IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 62

WCC No. 2002-0626

KATE J. OSWALD

Petitioner

vs.

HORIZON CMS HEALTHCARE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The 48-year old claimant suffering from Hepatitis C, an infectious disease obtained through exposure to infected blood or bodily fluids, worked as a nurse's aide at the Butte Convalescent Center from 1988 through 1994, where she provided direct patient care including exposure to blood and bodily fluids through changing patients' clothes, sheets, and bandages. Claimant credibly testified that she frequently worked with open cuts on her knuckles and hands, which she attributed to frequent hand washing at work. The Center did not provide gloves or other protective clothing and she did not use gloves or other protective clothing. Claimant also credibly testified that her other employments over the years did not involve direct contact with blood or bodily fluids. In 2001, claimant was diagnosed with Hepatitis C and currently suffers from numerous symptoms of the disease. Though now single, claimant was married from 1980 through 1996. Her ex-husband, to her knowledge, has not been tested for Hepatitis C but does not have symptoms of the disease. Claimant's treating physician, Dr. Florian Cortese, concluded that since claimant does not have other risk factors, it is highly probably she contracted Hepatitis C at the Butte Convalescent Center. While she would not conclude that claimant more probably than not acquired her disease through this work exposure, Dr. Dana Headapohl, who conducted an IME of claimant, opined that the two most probable means by which claimant obtained the disease were through the work exposure or through her husband. Dr. Headapohl also credibly and unequivocally testified that Hepatitis C is acquired through a single exposure. The self-insured entity that was the final employer of claimant while she worked at the Butte Convalescent Center, Horizon CMS Healthcare Corporation, denies liability on the ground that claimant cannot prove her exposure was through employment at the facility. It also argues claimant does not suffer from an occupational disease. Both

parties agreed that whether claimant's hepatitis is the result of an industrial injury within the meaning of the Workers' Compensation Act is not currently an issue before the Court.

Held: Crediting claimant's testimony about the frequency with which she was exposed to patients' bodily fluids or blood while having open cuts on her hands, and her testimony that her ex-husband to her knowledge does not have symptoms of Hepatitis C, the Court finds claimant to have proven she more likely than not acquired Hepatitis C through working at the Butte Convalescent Center. Because the uncontroverted medical evidence establishes that Hepatitis C is acquired through a single exposure, claimant does not meet the criteria of the Occupational Disease Act and is not entitled to occupational disease benefits.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Section 39-72-102(10), MCA (1993). While the Court was persuaded the former nurse's aide who was exposed to bodily fluids and blood of patients, frequently with open cuts on her hands and not wearing gloves, acquired Hepatitis C through contact with a patient's blood or bodily fluids, her occupational disease claim is denied where uncontroverted medical evidence established Hepatitis C is acquired through a single exposure.

Occupational Disease: Disease. While the Court was persuaded the former nurse's aide who was exposed to bodily fluids and blood of patients, frequently with open cuts on her hands and not wearing gloves, acquired Hepatitis C through contact with a patient's blood or bodily fluids, her occupational disease claim is denied where uncontroverted medical evidence established Hepatitis C is acquired through a single exposure.

Causation: Medical Condition. While the Court was persuaded the former nurse's aide who was exposed to bodily fluids and blood of patients, frequently with open cuts on her hands and not wearing gloves, acquired Hepatitis C through contact with a patient's blood or bodily fluids, her occupational disease claim is denied where uncontroverted medical evidence established Hepatitis C is acquired through a single exposure.

Medical Conditions (By Specific Condition): Hepatitis C. While the Court was persuaded the former nurse's aide who was exposed to bodily fluids and blood of patients, frequently with open cuts on her hands and not wearing gloves, acquired Hepatitis C through contact with a patient's blood or bodily fluids, her occupational disease claim is denied where uncontroverted medical evidence established Hepatitis C is acquired through a single exposure.

¶1 The trial in this matter was held on October 30, 2002, in Helena, Montana. Petitioner, Kate J. Oswald (claimant), was present and represented by Mr. Bernard J. Everett.

Respondent, Horizon CMS Healthcare, Corporation (Horizon) was represented by Mr. Charles G. Adams.

