IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 76

WCC No. 2004-0979

RONALD DOUBEK

Petitioner

vs.

CNA INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant suffers from asbestosis related to his work at the W.R. Grace zonolite mine. He filed an occupational disease claim in 1990 and it was accepted by CNA, which insured W.R. Grace. In July 1999 claimant was hospitalized with heart-related problems. CNA has denied payment for his hospitalization and follow-up care on the ground that his condition and care were unrelated to his asbestosis.

Held: The claimant's heart condition, July 1999 hospitalization, and his follow-up care were causally related to his asbestosis. CNA is liable for his medical expenses. Further, it is liable for attorney fees and a penalty since its denial of liability was unreasonable.

Topics:

Causation: Medical Condition. A workers' compensation insurer is liable only for medical conditions which are caused by the claimant's industrial accident or occupational disease.

Proof: Conflicting Evidence: Medical. The treating physician's opinions are entitled to greater evidentiary weight than the opinions of a non-treating physician, at least where all other factors are equal.

Proof: Conflicting Evidence: Medical. Where the treating physician has greater expertise in the treatment of the medical condition at issue than other physicians rendering opinions in the case, the treating physician's opinions are entitled to even greater deference than required under the treating physician rule.

Penalties: Insurers. While conflicting medical opinions ordinarily raise issues of fact which are appropriately submitted to the Workers' Compensation Court for

resolution, the fact that the insurer has obtained an IME opinion supporting its denial does not preclude a finding that its denial was unreasonable. An insurer must fairly and reasonably evaluate all facts and opinions with respect to medical issues.

Penalties: Insurers. An insurer acts unreasonably and is liable for a penalty, § 39-71-2907, MCA (1989), with respect to denied medical benefits where the treating physician finds a causal relationship between the medical condition treated and the industrial injury or occupational disease and where the physician expressing a contrary opinion was hired by the insurer, was provided with only selected records regarding the claimant's treatment, is less qualified than the treating physician, and relies on a medical test of questionable quality and value.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2907, MCA (1989). An insurer acts unreasonably and is liable for a penalty, § 39-71-2907, MCA (1989), with respect to denied medical benefits where the treating physician finds a causal relationship between the medical condition treated and the industrial injury or occupational disease and where the physician expressing a contrary opinion was hired by the insurer, was provided with only selected records regarding the claimant's treatment, is less qualified than the treating physician, and relies on a medical test of questionable quality and value.

Attorney Fees: Medical Benefits. An insurer acts unreasonably and is liable for attorney fees pursuant to § 39-71-612, MCA (1989), with respect to denied medical benefits where the treating physician finds a causal relationship between the medical condition treated and the industrial injury or occupational disease and where the physician expressing a contrary opinion was hired by the insurer, was provided with only selected records regarding the claimant's treatment, is less qualified than the treating physician, and relies on a medical test of questionable quality and value.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-612, MCA (1989). An insurer acts unreasonably and is liable for attorney fees pursuant to § 39-71-612, MCA (1989), with respect to denied medical benefits where the treating physician finds a causal relationship between the medical condition treated and the industrial injury or occupational disease and where the physician expressing a contrary opinion was hired by the insurer, was provided with only selected records regarding the claimant's treatment, is less qualified than the treating physician, and relies on a medical test of questionable quality and value.

¶1 The trial in this matter was held in Kalispell, Montana, on July 13, 2004. The petitioner was present and represented by Mr. Tom L. Lewis. The respondent was represented by Mr. David M. Sandler.

¶2 Exhibits: Exhibits 1 through 25 were admitted into evidence. Rulings on objections to particular exhibits were rendered orally. Exhibits to which there were relevancy objections were reviewed to determine if relevant. They were admitted and were considered to the extent that they were relevant.

¶3 Witnesses and Depositions: Dr. Alan C. Whitehouse, Dr. Brent P. Pistorese, and Sandra Mayernik testified at trial. In addition, the parties submitted the depositions of Drs. Whitehouse and Pistorese to the Court for its consideration.

