

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 5

WCC No. 9905-8229

TONETTE ROMERO,

Petitioner,

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Respondent/Insurer for

SUPERVALU, INCORPORATED,

Employer,

and

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

DUANE L. HOUSE, d/b/a COMMERCIAL BUILDING MAINTENANCE.

AFFIRMED IN

[Romero v. Liberty Mutual Fire Ins. Co., 2001 MT 303N](#)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant injured her right arm in a 1992 industrial accident, and ultimately developed into thoracic outlet syndrome. Thereafter, she began experiencing left arm and hand pain and numbness which her treating physician attributes to overuse of her left arm due to her inability to fully use her right arm. She developed symptoms prior to her returning to any work and has been diagnosed as suffering from thoracic outlet syndrome affecting her left arm. Claimant's physician testified that any activities requiring use of her arms causes claimant to overuse her left arm and causes her left arm to deteriorate. In November 1997 claimant went to work in the bakery at County Market in Billings. After 15 weeks her physician took her off work because of problems with both arms. Thereafter, she filed an occupational disease claim with respect to her left arm and her work at County Market. When the claim was denied she filed a petition with the Court. The first insurer (for

the right arm) was joined. **[NOTE:** The Supreme Court affirmed the WCC decision in [Romero v. Liberty Mutual Fire Ins. Co., 2001 MT 303N](#) (a non-citeable decision.)]

Held: Claimant's left arm condition is a natural progression of her 1992 industrial injury and the insurer for the 1992 injury is responsible for it. The only physician who addressed the proximate cause criteria of the occupational disease act, § 39-72-408, found that the criteria were not met. While claimant's treating physician did not address the criteria, his testimony supports that determination as it establishes that any sort of activity requiring claimant to use her arms causes deterioration of her left arm condition.

Topics:

Occupational Disease: Last Injurious Exposure. Where condition develops over a period of years as a natural progression and result of an earlier workers' compensation injury, the insurer for the earlier injury is liable even though part of the progression occurred during subsequent employment. **[NOTE:** The Supreme Court affirmed the WCC decision in [Romero v. Liberty Mutual Fire Ins. Co., 2001 MT 303N](#) (a non-citeable decision.)]

Occupational Disease: Disease. Where condition develops over a period of years as a natural progression and result of an earlier workers' compensation injury, it does not constitute an occupational disease even though part of the progression occurred during subsequent employment. **[NOTE:** The Supreme Court affirmed the WCC decision in [Romero v. Liberty Mutual Fire Ins. Co., 2001 MT 303N](#) (a non-citeable decision.)]

Occupational Disease: Proximate Cause. Where condition develops over a period of years as a natural progression and result of an earlier workers' compensation injury, even though part of the progression occurred during subsequent employment it does not constitute an occupational disease and is the responsibility of the insurer for the earlier injury since the progression was not fairly traceable to the subsequent employment and is not a natural incident of the work or business. § 39-72-408, MCA. **[NOTE:** The Supreme Court affirmed the WCC decision in [Romero v. Liberty Mutual Fire Ins. Co., 2001 MT 303N](#) (a non-citeable decision.)]

Causation: Medical Condition. Where condition develops over a period of years as a natural progression and result of an earlier workers' compensation injury, the insurer for the earlier injury is liable even though part of the progression occurred during subsequent employment. **[NOTE:** The Supreme Court affirmed the WCC decision in [Romero v. Liberty Mutual Fire Ins. Co., 2001 MT 303N](#) (a non-citeable decision.)]

¶1 The trial in this matter commenced on February 1, 2000, in Billings, Montana, but recessed after discussion with counsel. Trial thereafter reconvened on July 5, 2000, after

the State Fund was joined as an additional party to this action. Petitioner, Tonette Romero (claimant), was present and represented by Mr. James G. Edmiston. Respondent Liberty Mutual Fire Insurance Company (Liberty) was present and represented by Mr. William J. Mattix. Respondent, State Fund was represented by Mr. Michael P. Heringer and Ms. Lisa Rodeghiero Speare.

¶2 Exhibits: Exhibits 1 through 4, 8, 9, 22 through 24, 26, 28, and 29 were admitted without objection. Exhibits 5 through 7, and 10 through 20 were admitted subject to relevancy objections; if considered herein, they are deemed relevant. Exhibits 21, 25, and 27 were admitted over objections of Mr. Mattix. Exhibit 25 was admitted for limited purposes only.

¶3 Witnesses and Depositions: Claimant was sworn at both phases of the trial and testified. Larry Thomas, claims adjuster for State Fund, was sworn and testified. The parties agreed that the depositions of claimant and Richard A. Nelson, M.D., shall be considered by the Court.

¶4 Issues Presented: As set forth in the pretrial order, the issues are:

1. Whether Petitioner suffered an occupational disease of her left upper extremity (left thoracic outlet syndrome) as a result of her work in the bakery at Rimrock County Market.
2. Which insurer, if any, is responsible for Petitioner's left upper extremity problems.
3. Whether Petitioner's left upper extremity problems were caused by the February 26, 1992 injury while in the course of her employment with Commercial Building Maintenance.
4. Did Petitioner aggravate a pre-existing condition of her left upper extremity as a result of her occupational disease at County Market.
5. What benefits, if any, is Petitioner entitled to receive as a result of her occupational disease claim with County Market.
6. Is the State Fund entitled to indemnity from Liberty Mutual for any of the benefits it has paid Petitioner.
7. Whether Petitioner is entitled to an award of attorney fees and costs pursuant to *Section 39-71-611/612, M.C.A. (1997)*.