¶2 Exhibits: Exhibits 1, 2, 4, 5, 7, 8, and 10 were admitted without objection. Respondent's hearsay objection to Exhibit 3 was ruled untimely and the document was admitted. Exhibit 6, OSHA Blood Pathogens standards published at 29 FR 1920.1030, constitutes legal matter which will be considered over respondent's objection. Exhibit 9 was not provided to the Court.

¶3 Witnesses and Depositions: The only witnesses at trial were claimant and Dr. Dana Headapohl. No depositions were submitted to the Court.

¶4 Issues Presented: The issues stated in the Pre-Trial Order are as follows:

> 1. Whether KATE OSWALD contracted Hepatitis C in the course and scope of her employment by HORIZON CMS HEALTHCARE, CORPORATION.
>
> 2. Whether KATE OSWALD suffers from an occupational disease.
>
> 3. Whether KATE OSWALD is temporarily totally disabled as the result of an occupational disease.
>
> 4. Whether KATE OSWALD is entitled to temporary total disability benefits.
>
> 5. Whether KATE OSWALD is entitled to medical benefits.
>
> 6. Whether KATE OSWALD is entitled to costs and attorneys' fees for insurer's failure and refusal to pay her benefits.
>
> 7. Whether the penalty provisions of § 39-71-2907, MCA, should be imposed against Respondent in this case.

(Pre-Trial Order at 2-3.)

¶5 At the commencement of trial, discussion was held concerning the possibility that claimant, if she developed Hepatitis C in the course and scope of employment with Horizon, contracted the condition through a single exposure meeting the injury definition of section 39-71-119, MCA, of the Workers' Compensation Act. Counsel for both parties agreed that the injury issue is **not** before the Court. According to representations made by counsel for respondent, Montana State Fund insured claimant's employer during most of her employment, which raises a secondary issue as to which insurer is liable for any injury.[(1)]

¶6 Having considered the Pre-Trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶7 Claimant is 48-years old and lives in Butte, Montana. She is currently single, but was married from 1980 through 1996.

¶8 Claimant was a credible witness, therefore, the history recited in the following findings reflects her testimony.

¶9 Claimant has held a variety of jobs. From 1969 through 1971, she was a runner at St. James Hospital. She then worked in various capacities for Jobs Services, a day care, Head Start, Mal's Bar, and a school district. She was not exposed to blood or bodily fluids in any of these jobs.

¶10 From 1982 through 1985, claimant worked as an activity director for Crest Nursing Home in Butte. She did not provide direct patient care and was not exposed to blood or bodily fluids. From 1985 through 1988, claimant cared for an Alzheimer's patient in the patient's home, primarily fixing meals and cleaning house. She did not provide personal care because the patient was able to take care of her own personal needs. She was not exposed to blood or bodily fluids.

¶11 From March 1988 through March 1, 1994, claimant worked as a nurse's aide for the Butte Convalescent Center (Center), where she claims to have contracted Hepatitis C. Claimant's duties included direct patient care. She washed patients, dressed them, fed them, and changed the clothing, sheets and diapers of incontinent patients. It was common for residents to have skin tears, bed sores, or blood in their feces or urine. Claimant's responsibilities included changing clothes, pads, or sheets soaked in blood or other bodily fluids.

¶12 Claimant was not aware that any patient had Hepatitis C, however, because of patient confidentiality, that sort of information was not available to her. Claimant testified that some patients had numerous tatoos and some had been transferred to the facility from the state penitentiary.

¶13 During most of her employment with the Center claimant was not provided with, and did not use, protective gloves or other protective clothing or equipment when working with patients. Gloves and protective gowns were first made available to nurse's aides by the Center during mid or late 1992.

¶14 During her employment with the Center, claimant frequently had open cuts and splits in the skin of her own hands and fingers due to frequent hand washing at work. Her knuckles and the tips of her fingers often cracked and bled.

¶15 While working at the Center, claimant did not suffer any needle or razor cuts or pricks. Such incidents are known as "sharps."

¶16 During the 1990s, claimant also worked as a clerk for Corral West clothing store and as a caller/runner for Oasis Casino. She was not exposed to blood or bodily fluids in those employments.

