IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 60

WCC No. 9906-8268

AMERICAN ALTERNATIVE INSURANCE GROUP

Petitioner/Insurer,

and

FLATHEAD COUNTY SCHOOL DISTRICT 6

Petitioner/Employer

vs.

SUNG SORENSON

Respondent/Claimant

and

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Third-Party Respondent.

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

Summary: American Alternative Insurance Group (American Alternative) appeals from an initial determination of the Department of Labor and Industry (Department) finding that claimant suffers from an occupational disease of her low back. Claimant worked as a janitor for the Flathead County School District 6 (School District) from 1976 through 1999, when she stopped working upon doctor's advice. American Alternative has insured the School District since September 1, 1997. The Montana Schools Group Insurance Authority (MSGIA) was the prior insurer. At the request of American Alternative, MSGIA was joined as a party, American Alternatives contends that MSGIA is the responsible insurer.

MSGIA moves for summary judgment, arguing that recovery against it is barred by the doctrines of *res judicata* or *collateral estoppel*. Its defense is based on a 1996 occupational disease claim filed by claimant. That claim was denied by the Department following an occupational disease panel examination and the claimant did not request a hearing. Claimant argues she accepted the determination respecting her 1996 claim and continued working, which caused her symptoms to increase to the point where she was unable to

work and required surgery. She claims she has had an occupational disease since the 1997 claim and is entitled to recovery.

Petitioner, American Alternative, joins in the motion for summary judgment, arguing that if the 1996 claim bars recovery against MSGIA, it also bars recovery against American Alternative.

Held: The insurers are not entitled to summary judgment. Claimant has raised triable issues of material fact as to whether her work following her 1996 claim either materially aggravated her condition or represents a new condition. Claimant points to medical evidence indicating her condition at the time of the 1996 claim was much less serious than in 1997 when she was forced to quit working and undergo surgery. The Court is unable to resolve the defense of *res judicata* or *collateral estoppel* without taking a complete record on the nature and details of the 1996 and 1997 claims.

Topics:

Defenses: Collateral Estoppel: Two successive insurers of school district moved for summary judgment arguing that janitor's 1997 OD claim was barred by doctrine of collateral estoppel or res judicata where OD claim filed in 1996 was denied by DOL based on OD panel examination and claimant did not request a hearing on that denial. Court denied motion for summary judgment where claimant raised triable issues of material fact regarding whether her work following her 1996 claim materially aggravated her condition or she suffers from a new condition.

Defenses: Res Judicata. Two successive insurers of school district moved for summary judgment arguing that janitor's 1997 OD claim was barred by doctrine of collateral estoppel or res judicata where OD claim filed in 1996 was denied by DOL based on OD panel examination and claimant did not request a hearing on that denial. Court denied motion for summary judgment where claimant raised triable issues of material fact regarding whether her work following her 1996 claim materially aggravated her condition or she suffers from a new condition.

Occupational Disease: Last Injurious Exposure. Two successive insurers of school district moved for summary judgment arguing that janitor's 1997 OD claim was barred by doctrine of collateral estoppel or res judicata where OD claim filed in 1996 was denied by DOL based on OD panel examination and claimant did not request a hearing on that denial. Court denied motion for summary judgment where claimant raised triable issues of material fact regarding whether her work following her 1996 claim materially aggravated her condition or she suffers from a new condition.

Occupational Disease: Subsequent Disease. Two successive insurers of school district moved for summary judgment arguing that janitor's 1997 OD claim was barred by doctrine of collateral estoppel or res judicata where OD claim filed in 1996 was denied by DOL

based on OD panel examination and claimant did not request a hearing on that denial. Court denied motion for summary judgment where claimant raised triable issues of material fact regarding whether her work following her 1996 claim materially aggravated her condition or she suffers from a new condition.

Summary Judgment: Disputed Facts. Two successive insurers of school district moved for summary judgment arguing that janitor's 1997 OD claim was barred by doctrine of collateral estoppel or res judicata where OD claim filed in 1996 was denied by DOL based on OD panel examination and claimant did not request a hearing on that denial. Court denied motion for summary judgment where claimant raised triable issues of material fact regarding whether her work following her 1996 claim materially aggravated her condition or she suffers from a new condition.