(Pretrial Order at 3.)

¶5 Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶16 On February 26, 1992, while working as a janitor for Commercial Building Maintenance (CBM), claimant injured her right shoulder. CBM was insured by the State Fund, which accepted liability for the shoulder injury.

¶17 Claimant was thereafter off work for several years while receiving workers' compensation benefits.

¶18 On November 25, 1997, she began working part time at County Market in Billings. She worked in the bakery.

¶19 Claimant's employment with County Market lasted until March 3, 1998, approximately 15 weeks. During that time she suffered increasing pain in her left arm. On March 3rd her physician, Dr. Richard A. Nelson, took her off work and she has not worked since.

¶110 Both claimant and the State Fund contend that claimant's left arm problems, which are continuing, are caused by her work at County Market and constitute an occupational disease. Claimant filed an occupational disease claim, however, County Market's insurer, Liberty, denies liability for the claim and contends that claimant's left arm problems were caused by claimant's original right arm injury for which the State Fund is at risk. It argues that the left arm problems antedate claimant's employment at County Market and are the result of her overusing her left arm due to her inability to fully use her right arm.

¶111 As provided in section 39-72-602, MCA, the Department of Labor and Industry (Department) designated Dr. Thomas L. Schumann, a member of the Department's occupational disease panel, to examine claimant. Dr. Schumann found that claimant's employment at County Market did not proximately cause her left arm condition. Based on that report, the Department issued an initial order denying the claim. The claimant then filed a petition seeking occupational disease benefits.

¶112 At trial and in her deposition the claimant testified that while she had experienced some left arm problems after an automobile accident in 1990, those problems wholly resolved prior to her 1992 industrial injury. She testified she did not thereafter experience left arm symptoms until after she began working for County Market and doing repetitive heavy lifting of trays, baking bowls, and pans. Her testimony, however, is inconsistent with medical reports showing a history of left arm complaints after 1992, including shortly prior to her employment with County Market. I do not find her testimony concerning the onset of her left arm symptoms credible or persuasive. I find her medical records more reliable in assessing her history. Based on medical records, the findings of Dr. Schumann, and the deposition testimony of Dr. Nelson, who has treated claimant continuously since April 13, 1994 (ex. 9 at RN 16-34), I am unpersuaded that claimant suffers from an occupational disease, but I am persuaded that claimant's left arm condition is a consequence of her

overuse of that arm due to her inability to fully use her right arm, therefore, it is a consequence of her 1992 industrial injury.

The 1992 Injury

¶13 Claimant went to work in 1991 for CBM as a janitor. She performed general custodian duties such as vacuuming floors, dusting, cleaning bathrooms, shredding paper, taking out garbage, and stocking paper supplies.

¶14 On February 26, 1992, claimant injured her neck, back, right arm, chest, and right shoulder. She felt a "pop" in her right shoulder while dusting. (Ex. 7; petition for hearing at 1.)

¶15 By the next day she could not move her arm (Romero Dep. at 30, 42) and went to the emergency room of the Deaconess Medical Center in Billings (ex. 16). The ER history states that she complained of "pain to her right scapular area and muscles of her [right] arm" and some "mild tingling in her right arm diffusely" (*Id.* at 3.) She was diagnosed by the ER physician as suffering rotator cuff and supraspinatus muscle strains. (*Id.*)

¶16 Dr. Richard P. Lewallen, an orthopedic surgeon, took over claimant's care, seeing her for the first time on March 5, 1992. (Ex. 11 at OA 6.) At that time, Dr. Lewallen's impression was "she has muscle inflammation and is getting some muscle spasm from this." (*Id.*) He prescribed anti-inflammatory medication.

¶17 Over the next several months, claimant continued to experience some tenderness in her right shoulder, aching and discomfort in her right arm, and tingling into her right hand despite anti-inflammatory medication, using an armband, physical therapy, and an injection of DepoMedrol and Xylocaine. (*Id.* at OA 8-10, 12.) Essentially, she did not improve. Dr. Lewallen ordered an arthrogram and EMG, however, the results of those tests were normal. (*Id.* at OA 8-9.)

¶18 In the summer of 1997, Dr. Lewallen referred claimant to Dr. Neil I. Meyer, a neurosurgeon, for a second opinion. (*Id.* at 10.) Dr. Meyer saw claimant on August 18, 1992. (Ex. 19 at 2.) His report states that claimant's complaints were of "weakness in the right shoulder, numbness in the tips of the fingers of the right hand and thumb . . . [a]lso her right arm hurts when she moves her shoulder . . . [and] [s]he has a burning feeling around the right shoulder blade." (*Id.*) In his physical examination, Dr. Meyer noted:

with her arm elevated, her fingers would start to have the pins and needles [sic] feeling. In checking her, she loses [sic] her pulse bilaterally when she attempts to raise her arms.

(*Id.*) Dr. Meyer's impression was that claimant "probably has an element of thoracic outlet syndrome on the right and may also have a suprascapular nerve entrapment." (*Id.*)

¶19 During the latter part of 1992, claimant underwent examination by three additional physicians. The physicians did not unequivocally endorse a diagnosis of thoracic outlet syndrome; on the other hand they did not rule it out.

