

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 71

WCC No. 9903-8173

LIBERTY NORTHWEST INSURANCE CORPORATION

Appellant/Insurer

COLUMBIA CONSTRUCTION, INCORPORATED

Employer

vs.

MICHAEL STOLTZ

Respondent/Claimant.

DECISION ON APPEAL

Summary: Insurer appealed determination of DOL hearing officer that claimant suffered from an occupational disease, not an injury.

Held: Hearing officer affirmed. While the insurer's counsel's questioning tried to make it appear that claimant's pain resulted from one incident, a complete reading of claimant's testimony shows that while there may have been one day on which claimant began experiencing pain, it was not associated with a specific event or incident. Physician's testimony suggests it is more probable that lifting over several days led to the condition, making it an occupational disease.

Topics:

Causation: Injury. While the insurer's counsel's questioning tried to make it appear that claimant's pain resulted from one incident, a complete reading of claimant's testimony shows that while there may have been one day on which claimant began experiencing pain, it was not associated with a specific event or incident. Physician's testimony suggests it is more probable that lifting over several days led to the condition, making it an occupational disease.

Injury and Accident: Accident. While the insurer's counsel's questioning tried to make it appear that claimant's pain resulted from one incident, a complete reading of claimant's testimony shows that while there may have been one day on which claimant began experiencing pain, it was not associated with a specific event or

incident. Physician's testimony suggests it is more probable that lifting over several days led to the condition, making it an occupational disease.

Injury and Accident: Causation. While the insurer's counsel's questioning tried to make it appear that claimant's pain resulted from one incident, a complete reading of claimant's testimony shows that while there may have been one day on which claimant began experiencing pain, it was not associated with a specific event or incident. Physician's testimony suggests it is more probable that lifting over several days led to the condition, making it an occupational disease.

Occupational Disease: Disease. While the insurer's counsel's questioning tried to make it appear that claimant's pain resulted from one incident, a complete reading of claimant's testimony shows that while there may have been one day on which claimant began experiencing pain, it was not associated with a specific event or incident. Physician's testimony suggests it is more probable that lifting over several days led to the condition, making it an occupational disease.

¶1 This is an appeal from a Department of Labor and Industry (Department) decision finding that Michael Stoltz (claimant) is suffering from an occupational disease.

Record Below

¶2 The only witness testifying at the hearing below was the claimant, who testified by telephone. The hearing transcript amounts to 15 pages. All other evidence was presented by way of documentary exhibits and depositions, specifically those of Larry Luce, Richard Brian Trinastich, Randale C. Sechrest, M.D., Michael Righetti, M.D., and the claimant.

Facts

¶3 Claimant, who is forty-three years old, has a long history of back problems. In 1984, while employed by Plum Creek Timber Company (Plum Creek), he suffered an industrial injury to his back. Following the injury, he continued to work in pain for almost eleven months. The pain became progressively worse and included right leg pain. In April 1985, claimant underwent surgery described as "EXCISION LATERAL PROTRUDING DISC L5-S1." (Ex. C at 1, 10, caps in original.)

¶4 Claimant returned to work following his 1985 surgery and continued to work for Plum Creek until sometime in late 1987 or early 1988, at which time he began working for Columbia Construction, Inc. (Columbia). Over the next decade claimant continued working, although with chronic low-back pain. (Tr. at 9.)

¶5 In August of 1995, claimant acutely experienced increased low back pain and renewed right leg pain. He was treated by Dr. Michael Righetti, an orthopedic surgeon. (Righetti Dep. Ex. 1.) Following failed attempts at more conservative treatment, on November 1, 1995, Dr. Righetti performed a second surgery at the L5-S1 level, which he characterized as a

"Revision L5-S1 lumbar laminectomy with foraminotomy and discectomy, right side, L5-S1." (*Id.* at 3.) The surgery was the result of a non-work related aggravation and no claim for compensation was ever filed by claimant.