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

> ¶4a Whether the petitioner is entitled to payment of the medical expenses itemized in Exhibit 15.
>
> ¶4b Whether the petitioner is entitled to a 20% penalty.
>
> ¶4c Whether the petitioner is entitled to attorney fees and costs.

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

FINDINGS OF FACT

¶6 The petitioner in this case is Ronald Doubek and I will hereinafter refer to him as "claimant." He is 69 years old.

¶7 The claimant worked for W.R. Grace and its predecessor companies at its Libby mine from approximately 1953 to 1960 and again from 1965 to 1990. (Ex. 2 at 9.)

¶8 On or about May 31, 1990, the claimant was diagnosed as suffering from asbestos-related lung disease and filed an occupational disease (OD) claim. CNA Insurance Company (CNA) insured W.R. Grace at the time in question and accepted liability for his claim. (Pretrial Order, Uncontested Fact 2; Exs. 1 and 2.)

¶9 In 1993 the claimant and CNA entered into a compromise settlement of his claim. The settlement provided for a lump-sum payment of $18,500 in satisfaction of his claim for indemnity benefits. (Ex. 3.) It reserved future medical and hospital benefits (*id.*), thus preserving his entitlement to seek medical benefits for his OD.

¶10 The present case arises out of medical expenses the claimant incurred in connection with treatment for a heart condition he developed in 1999. CNA has denied liability for the heart condition, asserting that it is not causally related to the claimant's asbestosis. The medical expenses for which reimbursement is sought total $24,301.82. (Petitioner's Proposed Findings of Fact, Conclusions of Law and Judgment, ¶ 8; Ex. 15.)

¶11 Two doctors testified in this proceeding - Dr. Alan C. Whitehouse and Dr. Brent P. Pistorese. Both are pulmonologists and both testified by way of deposition and at trial.

¶12 The medical history as pertains to the present controversy begins on March 11, 1999, when the claimant was hospitalized at the Deaconess Medical Center in Spokane, Washington, for shortness of breath and discomfort in his left chest. (Ex. 20 at 19.) Dr. Whitehouse began treating the claimant at that time and has been his chief treating physician since that time.

¶13 Dr. Whitehouse is a board certified pulmonologist who has been treating Libby asbestosis cases for approximately three decades. As I noted in *Fellenberg v. Transportation Ins. Co.*, 2004 MTWCC 29, ¶ 16, the predominant asbestos in Libby is tremolite, which has amphibole fibers. Amphibole fibers are different from the more common, less dangerous serpentine fibers of chrysolite and other types of asbestos. Amphibole fibers are needle like, lodge in the lung, and over a period of years, migrate or penetrate through the lungs into the pleura, which is the membrane surrounding the lungs. Dr. Whitehouse has evaluated approximately 500 patients from Libby and maintains and tracks data concerning those patients. He has also treated asbestosis patients from the Hanford, Washington, nuclear facility.

¶14 Upon admission to the hospital on March 11th, the claimant was suffering from pleural effusions, which are an accumulation of fluid between the two layers of pleura in the chest cavity. The pleural effusions were caused by the claimant's underlying asbestosis. (Whitehouse Dep. at 6.)

¶15 The fluid in the claimant's chest was surgically drained. (*Id*. at 9 and Ex. 20 at 12.) The claimant was further treated with supplemental oxygen, steroids, and diuretics. (Whitehouse Dep. at 6, 9.) Upon discharge he was placed on Prednisone, which is a steroid. However, on June 10, 1999, he was instructed to taper his Prednisone over four weeks so that at the end of the four weeks his Prednisone usage would end. (Ex. 4 at 23.)

¶16 On July 13, 1999, the claimant was re-hospitalized for congestive heart failure. (Ex. 4 at 22.) Congestive heart failure is a general term for the inability of the heart to adequately circulate blood throughout the body. However, in this case Dr. Whitehouse used the term to mean left ventricle failure. (Whitehouse Dep. at 32.) The left ventricle pumps oxygenated, arterial blood to the aorta and thence to the arteries throughout the body.