1 Sung Sorenson (claimant) worked as a janitor for the Flathead County School District 6 (School District) for more than 20 years. In 1996, she filed an occupational disease claim with respect to her back. The claim was found non-compensable by the Department of Labor and Industry (Department). Thereafter, on October 14, 1997, she filed a second claim for occupational disease benefits, again based on her back. Following an initial determination of the Department finding in her favor, American Alternative Insurance Group (American Alternative) petitioned this Court for a hearing. Thereafter, Montana Schools Group Insurance Authority (MSGIA) was joined.

2 MSGIA now moves for summary judgment on the ground it has no liability for benefits to claimant or to indemnify American Alternative. American Alternative joins in the motion for summary judgment, arguing it also has no liability to claimant. The motions are based on claimant's failure to appeal the Department's prior Order denying her 1996 claim. The insurers argue that the present claim is for the same condition at issue in the prior claim and that it is barred by either the doctrine of *res judicata* or *collateral estoppel*.

3 In response, claimant argues that her continued work *after* the Department denied her first claim aggravated her condition, entitling her to recover for her present occupational disease regardless of the first claim. After careful consideration of the records submitted by the parties, as well as the factual assertions made by claimant, the Court finds that disputed issues of fact exist which preclude summary judgment.

Facts

5 Claimant worked for the School District from September 1976 through late 1997. (flathead county school district 6's motion for summary judgment and supporting brief, hereafter "motion," Exs. 1 and 7.)

6 On April 10, 1996, she filed a first report of occupational injury or occupational disease stating that her employment caused her back and shoulder pain and might be responsible

for kidney and blood infections. (motion, Ex. 1.) In a signed attachment to the First Report form, she wrote:

I started working as a janitor for School District Six in the fall of 1976. My body frame is small, and the work is demanding (e.g., moving furniture, oil mopping, vac-u-pack duties). From the beginning of my employment until sometime in 1995, School District Six did not provide or encourage workers to use "spine" or "back" safety equipment. Apart from my work as a janitor for School District Six, I have never been involved in any hobbies or activities that require intense physical exertion or lower-back stress.**Nonetheless, by 1978-79 I developed serious back and shoulder pains.** The pains would vary in intensity depending directly with the amount of physical exertion that my work required. Hard days meant more pain. At times, the pain could become so intense that I would cry myself to sleep.

As a result of the pain that my work caused me, in the late seventies I consulted three doctors, my family doctor and two back specialists. The two back specialist[s] concluded they were unable to help me at that time, but my family doctor, Dr. Hope, prescribed pain suppressants. The pain suppressants helped me cope with the daily rigors of my job, and I have continued to take prescription pain suppressants up to the present time.

Over the next fifteen to sixteen years, my lower back pain has slowly worsened. As a result, my doctors have prescribed stronger and larger quantities of pain suppressants. In addition, I have used medicated heat pads and have received acupuncture treatment, massage therapy, and foot treatment. Through these treatments, I was able to cope with my back problem.

Sometime in or about 1993, carpet was laid in sections of the junior high school. Because vacuum cleaning carpets is slower than oil mopping floors, the janitorial staff could not clean the same area without employing more workers or working the current workers harder. School District Six chose the latter and, for the first time, required janitors to wear heavy vacuum cleaning machines on their backs (vac-u-packs). Vac-u-packs are mobile and efficient cleaning tools, but painful to the back and shoulders.

Using vac-u-packs started causing additional aches and pains in my lower back and shoulders. On several Mondays, I was forced to use sick time days or use my vacation days to help recover from the prior weeks pain.

Some time shortly before March 6, I recall terrible pain in my lower back. I cannot say for sure if it was caused by a particular incident, such as an awkward twist or sudden jerk, or if the pain resulted from damage occurring over a period of time. My guess is that it "developed" over a long period of time as I have outlined in this section.

