IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 15

WCC No. 9907-8272

ROBERT J. WEATHERWAX

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

FINAL PHASE COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT RESPECTING INJURY VERSUS OCCUPATIONAL DISEASE

¶1 The trial in this matter was held on February 22, 2000, in Helena, Montana. Petitioner, Robert J. Weatherwax (claimant), was present and represented by Mr. Thomas A. Budewitz. Respondent, State Compensation Insurance Fund, was represented by Ms. Carrie L. Garber.

¶2 Exhibits: Exhibits 1 though 48, 55 and 56 were admitted without objection. Ruling on Exhibit 49 was reserved and is now refused. Page 5 of Exhibit 50 and page 2 of Exhibit 52 were admitted but the other pages of those exhibits were refused. Exhibit 51 and 53 were withdrawn. Exhibit 54 was admitted over objections.

¶3 Witnesses and Depositions: Claimant and Vickie R. Hirschi testified. In addition, the parties submitted depositions of Jack Williams and Dr. Thomas L. Schumann for the Court's consideration.

¶4 Issues: The Court restates the issues as follows:

1. Did claimant suffer an injury on July 10, 1991, or does he suffer from an occupational disease?

2. If claimant suffers from an occupational disease, does the failure of the Occupational Disease Act to provide an impairment award and permanent partial disability benefits violate claimant's constitutional right to equal protection of the

laws?

3. Did claimant suffer a wage loss as a result of his injury or occupational disease?

The second issue was deferred pending a determination as to whether claimant suffered an injury. Since the Court finds that claimant in fact suffered an injury on July 10, 1991, it is unnecessary to address the constitutional challenge. The third issue is deferred until the parties can confer and determine whether additional briefs should be filed.

¶5 Having considered the Pre-trial 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

¶6 Claimant is a carpenter and worked for many years as a construction superintendent.

Claimant's Employment with Final Phase

¶7 In 1978 claimant's ex-wife, Susan Weatherwax, started up a small company to perform "final cleaning" at construction projects. The company was known and thereafter operated as "Final Phase."

¶8 Final Phase initially subcontracted to perform final cleanup at a construction project in Billings, Montana. Claimant was the superintendent supervising the project. At the time he and Susan were not married.

¶9 Sometime thereafter the claimant began working for Final Phase.

¶10 In 1981 claimant and Susan married. They divorced in 1999 after being separated for several years.

¶11 Claimant was a superintendent for Final Phase. He estimated and bid jobs. He also supervised and worked alongside other employees. Susan acted as the company's bookkeeper and financial officer, and performed other administrative functions.

¶12 While it appears that claimant and Susan operated Final Phase much like a partnership, it was more likely than not a sole proprietorship of Susan's. Claimant was paid an hourly wage and his wages were reported on W-2 forms. Susan was not paid a wage and took draws, albeit infrequently.

¶13 In the mid-1980s, Final Phase began subcontracting for the installation of laboratory fixtures and equipment in chemistry labs. Final phase subcontracted for the work with Kewaunee Scientific Corporation, which manufactured and sold the fixtures and equipment. Its first major project was in 1986 and/or 1987 at the University of Kansas.

¶14 Thereafter, Final Phase's primary business was laboratory installations. Most of its work was at sites in other states. However, it continued to maintain its home base of operations in Billings, where Susan did most of her work. Susan only occasionally traveled to and worked at actual construction sites.

¶15 Claimant, on the other hand, worked at the actual job sites. He estimated and bid the projects. He hired and fired workers for Final Phase, purchased necessary tools and equipment, and acted as a working superintendent, supervising and working alongside other Final Phase employees during actual installation.

¶16 On some occasions, when Final Phase's bonding or licenses were insufficient, claimant worked as an employee for Kewaunee.

Onset of Back Pain

¶17 In 1991, Final Phase contracted for a job at the University of California at Irvine, a job called "PS 1." The job entailed replacing all laboratory equipment and fixtures in a four story chemistry building. The installation included new cabinets, epoxy-resin countertops, racks, and fume hoods, among other things.

¶18 Actual work on PS 1 began during the week of July 8, 1991. The initial work was to unload five semitrailers of equipment. Claimant and other Final Phase employees unloaded the trailers.

¶19 Claimant testified that on July 10, 1991, while helping unload the third or fourth semitrailer, he experienced a sharp pain in his back. He was unable to continue with unloading, went into the chemistry building, and limited his work to supervising others. During the afternoon, his back stiffened.

¶20 This was not the first time claimant had experienced back pain. He had back pain off and on during previous years but it typically subsided with rest. His last medical treatment for back problems was in 1986 or 1987.