- On September 9, 1992, Dr. Donald H. See performed a needle EMG of claimant's upper right arm. (Ex. 18.) In a pre-EMG physical examination, Dr. See noted, as had Dr. Lewallen on some previous occasions, that claimant's radial pulse in the right arm "was obliterated [lost] with the arm elevated and arm symptoms appear in a few seconds." (*Id.* at 6.) Additionally he noted a similar obliteration "on the left side but without symptoms." (*Id.*) The EMG study was normal. However, Dr. See noted that "these studies are designed to rule out neurological deficit from thoracic outlet syndrome but do not necessarily rule out a thoracic outlet syndrome." (*Id.*)
- On September 10, 1992, claimant was examined by Dr. John H. Cook, a surgeon specializing in general, vascular, and thoracic surgery. (Ex. 13 at 1.) He concluded that she had "only minimal evidence for neurovascular compression at the thoracic outlet" and that she was not a surgical candidate. (*Id.* at 1-2.)
- On December 22, 1992, claimant was examined by Dr. William S. Shaw, a specialist in occupational medicine. (Ex. 12 at BC 82.) Dr. Shaw reported that "[a]bduction, external rotation maneuver mildly diminishes the left radial pulse but not the right." (*Id.* at 84.) However, he found nonsignificant findings of thoracic outlet syndrome. His primary diagnosis was myofascial pain syndrome with a chronic pain component. (*Id.*)

¶20 Dr. Lewallen continued treating claimant throughout 1993. Claimant's complaints continued to be much the same. (Ex. 11 at OA 15-21.)

¶21 On April 16, 1993, Dr. Lewallen found claimant to be at MMI. (Ex. 11 at OA 18.) He noted that her right arm condition was "much the same," with pain and swelling. (*Id.*) He rated her impairment at 2%. (*Id.* at OA 20.)

¶22 In the summer of 1993, claimant had a baby. (Ex. 24 at 1.) This fact is significant since claimant's care of her baby is reflected in her later symptoms and medical care.

¶23 Claimant underwent a functional capacities evaluation (FCE) in September 1993. It showed her capable of light work. (Ex. 11 at OA 22; Ex. 17.) During the evaluation the claimant "indicated **she is very dependent upon her left upper extremity**" in caring for her baby. (Ex. 17 at 1, emphasis added.)

¶24 In February 1994, the State Fund requested Dr. Cook to reevaluate claimant and provide with a "definitive diagnosis and prognosis . . ." (Ex. 13 JC 4.) He did so on March 3, 1994. (*Id.* at 8-10.) In his office note, Dr. Cook noted that claimant's reported symptoms had not improved since he last examined her and that, due to pain in her right arm and

shoulder, she was using, "for the most part, **only her left arm for any significant physical activity.**" (*Id.* at 9, emphasis added.) He reported her symptoms as follows:

She has pain in the right anterior, superior, and posterior shoulder region. In addition, she has pain in the right posterior lateral neck area as well as occipital headaches. She has pain, numbness and tingling in the entire right upper extremity involving all five fingers equally. She finds that she has a hard time [falling] asleep each night and then frequently is awakened because of the pain in the shoulder, arm, forearm, and hand. She finds that she can sleep most comfortably only if she is lying on her left side with her right arm elevated on a pillow in front of her. She finds that she cannot use the arm over her head because of limited range of motion and pain in the right shoulder region when she attempts to elevate the arm. In addition, when she elevates the arm she develops a feeling of numbness in the arm.

(*Id.*) Dr. Cook found no "significant evidence for neurovascular compression at the thoracic outlet." (*Id.*) He observed that it was "difficult to find a precise diagnosis." (*Id.* at 10.) He reiterated his previous opinion that she was not a candidate for surgery.

¶25 With the approval of the State Fund, claimant then began treating with neurologist Dr. Nelson. (Ex. 9 at RN 16, 34.) He first saw her on April 13, 1994. (*Id.* at 16.) At that time, he noted that her shoulder was painful and swollen, and that there was "audible and palpable popping of the shoulder at the superior portion of the acromion and this appears to be sort of an impingement syndrome with probably the supraspinatus tendon rolling underneath." (*Id.*) His impression at the time was

that she had a shoulder impingement syndrome with bursitis, and that we were to rule out a cervical disc syndrome at C4-5 and C5-6 central and to the right side, and that she had myofascial dysfunction of the right shoulder girdle. **No evidence for thoracic outlet syndrome. However, it was difficult to test it, because she couldn't raise the arm high enough to tell.**

(Nelson Dep. at 25, emphasis added.)

¶26 On September 26, 1994, the State Fund referred claimant to Dr. Thomas R. Johnson for clarification of her diagnosis and an opinion as to whether claimant was at MMI with respect to her February 26, 1992 industrial injury. (Ex. 14 OS 1.) Dr. Johnson examined her on October 17, 1994. (*Id.* at 2.) At that time, claimant reported constant pain in her right shoulder, right arm, and right hand, and some numbness and tingling down into her hand. (*Id.* at 3.) X-rays taken of her shoulder revealed a small subacromial spur on the right side, and it was Dr. Johnson's impression that she had subdeltoid, subacromial bursitis with impingement syndrome. (*Id.*) He recommended another injection of the shoulder. (*Id.*)

¶27 On December 2, 1994, claimant returned to Dr. Nelson because of **left shoulder** complaints. Dr. Nelson noted:

At present she is having left shoulder problems now which I think are due to the fact that she has switched sides and [is] unable to utilize her right shoulder

(Ex. 9 at RN 24.) At the time of these complaints, claimant was not working but was taking care of a toddler at home. (Nelson Dep. at 87.) Dr. Nelson's notes continue:

The right shoulder injury initiated itself in 1992 and was seen by Dr. Lewallen at that time and so, therefore, **the cascade of events has gone from the Work Comp injury of 1992 causing problems with right shoulder and arm which have not yet been addressed surgically or cured switching her to exclusive use of left arm and shoulder to carry the baby and now we are in position where she is unable to utilize either one to any extent.**

(Ex. 9 at RN 24, emphasis added.)