On March 11, 1996, I took the day off to help recover from my lower back pain. I worked the rest of the week. By March 17, the pain became so unbearable that I could not walk or

function except for eating and using the bathroom. My husband took me to the emergency room that day, and I was referred to a back specialist; X-ray tests discovered bulging discs in my spine. I received a stronger pain suppressant prescription than the one I was using and was released for home treatment. In addition, I was not allowed to return to work until released by a doctor.

At home, my health continued to deteriorate (e.g., 104 degree fever, swelling, more pain, etc.) until I thought I might die. On March 24, I was rushed, by ambulance, to the emergency room at Kalispell Regional Hospital. I was released into the critical care unit for three days, then to a regular unit for two days, and then from the hospital to home care. Doctors believe that I have or had kidney and blood infections.

The doctors have not determined the source of my kidney and blood infections, and they could have been caused by factors such as (1) my weakened health from the back injury and (2) the strong prescription pain suppressants I was required to take for my back.

My kidney and blood infections may have been caused by my employment. **My back and shoulder pains were caused by my employment.**

(Motion, Ex. 1, emphasis added.)

7 At the time claimant filed the April 1996 claim, the School District was insured by MSGIA. MSGIA denied the claim.

8 Pursuant to section 39-72-602, MCA, the Department referred claimant to Dr. James R. Burton, a member of its medical panel for evaluation. Claimant was examined by Dr. Burton on February 10, 1997. (motion, Ex. 2.) She complained of "lower lumbar pain." (*Id.* at 2.) The "Physical Examination" section of Dr. Burton's report states:

GENERAL: Ms. Sorenson is right handed. Height is 5' 0". Weight is 110 pounds.

Mrs. Sorenson does not appear to be in acute distress. She has no obvious pain behaviors. She moves about as though she has no discomfort or limitations. She is able to sit and stand and turn left and right without difficulty. She can bend over and remove her shoes without difficulty.

HEENT: The patient states that she does use reading glasses. Normocephalic. Cranial nerves are grossly intact.

CERVICAL: Rotation is 60 degrees, left equals right. Tilt is 30 degrees, left equals right. Normal flexion and extension. Spurling and Lhermitte's tests are negative.

UPPER EXTREMITY: Full, normal range of motion of the shoulder, elbow and wrist. Deep tendon reflexes at the biceps, triceps and radius are 1/5 and equal. There is no atrophy of the biceps or the upper forearm. Elbow flexion/extension strength and hand grip strength is strong and equal, left and right.

THORACIC: Chest is symmetrical. No scoliosis. No kyphosis.

LUMBAR: Easy flexion to 75 degrees. She can place her fingertips within two inches of her toes. Lumbar extension is 10 degrees. Lumbar tilt is 30 degrees, left equals right. There is no lumbar scoliosis or involuntary muscle spasm.

LOWER EXTREMITY: The patient can toe walk, heel walk and deep knee bend with spontaneous recover without difficulty. Range of motion of the hips, knees and ankles is within normal limits, left and right. Straight leg raising test is negative, left and right. Knee jerks are 2/5, left and right. Right ankle jerk is 1/5 and left ankle jerk is 3/5. Circumference of the thigh and calf is equal, left and right. Ankle and toe extension and flexion strength is normal.

XRAYS: Xrays taken by Dr. Ingraham dated March 21, 1996 shows moderate narrowing at the L4-5 interspace. There is also moderate facet degenerative arthritis at L4-5 and L5-S1.

Xrays dated October 04, 1996 at the Wilson Chiropractic Clinic also show narrowing at L4-5. A lateral cervical xray shows slight narrowing at C5-6.

Lumbar xrays taken at Kalispell Regional Hospital dated March 24, 1996 also show the narrowing at the L4-5 interspace with lots of bowel gas. I think this was the incidence of pyelonephritis.

TO ANSWER YOUR SPECIFIC QUESTIONS:

1. My impression is, because she had symptoms so early after starting work at age 33, I seriously doubt that the degenerative disc disease at L4-5 should be considered a result of her employment. Once this condition starts, obviously doing the type of work she does will cause it to become symptomatic and perhaps, may, gradually aggravate it, but my medical impression is that she would probably be in her present status had she never worked for school district #6.

