IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 38

WCC No. 2003-0831

UNINSURED EMPLOYERS' FUND

Petitioner

vs.

KEITH GRANT d/b/a THE CABINET SHOP

Respondent/Employer

IN RE: DAVID R. STONEMAN

Claimant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

APPEAL DISMISSED 12/22/04

Summary: Uninsured Employers' Fund (UEF) commenced action for indemnification of benefits it paid to a worker of an uninsured employer. The worker suffered a shoulder impingement condition which he alleged arose out of his employment at a cabinet fabrication shop. The UEF accepted liability for his condition.

Held: The UEF is entitled to indemnification. A preponderance of the evidence establishes that claimant's shoulder impingement condition is an occupational disease. Moreover, in an uninsured employer case, the uninsured employer has both the burden of production and the burden of persuasion to show that the claim was not compensable. The Workers' Compensation Court decision in *Garcia v. Uninsured Employers' Fund,* 1998 MTWCC 53 regarding burden of persuasion is overruled. In this case the employer satisfied neither burden.

Topics:

> **Proof: Sufficiency.** Unsworn and unsupported accusations of an uninsured employer regarding causation of a claimant's condition are entitled to no weight, especially where the evidence indicates that the employer has attempted to evade workers' compensation insurance requirements.

Proof: Causation. Where the sole evidence concerning causation is in the form of a written opinion of a physician, the opinion must be read in context. Where the opinion is focused on distinguishing between an injury and occupational disease, the physician's failure to use precise language regarding medical certainty or medical probability is not fatal to a reading of the opinion as finding causation.

Proof: Burden of Proof: UEF Cases. Where an employer disputes the decision of the Uninsured Employers' Fund accepting liability for a claim, the employer bears both the burden of producing evidence and the burden of persuasion with respect to the non-compensability of the claim. The Workers' Compensation Court decision in *Garcia v. Uninsured Employers' Fund,* 1998 MTWCC 53 regarding burden of persuasion is overruled.

Cases Discussed: *Garcia v. Uninsured Employers' Fund,* 1998 MTWCC 53. Where an employer disputes the decision of the Uninsured Employers' Fund accepting liability for a claim, the employer bears both the burden of producing evidence and the burden of persuasion with respect to the non-compensability of the claim. The Workers' Compensation Court decision in *Garcia v. Uninsured Employers' Fund,* 1998 MTWCC 53 regarding burden of persuasion is overruled.

Uninsured Employers' Fund: Burden of Proof. Where an employer disputes the decision of the Uninsured Employers' Fund accepting liability for a claim, the employer bears both the burden of producing evidence and the burden of persuasion with respect to the non-compensability of the claim. The Workers' Compensation Court decision in *Garcia v. Uninsured Employers' Fund,* 1998 MTWCC 53 regarding burden of persuasion is overruled.

Uninsured Employers' Fund: Indemnification. Where an employer disputes the decision of the Uninsured Employers' Fund accepting liability for a claim, the employer bears both the burden of producing evidence and the burden of persuasion with respect to the non-compensability of the claim. The Workers' Compensation Court decision in *Garcia v. Uninsured Employers' Fund,* 1998 MTWCC 53 regarding burden of persuasion is overruled.

Uninsured Employers' Fund: Indemnification. The Uninsured Employers' Fund is entitled to indemnification from the uninsured employer where medical evidence establishes that the claimant is suffering from an occupational disease and in any event the uninsured employer failed to produce evidence to establish or persuade the Court that the claimant's condition was not work related.

Appeals to Workers' Compensation Court: Timeliness. Where, within the ninety days provided in section 39-71-520, MCA (1993-2003), an uninsured employer fails to appeal a determination of the Uninsured Employers' Fund finding that a claim is

compensable, the uninsured employer is barred from thereafter litigating that issue in an action by the Uninsured Employers' Fund seeking indemnification from the employer.

Uninsured Employers' Fund: Indemnification. Where, within the ninety days provided in section 39-71-520, MCA (1993-2003), an uninsured employer fails to appeal a determination of the Uninsured Employers' Fund finding that a claim is compensable, the uninsured employer is barred from thereafter litigating that issue in an action by the Uninsured Employers' Fund seeking indemnification from the employer.

¶1 The trial in this matter was held in Missoula, Montana, on January 20, 2004. Petitioner was represented by Mr. Kevin M. Braun. Respondent, Keith Grant, was represented by Mr. Dustin Chouinard. The claimant was represented by Mr. Robert K. Ogg.

¶2 Exhibits: Exhibits 1 through 22 were admitted without objection.

