not have a claim against Town Pump, at least in the record. However, we do have a November 10, 1992 first report from Town Pump. That report indicates that no accident occurred while claimant was working for Town Pump and that "Mr. Olesky stated he injured himself at Pizza Hut and there was no injury at Town Pump." (Ex. 2.) Nonetheless, on October 15, 1992, Town Pump commenced paying benefits, retroactive to May 1992, under a reservation of rights. (Ex. 1.)

While paying benefits, Town Pump sought an independent medical evaluation from Dr. Robert Seim, an orthopedic surgeon. Dr. Seim examined claimant on March 24, 1993, and reported his impression as follows:

My impression at this time is that Mr. Olesky has an impingement syndrome of the shoulder secondary to significant abduction of his arm at work. He also has a biceps tendinitis with this. The arthrogram shows a very small tear of the cuff which means he very well does have a rotator cuff tear present. . . .

(Ex. 21. at 9.) Dr. Seim laid the blame for claimant's condition on Pizza Hut and recommended surgery.

Following Dr. Seim's exam, the claimant began treating with Dr. Thomas Johnson, who is an orthopedic surgeon. Dr. Johnson initially saw claimant on October 18, 1993, at which time his impression was "chronic impingement syndrome of the right shoulder with an underlying rotator cuff tear." His condition was consistent with prior medical impressions. In January of 1994, Dr. Johnson operated on the claimant's shoulder. The surgery consisted of "[r]epair rotator cuff, acromioplasty and excision of the distal clavicle." (Ex. 21 at 59.)

Notwithstanding surgery, claimant's shoulder pain has persisted. Dr. Johnson last saw the claimant on November 30, 1994, at which time he noted that claimant had "plateaued as far as his shoulder was concerned." He did not recommend further surgery. (Ex. 21 at 64.)

Meanwhile, Town Pump invoked the medical panel procedures of the Occupational Disease Act. At Town Pump's request, the Department designated an Occupational Disease Panel to examine claimant. The panel consisted of Dr. Thomas Schumann, who specializes in occupational medicine; Dr. John Diggs, who specializes in physical medicine and rehabilitation; and Dr. Dana Headapohl, who specializes in occupational and environmental medicine. Drs. Schumann and Diggs examined claimant. Dr. Headapohl served as panel chair. She did not examine claimant but reviewed claimant's medical records and the reports of the other two panel members.

Dr. Schumann examined claimant on November 4, 1993. He opined that claimant suffered from a chronic impingement of the right shoulder with an underlying rotator cuff tear. He attributed the conditions to claimant's work at Pizza Hut:

There is by his history a direct causable connection between lifting the pizzas out of the oven and the development of his right shoulder pain which seemed to come from this and not any other cause per his report. I was not able to elicit any history of any exposure outside of the work place to which he would have had equal exposure of stress to the shoulder. It is his impression that it came about as a result of the activity of taking pizzas out of high ovens at the Pizza Hut. This history is consistent in all medical records available to me and is a plausible explanation of his condition.

(Ex. 21 at 11.) Dr. Schumann's records note that claimant and his wife mentioned claimant's work at Town Pump. He wrote:

He reports that after working at Pizza Hut for a year he found a better job working as a manager of Town Pump and changed employers at that time. He states that when he went to work at the Town Pump they knew that he had shoulder limitation and that he was not required to do heavy work. Nevertheless his wife reports that his symptoms did worsen during the time he was working at the Town Pump and that he did do some things such as help with dishes at times. He feels that there was minimal contribution of his shoulder problems with any work that he did at the Town Pump. He also denies any significant stress or trauma to his shoulder in other areas other than work.

(*Id.* at 13.) When questioned about her comment to Dr. Seim, at trial Mrs. Olesky explained that on days that the claimant had to fill in for the dishwasher his "arm would be just dead." (Tr. at 57.)

Dr. Schumann apportioned 90% of the claimant's disability to occupational factors and 10% to nonoccupational factors. In apportioning, the doctor observed that he was "[n]ot aware of any specific nonoccupational disease or infirmity which contributes to his current symptoms. There is a family history of arthritis which may contribute to his predisposition to develop shoulder problems." (Ex. 21 at 11.)