2. See answer to above.

I think questions 3, 4 and 5 are moot because of my answer to #1.

In other words, I think she does have degenerative disc disease at L4-5 which started less than two years after her work started as a janitor at school district #6. I have no information to specifically relate this to a work injury and, in addition to this, **she actually seems to be doing extremely well today. Her examination is virtually normal with a very supple back without spasm and negative straight leg raising test, etc. She also has no history of missing much work because of significant back pain. I think the flare-up of pyelonephritis[(1)] that she mistook for a flare-up of mechanical back condition has her confused and perhaps somewhat frightened her and led her to believe that she has a much more severe lumbar problem than she actually does.**

(Motion, Ex. 2, emphasis added.)

9 Neither party requested further medical evaluation and on March 14, 1997, the Department entered an order of determination denying the claim. The Order was as follows:

IT IS THEREFORE ORDERED that claimant's claim for benefits under the Occupational Disease Act is hereby denied, and the claimant is not entitled to any benefits under the Occupational Disease Act FOR SHOULDER & BACK PROBLEMS.

(Motion, Ex. 4, capitalization and bold in original.)

10 The Department's order of determination contained notice of the right to request a hearing before the Department and stated that a hearing was necessary to preserve the right to challenge the Department's Order. (*Id.*) Claimant did not request a hearing.

11 Claimant continued working as a janitor for the School District. Meanwhile, on September 1, 1997, the insurer for the School District changed from MSGIA to American Alternative.

12 On September 29, 1997, claimant was examined by Dr. Michael Righetti, an orthopedic surgeon. His office note for the examination is as follows:

The patient is here with her husband. She is 55 years of age. She works as a janitor. She has had progressive increase in pain for several years. She has seen Dr. Ingham for six months. She is getting progressive pain with ambulation. In particular, she gets the feeling that both of her calves are ready to burst when she is up and about for any period of time. Treatment has been mainly supportive with medication. She has not missed much, if any, work. She has not had much physical therapy. She describes that her back is fine until she does wet mop work and heavier lifting at work. **She states recently that work has gotten harder and has made her pain considerably worse. It has gradually gotten worse over time.** She is able to sleep okay at night. Her general health has been pretty good. She is getting progressively more frustrated with her symptoms. She is carefully questioned. Her main medication includes Lortab. She is on several other medications that her husband will bring in.

EXAM: She is examined. She has a definite absent S1 reflex on the right; the left reflex is intact. Straight-leg raise causes mild pain in her back, right cheek, and buttocks, nothing on the left. Range of motion of her hips is normal. There is no obvious atrophy. She has pretty good strength in plantar flexion and dorsiflexion, although a little bit weak in plantar flexion on the right. The lumbar spine is stiff and sore to pressure.

(Respondent Sung Sorenson's Response to Respondent MSGIA's Motion for Summary Judgment at Ex. 4, emphasis added.) Dr. Righetti had not reviewed imaging studies at the

time of the September 29th evaluation, but he suspected "L5-S1 disk and suspected spinal stenosis." (*Id.*)

13 On October 14, 1997, claimant filed a second first report for her back. In it she stated, "Over time my back has got worse now I can't work on Dr advice." (motion, Ex. 5.)

14 Based upon the second claim, the Department referred claimant to Dr. John V. Stephens, who examined her on March 2, 1999. (motion, Ex. 6.) Dr. Stephens also reviewed "records of Chet Hope, M.D.; Professional Therapy Associates; limited record of Michael Righetti, M.D.; and imaging study reports." From his examination of claimant, Dr. Stephens recorded the following:

This lady's gait is slow with a decreased heel strike and toe push off on the right. She was able to tandem walk, though she appeared to stumble a little bit in full stance phase on the right leg. She was able to rock back on her heels and plantar flex forward though she noted some weakness on the right. Romberg was negative. She was able to squat with some difficulty. Her hips were level. On palpation she was tender in the greater trochanter on the right, but not particularly tender over the sciatic notch. She could flex forward to about 60 deg. **but noted back pain, extension also caused her back pain**; lateral bending and lateral rotation were 10 deg. Her cervical flexion, extension, lateral bending and lateral rotation were full, except for lateral rotation right which was to 7 deg. Her upper extremities had reasonably full strength and motion. In her lower extremities she had no clear weakness, she was consistent. On sharp/dull she was not abel [sic] to appreciate any definite sensory deficits. Her reflexes were clearly asymmetrical: biceps jerks, brachioradialis jerks, triceps jerks, knee jerks being 2+/2+; left ankle jerk clearly present at +, right ankle jerk was absent, even with argumentation techniques. Straight leg raise performed both in the seated and supine position was consistently positive on the right and negative on the left. On abdominal exam she had some slight upper quadrant discomfort primarily along the right rib margins. **An MRI that accompanies her shows a rather pronounced abnormality at the L4-5 level with relative spinal stenosis. Plain x-rays show a significant compression fracture of L1.**

(*Id.*, emphasis added) Dr. Stephens' diagnoses were:

1. L4-5 spinal stenosis with neuroforaminal enroachment and clear evidence of a right S1 radiculopathy.

2. Compression fracture L1.

(*Id*.)

15 With regard to the occupational disease claim, Dr. Stephens wrote, "Diagnosis No. 1 clearly appears to be an occupational disease. This lady has been symptomatic for probably greater than 15, possibly 20 years. I doubt we will ever know exactly when the

radicular pain started in her right leg." (*Id*.) With regard to the compression fracture, he concluded it was "obviously something that acutely happened, [but] the majority of her pain appears to be due to Diagnosis No. 1." (*Id*.)

16 Dr. Stephens opined that claimant was "permanently unable to perform previous work" and "currently unable to perform any type of work though ultimately may be able to do sedentary light-manual work." (*Id*.) He recommended claimant "seriously discuss her situation with her treating surgeon and give strong consideration to a surgical procedure." (*Id*.)

17 Based upon Dr. Stephens' report, on April 9, 1999, the Department issued an order of determination finding that claimant suffers from an occupational disease.

18 On April 27, 1999, American Alternative requested a hearing. Following passage of the 1999 amendments to the Occupational Disease Act, which transferred jurisdiction over denied OD claims to the Court, the matter was transferred to this Court on June 24, 1999.[(2)]

19 On August 30, 1999, American Alternative filed a formal petition for hearing. On December 8, 1999, upon American Alternative's motion, the Court joined MSGIA as a third-party defendant.

20 On the same day MSGIA was joined, Dr. Michael Righetti operated on claimant, doing a bilateral L3-4, L4-5 laminectomy with foraminotomy and L4-5 intertransverse lumbar fusion with right iliac crest autograft. (respondent sung sorenson's response to respondent msgia's motion for summary judgment, Ex. 3.)

21 On March 3, 2000, Dr. Dana Headapohl conducted an Independent Medical Examination (IME) at the request of counsel for American Alternative. In conjunction with her examination of claimant, she reviewed medical records dating back to 1977. She reached the following opinions:

Discussion

Ms. Sorenson is suffering from an occupational disease, which is as a result of her occupational exposures as a janitor for Columbia Falls School District. She may have come to the job with some pre-existent spinal problems, but the nature of her work materially accelerated the degenerative changes.

Ms. Sorenson first documented that she knew her symptoms were the result of occupational exposures when she filed her first occupational disease claim in 1996. She was noted to have a lost right ankle jerk reflex in a 7/25/96 note. In Dr. Burton's occupational disease evaluation she again had decreased right ankle jerk, as well as radiographic evidence of spinal stenosis and significant disc disease particularly at L4-5, but involving other lumbar levels as well. It was Dr. Burton's opinion that she was not suffering from an occupational disease, as she was asymptomatic. I disagree with this

conclusion, as she had objective radiographic and examination evidence of disease consistent with those changes expected to result from her exposures at work.