¶17 After leaving the Center, claimant worked for Aware, a group home for adolescents. She was not exposed to blood or bodily fluids in that work.

¶18 During 1997, claimant returned to the Center for another year and a half. During that time she used protective gloves and clothing. She recalls no time when she was exposed to blood or bodily fluids when not wearing protective gloves. She had no sharps injuries during this time.

¶19 Claimant testified she left the Center because she was beginning to have many problems. She began having frequent colds. She often felt like she had the flu. She was achy and sometimes vomited.

¶20 After leaving the Center in 1998, the claimant worked at several different jobs. She was not exposed to blood or bodily fluids, or to any sharps injuries, at any of the jobs.

¶21 Claimant had difficulty working at her last few jobs. She frequently missed work due to her health problems.

¶22 Claimant became concerned she might have hepatitis. On May 23, 2001, she went to Dr. Florian Cortese with her concerns. (Ex. 1 at 1.) He tested her for hepatitis. The test was positive for Hepatitis C. (*Id.* at 4.) Respondent does not dispute that claimant suffers from Hepatitis C.

¶23 On September 27, 2001, Dr. Cortese wrote to the insurer, opining, "Since the patient has no other risk factors, it is highly probable that she became exposed to Hepatitis C while working as a healthcare provider at the Butte Convalescent Center." He went on to note that "[h]ealth care workers are one of the at risk groups to contact Hepatitis C." (Ex. 3.)

¶24 Claimant has never used IV drugs, never had a blood transfusion, and has never been hospitalized for the disease. While she does not know if her ex-husband has ever been tested for Hepatitis C, she testified he does not have any of the symptoms associated with the disease.

¶25 Dr. Dana Headapohl, who is board certified in occupational and environmental medicine, testified at trial on behalf of the insurer. Her testimony was based on her January 29, 2002 examination of claimant and her review of claimant's medical records.

¶26 While Dr. Headapohl agrees with the Hepatitis C diagnosis, she could not say on a more probable than not basis that claimant contracted the hepatis while working for the Center, although she readily conceded that it was possible that she did. The doctor's reluctance to ascribe causation to claimant's work was due to a lack of evidence

demonstrating that claimant had come into contact with hepatitis infected patients at the Center and the possibility that she could have contracted the condition through sexual contact with her ex-husband.

¶27 Despite Dr. Headapohl's inability to ascribe causation to claimant's employment, her testimony nonetheless provides a basis for the Court to conclude on a more probable than not basis that claimant was in fact infected through contact with a patient at the Center while she was working there in the 1980s and early 1990s. The important points from her testimony are as follows:

> ¶27a Hepatitis C is an infectious disease transmitted by virus and infecting the liver. Chronic problems appear in seventy to eighty percent of those infected.
>
> ¶27b Hepatitis C is transmitted primarily through blood and bodily fluids. Transmission can be through sexual contact or sharing items such as razors or toothbrushes. In approximately fifty percent of Hepatitis C cases, the precise means of transmission is not known. There is no medical evidence that transmission may occur other than through exposure to infected blood or bodily fluids.
>
> ¶27c Nearly two percent of the United States population has Hepatitis C. Dr. Headapohl reported the incidence is not higher in healthcare workers. Of the healthcare workers who have Hepatitis C, approximately ten percent suffered a needle stick. Among non-healthcare workers with the disease, the largest source of infection is IV drug use.
>
> ¶27d A high percentage of prison inmates have Hepatitis C due to tattoos (needle stick).
>
> ¶27e While Hepatitis C is more commonly acquired by "inoculation" through needle stick or sharp objects, it can be transmitted through broken skin, such as open cuts and sores as described by claimant.
>
> ¶27f Exposure to blood and bodily fluids, as described by claimant, **was** a risk factor for claimant acquiring Hepatitis C.
>
> ¶27g The only other significant risk factor for claimant was her sexual relations with her ex-husband. While claimant has previously undergone surgery, she did not have a blood transfusion and Dr. Headapohl opined that there was very little risk of her contracting hepatitis during surgery absent a transfusion.
>
> ¶27h Contraction of hepatitis in the late 1980s or early 1990s is consistent with the known latency of the disease. Dr. Headapohl testified that less than one-fourth of those who have been exposed and have "converted," i.e., the virus begins to reproduce in the individual's body, will have an acute episode of flu-like symptoms within six to seven weeks of conversion. A person can "convert" to viral status and

have no symptoms for many years. The chronic phase of the disease frequently does not arise until years after the exposure, sometimes up to twenty years later. This leads to difficulty in pinpointing the transmission factor in a particular case.