¶6 Claimant returned to work at Columbia following this surgery and thereafter worked until December 1996. However, in November 1996 he experienced renewed, acute symptoms. Claimant described the onset of his symptoms as occurring over several days while working on a project at Stoltze Lumber Company (Stoltze Lumber) in November 1996. He could not identify a single event as giving rise to his acute symptoms. In a January 16, 1997 statement given to Liberty's adjuster, he responded to the adjuster's questions regarding the onset of his symptoms as follows:

CS: And is this something that occurred on one shift or is it something you noticed occurring over a period of time?

MS: Well, I noticed it on the second day I was there. You see with my back, and it's always been this way, I've had back problems before. It wasn't like a broken leg, you know where you just, boom, so I started thinking, "Okay, I've aggravated it again, so I better start taking it easy." Then it just kept getting worse. It wasn't like, like right now, I just noticed it aching and it just kept getting worse on me.

CS: Okay, and did that occur on one shift that you noticed it was really hurting you?

MS: It was the first day we were there when it started. We were there four days and by the fourth day I was noticing it, yeah.

(Stoltz Dep. Ex. 2 at 5.)

¶7 Claimant's deposition testimony concerning the onset of acute symptoms in November 1995 was consistent with his report to Liberty's adjuster. He could not identify a moment in time when he knew that he had reinjured his back. (Tr. at 10; Stoltz Dep. at 22-23.)

¶8 Claimant continued to work until December 16, 1996, when he finally "had enough." (Stoltz Dep. at 20.)

¶9 On January 2, 1997, he returned to Dr. Righetti, who had performed the 1995 surgery. Dr. Righetti's office note of that date records:

Mike has slowly deteriorated after his laminectomy. He did great for the first several months and now has developed at least as much pain as he had previously. There has been several events including trying to go back to manual (sic) labor that may have contributed. He was feeling great until actually going back to work, about six weeks ago, he was lifting too much iron at Stoltze Lumber and had acute pain in his right leg. He comes in today needing more medication and a recheck.

(Ex. A at 6.) Dr. Righetti's impression at this time was that the claimant "has either re-herniated a disk or really aggravated some scar tissue." (*Id.*)

Dr. Righetti ordered MRI, which revealed:

RECURRENT LARGE 6 MM 5-1 DISC HERNIATION ABUTTING THE ORIGIN OF THE RIGHT S1 NERVE ROOT WITH MODERATE POST OP FIBROSIS AND MODERATE FACET HYPERTROPHY AT THIS LEVEL. FINDING REPRESENTS SIGNIFICANT INTERVAL CHANGE SINCE 8-15-95.

(Ex. A at 5; capitalization in original.) Dr. Righetti testified the finding represented a "new disk" problem. (Righetti Dep. at 18-19.)

¶10 Dr. Righetti was asked his opinion concerning the cause of the new, January 1997 finding. He answered:

A My opinion is, on a more probably than not fashion and a more probably than not indication, that the lifting done six or so weeks previously reherniated another piece of fragmented disk at L5-S1.

(Righetti Dep. at 18.) He testified that the latest finding represented a discrete event. (*Id.* at 19.) He recommended addition surgery involving further excision of the disk at the L5-S1 level and fusion at the same level. (*Id.* at 20.)

¶11 During Dr. Righetti's deposition, Liberty's counsel probed the doctor further about the cause of claimant's latest disk herniation. He asked whether the claimant's condition was an acute event or brought on by days of lifting as described by the claimant. Dr. Righetti responded:

A He [claimant] described it to me as several events. He was doing well, and he defined it over a short period of time, indicating that one of those - - It would be my feeling that it's more probable than not that one of those events, rather than repetitive activities, caused this recurrent disk herniation.

(Righetti Dep. at 21.)

¶12 Based on the recurrence of his back condition, claimant filed an occupational disease claim on January 2, 1997. (Stoltz Dep. Ex. 1.) In the claim he stated that he suffered a back injury while "Packing planks & steel at Stoltze Lumber mill. Too much lifting and bending." (*Id.*) He listed a date of injury of November 12, 1996. (*Id.*)

¶13 Liberty contested the claim and the Department designated Dr. Randale C. Sechrest to evaluate the claim. Dr. Sechrest performed his examination on January 8, 1998 and reported to the Department:

I think his current occupation at the time he was injured and up to this point, has contributed to his resulting low back pain with segmental instability and recurrent disc herniation.