¶17 The claimant's presenting symptoms on July 13, 1999, were increasing difficulty with breathing; a weight gain of eighteen pounds due to peripheral edema (fluid retention); and a feeling of soreness and tightness in his chest. (Ex. 4 at 22.) A chest x-ray also showed pulmonary edema (*id.*), which is an abnormal accumulation of fluid in the lungs. Dr. Whitehouse's impressions upon admission were:

1. Severe asbestosis.
2. Superimposed onset congestive heart failure, unclear etiology, possibly an additional process in addition to his asbestosis.

(*Id*.)

¶18 In a July 13, 1999 letter, Dr. Whitehouse wrote to Dr. Brad Black, a Libby physician who treated the claimant locally. Dr. Whitehouse laid out his reasons for hospitalizing the claimant:

> I admitted Ron Doubek to the hospital at Deaconess today. His x-ray, I thought, looks like occurrence of pulmonary edema bilaterally with some degree of pleural effusion and the clinical exam suggested that as well. Actually, since the last time I saw him he had gained 18 pounds, which I think is all fluid. I admitted him to Deaconess for diuresis and I will keep you informed.

(*Id*. at 49.)

¶19 Upon hospitalization, the claimant was seen by a hospital resident training in cardiology. The resident's impression was that the claimant's history "seems consistent with an acute myocardial infarction." (*Id*. at 21; Whitehouse Dep. at 51.) Dr. Whitehouse testified that he did not think the resident "understood what he was dealing with." (*Id*.) Indeed, heart attack (myocardial infarction) was later ruled out.

¶20 An echocardiogram (echo) was done on July 14, 1999. (Ex. 20 at 1.) A cardiologist performed the test. His most significant finding was a markedly enlarged left ventricle with severely reduced left ventricular systolic function and an overall ejection fraction "visually estimated to be in the 15-20% range." (*Id*.) According to Dr. Pistorese, an ejection fraction of 60% is considered normal. (Pistorese Dep. at 25.) Dr. Whitehouse testified that 55% to 60% is normal. (Whitehouse Trial Test. and *see* Whitehouse Dep. at 44.)

¶21 In addition, the cardiologist reported that the left atrial was enlarged. On the right side of the heart, he found both chambers were of normal size but right ventricular systolic function was reduced. (Ex. 20 at 1.) The right ventricle pumps blood through the pulmonary artery to the lungs, where it is oxygenated. Pulmonary artery systolic pressure (from the right ventricle) was estimated to be 45 millimeters mercury (mm), which the cardiologist characterized as "mild pulmonary hypertension." (*Id*.) Systolic pressure is the pressure when the ventricle contracts. Dr. Pistorese testified that normal pressure is 30 and agreed with the cardiologist's characterization of 45 mm as "mild." Dr. Whitehouse characterized pressure of 45 mm as "moderate" and I note that a reading of 45 is 50% higher than normal.

¶22 The cardiologist who did the echo reported the study as only "fair." (*Id*.) Echos use ultrasound (high frequency sound waves) to image the heart. The procedure is non-invasive, i.e., it is performed using a wand which is placed against the outside of the chest.

Dr. Whitehouse testified that good echos are more difficult to obtain in patients with lung disease because the diseased lung is between the chest wall and the heart,[(1)] thus "you're not getting a clean view frequently of the heart."[(2)] (Whitehouse Dep. at 45-46.) At trial he testified that lung disease may obscure ultrasound heart images, which may explain why the quality of the test was characterized as only "fair." Moreover, the measurements of both the ejection fraction and pulmonary pressure were based on visual estimates of the cardiologist and thus were imprecise.

¶23 At the time of the claimant's July 1999 hospitalization, Dr. Whitehouse believed that the claimant suffered from both cor pulmonale and cardiomyopathy. (*Id*. at 74.)

¶24 Cardiomyopathy is heart failure involving the left ventricle. The left ventricle pumps arterial blood to the aorta and thence to the body. Thus, cardiomyopathy involves an inability of the left ventricle to pump sufficient blood to the aorta and thence to the body.