Dr. Diggs examined claimant on February 14, 1994. At this point the record becomes problematic. Dr. Diggs' diagnosis, as well as his conclusion that claimant is suffering from an occupational disease, coincides with the opinions of Dr. Schumann. However, Dr. Diggs fixed responsibility for the occupational disease on Town Pump rather than Pizza Hut. His placement of responsibility was based on a difference in medical history and emphasis. Claimant, who had heretofore been focusing on his work at Pizza Hut as the malefactor to his condition, provided Dr. Diggs with a detailed, handwritten description of his job duties at Town Pump. In his historical recitation, the claimant's focus was on the work he performed at Town Pump. Based on that history, Dr. Diggs' impression was:

The right shoulder degenerative changes requiring orhtopedic [sic] surgery recommended in early 1993 and finally done on 1-4-94 would be a result of heavy repetitive lifting and overhead work at his job with Town Pump.

(Ex. 21 at 17.) Dr. Diggs concluded that the prior opinions attributing claimant's condition to his work at Pizza Hut were premised on a number of inaccurate descriptions of his work requirements at Pizza Hut. (*Id.* at 18-19.) He believed that claimant's symptoms localized *after* he went to work for Town Pump. (*Id.*) He concluded that claimant's "shoulder symptoms were not involved until *after* he left Pizza Hut and was working for several weeks with Town Pump." (*Id.*)

Dr. Headapohl did not examine the claimant but attempted to resolve the conflicting opinions of Drs. Schumann and Diggs. She reviewed their reports and evaluations, along with the other medical records of claimant. She also reviewed the sworn statement of the claimant taken on January 28, 1993. She discussed the case with both Dr. Schumann and Dr. Diggs.

Dr. Headapohl then wrote the final report. She determined that the claimant was suffering from "degenerative rotator cuff (right) shoulder." (Ex. 21 at 54.) She concluded that his condition is an occupational disease "that is the result of his employment." In allocating responsibility for the occupational disease, Dr. Headapohl said:

The medical history and record is consistent (with the exception of the history given to Dr. Diggs). It is medically well established that the shoulder problem began at the Pizza Hut and continued during his employment at Town Pump. His employment at Town Pump aggravated symptoms, but did not permanently change the physical condition itself. His shoulder was medically unstable at the time of his transition from Pizza Hut to Town Pump.

...

Mr. Olesky's problems are attributable to his position at Pizza Hut. His symptoms were aggravated by his job at Town Pump. Therefore the disease was caused by the Pizza Hut position. The symptoms were aggravated at Town Pump.

(Ex. 21 at 55; emphasis added.) Her opinions represented the consensus reached by all three physicians.

Dr. Headapohl was deposed on October 6, 1994. During her deposition, she explained the importance of medical history.

A: The history is extremely important, particularly if there is limited medical, written medical documentation. Because in that case, causation is guessed at or determined primarily on the basis of the history given.

(Headapohl Dep. at 14.) She explained that one of her tasks in obtaining a consensus opinion was to reconcile the differences in the histories which claimant provided to Dr. Schumann and Dr. Diggs.

Q: In this case, and in, I think, in many other cases there appears over time to be some sort of -- sometimes some factual inconsistencies in the records that you review. How do you work through those inconsistencies to form an opinion based on history?

A: Well, it depends on the circumstances, but an example would be, which is similar to this case, if I see early evidence in the medical record that a patient has been

complaining about a problem at that time and then I see evidence later on that the patient had no -- or documentation that the patient had no preexisting problem, I would put more weight on the original report because that was reported at the time. Recall data is less reliable. [Emphasis added.]

(Headapohl Dep. at 14, 15.) She further noted:

The history as reported in Dr. Diggs' report is at great variance with the other medical records. This is intriguing, and in general when I see the history given to previous medical examiners is at great variance with one report, I tend to give those previous evaluations much greater weight. The fact that he did not mention job activities at Town Pump after his employment there and at the time of seeking medical attention is significant. [Emphasis added.]

(*Id.* at 39.)

The history and historical emphasis which claimant provided to Dr. Diggs were at odds with claimant's previous reports and emphasis. Beginning with his initial claim for compensation, claimant attributed his condition to the work which he performed at Pizza Hut. Even at the late date of the hearing, claimant still believed that his shoulder condition was caused by his work at Pizza Hut.

Dr. Headapohl opined that claimant's work at Town Pump did not permanently aggravate his shoulder condition. She was questioned closely about her conclusion. While she conceded that claimant's Town Pump job increased his symptoms, she opined that it did not permanently affect his condition:

A: Temporary aggravation of symptoms is manifest by increased pain which is short-lived and returns to baseline, which is what happened in this case. A permanent damage or exacerbation--not exacerbation--permanent changes would include significant change in symptomatology or in function and structure and that did not occur in this case, would not be expected to occur as a natural process of the disease process that was already started. [Emphasis added.]