Diagnosis and Treatment

¶21 On the following Monday, July 15, 1991, the claimant obtained chiropractic treatment for his back. From that time through May 1992, he regularly obtained chiropractic treatment. While in California he was treated by Dr. F. Vanise Smyth. (Ex. 7.) When home in Billings in late November and December 1991, he was treated by a Billings chiropractor.

¶22 In April 1992, claimant was examined by Dr. Robert C. Wood, an orthopedic surgeon. He ordered a myelogram and CT scan, which revealed "bilateral L5 root compression from spondylotic changes," as well as degenerative disk disease (Ex. 5.) Dr. Wood recommended "bilateral decompressive laminectomy for nerve root decompression." (Id.)

¶23 On June 12, 1992, claimant underwent extensive low-back surgery in Billings, including multilevel nerve root decompression, laminectomies, and fusion with instrumentation. As a result of his surgery and back condition, claimant is precluded from performing heavy labor of the sort he performed on and prior to July 10, 1991.

Claim History

¶24 On or about September 10, 1991, Final Phase filed an Employer's First Report of Occupational Injury or Occupational Disease. The form included a section for the employee's claim for compensation. Claimant signed that part.

¶25 In the ACCIDENT INFORMATION part of the form, the following information was printed:

> INJURY APPEARS TO BE OF A CUMMULATIVE [sic] NATURE AGGRAVATED BY THE LIFTING, TURNING AND BENDING ASSOCIATED WITH BEING EMPLOYED.

(Ex. 38.) In the part for date of injury, the following was recorded: "(UNKNOWN – APPROX 5 YRS.)" (Id.)

Occupational Disease Evaluation

¶26 At the time of the claim, Final Phase was insured by the State Fund. As might be expected, the State Fund requested an occupational disease (OD) evaluation.

¶27 The OD evaluation was performed by Dr. Jonathan C. Greenberger on February 7, 1992, in San Diego, California. Dr. Greenberger recorded the following history from claimant:

> Robert Weatherway [sic], a 41-year-old male is seen for evaluation. The patient states he has had back pain since September 27, 1985. The patient, at that time, was working at the Rim Rock Foundation as a counselor. He states that he has pain that has come and gone since then.
>
> He went to work for Final Phase in April 1986. He has noted since that time that his pain has increased at times when his work load increases. If he has a project where he has to unload a truck then the pain will increase. He states that because he is able to be the manager and supervisor he has tried to limit what he is doing. He states this pain increased again in June 1991 when he was unloading a few trucks. He remembers loads of 12,000 pounds and 30,000 pounds come in. He states that he is not the type of guy who likes to stand around and watch others do the work. "I'm always doing something". He does hire people to do the heavy work.
>
> He was helping out quite a bit and in June 1991 ended up seeing a chiropractor because of pain. The patient states he has had chiropractic manipulation since that time. He has been using extra strength Bufferin, Motrin or Tylenol.

> He has had since June 1991 intermittent radiation to the right hip and right leg with muscle ache and spasm. He states that when he rests and avoids lifting the pain goes down. Weekends he is not pain free but feels better.
>
> Using three extra strength Bufferin gives him relief. He remembers as far back as 1985 having some shooting pain down the left leg but this has not been more recent. He has had no bowel or urinary problems. He denies any periodic fevers or chills.

(Ex. 1 at 1-2.)

Acceptance of Claim as Occupational Disease

¶28 Based on the information set out in the claim and Dr. Greenberger's report, the State Fund accepted liability for the claim as an occupational disease.

Injury Allegation and Resolution

¶29 In this proceeding, claimant alleges that his back condition and surgery were a result of an industrial injury occurring July 10, 1991, rather than an occupational disease.

¶30 In addition to his testimony concerning the onset of acute back pain while lifting and carrying laboratory cabinets on July 10, 1991, his allegation is supported by contemporary statements. In a September 23, 1991 report, Dr. Smyth, the chiropractor who treated claimant beginning July 15, 1991, described her first treatment. The history portion of the report records:

> INJURED BACK MOVING CABINET JULY 10, 1991. CABINET WEIGHT APPROX 70 POUNDS.

(Ex. 34.) In an October 23, 1991 handwritten statement of claimant to the State Fund, he wrote:

> I Robert J. Weatherwax reside at 2223 Rosebud, Blgs, Mt. I am employed as a contractor/manager for Final Phase Co. I just noticed I was having problems with my low back in September of 1985. It became stiff and I lost my range of motion. I was treated at St. Vincents [sic] Hosp. I then went to a physical therapist for a period of time. Since that time my condition gets better and then it gets worse. I went to Tuson [sic] Arizona and was treated there for the possibility of any internal problems. I have continued working, being able to self modify my activities being self employed. In July 1991 I was working in Irvine California. We were unloading trucks around July 10, 1991. We had five trucks to unload throughout the week. One morning I was unable to get out of bed, I was unable to work. I went to Dr. Smyth D.C. I have been treated by her since I have not suffered a wage loss to date because of this.