¶3 Witnesses and Depositions: Bernadette Rice, David Raymond Stoneman, James Douglas Anderson, and David Wegan testified. No depositions were submitted.

¶4 Issues Presented: The issues as set forth in the Pre-trial Order are as follows:

> ¶4a Did David Stoneman have a compensable occupation disease arising out of or contracted in the course and scope of his employment with Keith Grant d/b/a Cabinet Shop?
>
> ¶4b If so, was Keith Grant d/b/a Cabinet Shop the employer in whose employ Stoneman was last injuriously exposed to the hazard of disease?
>
> ¶4c If so, was Keith Grant d/b/a Cabinet Shop and [sic] "uninsured employer" at all time pertinent to David Stoneman's occupational disease?
>
> ¶4d If so, is Keith Grant d/b/a Cabinet Shop statutorily responsible for reimbursing the UEF for all benefits paid and to be paid on David Stoneman's claim?
>
> ¶4e Alternatively, if Keith Grant d/b/a Cabinet Shop is not responsible for David Stoneman's claim, should the UEF be ordered to reimburse Keith Grant for his cost of suit and attorney's fees in relation to this matter?
>
> ¶4f Alternatively, if Keith Grant d/b/a Cabinet Shop is not responsible for David Stoneman's claim, should David Stoneman be ordered to reimburse the UEF for all benefits paid to him or on his behalf by the UEF?

(Pre-Trial Order at 2.)

¶5 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

¶6 This case involves the claim of David Stoneman (claimant). The claimant suffers from right shoulder impingement, which he alleges arose during employment with Keith Grant (Grant). Grant was uninsured and the claim was therefore submitted to the Uninsured Employers' Fund (UEF), which accepted liability for the claimant's shoulder condition. UEF now seeks indemnification from Grant.

¶7 Credibility questions are resolved in accordance with the following findings of fact. I found the claimant credible despite Grant's attack on his character.

¶8 Grant operates a cabinet shop in Missoula. Appropriately, it is known as "The Cabinet Shop" (Cabinet Shop). Since it is a sole proprietorship, I will hereinafter refer to its owner (Grant).

¶9 Over the years, Grant has maintained workers' compensation insurance only sporadically. He was uninsured from January 1, 1994 to September 17, 1996, again from December 13, 1996 to February 25, 1998, and then again from March 12, 2000 until September 21, 2002. (Ex. 7.) His shop foreman has an independent contractor exemption and claims that he is "self-employed." Moreover, in a response to an unemployment claim by the claimant, Grant told an investigator for the Unemployment Insurance Division that all of his workers were "paid a % of the take on the product and are self-employed." (Ex. 12 at 9.) These facts strongly indicate that Grant has attempted to evade workers' compensation laws. In that light, and in light of the fact that Grant chose not to testify at trial, I give no weight to his accusations of fraud against the claimant. The accusations are found in the exhibits in this case. They are uncorroborated and unsworn, and there is good reason to doubt them.

¶10 Grant employed the claimant from 1996 through early 2001. The claimant worked primarily as a sander although he also did some other jobs. A coworker described the claimant as the best sander he had ever seen, characterizing him as "a machine." The claimant's sanding involved a great deal of movement of his right arm and his right arm experienced a great deal of vibration from the sander.

¶11 In February 2000 the claimant experienced a snapping sensation and pain in his right shoulder while installing a sled on a table saw at work. However, the pain resolved after a couple of days and the claimant did not seek medical care.

¶12 However, over the next several months the claimant experienced renewed right shoulder pain. On September 28, 2000, his pain became so severe that he could not pull the trigger on a drill.

¶13 On October 2, 2000, the claimant went to his family physician for his shoulder pain. The claimant reported that his shoulder pain has been bothering him for nearly six months intermittently. It will start to bug him a little bit and he will take it easy on it and it will go away for about a month or so and then come back.

(Ex. 13 at 1.)

¶14 The claimant continued to work but with right shoulder pain. Medical records of November 8, 2000, December 7, 2000, and December 15, 2000, all indicate that he continued to have shoulder pain, and on December 15, 2000, his physician ordered shoulder x-rays.

¶15 Because of his continuing shoulder pain, the claimant was referred to Dr. Colin G. Sherrill, an orthopedic surgeon. Dr. Sherrill first saw the claimant on January 8, 2001. At that time, the claimant reported the following history:

> **HPI:** David Stoneman is a 47yo white male who presents for initial evaluation of right shoulder pain. He initially had a shoulder strain-type injury while at work. He is a cabinet maker. This occurred approximately a year ago and he states the symptoms lasted for several weeks but then resolved. He then recently--in the last three months--noticed the spontaneous onset of right shoulder pain mostly superiorly and radiating down the lateral aspect of his upper arm with no specific injury. He denies any previous problems, denies any numbness, tingling, or sensation of weakness. He is right-hand dominant.