¶25 Cor pulmonale is a form of congestive heart failure of the right ventricle of the heart. (*Id*. at 8.) As noted earlier, the right ventricle pumps blood through the pulmonary artery to the lungs. The hallmarks of cor pulmonale are pulmonary hypertension, low oxygen levels in the blood, and edema (excessive water retention in the tissues). (*Id*.) Dr. Whitehouse testified that cor pulmonale "[a]lmost always is related to lung disease and pulmonary hypertension." (*Id*. at 68.) In Libby asbestosis cases, the pulmonary hypertension and cor pulmonale is due to the heart pumping against increased pressure due to the asbestosis. (Whitehouse Trial Test.)

¶26 Cardiomyopathy has numerous causes, the most common of which is ischemia. Other causes include alcoholism, chemotherapy, other drug therapy, certain viral infections, pregnancy, and "vasculitis or inflammatory disease of muscles." (Pistorese Dep. at 13 and Trial Test.) It is rarely caused by lung disease.

¶27 CNA denied liability for the claimant's July 1999 hospitalization and follow-up care on the ground that it was unrelated to his asbestosis. Sandy Mayernik, the current CNA adjuster in this case, testified that liability for the hospitalization was not denied until October 11, 2002, based on reports of Dr. Pistorese and Dr. T. Shull Lemire. I find the history leading up to the denial, indeed the insurer's entire handling of the case, disturbing. The history of the claim, as presented to the Court, is set out in the following paragraphs.

¶28 On February 16, 2000, CNA's adjuster requested a medical opinion concerning whether the claimant's heart condition in the summer of 1999 was related to his asbestosis. (Ex. 21.) It is clear that by this date it was aware of the claimant's July 1999 hospitalization and its potential liability for his care.

¶29 CNA's request for a medical opinion was forwarded to Dr. Lemire, a pulmonologist practicing in Missoula. He reviewed medical records for the period of February 22, 1999 to September 1, 1999. On March 20, 2000, he replied:

> Those records deal with his shortness of breath caused by asbestosis, as well as a severe diffuse cardiomyopathy. His heart problem of 1999 is not a direct result of the asbestosis and is more likely due to some other cause - which is unknown at the present time.

(Ex. 7 at 2.) I note that the request for his opinion did not ask the broader question as to whether the claimant's hospitalization or any of the expenses associated with his hospitalization were related to his asbestosis.

¶30 In October 2000, CNA referred the matter to legal counsel. (Mayernik Trial Test.) On October 16, 2000, counsel wrote to Dr. Lemire and asked him to specifically address "whether the heart problem of 1999 was the indirect result of asbestosis." (Ex. 7 at 3.) Dr. Lemire replied on November 7, 2000. In that reply, he did not question the diagnosis of cardiomyopathy but merely addressed whether cardiomyopathy may be caused by asbestosis. Based on literature search he concluded, "I still cannot say that his cardiomyopathy is a result of asbestosis." (Ex. 7 at 1.)

¶31 No denial ensued. Rather, the next correspondence was on January 22, 2001, when the claimant's attorney wrote to CNA's adjuster and requested payment for the cardiologist's bills from July 17, 1999 through August 28, 2000. (Ex. 9.)

¶32 Receiving no reply to his January 22, 2001 letter, on April 4, 2001, the claimant's attorney again wrote to CNA's adjuster and requested payment of the cardiologist's bill. (Ex. 10.)

¶33 On July 11, 2001, Dr. Whitehouse wrote to the claimant's attorney regarding the cardiology bills. He wrote:

> Ron Doubek tells me he has some bills from cardiologists relative to his hospitalization in 1999, at Deaconess. That hospitalization was related to a benign pleural effusion from his asbestosis along with some cor pulmonale and I believe his cardiac problems are related to his asbestosis.

(Ex. 4 at 12.)

¶34 On August 8, 2001, the claimant's attorney wrote to CNA's adjuster, this time enclosing an unpaid bill for the claimant's July 1999 hospitalization in the amount of $18,212.82. (Ex. 11.) He also enclosed a copy of Dr. Whitehouse's July 11, 2001 opinion letter and demanded payment for the outstanding medical expenses. (*Id.*)

¶35 On August 20, 2001, the claimant's attorney sent CNA additional records he had received from Dr. Whitehouse concerning the claimant's July 1999 hospitalization. (Ex. 12.) In his letter, the claimant's counsel noted:

> The medical creditors have been patient. They are now pressing for payment of the medical care in question.