¶28 During 1995 claimant continued seeing Dr. Nelson. In addition she also saw Dr. Johnson and Dr. David W. Shenton, who is an orthopedic surgeon and one of Dr. Lewallen's partners or associates. (Ex. 11 at OA 24.) Her medical treatment and testing during that year were for right shoulder complaints. The picture of her underlying medical condition did not become any clearer.

¶29 However, by March 21, 1996, claimant's **left arm** was again bothering her. On that date she saw Dr. Nelson, who noted that claimant's left shoulder, arm, and hand were bothering her even more than the right recently. (Ex. 9 at RN 70.) She also reported "sharp pain in her hands." (Nelson Dep. at 39.) Dr. Nelson testified that at that time it was his opinion that claimant had a thoracic outlet problem bilaterally, possibly combined with carpal tunnel. (*Id.* at 36, 40.)

¶30 Claimant saw Dr. Nelson several other times thereafter in 1996, specifically on April 25, May 23 and 27, July 17, August 15, October 14, November 11, and December 9, 1996. (Ex. 9 at RN 70, RN 74, RN 86, RN 88.) Her primary complaints were of right sided arm pain. However, Dr. Nelson noted muscle spasm in the neck and "shoulder girdle" on several of those examinations. (*Id.*) In his deposition, he explained his reference to the "shoulder girdle" was to both shoulders. (Nelson Dep. at 43.)

¶31 During 1996 the claimant worked for short periods as a housekeeper and at ShopKo. She began working at the housekeeping job in approximately July but was no longer working that job in October, when she began working for ShopKo. (Ex. 9 RN 74, RN 86.) She had difficulty doing the housekeeper job and Dr. Nelson advised her to find a lighter job. (Ex. 9 at RN 74; Nelson Dep. at 44.) Shortly after going to work for ShopKo, she reported "having problems with right hand cramping."

¶32 Dr. Nelson continued treating claimant during 1997. She continued to report both right and left arm/shoulder symptoms. On January 13, 1997, she reported pain in both

shoulders. (Nelson Dep. at 50.) On February 10 and April 7, her complaints were predominantly on the right. (*Id.* at 53.) On May 12, 1997, she had muscle spasm of the shoulder girdle, both left and right. (Ex. 9 at RN 91.) In June and July her complaints were predominantly right sided. (Nelson Dep. at 56-57.) On September 10, 1997, Dr. Nelson noted that her "**left shoulder has increased in pain due to secondary overuse since [the] right side is fairly poorly functional.**" (Ex. 9 at RN 107, emphasis added.)

¶133 On October 13, 1997, Dr. Nelson reported:

Patient having lot of headaches recently and cramping in her shoulders. **Left** hand feels weak as well as shoulder having cramping pain.

(Ex. 9 at RN 115, emphasis added.) Dr. Nelson opined at that point that claimant was suffering from low-grade thoracic outlet syndrome and that her left shoulder/arm complaints were due to overuse of her left arm on account of her inability to fully use her right arm. (Nelson Dep. at 59, 61, 64.)

The Bakery Job and Sequela

¶134 Claimant began work in the bakery of County Market on November 25, 1997. Her duties included packaging of bakery goods, stocking shelves, and cleaning, as well as some supervision of other employees. She was required to lift trays and bowls, do dishes, and wash floors. She used both hands and arms in her work but because of difficulty in using her right arm she used her left arm to a greater degree.

¶135 Within two weeks she was back to Dr. Nelson, who recorded:

Talked over the patient's physical status and she is trying now to be working in bakery at County Market on Grand Avenue. . . . She is having hard time maintaining job situation on prolonged sustained basis due to intermittent recurrence of pain that stops her working for time and then is obliged to quit work and go back into different job at later time⁽¹⁾ . . . **From point of view of her physical status it fluctuates according to activities and as one would expect [it] will become activated with overloading and create increased pain syndrome.**

(Ex. 9 at RN 115, emphasis added.)

¶136 Claimant next saw Dr. Nelson on January 7, 1998. At that time she was complaining primarily of right hand problems. (Ex. 9 at RN 115; Nelson Dep. at 66.) He prescribed a brace for her right wrist and told her that she may need some modifications at work to reduce the use and swelling of her right hand. (*Id.*)

¶137 Claimant returned to see Dr. Nelson on March 2, 1998, and reported that she was still working at County Market and was having a great deal of numbness of her hands bilaterally.

(Ex. 9 at RN 124.) Claimant did not have a pulse in either arm upon arm elevation. (*Id.*) Dr. Nelson diagnosed thoracic outlet syndrome secondary to shoulder pain. (*Id.*)

¶138 At Dr. Nelson's recommendation (ex. 9 at RN 130), claimant ceased working on March 3, 1998, and has not worked since then.

Subsequent Medical history

¶139 Following her cessation of work in March 1998, claimant's condition worsened. She continued to have both right and left arm problems. On June 9, 1998, Dr. Nelson noted that claimant's right arm symptoms were worse, but on June 30, 1998, her left arm and shoulder girdle symptoms were worse. (Ex. 9 at RN 145, RN 151.) On August 10, 1998, Dr. Nelson reaffirmed his diagnosis of bilateral thoracic outlet syndrome, greater on the right than left. (*Id.* at RN 156.)