When the occupational disease claim was rejected, Ms. Sorenson continued to work, believing that she had been found not to have an occupational disease. However, her symptoms got gradually worse and she filed again in October of 1997. She had no significant changes in her condition other than gradually increasing symptoms. Dr. Righetti found her to have an occupational disease on 10/13/97. On 10/13/97 Dr. Righetti notes a new L1 compression, which occurred sometime after October of 1996. Dr. Righetti assumes that this is secondary to one of Ms. Sorenson's numerous slip and falls at work. He documents progressive increase in symptoms over the previous year.

There is no evidence that Ms. Sorenson's occupational medical condition related to the lower lumbar spine and associated neurologic findings changed between late August 1997 and the time she filed her second claim on October 13, 1997. She describes a gradual increase in symptoms and no new symptoms.

(Flathead County School District 6's Motion for Summary Judgment and Supporting Brief, Ex. 7, emphasis added.)

Discussion

22 Summary judgment is appropriate only where undisputed facts entitle the moving party to judgment as a matter of law. ARM 24.5.329(2). "Summary judgment is an extreme remedy which should never be substituted for a trial if a material factual controversy exists." *Montana Metal Bldgs. Inc. v. Shapiro*, 283 Mont. 471, 474, 942 P.2d 694, 696 (1997).

23 In moving for summary judgment, American Alternative contends that if any insurer is liable, it is MSGIA. It relies on section 39-72-303(2), MCA, which provides:

When there is more than one insurer and only one employer at the time the employee was injuriously exposed to the hazard of the disease, the liability rests with the insurer providing coverage at the earlier of:

(a) the time the occupational disease was first diagnosed by a treating physician or medical panel; or

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

American Alternative argues that claimant knew or should have known she was suffering from an occupational disease while MSGIA insured the School District.

24 MSGIA in turn argues any claim against it is barred by *res judicata* or *collateral estoppel* based on the Department's determination denying her 1996 claim.

25 Both *res judicata*, sometimes called claim preclusion, and *collateral estoppel*, sometimes called issue preclusion, preclude relitigation of matters previously litigated. *Scott v. Scott,* 283 Mont. 169, 175, 939 P.2d 998, 1001 (1997). The doctrine of *res judicata* "is based on the public policy that there must be some end to litigation" and bars relitigation of matters the party has already had an opportunity to litigate. *Glickman v. Whitefish Credit Union Ass'n,* 287 Mont. 161, 166, 951 P.2d 1388, 1391 (1998). For the doctrine of *res judicata* to apply, four elements must be satisfied:

(1) the parties or their privies must be the same; (2) the subject matter of the action must be the same; (3) the issues must be the same and relate to the same subject matter; and (4) the capacities of the persons must be the same in reference to the subject matter and to the issues.

Parini v. Missoula County High School, Dist. No. 1, 284 Mont. 14, 23, 944 P.2d 199, 204 (1997).

26 To find MSGIA entitled to summary judgment on the basis of *res judicata*, the Court would have to find that there are no triable issue of facts with respect to each of the four elements and that all four elements are satisfied. The first and fourth criteria are without doubt satisfied: Both MSGIA and claimant were parties to the 1996 claim, and their capacities are the same in reference to the subject matter and issues.

27 The second and third criteria of *res judicata*, however, are not so facilely satisfied. Without a complete record, the Court cannot conclude that the "subject matter" of the 1997 claim is the same as that of the 1996 claim, nor that the issues are the same and relate to the same subject matter. As claimant points out, there is evidence supporting her contention that her medical condition at the time of the 1996 claim was less serious than at the time of the 1997 claim. Indeed, Dr. Burton's evaluation with respect to the 1996 claim noted that claimant was not in acute distress and had no obvious pain behaviors. He observed that claimant was "doing extremely well" and may have confused symptoms of pyelonephritis for back symptoms. His report suggests her primary complaints at the time of his examination in early 1997 may not have been due to her back condition. Claimant continued working after the 1996 claim, an indication that she was not disabled at that time.