(Ex. 33.)

¶31 Jack Williams, a Final Phase employee who worked on the PS 1 project, testified by deposition. He recalled that early on in the PS 1 project the claimant began complaining about his back and said "he had hurt his back and it was really giving him some trouble." (Williams Dep. at 8.) Williams noted that prior to that time the claimant had been moving hoods and other things into the building but that once his back started hurting he stopped assisting with the moving. (Id. at 8.)

¶32 Dr. Thomas L. Schumann, who is board certified in occupational medicine, examined claimant on July 21, 1999, at the request of claimant's attorney. Dr. Schumann also reviewed medical records of Dr. Robert Wood, the surgeon who initially examined claimant in 1992, and Dr. James Scott, the orthopedic surgeon who operated on claimant's back in June 1992. (Schumann Dep. at 7.)

¶33 Dr. Schumann was deposed, and provided the only medical testimony in this case. All other medical evidence consists of medical records and reports.

¶34 Initially, Dr. Schumann provided an impairment rating of 10% of the whole person and limited claimant from returning to heavy lifting. (Id. at 25-26.) With respect to the injury versus disease question, Dr. Schumann indicated his understanding that claimant had relatively mild low-back symptoms prior to 1991, and that during the summer of 1991, the symptoms became significantly worse. (Id. at 22.) He testified it was possible the significant worsening was caused by a single traumatic incident on a single day or from progressive deterioration. Based on the condition of claimant's lower spine , he opined that progressive deterioration was at least a component of claimant's problems. (Id. at 23-24.) In discussing injury versus disease, he said:

> Dr. Scott in his note relates back pain for some six years's time and doesn't really get into when it got worse in his note. I don't have, I've never seen the initial chiropractic notes, and they may or may not be helpful, and depending on the quality of the documentation that was done. Usually the most valuable notes in terms of determining that are the ones that are done when the patient first seeks medical attention. . . .

(Id. at 23.)

¶35 Later in his deposition, Dr. Schumann returned to the injury issue, testifying:

> If the facts of the case were that he was fine the day before he woke up and couldn't move and had been fine and totally asymptomatic for weeks or months, and that the previous day there had been something that occurred could be identified, and that made it worse and it never got better, then I would say it was an aggravation of an underlying condition.

(Id. at 28-29.)

¶36 While the history of claimant's back pain does not precisely fit Dr. Schumann's hypothetical, it is close enough that, when taken together with his earlier opinion that an injury was "possible", I am persuaded that on July 10, 1991, while lifting and moving cabinets, the claimant suffered a material aggravation of his underlying back condition. The following factors influence me in arriving at that conclusion:

· Claimant was a credible witness.

· While claimant was treated for low-back problems in the mid-1980s, in July 1991 he had no recent history of treatment or acute back pain.

· Claimant's testimony that his acute pain began on July 10, 1991, while lifting and moving cabinets, and continued thereafter until he had surgery, is supported by the report of his chiropractor, his own written statement to the State Fund, the testimony of a coworker, and the frequency of post-July 1991 chiropractic treatments.

Plainly, claimant's low-back symptoms were significantly worse after July 10, 1991, than previously.

¶37 In reaching my decision I have taken into consideration the history claimant gave in his initial claim and to Dr. Greenberger. That history is not incompatible with the finding above. Claimant did have a history of low-back pain and may well have believed that his condition was a continuation and progression of his underlying condition, which indeed it was. While Dr. Greenberger refers to unloading trucks as occurring in June, that is likely a mistake since other evidence shows the unloading was in July. Claimant is not sophisticated in technical causation issues underlying the aggravation doctrine in workers' compensation law, thus he could not have been expected to appreciate the fact that he suffered a material aggravation due to his work on July 10, 1991, hence an "injury" within the meaning of the Workers' Compensation Act.

CONCLUSIONS OF LAW

¶38 The claim in this matter is governed by the 1991 version of the Workers' Compensation Act since that version was the law in effect on July 10, 1991. Buckman v. Montana Deaconess Hospital, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶39 Injury is defined under the 1991 Act, as follows:

> **39-71-119. Injury and accident defined.** (1) "Injury" or "injured" means:
> (a) internal or external physical harm to the body;
> (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
> (c) death.

(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.

A material aggravation of a preexisting condition may constitute an industrial injury. Section 39-71-407(2), MCA (1991), provides in relevant part:

(2)(a) An insurer is liable for an injury, as defined in 39-71-119, if the claimant establishes it is more probable than not that:
(i) a claimed injury has occurred; or
(ii) a claimed injury aggravated a preexisting condition.
(b) Proof that it was medically possible that a claimed injury occurred or that such claimed injury aggravated a preexisting condition is not sufficient to establish liability. [Emphasis added.]