¶140 On September 11, 1998, claimant was examined by Dr. John I. Moseley, who is a neurosurgeon. (Ex. 8 at JM 3.) Dr. Moseley noted that an EMG showed mild right carpal tunnel disease. (*Id.*) He further noted palpation above the right and left clavicle were significant for pain in the arm, much worse on the right than the left. (*Id.*) In addition, hyperabduction was severely abnormal in the right and to a mild degree on the left. (*Id.*) Sensory examination showed numbness from the right shoulder down to and including the entire hand. (*Id.*) Dr. Moseley's impressions were: (1) right thoracic outlet syndrome; (2) possible early left thoracic outlet syndrome; and (3) right carpal tunnel syndrome. (*Id.*)

¶141 On November 5, 1998, claimant was examined by Dr. Schumann, who specializes in occupational medicine. (Ex. 11 at OA 35.) Dr. Schumann, as previously mentioned, was designated to examine claimant with respect to her occupational disease claim against County Market. He diagnosed: (1) chronic cervical thoracic myofascial pain; (2) possible fibromyalgia; and (3) possible thoracic outlet syndrome. (*Id.* at OA 36.) In answering the specific questions put to him by the Department concerning claimant's claim for occupational disease, Dr. Schumann answered:

- 1) The criteria for proximate causation of an OD was not met;
- 2) Given the long antecedent history as well as the lack of improvement with over six months of abstention from work activities, it does not appear that there is a convincing direct causal connection between the conditions under which that work was performed and her current condition;
- 3) Similarly it is difficult to conclude that her current condition can be seen to have followed a natural incident of work done for four months⁽²⁾ over six months ago;
- 4) Claimant's problem cannot be fairly traced to that employment as the proximate cause; and

5) Claimant's current problems cannot be said to be incidental to the character of that business and not independent of the relation of the employer and the employee.

(*Id.* at OA 37.)

¶42 At the request of Dr. Moseley, on January 26, 1999, claimant underwent vascular testing. (Ex. 8 at JM 11.) The testing indicated:

Abnormal UE arterial evaluation demonstrating positive evidence of bilateral, left greater than right, thoracic outlet compression as described above.

(*Id.*)

¶43 On February 24, 1999, claimant returned to Dr. Cook, who had seen her in 1994, for evaluation of possible thoracic outlet syndrome. (Ex. 13 at JC 6.) Dr. Cook noted that since he first saw claimant in 1992, she now had increasing symptoms of pain, numbness, and tingling in the arms and neck bilaterally. (*Id.*) He noted that claimant's symptoms had significantly worsened over the seven years since he had last seen her and concluded that claimant's symptoms were consistent with thoracic outlet syndrome. (*Id.* at JC 7.)

¶44 Dr. Cook reevaluated claimant on December 8, 1999, just prior to thoracic outlet decompression surgery performed by Dr. Moseley. (Ex. 13 at JC 13.) His evaluation was essentially the same as on February 24, 1999, and he noted the risks attendant to the surgery and the prospects of success:

Ms. Romero is being admitted for thoracic outlet decompression. She has signs and symptoms which one might consider consistent with thoracic outlet syndrome. Her symptoms have significantly worsened over the past several years. I have discussed with her in great detail the fact that the diagnosis of thoracic outlet syndrome is one that can never be made with certainty and is for the most part one of exclusion. We have also discussed the fact that there is a very wide spectrum of results in terms of patient improvement following decompression of the thoracic outlet and that in general one might find an average of 65-70% or so of patients noting improvement following the procedure. We have also discussed the fact that it's rare for patients to develop complete and total return of normal function and comfort in the extremity in spite of a successful decompression.

(Ex. 13 at JC 13-14.)

¶45 Following Dr. Cook's evaluation, claimant underwent thoracic outlet surgery on the right side. Her trial testimony indicates she has obtained little relief from the surgery.

Dr. Nelson's Testimony

¶46 Dr. Nelson is the only physician testifying in this case. He testified that claimant's left arm problems were caused by her 1992 industrial accident. According to Dr. Nelson, the limited use of her right arm, which resulted from the accident, required her to rely more on her left arm, thus causing her to overuse her left arm. This in turn led to her developing left-sided thoracic outlet syndrome. Thus, claimant's left arm problems are a direct result and natural progression of her right arm limitations, which, in turn, are due to the 1992 injury. While claimant's work at County Market may have contributed to her condition, Dr. Nelson's testimony indicates her work was neither a significant nor unique contribution to her left arm condition. In his opinion, any activity requiring her to use her arms resulted in the overuse of her left arm, thence the development of her left arm condition. In Dr. Nelson's opinion, however, claimant's 15 weeks of work at County Market did accelerate her left arm deterioration.

¶47 In the following paragraphs, I set out portions of Dr. Nelson's deposition which provide the basis for my characterization of his testimony.

¶48 On October 13, 1997, which was prior to the claimant going to work for County Market, claimant complained of cramping in both of her shoulders and weakness in her left hand. Dr. Nelson was asked about his opinions concerning her condition at that time. He testified:

Q. Do you have an opinion, Doctor, as of the date of this examination, what was causing Ms. Romero's left hand to feel weak and her left shoulder to have cramping pain?

A. Yes, I think that this was the progression moving forward of what was to turn out to be a low-grade thoracic outlet syndrome at this time, and was going to turn out to be a full-blown one down the road.