¶27i While dermal exposure has a lower risk of infection than needle sticks or cuts from sharp objects, she also testified that she believes most studies show that infection rate through sexual contact is lower than through inoculation (such as a needle stick) or dermal contact, although infection rate may vary depending on the type of sexual contact.

¶27j Even if claimant's husband tested positive for Hepatitis C, it is possible he acquired it from claimant rather than vice-versa, thus his being infected would not rule out claimant having contracted the disease at work.

¶27k Given claimant's history, possible sources of infection other than from work at the Center and sexual transmission from claimant's husband are even less likely.

¶28 Although Dr. Headapohl was unable to medically ascribe claimant's Hepatitis C to her work at the Center, her testimony, as summarized above, demonstrates that the most likely source of claimant's disease was her exposure to an infected patient while working at the Center. Dr. Headpohl's testimony establishes that other risk factors were more insubstantial and unlikely than infection contracted at work through dermal contact with patients' blood and bodily fluids. While no specific infected patient can be identified as the source of her infection, the incidence of Hepatitis C in the general population (2%) indicates a likelihood that one or more patients at the Center had hepatitis. Moreover, since the Center had patients who had been in prison, the incidence of patients with hepatitis at the Center was more likely than not higher than the 2%.

¶29 I therefore find, on a more probable than not basis, that claimant was infected with Hepatitis C while working for the Center in the 1980s and early 1990s. Claimant is not required to rule out every other possible source of infection, she is only required to show that her work was the most likely source of infection. She has carried that burden.

¶30 However, claimant has failed to prove that she contracted hepatitis as the result of multiple exposures. Dr. Headapohl testified unequivocally and without contradiction that the likely mechanism of infection by Hepatitis C is through a single exposure; it is not contracted through cumulative, multiple exposures.

CONCLUSIONS OF LAW

¶31 Insofar as an occupational disease claim is concerned, this case is governed by the 1987-1993 version of the Occupational Disease Act, *Buckman v. Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986), since that is the period of time during which she claims to have contracted Hepatitis C. While claimant worked for respondent again in

1997-1998, she used gloves during that employment, making infection during that time unlikely.

¶32 Claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973).

¶33 Section 39-72-102(10), MCA (1987-1993), of the Occupational Disease Act states:

> "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.

In contrast, section 39-71-119(1), MCA (1987-1993), of the Workers' Compensation Act defines an injury as caused by an accident that is "caused by a specific event on a single day or during a single work shift."

¶34 On the question of whether Hepatitis C is caused by a single exposure versus cumulative, multiple exposures, the medical evidence in the record is unequivocal and without contradiction. Dr. Headapohl testified, and I am persuaded, that Hepatitis C is acquired through a single exposure. The mechanism of infection is a matter of medicine. Given this uncontroverted evidence, I am forced to conclude claimant does not suffer from an occupational disease within the meaning of the Occupational Disease Act (ODA) even though I am convinced that she acquired the disease while working for the Center in the late 1980s or early 1990s.

JUDGMENT

¶35 Claimant does not have an occupational disease within the meaning of the ODA, section 39-72-101, MCA (1993), et seq., and is not entitled to occupational disease benefits.

¶36 Claimant is not entitled to costs or attorney's fees.

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

¶38 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 December, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Bernard J. Everett
Mr. Charles G. Adams
Submitted: November 14, 2002

1. Given section 39-72-303, MCA, and the facts of this case, the complication of multiple insurers does not exist when the issue is framed as one of occupational disease. Section 39-72-303(2), MCA (1993), provides:

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

As noted below, claimant was not diagnosed with Hepatitis C until 2001, long after she left employment. There is no evidence that she knew or should have known her symptoms were the result of an occupational disease until 2001.