(Ex. 14 at 2.) The history is consistent with prior medical records and the claimant's testimony. Dr. Sherrill diagnosed "Impingement of the right shoulder" and prescribed a Celestone injection into the shoulder and a course of physical therapy. (*Id.*)

¶16 Despite the injection and commencing physical therapy, eight days later the claimant was back to see Dr. Sherrill, complaining that the effects of the shoulder injection had worn off and his shoulder pain was as bad as previous. (*Id*. at 3.) Dr. Sherrill advised surgery. (*Id*.)

¶17 Based on various statements made in connection with a subsequent unemployment benefits application, sometime in January the claimant got into a tiff with Grant over the filing of a workers' compensation claim. Grant vehemently resisted his doing so. (*See* Ex. 12 at 7.) The claimant proceeded to do so anyway: On January 29, 2001, the claimant filled out and filed a claim for compensation with respect to his right shoulder pain. (Ex. 1.) In his January 29, 2001 claim for compensation, the claimant stated that his shoulder had been

bothersome for several months. On Sept. 28th I was installing hardware into cabinets. My shoulder pain became so severe I couldn't hold the drill.

(*Id*.)

¶18 On the same day he filed his claim, the claimant quit work and reported Grant to the Fire Marshall for violations on fire safety regulations governing the use of paint in the cabinet shop. (Exs. 1, 12, and 8.)

¶19 Since Grant was uninsured, the January 29, 2000 claim for compensation was forwarded to the UEF, which undertook an investigation of the claim. The UEF initially agreed to pay benefits under a reservation of rights, § 39-71-608, MCA. (Ex. 10.) It requested an opinion by Dr. Sherrill concerning the work-relatedness of his shoulder impingement syndrome. Bernadette Rice, the UEF's claims adjuster, apprized Dr. Sherrill of the history reported by the claimant, and specifically of the claimant's report of the February 2000 incident at work, the resolution of his pain shortly after the incident, and the later onset of shoulder pain which led to him seeking treatment in October 2001. (Ex. 9.)

¶20 Dr. Sherrill replied on March 15, 2001. He wrote in relevant part:

> In response to your questions on patient David Stoneman, the radiographic findings usually develop over a long period of time, i.e., in other words months to years, and the bone spurs that I described do not occur with one specific injury. However, the irritation of his rotator cuff certainly could have occurred with one particular injury or motion as the rotator cuff impinged on these bone spurs. I think the rotator cuff tendinitis and possible rotator cuff tear could certainly develop with repeated activities such as may be a part of being a sander.
>
> . . . .
>
> I think likely David is going to have troubles performing his current job with his shoulder as it is. His first attempt at seeking medical treatment was in October whereas the first time I saw him was in January. His disability as a sander was most likely begun sometime around the time of his visit with me, although I am not in a position to more accurately determine that. I do feel that he is able to perform certain occupations or certain activities, although repetitive shoulder and arm use especially at or above shoulder level would be very difficult for him and probably should not be attempted until he is treated operatively.

(Ex. 11.)

¶21 The claimant underwent shoulder surgery on April 25, 2001, consisting of "arthroscopy of the right shoulder with debridement of a partial thickness rotator cuff tear, subacromial decompression, and distal clavicle excision." (Ex. 14 at 4.)

¶22 One of Grant's contentions is that the claimant injured his shoulder in a water slide accident. The contention is unsupported and I reject it. David Wegan, Grant's foreman at the time of the claimant's employment, and who claims to have been "self-employed" despite working as a "foreman", wrote a statement dated February 22, 2001, in which he said that the claimant "complained about his shoulder hurting when he came in one Monday after going to Fairmont Hotsprings swimming." (Ex. 5.) At trial, however, he recalled that the claimant had complained "just a little bit" about his shoulder following some swimming. Then he said he really could not remember anything about it and that he must have written the statement at Grant's request.

¶23 James Anderson, another of Grant's workers, also wrote a statement at Grant's request. In it he said that he "DID NOT WITNESS ANY SPECIFIC ACTIVITY OR ACTIVITIES THAT RESULTED IN CONDITION OF CLAIMANT." (Ex. 6, capitalization in original.) But at trial he testified that the sort of work the claimant did "takes a toll after a while." (Trial Test.)

¶24 While Dr. Sherrill does not address the specific criteria for an occupational disease, and might have been stronger in terms of medical probability, his opinions must be read in context. In context, he was addressing whether the claimant suffered from an injury on a specific date (the February 2000 incident) or from an occupational disease. He found it more likely that the claimant's condition was due to long term occupational factors and not to a specific injury. Grant has presented no contrary evidence.