(Headapohl Dep. at 25.) Dr. Headapohl took the job description of the Town Pump position into account in reaching her opinion. (*Id.* at 33, 38.)

Dr. Headapohl specifically considered the report by claimant's wife that his symptoms had increased during his employment at Town Pump. She explained:

. . . That is not surprising as part of the progression of a degenerative disease, not necessarily suggestive of a reinjury. In fact, if Dr. Schumann's history is accurate, Mr. Olesky himself, denied, quote "any other activity which seems to have aggravated," end quote. So put in that context, it fits. [Emphasis added.]

(*Id.* at 47-48.)

This case, in large part, spins around the history provided by claimant to Dr. Diggs. Claimant provided Dr. Diggs with a detailed description of his duties for Town Pump and focused the doctor on that job. The job description was prepared at the behest of claimant's attorney, who apparently was focusing on the Town Pump job at that time.

Claimant, who the hearing officer found credible, testified at his deposition that his shoulder problems preexisted his employment by Town Pump and affected his work there:

A Everybody that worked for me knew I had shoulder problems.

Q How so?

A Because I asked for help a lot of times putting stuff away.

(Olesky Dep. at 27.) He acknowledged that the job at Town Pump initially had heavy physical demands (*id.* at 47) and that up to a point he did repetitive heavy lifting (*id.* at 54). But he testified that his work at Town Pump only made a "minimal contribution" to his shoulder problems. (Tr. at 37.)

A fair summary of claimant's testimony in his deposition and at the Department hearing is as follows:

- The job at Pizza Hut caused his shoulder condition.
- The job at Town Pump did require heavy lifting "up to a point."
- Supervisors at Town Pump were aware of his shoulder condition and other employees assisted him with heavy tasks.
- His condition was the same when he left Pizza Hut as when he left Town Pump.
- The Town Pump job had minimal impact on his shoulder condition.
- Until the State Fund's attorney and his own attorney focused on his employment with Town Pump, he did not consider his Town Pump job as materially contributing to his shoulder condition.

Jurisdiction

Subject matter jurisdiction may be raised at any time by any party, or by the Court sua sponte. *Estate of Stoian*, 138 Mont. 384, 394-95, 357 P.2d 41 (1960); *In re Marriage of Miller*, 259 Mont. 424, 426, 856 P.2d 1378 (1993). On appeal Town Pump questions whether the Department has jurisdiction to apportion as between occupational and nonoccupational factors.

Notwithstanding Town Pump's concerns, the Department has jurisdiction to apportion in a case of disputed liability. The Department has jurisdiction to determine liability in disputed liability cases. §§ 39-72-602 and -611, and -612, MCA. When the Department's jurisdiction attaches, it acquires jurisdiction to determine matters ancillary to liability. See *State ex rel. Uninsured Employers' Fund v. Hunt*, 191 Mont. 514, 519, 625 P.2d 539, 542 (1981). Apportionment, as provided in section 39-72-706, MCA, affects the extent of an insurer's liability. Apportionment is therefore an ancillary matter over which the Department has jurisdiction.

Standard of Review

Section 39-72-612(2), MCA (1989), sets forth the standard of review applicable to this appeal. It provides:

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

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

The grounds set forth in subparagraphs (d) and (e) of section 39-72-612(2), MCA, are involved in this appeal. Under (d), the Court's review is plenary since conclusions of law must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 803 P.2d 601 (1990). When reviewing a decision under the clearly erroneous standard of subparagraph (e), the hearing officer's findings of fact may be overturned on judicial review only where they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 827 P.2d 85, (1992). This Court will not reweigh the evidence; the findings and conclusions of the fact finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. Semitool, Inc.*, 252

Mont. 286, 289, 829 P.2d 1, 3 (1992). In this case all of the medical evidence was submitted by way of deposition and medical records. The standard of review is therefore broader. "Where crucial testimony is taken by deposition, the court will examine findings more closely, as it is in as good a position as the lower court to assess such evidence." *Stangler v. Anderson Meyers Drilling Co.*, 229 Mont. 251, 255-56, 746 P.2d 99, 101 (1987).

Discussion

1. Liability.

The State Fund invokes the "last injurious exposure rule" in support of its argument that Town Pump should pick up this claim. The rule is set forth in section 39-72-303, MCA (1989), and provides in relevant part:

39-72-303. Which employer liable. (1) Where compensation is payable for an occupational disease, the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazard of such disease.