(*Id*.)

¶36 CNA's adjuster did not respond to the January, April, or August 2001 letters from the claimant's counsel.

¶37 Sometime prior to January 7, 2002, attorneys for CNA requested Dr. Pistorese to address whether cardiomyopathy is related to asbestosis. They furnished the doctor with only some of the available records. The fact that only selective records were furnished to Dr. Pistorese is disturbing and figures in my ultimate determination that the insurer has acted unreasonably in denying the claimant's claim for medical expenses related to his July 1999 hospitalization. (Pistorese Dep. at 5-6.) It is also significant that Dr. Pistorese was not asked to review the broader question as to whether the claimant's hospitalization and at least some of his medical expenses were related to his asbestosis.

¶38 Dr. Pistorese replied on January 7, 2002, stating that he had reviewed the materials provided to him and some medical literature and had concluded that "it is far more likely that his cardiomyopathy was neither the direct or indirect result of asbestos exposure but due to ischemic cardiac disease." (Ex. 25 at 1.)

¶39 In his deposition and trial testimony, Dr. Pistorese disavowed his opinion that the claimant's heart condition was ischemic. He testified that his opinion in that regard had been based on incomplete medical records and was erroneous.

¶40 Still, CNA did nothing with the claim. On June 28, 2002, the claimant's attorney again wrote its adjuster asking if it had paid the medical bills. (Ex. 13 at 5.) Receiving no reply other than the fact that the adjuster in charge of the claim had changed (*id*. at 4), the claimant's attorney wrote to the new adjuster on September 10, 2002, again demanding payment for hospital and medical bills related to the claimant's July 1999 hospitalization. (*Id*. at 1.) He enclosed yet another letter from Dr. Whitehouse, dated August 21, 2002 (Ex. 4 at 10), stating that the claimant's hospitalization in 1999 was for pleural effusions and cor pulmonale that was caused by his asbestosis. (*Id*.)

¶41 Finally, on October 11, 2002, CNA replied to the claimant's demand for payment of his July 1999 hospitalization and related medical bills, writing:

> I am writing to you regarding your client, Ronald Doubek. *I apologize for the delay in responding*.
>
> A review of the medical records from independent medical examiners and consultation with legal counsel concludes that treatment of his heart condition is unrelated to his work exposure at WR Grace and is therefore denied. If you would like to discuss this matter further please do not hesitate to contact me.

(Ex. 19 (italics added).)

¶42 There the matter languished. No further opinions were requested by CNA until shortly before Dr. Pistorese's deposition was taken on April 28, 2004. Shortly before the deposition was taken, CNA furnished him with more complete medical records. As noted earlier, the additional records led him to change his opinion concerning ischemic heart disease.

¶43 Nonetheless, in his trial and deposition testimony, Dr. Pistorese stuck to his opinion that the claimant's heart condition in July 1999 was cardiomyopathy, not cor pulmonale, and that it was not related to his asbestosis.

¶44 In his testimony Dr. Whitehouse opined that the claimant's primary heart problem in July 1999 was cor pulmonale caused by his asbestosis. He also testified that had the claimant's problem been merely cardiomyopathy it could have been treated without hospitalization. According to Dr. Whitehouse, it was his heart condition in combination with the asbestosis that put the claimant over the edge and required hospitalization.

¶45 I am persuaded by Dr. Whitehouse's opinions and find that the claimant's hospitalization in July 1999 was caused primarily by his asbestosis and that his congestive heart failure in July 1999 was primarily cor pulmonale, although I suspect some of his heart failure may have been due to cardiomyopathy. My rationale is as follows:

¶46 The most common cause of cardiomyopathy is ischemia, which is a lack of sufficient blood supply to the heart muscle. However, coronary angiography, along with a thalium study, showed adequate blood supply to the right side of the claimant's heart and ruled out ischemia as the cause of the claimant's cardiac insufficiency. Indeed, Dr. Batkoff, the cardiologist who consulted on the claimant's case during his hospitalization and followed the claimant for a time after his discharge, noted on September 1, 1999, that he suspected the claimant's heart condition was "nonischemic in nature." (Ex. 6 at 5.) Both Drs. Whitehouse and Pistorese agree that the claimant was not suffering from *ischemic* cardiomyopathy.