ASSESSMENT: To answer your questions, I do feel that this gentlemen **is suffering from an occupational disease** and I feel that his employment and his past history of injuries; both in 1985 and 1995, have contributed to his current symptoms. I feel that there is a direct causal connection between the conditions and the occupational disease. . . . I do feel that he is disabled if he has no further surgical intervention at this point. (Emphasis added.)

(Ex. B at 2; Sechrest Dep. Ex. 1 at 2.)

¶14 In his deposition, Dr. Sechrest provided his opinions regarding the causation of the claimant's condition.

A. I do not think that his symptoms today are the result of a single injury. At the point, I think that his symptoms today really began in 1985 with that injury. I mean the risk of having this, having the symptoms that he had today actually began in that point in time. And I think that all the things that you have identified have collaborated so to speak in giving him the symptoms that he has today.

I think what makes this case difficult is to try to extract out one event at this point is very difficult from a medical standpoint and assume that what he is dealing with right now is an isolated event. If it was a fractured tibia or something like that, I think it would be much different. But no, I don't think that what he exhibits today can be traced to one sole event as the sole contributing cause of his current symptoms. Is that clear?

(/d. at 15-16.) Dr. Sechrest did state during deposition that he would defer to claimant's treating physician, Dr. Righetti, regarding the claimant's condition and cause. (Sechrest Dep. at 11.)

Decision Below

¶15 During the proceeding below, Liberty argued, as it does on appeal, that the evidence demonstrates that claimant suffered a work-related injury, not an occupational disease. The hearing examiner was unpersuaded by the argument and found that claimant suffered from an occupational disease since it was work related and did not arise from a single, identifiable event during one work day. Liberty appeals.

STANDARD OF REVIEW

¶16 Section 39-72-612(2), MCA (1987), provides the standard of review applicable to this appeal. It provides in relevant part:

The judge may overrule the division only on the basis that the division'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.

Under the clearly erroneous standard of subparagraph (e), the hearing examiner's findings of fact must be overturned on judicial review 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, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA). The Court will not reweigh the evidence, *Nelson v. EBI Orion Group*, 252 Mont. 286, 289, 829 P.2d 1 (1992), however, the Court is in as good of position as the hearing examiner to review medical opinions provided by way of depositions and will therefore review them *de novo*. See *Stangler v. Anderson Meyers Drilling Co.*, 229 Mont. 251, 255, 746 P.2d 99, 101 (1987). Conclusions of law, must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 474-75, 803 P.2d 601 (1990).

DISCUSSION

¶17 Liberty does not dispute that claimant's latest aggravation is work-related, rather it urges that it constituted an industrial accident. It supports its argument with Dr. Righetti's opinion that the latest herniation occurred as a result of "one event" and with selected portions of claimant's depositions which it construes as indicating the condition arose in a single, identifiable event.

¶18 The Workers' Compensation Act defines injury at section 39-71-119(2), MCA, (1995):

- (2) An injury is caused by an accident. An accident is:
 - (a) an unexpected traumatic incident or unusual strain;
 - (b) **identifiable by time and place of occurrence;**
 - (c) identifiable by member or part of the body affected; and

(d) **caused by a specific event on a single day or during a single work shift.**

[Emphasis added.]

¶19 The Occupational Disease Act defines an occupational disease at section 39-72-102(10), MCA, 1995.

(10) "Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift. The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity.

¶20 Neither Dr. Righetti, claimant, nor anyone else identified any traumatic event or strain occurring at an "identifiable time and place" during any single shift of work. At best, claimant was able to say that his pain began on one day during the Stoltze Lumber project. Liberty's attorney questioned claimant at length on this point (Stoltz Dep. at 20) and has tried to make it appear that there was a single, identifiable event satisfying the injury definition. A complete reading of claimant's testimony, however, shows that while there may have been a specific day on which claimant began experiencing pain, it was not associated with a specific event or incident and that claimant's condition worsened on the ensuing days.