Q. And that's your opinion to a reasonable degree of medical probability?

A. Yes.

Q. And that progression is a result of the secondary overuse caused by the fact that she's unable to use her right shoulder extensively?

A. Switching back and forth to use one to protect the other, and if it's too sore on that side, she switches to the other side. So doing that back and forth is what induces the pain to be more intense on one side than the other periodically.

Q. That's your opinion to a reasonable degree of medical probability?

A. Yes.

(Nelson Dep. at 61-62.)

¶49 Dr. Nelson testified unequivocally that the claimant's left arm problems are a consequence of her 1992 injury:

Q. Okay. And her need to overutilize that left upper extremity is -- results from the injury that she had to the right upper extremity. Is that fair?

A. That's correct.

(*Id.* at 73.)

¶50 During his deposition, Dr. Nelson was asked about further deterioration of the claimant's left arm condition since she ceased working at County Market. His testimony shows that her condition has continued to deteriorate, despite being unemployed, because her inability to fully use her right arm forces her to rely on her left arm:

Q. Has her problem since the time she stopped working at County Market been primarily with the right arm, or primarily with her left arm?

A. The problem has been always as the right arm is the worst, and that was the one that was picked on therefore to be dealt with first.

And the left arm, however, ideally should have a surgical intervention, because it is also abnormal enough that she can't function with it.

Q. Has it continued to deteriorate since the time she stopped working at County Market?

A. It has, and again, because the right side is now fairly nonfunctional, and she has to use the left side primarily.

Q. And that's causing the left side to deteriorate?

A. Yes.

Q. That's your opinion to a reasonable degree of medical probability?

A. Yes, it is.

(*Id.* at 74-75.) He testified that the further deterioration is not unexpected:

Q. Okay. After that point of in time [a May 18, 1998 examination by Dr. Williams], did her symptomology [sic] in the left hand continue to deteriorate?

A. Yes, it has.

Q. Despite the fact that she was no longer working for anyone?

A. That's correct.

Q. Is that unexpected?

A. No, it's not.

Q. Why is that?

A. The continuous problem that we've seen over the years here is that she will be utilizing the right hand, causing severe symptoms that will then cause her to switch to the left, and that will cause that to flare, and it goes back and forth and back and forth.

(*Id.* at 72.)

¶51 On the other hand, he testified that claimant's work at County Market caused a significant worsening of her condition:

Q. And given the history and findings, is it your opinion that it was a significant aggravation, the County Market experience?

A. It would have been significant in comparison to what she had several years prior to that, yes.

Q. And when you say significant compared to several years prior, would that include problems of handling her baby and problems that she might have had while she was working at ShopKo, or housecleaning?

A. Yeah. The disorder was much less intense at that time than it was after the County Market events. This is a -- as I said, a relapsing and continuing progression. Finally, once it arrives at a point where it obstructs the vessels, then the thing has become severe. And we know that that occurred within the past two years.

Q. So, Doctor, when you say "significant aggravation," in what way was it a significant aggravation?

A. Anything that has caused her to have enough muscle spasm that will produce obstruction of her vessels, which it has done, would be an aggravation.

And it links itself in time is all I can say; the beginning to the end. Most severe now in the past few years. She probably didn't even have the diagnosis of the thoracic outlet made until about 1996 or '97 as a clinical entity.

Q. So, Doctor, is it your opinion that her work at County Market permanently worsened Ms. Romero's condition?

A. Well, I think it worsened it, and what it permanently means is that since this condition fluctuates with intensity, that it has worsened to the extent that it required some surgery, but now we have, as I said, some unfortunate complications going on.

Q. I think you said earlier on questioning by Mr. Mattix that she had low-grade thoracic outlet, which ultimately went full-blown?

A. Yes.

Q. And can you put a time frame on the full-blown aspect? Would that have been subsequent to her -

A. Having the full-blown situation back in 1998, is when we began to look and see, you know, attention from the Doppler studies and Dr. Roger Williams and Dr. Moseley, Dr. Cook.

Q. Doctor, is Ms. Romero's full-blown thoracic outlet syndrome and her need for surgery related in your opinion to her aggravation at County Market?

A. Well, I'd say it's one of the links in the chain, and the most -- more recent one in the chain, you know, that we had for documentation purposes.

MS. RODEGHIERO: Could we take another just five-minute break?

(Whereupon a brief recess was had.)

. . . .

Q. And then, Doctor, with respect to the left-sided problems, is it your opinion that there problems were significantly aggravated by her work at County Market based on her testimony and your records?

A. Given her history, yes.

(*Id.* at 103-106.)

Resolution

¶52 This is a difficult case. While Dr. Nelson's evidence and the history of claimant's left arm complaints leave me with little doubt that her left arm condition was caused by her 1992 injury, Dr. Nelson's testimony indicates that her work at County Market made the thoracic outlet syndrome involving her left arm worse. However, his testimony also establishes that any activity requiring claimant to use her arms will inevitably lead to further deterioration of her left arm condition. Indeed, claimant's overuse of her left arm had already caused left sided thoracic outlet syndrome, albeit "low-grade" (Nelson Dep. at 61), before claimant started work for County Market. The case therefore turns on an application of statutory decisional law, which is more appropriately discussed in the conclusions of law that follow.