¶47 There are numerous other known causes of cardiomyopathy. Dr. Pistorese was unable to identify any of the other known causes as responsible for the claimant's heart failure and ultimately concluded that he was suffering from "idiopathic" cardiomyopathy. "Idiopathic" is a silver dollar term for "don't know." The "don't know" is significant in this case since the testimony by both Drs. Whitehouse and Pistorese established that the cause of cardiomyopathy can be identified in an overwhelming number of cases. Thus, *idiopathic* cardiomyopathy is uncommon, like finding a zebra in a herd of horses.

¶48 Another fact argues against cardiomyopathy as the sole cause of the claimant's 1999 heart problems. The testimony of both Drs. Whitehouse and Pistorese establish that most patients suffering from cardiomyopathy do not improve. Dr. Pistorese testified that patients suffering from cardiomyopathy related to chemotherapy and other drug therapy may

improve. (Pistorese Dep. at 14.) The claimant was suffering from none of the causes Dr. Pistorese identified. Nonetheless, the claimant's heart condition improved remarkably following his hospitalization. Indeed, his ejection fraction as measured subsequent to his July 1999 hospitalization was 30%, double the measurement recorded in July 1999. His overall cardiac function improved to the point that he returned to a fairly normal, albeit sedentary, life.

¶49 This brings me to another point favoring Dr. Whitehouse's opinions. Dr. Pistorese's opinion concerning cardiomyopathy hinged almost entirely on the July 14, 1999 echocardiogram. Dr. Whitehouse testified that the 15% ejection fraction was suspect in the first place. He opined that 15% is incompatible with life. In view of the marked increase in the fraction upon the second echo,[(3)] the cardiologist's rating of the first echo as only *fair*, and Dr. Whitehouse's uncontradicted testimony concerning the difficulty in obtaining clear ultrasound images of the heart in patients suffering from asbestosis, I am unconvinced that the first July 14, 1999 echo was accurate, especially in the assessment of the left ventricle ejection fraction.

¶50 There are further reasons for preferring Dr. Whitehouse's opinions. First, and foremost, Dr. Pistorese admittedly does not understand the differences between amphibole and serpentine asbestosis disease. (Trial Test.) As described by Dr. Whitehouse, amphibole asbestosis is different from and more malignant than serpentine asbestosis. Second, Dr. Whitehouse has far more experience than Dr. Pistorese in treating Libby asbestosis cases, including secondary cor pulmonale. Dr. Whitehouse testified, and I have no reason to disbelieve, that he has treated hundreds of patients with cor pulmonale. (Whitehouse Dep. at 22.) Third, despite a frivolous contention made at trial by CNA's attorney that Dr. Whitehouse is not a treating physician for purposes of the issues in this case, Dr. Whitehouse in fact has been the claimant's treating physician since March 1999, was his admitting physician for his July 1999 hospitalization, followed the claimant throughout his July 1999 hospitalization, and has treated the claimant ever since. Fourth, Dr. Pistorese's opinions were initially in response to carefully framed questions put to him by CNA without the benefit of complete medical records and without the benefit of even being asked the critical question, which was whether the claimant's July 1999 hospitalization was attributable to his asbestosis. Fifth, Dr. Pistorese never saw and never treated the claimant. While that may not be significant in some cases, I am persuaded it is significant in this case. In particular, I note Dr. Whitehouse's testimony that upon stethoscopic examination of the claimant in July 1999, he noted a "gallop" in the claimant's heart beat. (Whitehouse Dep. at 35.) A "gallop is a soft sound that occurs after valve closures that's associated with heart failure." (*Id*.) The gallop he heard in July 1999 was on the right side (*id*.), which is consistent with right ventricular failure and cor pulmonale.

¶51 I therefore find that the claimant's hospitalization in July 1999, his heart condition at that time, and his follow-up care with respect to his heart condition were causally related

to his asbestosis. CNA is therefore liable for his medical bills associated with that hospitalization and treatment.