¶25 Based on Dr. Sherrill's reply, on October 11, 2002, the UEF accepted liability for the claim as an occupational disease but did so under a continuing reservation of rights pending the employer's right of appeal. (Ex. 16.) On the same date - October 11, 2002, the UEF also notified Grant of its determination of the compensability and his right to appeal its determination within ninety days. The Court has no record of a timely appeal. The present action was not brought by Grant but by the UEF, and then not until July 11, 2003, nine months after the UEF determination.

¶26 Since the information it received concerning the claimant's reasons for quitting his employment on January 29, 2001, indicated the claimant did not quit on account of his shoulder condition, the UEF did not commence payment of indemnity benefits until March 15, 2001, the date of Dr. Sherrill's letter. In that letter, Dr. Sherrill indicated the claimant should not be performing his job at the Cabinet Shop. (Ex. 11.)

¶27 Subsequent to the claimant's shoulder surgery, Dr. Sherrill disapproved the claimant's return to work in his old job with the Cabinet Shop. (Ex. 19 at 5.) A vocational analysis determined that jobs in which he might be placed without retraining pay $6.50 to $7.50 an hour in comparison to his $10.00 an hour wage at the Cabinet Shop. Following that determination, on March 24, 2003, the UEF began paying the claimant biweekly benefits under section 39-72-705, MCA, noting that it might have to redetermine those benefits based on the ultimate decisions on appeal in *Stavenjord* and *Schmill*. Section 39-72-705,

MCA, provides for up to $10,000 in occupational disease cases where the claimant suffers permanent disability but is not permanently totally disabled. In *Stavenjord v. Montana State Fund,* 2003 MT 67, 314 Mont. 466, 67 P.2d 229, the Supreme Court held that a claimant suffering from an occupational disease is entitled to the permanent partial disability benefits available to workers suffering work-related *injuries* if those benefits are greater.

¶28 As of the date of trial, the UEF had paid a total of $34,945.74 in medical and indemnity benefits. It estimated its remaining liability at $9,313.0 for permanent partial disability and medical benefits.

CONCLUSIONS OF LAW

¶29 This case is governed by the 1999 version of the Montana Occupational Disease Act (MODA) since that was the law in effect at the time the claimant's condition was diagnosed and he filed his claim. *Fellenberg v. Transportation Ins. Co.,* 2004 MTWCC 29, ¶ 36 and *see Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶30 At the time the claimant's shoulder condition became symptomatic, at the time it was diagnosed as an occupational disease, and at the time the claimant filed his claim for compensation, Keith Grant was uninsured.

¶31 On October 11, 2002, the Department of Labor and Industry (Department) made a final determination of compensability of the claim in this case. On that date it notified Grant of its determination and his right to appeal within ninety days. That right to appeal is governed by section 39-71-520, MCA (1993-2003), which provides:

> **39-71-520. Time limit to appeal to mediation -- petitioning workers' compensation court -- failure to settle or petition.** (1) A dispute concerning uninsured employers' fund benefits must be appealed to mediation within 90 days from the date of the determination or the date that the determination is considered final.
> (2)(a) If the parties fail to reach a settlement through the mediation process, any party may file a petition before the workers' compensation court.
> (b) A party's petition must be filed within 60 days of the mailing of the mediator's report provided for in 39-71-2411 unless the parties stipulate in writing to a longer time period for filing the petition.
> (c) If a settlement is not reached through mediation and a petition is not filed within 60 days of the mailing of the mediator's report, the determination by the department is final.

Under this section, the Department's determination of compensability was final unless Grant appealed the determination within the time limits set out in that section. The Court has no record of any such appeal by Grant and there is no evidence that an appeal was ever filed. The UEF's October 11, 2002 determination that the claimant suffered a compensable

injury entitling him to benefits was therefore final and Grant is now foreclosed from contesting liability for the claimant's shoulder condition.

¶32 Moreover, even if this Court has jurisdiction at this late date to determine compensability, I find that the claimant is entitled to compensation.

¶33 Grant's suggestion that the claimant was an independent contractor is factually unsupported. I need go no further than section 39-71-120(1)(b), MCA (1997-2003), in considering the argument. The cited subsection requires proof that the claimant was "engaged in an independently established trade, occupation, profession, or business" in order to be deemed an independent contractor. *Lundberg v. Liberty Northwest Ins. Corp.*, 268 Mont. 499, 877 P.2d 156 (1995). There is not a scintilla of evidence that the claimant was engaged in an independent occupation. Moreover, exhibits suggest that Grant may have been treating his workers as independent contractors simply to avoid workers' compensation requirements. Thus, the defense is unsupported and utterly without merit.