CONCLUSIONS OF LAW

¶153 The State Fund is liable for the claimant's 1992 injury, thus, its liability for the claimant's left arm condition is governed by the 1991 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Liberty's liability is governed by the 1997 version of the Occupational Disease Act. *Id.* However, the different versions of the Acts do not play a part in my decision since the legal principles under 1991 and 1997 law are the same.

¶154 The issue in this case is whether the claimant's left arm condition is due to or was aggravated by an occupational disease. The facts, as found, show that the condition did not develop as a result of the claimant's 15 weeks of work at County Market. The claimant's condition was already present when she began work at the bakery. Therefore, the claim for occupational disease benefits rests on proof of aggravation of the preexisting condition caused by the 1992 injury.

¶155 There is no question that one of the two insurers is liable in this case, the question is which one. The answer to that question involves interplay between the Workers' Compensation Act and the Occupational Disease Act, as interpreted and applied by the Montana Supreme Court.

¶156 Under the Workers' Compensation Act, the insurer liable for a work-related injury is also liable for "a subsequent injury . . . if it is the direct and natural result of a compensable primary injury, and not the result of an independent intervening cause." *Rightnour v. Kare-Mor, Inc.*, 225 Mont. 187, 189, 732 P.2d 829, 831 (1987); accord *Caekaert v. State Compensation Mut. Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495, 499 (1994) ("A later injury is compensable by the original carrier if it is a direct and natural result of a compensable primary injury, and not the result of an independent intervening cause attributable to the claimant.") (citing *Rightnour*). In *Caekaert* the Supreme Court said, "If the original injury or occupational disease was the cause of the current condition, the State Fund [the insurer for the original injury] is liable." 268 Mont. at 112, 885 P.2d at 499. Literal application of this language to the facts of the present case require a conclusion that the State Fund, as it was in *Caekaert*, is liable for the claimant's injury since Dr. Nelson's testimony establishes that the claimant's condition - thoracic outlet syndrome affecting her right arm - was caused by her 1992 injury. Indeed the condition preceded and was diagnosed prior to claimant's going to work for County Market.

¶157 The language in *Caekaert*, however, is arguably limited to the facts of that case. The claimant in that case suffered from carpal tunnel syndrome caused by the prior injury for which the State Fund was responsible. Subsequently, he was self-employed in a poultry business. This Court found that his work in the poultry business worsened his condition and therefore constituted an occupational disease which relieved the State Fund from further liability for his condition. The Supreme Court reversed, holding that the medical testimony established that claimant's subsequent carpal tunnel surgery would have been

required irrespective of his poultry work. "Because the State Fund did not offer substantial evidence that a second event or exposure caused Caekaert to undergo surgical procedures in 1992 and 1993, the Workers' Compensation Court incorrectly concluded that the last injurious exposure rule barred Caekaert's claim." 268 Mont. at 115, 885 P.2d at 501.

¶58 The "last injurious exposure rule," mentioned in the last quoted material, was discussed in *Caekaert*:

Montana statutorily recognizes a version of the last injurious exposure rule in occupational disease cases. Section 39-72-303(1), MCA, provides that "[w]here 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.*" (Emphasis added.)

We have not construed this statute, but Larson's Workmen's Compensation Law treatise states that recurrences of disabilities in occupational disease cases should be treated the same as accidental injury cases. Larson § 95.27. Larson also recognizes that:

[W]hen disability has once resulted from occupational disease, a second disability occurring under a different carrier will be chargeable to the first carrier if it is a recurrence of the first disability. *The persistence of symptoms in the meantime, and the failure to demonstrate an incident that can independently explain the second onset, are strong grounds for finding a mere recurrence....*

....

However, if 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.

Larson § 95.27 (emphasis added). The State Fund asserts that Caekaert's activity between surgeries actually and proximately caused the need for additional surgeries. The statutory language indicates that the only employer liable is the employer where the employee was last injuriously exposed. As the language from Larson indicates, the first insurance company is liable for the second disability if it is a recurrence.

To succeed in its last injurious exposure defense, the State Fund must show that the subsequent surgeries did not result from Caekaert's initial occupational disease. In other words, for the last injurious exposure rule to apply,

there must be evidence of a second injury or injurious exposure that materially or substantially contributed to Caekaert's symptoms from carpal tunnel syndrome. See *Peterson v. Eugene F. Burrill Lumber* (1983), 294 Or. 537, 660 P.2d 1058, 1061.

A later injury is compensable by the original carrier if it is a direct and natural result of a compensable primary injury, and not the result of an independent intervening cause attributable to the claimant. *Rightnour v. Kare-Mor, Inc.* (1987), 225 Mont. 187, 189, 732 P.2d 829, 830-31. If the original injury or occupational disease was the cause of the current condition, the State Fund is liable.

268 Mont. at 111-112, 885 P.2d at 499 (emphasis added). As the bolded language above indicates, the need for surgery was the critical question in *Caekaert*. If surgery was required because of claimant's subsequent work, then the last injurious exposure rule would have applied.

¶159 While surgery for claimant's left arm condition has not occurred, responsibility for medical benefits respecting claimant's left arm is still at issue. Moreover, the question remains as to which insurer is responsible for claimant's current total disability. Dr. Nelson testified that claimant's primary disabling condition is her right-sided symptoms, however, he also indicated that she is concurrently disabled by her left-sided problems. The right arm condition is the responsibility of the State Fund, thus, it is liable for her disability unless it can show that her current disability is not the result of her right arm condition. I consider these questions in reverse order.

¶160 Claimant's predominant problem remains her right shoulder and right arm condition. It is disabling irrespective of her left arm condition and was the primary reason for her ceasing her work for County Market. It was, and is, totally disabling.