Q When you were working on this [Stoltze Lumber] project, remodeling the sorter, if I remember your testimony earlier, you began packing planks and moving steel the very first day on that project?

A Yes.

Q Is that the day you first noticed the back problems?

A I don't remember.

Q But it was one of the four days?

A Yeah.

Q Okay. During one of those shifts, whatever day it was, you knew you were having back problems; would that be accurate?

A I could -- My back was **starting** to hurt me.

Q Did you associate the back pain with lifting the steel and the planks?

A Yes.

(Stoltz Dep. at 20.)

Q But do you think you continued to aggravate your back however many number of days that were after the first day of aggravation?

A Yes.

(*Id.* at 22.) And during the hearing, claimant testified:

THOMAS: Let's talk about the incident that led to this hearing. Was there in your mind a crystal clear moment in time in which you knew that you had re-injured your back as you knew during your first injury at Plum Creek?

STOLTZ: No.

(Tr. at 10.)

¶21 While Dr. Righetti was of the opinion that the new herniation occurred as a single event, his testimony is not conclusive and the evidence must be viewed as a whole. See *Plainbull v. Transamerica*, 264 Mont. 120, 126, 870 P.2d 76, 80 (1994). In *Plainbull* the Court addressed the manner of proof in an injury case, saying as follows:

Under our present statutory scheme, all that the legislature has required of a claimant is that he establish that it is "more probable than not" that his injury or aggravation of a preexisting condition occur out of and in the course of his employment and, implicitly, under the case law, that the injury cause the condition for which he is seeking workers' compensation benefits. Whether the claimant chooses to meet that burden with medical evidence, non-medical evidence or a combination of both, is up to him and, obviously, depends on the facts and circumstances of his particular case, the nature of the claimed injury, and the evidence available.

Id. The same rule applies where a claimant pursues occupational disease benefits.

¶22 If injured, a claimant is required to report the injury to his employer, § 39-71-601, MCA. In this case how could he report an injury if he was unaware of any single incident or strain, only that his back began hurting and over ensuing days got worse to the point that he was unable to work? While Dr. Righetti thought a single event was the cause, he could not identify such event and his testimony **did not exclude** the possibility claimant's activities over two or more days cumulatively caused his condition. Moreover, Dr. Righetti's testimony that claimant's condition gradually deteriorated over a six week period following his lifting on the Stoltze Lumber project (Righetti Dep. 21:23-25; 22:1-18) gives credence to claimant's testimony that he could not identify a single event or strain as giving rise to his condition:

Q Perhaps just a question. Dr. Righetti, my name is Ken Thomas. I represent Ken Stoltz. I, too, am looking at your January 2nd, 1997 interim note. You indicate in the

first sentence that Mike slowly deteriorated after his laminectomy. If you can, could you flesh that out just a little bit for me? What does that deterioration mean, and what was given to you in the history that would indicate a slow deterioration?

A That deterioration in my mind, having to reflect back on the record, relates to the deterioration that I feel occurred during the six or eight weeks following the events of lifting that is mentioned here, for in the very next sentence it says, He did great for several months and now has developed at least as much pain as he had previously, and then I explained when that pain seemed to start, which was in the range of six weeks prior to this visit. So his deterioration - his gradual deterioration would be over that six-week period of time.

There is ample evidence to support a finding that claimant's latest work-related back condition is properly cognizable as an occupational disease rather than an injury.

ORDER

¶23 1. The hearing officer's determination that claimant suffers from an occupational disease is supported by substantial evidence. The decision below is **affirmed**.

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

¶25 3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration from this Decision on Appeal.

DATED in Helena, Montana, this 9th day of November, 1999.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Larry W. Jones

Mr. Kenneth S. Thomas

Date Submitted: July 6, 1999