¶40 Case law defines what constitutes an aggravation of a preexisting condition. It has long been the law of Montana that employers take their workers as they find him, with all their underlying ailments, and that a traumatic event or unusual strain which lights up, accelerates, or aggravates an underlying condition is compensable. *Birnie v. U.S. Gypsum Co.*, 134 Mont. 39, 45, 328 P.2d 133, 136 (1958); *see also*, *Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992) and *Hash v. Montana Silversmith*, 248 Mont. 155, 158, 810 P.2d 1174, 1175 (1991). "The rule is that when preexisting diseases are aggravated by an injury and disabilities result, such disabilities are to be treated and considered as the result of the injury." *Strandberg v. Reber Co.*, 179 Mont. 173, 175, 587 P.2d 18, 19 (1978).

¶41 The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). Thus, he bears the burden of proving he suffered an injury which materially aggravated his underlying back condition.

¶42 Claimant has satisfied his burden. Initially, he has presented persuasive evidence that his condition became worse on and after July 10, 1991. The worsening, as evidenced by his medical treatment, his inability to continue doing manual labor, and ultimately his surgery, demonstrate that the worsening was material. He has presented further persuasive evidence that the events of a single day -- July 10, 1991 -- caused that aggravation, thus satisfying subsections (2)(b) and (2)(c) of section 39-71-119, MCA (1991). While he did not identify a single, specific incident of lifting on that day, he identified his lifting and carrying of cabinets during the day as the event. That lifting and carrying, which took place during the single day, is sufficient under section 39-71-119 (2)(d), MCA (1991). *Welch v. American Mine Services, Inc.*, 253 Mont. 76, 82, 831 P.2d 580, 584 (1992) (foot infection due to

abscess which was caused by new boots rubbing claimant's feet during a single work shift is an injury under the criteria identical to those in the present case). Finally, as shown by the discussion in Welch, it satisfies the requirement that it be an "unexpected traumatic incident or unusual strain":

> The common meaning of "unexpected" is "unlooked for, unforeseen, surprising." Webster's Third International Dictionary (1971). We note that the 1987 amendments to § 39-71-119, MCA, retain the word "unexpected" from the pre-1987 definition of injury. In *Bremer v. Buerkle* (1986), 223 Mont. 495, 727 P.2d 529, we affirmed the Workers' Compensation Court's decision that a worker's allergic contact dermatitis constituted an injury because it met the "unexpected" requirement of the statute. In Bremer, the claimant had been working with the same chemicals for nine years without sustaining any allergic reaction. We concluded that, despite this ongoing contact, the chemical contact which occurred on one day unexpectedly stimulated his immune system and led to an allergic reaction. In a similar fashion, Welch had experienced no problems in breaking in new safety boots during his many years of working in mines. Despite this twenty-five year history, the new boots he wore on April 27, 1989, rubbed sores on his foot which became infected. We conclude that the incident was unexpected under § 39-71-119(2)(a), MCA (1987).

Id. at 82-83, 831 P.2d at 584. Here claimant had been lifting and carrying cabinets for years without the consequences he experienced on July 10, 1991.

¶43 Since claimant suffered an industrial injury and has a rateable impairment on account of the injury, he is entitled to a 10% impairment award. Section 39-71-703(3), MCA (1991), provides for payment of an impairment award to a permanently partially disabled worker. Claimant satisfies the 1991 definition of permanent partial disability since he has a physical restriction which limits his ability to work. § 39-71-119(15), MCA (1991), and see Walter J. Casarotto v. Montana Municipal Insurance Authority, WCC No. 9308-6870, Findings of Fact, Conclusions of Law and Judgment (July 8, 1994).

¶44 The Court makes no determination at present concerning claimant's request for wage-loss benefits. The parties shall confer and determine whether they wish to submit written briefs concerning that issue. If so, a briefing schedule shall be set.

¶45 A determination concerning any other matters, including costs, is deferred until the wage-loss issue is submitted for decision.

PARTIAL JUDGMENT

¶46 The claimant is entitled to an impairment award in the amount of 10%, which the State Fund shall pay in a lump sum.

¶47 The parties shall confer and determine whether they wish to submit written briefs concerning the wage-loss benefits. If so, a briefing schedule shall be set.

¶48 A determination concerning all other matters, including costs, is deferred until the wage-loss issue is submitted for decision.

DATED in Helena, Montana, this 22nd day of March, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Thomas A. Budewitz
Ms. Carrie L. Garber - Courtesy Copy
Mr. Thomas E. Martello
Submitted: February 22, 2000