State Fund argues that claimant's "heavy, strenuous, and extended work at Town Pump clearly aggravated and hastened on his underlying shoulder condition which was as yet undiagnosed." (state fund's initial brief at 5.) It argues that the proper inquiry is whether claimant was "exposed to the hazard of the disease" while employed at Town Pump. (*Id.*)

Resolution of this case involves, in part, a matter of statutory interpretation. Section 39-72-303, MCA, puts responsibility for an occupational disease on the "employer in whose employment the employee was last injuriously exposed to the hazard of such disease." The statute is plain on its face, and must be applied as written. *Blake v. State*, 226 Mont. 193, 198, 735 P.2d 262, 265 (1987). It provides not only that the last employment expose him to the "hazard of the disease" but that the exposure be the *last injurious exposure*. Thus, even though the claimant's employment with Town Pump *could* have affected his condition, the proper inquiry is whether the risks to which he was exposed *in fact* caused further injury. See *Caekaert v. State Compensation Mut. Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495, 499 (1994). In *Caekaert* the Supreme Court adopted the following test:

"[I]f the later exposure should increase the degree of disability caused by the initial exposure, the second carrier might become responsible; but in such a case it would be necessary to distinguish carefully between the increased disability from natural progress of the disease and that resulting from the added exposure." [Emphasis added.]

(*Id.* at 111, 885 P.2d at 499.) Moreover, the last employment must cause more than a trivial aggravation:

[F]or the last injurious exposure rule to apply, there must be evidence of a second injury or injurious exposure that materially or substantially contributed to [the claimant's] symptoms. [Emphasis added.]

(*Id.* at 112, 885 P.2d at 499.)

The Department's hearing officer found that claimant's job with Town Pump did not materially worsen his shoulder condition. That conclusion is supported by substantial evidence, including the medical evidence. The claimant attributed his condition to his Pizza Hut employment, failing to even mention, until it was suggested to him, his employment at Town Pump as possibly contributing to his shoulder condition. His reports to the various physicians, as well as his testimony, are strong evidence that he did not perceive any material change in his condition after he left his Pizza Hut employment. Dr. Headapohl's testimony provides further support for his contention that his Town Pump employment did not materially or significantly contribute to his condition. Indeed, only Dr. Diggs' report undermines the hearing officer's ultimate finding regarding responsibility for the claimant's condition. That report was based on the undue emphasis claimant gave his Town Pump job. That emphasis was spurred by the State Fund, which was resisting his claim, and his attorney. The hearing officer properly gave little weight to Dr. Diggs' written opinion.

2. Apportionment -- Generally.

Section 39-72-706, MCA, provides for apportionment between occupational and non-occupational factors. The responsible employer is responsible for benefits only in proportion to the degree to which claimant's occupation contributed to his disease.

The hearing officer adopted Dr. Schumann's report that claimant's occupation was 90% responsible for his condition and that nonoccupational factors were responsible for the other 10%. That determination was erroneous. Dr. Schumann wrote, "I am not aware of any specific nonoccupational disease or infirmity which contributes to his current symptoms. There is a family history of arthritis which may contribute to his predisposition to develop shoulder problems." (Ex. 21 at 11; emphasis added.) On its face, there is no basis for the allocation of 10% to nonoccupational factors.

3. Apportionment -- Medical Benefits.

Even if the hearing officer was correct in apportioning 10% of claimant's shoulder condition to nonoccupational factors, the hearing officer incorrectly held that medical benefits should be reduced by 10%. In *Davis v. Liberty Northwest Insurance Corp.*, WCC No. 9312-6974, decision and judgment, issued September 6, 1994, this Court determined that while compensation benefits may be apportioned, medical benefits may not be apportioned. I have reviewed that decision and decline the State Fund's invitation to rescind it. The *Davis* decision, which was not appealed, is binding on the Department and must be followed.

JUDGMENT

Pursuant to the foregoing discussion, it is hereby adjudged that:

1. The decision below finding the State Fund liable for claimant's occupational disease is affirmed.
2. The hearing officer's determination that 10% of claimant's disease is attributable to non-occupational factors is reversed. Upon remand the hearing officer shall enter a determination that 100% of claimant's disease is attributable to his employment and occupation.
3. The hearing officer's conclusion that medical benefits are apportionable is reversed. This Court's decision in *Davis v. Liberty Northwest Insurance Corp.*, WCC No. 9312-6974, decision and judgment, issued September 6, 1994, is reaffirmed and shall be followed by the Department until and unless the Supreme Court reaches a different conclusion.
4. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

Dated in Helena, Montana, this 21st day of May, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Charles G. Adams
Mr. Thomas J. Lynaugh
Mr. Bradley J. Luck
Ms. Christine L. Noland
Mr. Brian McCullough - Zip Mail
Submitted February 20, 1996