¶34 Similarly, Grant's assertion that the claimant injured his shoulder in a swimming or water slide accident is unsupported. The statement he had his foreman write in that regard was essentially repudiated by the foreman in his testimony at trial. Moreover, the medical history provided by the claimant long before he filed his workers' compensation claim is consistent with his testimony that his condition developed as a result of his work and not while either swimming or water sliding.

¶35 The only evidence concerning causation of the claimant's right shoulder condition is set out in the March 15, 2001 letter of Dr. Sherrill. (Ex. 11.) As I note in paragraph 24, the letter could have better addressed the causation issue, nonetheless it is sufficient in light of the history provided by claimant to establish, by a preponderance of the evidence, that he is suffering from an occupational disease that was due at least in part to his employment at the Cabinet Shop. Where a physician's opinion is focused on distinguishing between an injury and an occupational disease, his failure to use precise language regarding medical certainty or medical probability is not fatal to a reading of the opinion as finding causation.

¶36 At the close of trial I asked the parties to file legal briefs as to whether the UEF or Grant bears the initial burden of production concerning the disputed issues in this case, and which party bears the ultimate burden of persuasion. In *Garcia v. Uninsured Employers' Fund,* 1998 MTWCC 53, I determined that the burden of persuasion rests on the UEF to prove that the claimant suffered a compensable injury. I did not address the initial burden of production with respect to the issue of compensability. Moreover, while my decision in *Garcia* was affirmed on appeal, the decision on appeal was a non-citeable decision, therefore it has no precedential effect and does not preclude my reconsideration of the matter.[(1)]

¶37 In considering the burden of persuasion, I note initially that Grant was required to carry workers' compensation insurance. His failure to do so put the UEF in the position of an insurer. It is well established that a workers' compensation insurer is directly liable for compensation. Its duty is therefore to the claimant, not to its insured. Therefore, among its duties is the duty to independently analyze each claim and make an independent decision regarding compensability of the claim. Indeed, the delegation of the decision concerning compensability to the employer is *per se* unreasonable. *Hernandez v. National Union Fire Ins. Co. of Pittsburgh,* 2003 MTWCC 5.

¶38 Since the UEF's position is analogous to that of a worker's compensation insurer, it had a duty to adjust this claim with similar independence and objectivity. Given that duty, at minimum the employer bears the burden of producing evidence which, if believed, would establish that the claim is not compensable. Moreover, given that duty, I now conclude my decision in *Garcia* was incorrect and that the uninsured employer bears the burden of persuasion to prove that the claim is non-compensable, at least where the claim has been accepted. To hold otherwise would impede the UEF in objectively and independently assessing the compensability of a claim.

¶39 The benefits paid by the UEF in this case were reasonable and supported by the evidence. Pursuant to section 39-71-504, MCA (1997-2001), the UEF is entitled to judgment for those benefits. The section provides:

> **39-71-504. Funding of [Uninsured Employers'] fund -- option for agreement between department and injured employee.** (1) . . . .
> (b) The [Uninsured Employers'] fund shall collect from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to an injured employee of the uninsured employer.

The UEF is therefore entitled to judgment against Grant for the full amount it had paid to the claimant at the time of trial - $34,945.74 - and is entitled to an execution for that amount. It is also entitled to judgment against Grant providing that he is liable for all permanent partial disability benefits, section 39-72-405, MCA benefits, rehabilitation benefits, medical benefits, and any other benefits paid by the UEF to the claimant after the date of the trial so long as the benefits paid are reasonable.

JUDGMENT

¶40 Judgment is hereby entered against Keith Grant and in favor of the Uninsured Employers' Fund in the sum of $34,945.75, which Grant shall pay. The UEF may apply to the Court for an execution to enforce the judgment.

¶41 Judgment is further entered ordering Keith Grant to reimburse the UEF for those reasonable benefits it pays after the date of the trial in this matter, i.e., after January 20, 2004. If he fails to do so, the UEF may apply to the Court for a determination of any

additional amounts due and upon determining such amounts, a further execution or executions shall issue.

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

¶43 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 23rd day of April, 2004.

(SEAL)

\s\ MIKE McCARTER
JUDGE

c: Mr. Kevin Braun
Mr. Dustin Chouinard
Mr. Robert K. Ogg
Submitted: January 20, 2004

1. The affirmance was based on the UEF's failure to cite any law in support of its argument that I had erred in my legal conclusions.