¶161 Claimant and the State Fund have failed to persuade me that the left arm condition, and the disability resulting from it, is not the result of claimant's 1992 injury. While Dr. Nelson testified that the claimant's job at ShopKo worsened claimant's left arm condition, his testimony also establishes that at best it may have accelerated her condition but that deterioration of her left arm condition and disability were inevitable because any activity requiring claimant to use her arms required her to overuse her left arm, thereby aggravating the left arm condition that preexisted her County Market job.

¶162 The facts in this case are similar to those in *Burgland v. Liberty Mutual Fire Ins. Co.*, 286 Mont. 134, 950 P.2d 1371 (1997). In that case the claimant suffered a back injury. He continued working and his back condition worsened. Based upon the worsening, the insurer for the first injury argued that claimant was suffering from an occupational disease, thereby relieving it of further liability for the back condition. I determined that claimant's back condition was caused by the initial injury and the Supreme Court agreed.

Likewise, Liberty claims that Burglund's work at UPS from 1991 to 1995 constituted a secondary exposure that aggravated his lower back and caused his disability. However, the medical evidence at Burglund's trial substantially supported the Workers' Compensation Court's finding that Burglund's condition was caused by a natural progression of his 1984 injury and 1991 surgery. **While Dr. Wilson testified that Burglund's work from 1991 to 1995 may have hastened the degenerative process that Burglund experienced, he further testified that such work was not a substantial cause of the degeneration and that Burglund's low-back condition would have deteriorated even if he had not resumed his duties at UPS.** The Workers' Compensation Court's finding that Burglund's disability was caused by the 1984 injury and 1991 surgery is supported by substantial evidence. The Workers' Compensation Court correctly concluded that Burglund's disability is not an occupational disease.

286 Mont. at 137, 950 P.2d at 1372-73 (emphasis added).

¶63 In this case, Dr. Nelson gave testimony analogous to that of Dr. Wilson, indicating that the claimant's left arm condition was attributable to her 1992 right arm injury and that although her 15-week employment with County Market may have hastened a worsening of her condition, a worsening of her condition was inevitable whether or not she worked. Indeed her condition had worsened with caring for her child.

¶64 Approaching the issue from another perspective, I reach the same conclusion. Section 39-72-102(10), MCA, defines occupational disease as "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." Section 39-72-408, MCA (1997), requires that the occupational disease arise out of the employment and provides criteria for determining whether it does, providing as follows:

39-72-408. Proximate causation. Occupational diseases shall be deemed to arise out of the employment only if:

- (1) there is a direct causal connection between the conditions under which the work is performed and the occupational disease;
- (2) the disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
- (3) the disease can be fairly traced to the employment as the proximate cause;
- (4) the disease does not come from a hazard to which workmen would have been equally exposed outside of the employment;
- (5) the disease is incidental to the character of the business and not independent of the relation of employer and employee.

Dr. Schumann, who conducted the occupational disease evaluation for the Department, found that none of the statutory causation criteria were met. Dr. Nelson was not asked to address the criteria.

¶165 Recognizing that the criteria must encompass aggravation of a preexisting condition, the facts in this case nonetheless support Dr. Schumann's conclusions, especially his conclusions as to factors 2, 3, and 5. Dr. Nelson's testimony supports, rather than undermines, those conclusions.

¶166 Factor 2 requires that "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." Dr. Nelson's testimony establishes that the nature of claimant's employment did not uniquely contribute to her condition, rather any activity requiring use of her hands was destined to worsen both her left and right arm problems, both of which preexisted her work at County Market. Indeed, it was these preexisting problems which made the work significant.

¶167 Factor 3 requires that "the disease can be fairly traced to the employment as the proximate cause." Dr. Nelson's testimony establishes that the claimant's condition - both right and left arm - was fairly traceable to her 1992 injury. Dr. Nelson did not identify any unique activity associated with the County Market job which contributed to the condition. The mere use of her arms - whether occurring while caring for her child or on any job requiring use of the arms and hands - was destined to worsen her condition.

¶168 Factor 5 asks whether "the disease is incidental to the character of the business and not independent of the relation of employer and employee." In his testimony, Dr. Nelson repeatedly stated that any activity requiring the claimant to use her hands and arms worsened both her right and left arm conditions. Thus, any worsening of claimant's left arm condition was not "incidental to the character of the business" of County Market.

JUDGMENT

¶169 1. Claimant is not suffering from an occupational disease. Both her right and left arm conditions are the result of her 1992 industrial accident for which the State Fund is liable. Her petition against Liberty is **dismissed with prejudice**.

¶170 2. The State Fund is not entitled to indemnification from Liberty.

¶171 3. The claimant is not entitled to attorney fees or costs since she has not prevailed in this action.

¶172 4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶173 5. Any party to this dispute may have 20 days in which to request a rehearing from these findings of fact, conclusions of law and judgment.

DATED in Helena, Montana, this 29th day of January, 2001.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. James G. Edmiston - Faxed and Mailed

Mr. William J. Mattix - Faxed and Mailed

Mr. Michael P. Heringer - Faxed and Mailed

Ms. Lisa Rodeghiero Speare - Faxed and Mailed

Submitted: July 5, 2000

1. Dr. Nelson was apparently referring to claimant's previous attempts to work as a housekeeper and then for ShopKo.

2. Claimant actually worked from November 26, 1997, to March 3, 1998, which is 15 weeks.