28 The 1997 claim alleges that claimant's "back has got worse." The proffered records of Dr. Righetti, and claimant's statements, indicate that work became more difficult for her after the first claim and that her medical condition at the time of the second claim had seriously deteriorated. Dr. Stephens, during his March 1999 evaluation of claimant, made several findings suggesting a more serious clinical condition, including reference to an altered gait, stumbling, and pain upon examination. He found claimant "permanently unable to perform previous work" and recommended she give serious consideration of surgery. In fact, surgery was later performed in December 1999. While Dr. Headapohl's independent

medical examination concludes that claimant has long suffered from a gradually deteriorating occupational disease, the Court must also consider the other medical opinions and claimant's subsequent history of work and symptoms. Dr. Headapohl's opinion alone does not resolve beyond dispute whether claimant was presenting the same occupational disease claim in April 1996 and October 1997. There is sufficient evidence contrary to Dr. Headapohl's opinions to raise a factual issue as to whether claimant's condition materially worsened after her 1996 claim on account of her continued work.

29 The question then becomes whether a material worsening caused by work performed subsequent to the 1996 claim constitutes a separate, compensable occupational disease. The answer is found in *Liberty Northwest Ins. Corp. v. Champion International Corp.*, 285 Mont. 76, 945 P.2d 433 (1997), and an earlier case, *Caekaert v. State Compensation Mutual Ins. Fund,* 268 Mont. 105, 111, 885 P.2 495, 499 (1994), which was extensively quoted in *Liberty Northwest*, from which I in turn will now quote:

In *Caekaert v. State Compensation Mutual Insurance Fund* (1994), 268 Mont. 105, 111, 885 P.2d 495, 499, we noted that:

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."

In *Caekaert,* we quoted, with approval, from 95.27 of Larson's Workmen's Compensation Law, which provides 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.

Caekaert, 268 Mont. at 111, 885 P.2d at 499 (quoting Larson 95.27).

Based on these rules, we concluded in *Caekaer*t that "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." *Caekaert*, 268 Mont. at 112, 885 P.2d at 499.

285 Mont. at 80, 945 P.2d at 435-36.

30 It is clear from the quoted discussion that a subsequent injurious exposure which materially or substantially worsens or accelerates a preexisting injury, condition, or occupational disease, is compensable on its own merits, just as is a material aggravation caused by a single industrial accident. In this case, I cannot say that the medical opinions and history presented in connection with this motion require me to conclude that claimant's condition in the fall of 1997 was a natural progression of the condition from which she was suffering in 1996 and was not materially worsened or accelerated by her continued work. She has presented sufficient facts to require a trial before making that determination. This triable issue is not the same issue decided in connection with the 1996 claim. Therefore, element 3 of the *res judicata* (identical issues) is not met.

31 Analysis under the doctrine of *collateral estoppel*, which MSGIA seems to favor, is be identical.

1) the identical issue raised has been previously decided in a prior adjudication;

2) a final judgment on the merits was issued in the prior adjudication; and

3) the party against whom the plea is now asserted was a party or in privity with a party to the prior adjudication.

Fadness v. Cody, 287 Mont. 89, 96, 951 P.2d 584, 588 (1997).

32 For the reasons noted above, element (1) of the doctrine of collateral estoppel is not met.

33 Because there is a factual dispute on an issue not determined in connection with the 1996 claim, the motions for summary judgment are **denied**. MSGIA and American Alternative insured the School District after the 1996 claim, either could be responsible for the 1997 claim.

DATED in Helena, Montana, this 19th day of September, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Kenneth S. Thomas
Mr. Leo S. Ward
Mr. Kelly M. Wills
Submitted: May 19, 2000

1. Pyelonephritis is defined as "inflammation of both the parenchyma of a kidney and the lining of its renal pelvis especially due to bacterial infection." See Merriam-Webster Dictionary at www.medscape.com.

2. Under section 31(2) of Montana Laws 1999, chapter 442, either party could have elected to have the matter heard in the Department. Neither party elected to do so.