¶52 I further find that CNA has unreasonably delayed and unreasonably denied payment for the claimant's medical bills. Its failure to timely respond to the demands of the claimant's attorney for payment of medical bills and its three-year delay in denying liability for the bills is incomprehensible and inconsistent with its duty to promptly investigate and pay benefits. Its feeding of selected medical records to its medical experts and the narrow questions it put to them is inconsistent with any objective, reasonable investigation into liability for the medical bills. Finally, CNA failed to take the treating physician rule, as well as the weaknesses of its cardiomyopathy contention, properly into account. Indeed, at trial it denied altogether that Dr. Whitehouse is a treating physician, a denial that is frivolous. The fact that Dr. Whitehouse called in other specialists, i.e., cardiologists, to assist in the evaluation and treatment of the claimant, does not take away from the fact that he was the claimant's admitting physician and his primary physician throughout. It is well established under Montana law that a treating physician's opinions are entitled to greater weight than a non-treating physician, *Wall v. Nat'l Union Fire Ins. Co.*, 1998 MTWCC 11; *Waite v. State Compensation Ins. Fund*, 1998 MTWCC 47. I have held that, unless there are cogent reasons for preferring the opinions of non-treating physicians, the treating physician's opinions will prevail. *Id*. In this case, the principal ground for Dr. Pistorese's opinion was the July 14, 1999 echo, and there were multiple, cogent reasons for doubting the accuracy of that test and the resulting diagnosis of cardiomyopathy. Moreover, in relying on Dr. Pistorese's opinions, CNA similarly ignored the fact that the tremolite asbestos in Libby is different from other asbestos and that Dr. Pistorese did not know the difference.

CONCLUSIONS OF LAW

¶53 This case is governed by the 1989 version of the Montana Occupational Disease Act since that was the law in effect at the time the claimant's occupational disease was diagnosed and he submitted a claim for compensation. *Bouldin v. Liberty Northwest Ins. Co.,* 1997 MTWCC 8, and *see Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶54 CNA accepted liability for the claimant's asbestosis. It is therefore liable for reasonable hospital and medical expenses related to his asbestosis. § 39-72-704, MCA (1989).[(4)] The claimant, however, bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks, *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). Therefore, he must prove by a preponderance of the evidence that the medical bills for which payment is sought are causally related to his occupational disease.[(5)] *McCauley v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 43, ¶ 47 (citing *Hash v. Montana Silversmith,* 256 Mont. 252, 257, 846 P.2d 981, 983 (1993).

¶55 The claimant has satisfied his burden of proof. I have found as a matter of fact that the predominant condition leading to his July 1999 hospitalization was cor pulmonale and that the condition was caused by his asbestosis. CNA is therefore liable for the medical expenses set forth in Exhibit 15.

¶56 CNA is also liable for both attorney fees and a penalty. Those awards are premised on my finding that it acted unreasonably in adjusting the claim for medical benefits. I have found as a matter of fact that the insurer not only unreasonably delayed processing of the claim but in the end failed to reasonably evaluate it.

¶57 The attorney fee and penalty statutes are sections 39-71-612 and -2907, MCA (1989). Section 39-71-612, MCA (1989), provides in relevant part:

> **39-71-612. Costs and attorneys' fees that may be assessed against an insurer by workers' compensation judge.** (1) If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, a reasonable attorney's fee and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.
> (2) An award of attorneys' fees under subsection (1) may only be made if it is determined that the actions of the insurer were unreasonable. . . .

Section 39-71-2907, MCA (1989),[(6)] provides:

> **39-71-2907. Increase in award for unreasonable delay or refusal to pay.** (1) When payment of compensation has been unreasonably delayed or refused by an insurer, either prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant compensation benefits, the full amount of the compensation benefits due a claimant between the time compensation benefits were delayed or refused and the date of the order granting a claimant compensation benefits may be increased by the workers' compensation judge by 20%. The question of unreasonable delay or refusal shall be determined by the workers' compensation judge, and such a finding constitutes good cause to rescind, alter, or amend any order, decision, or award previously made in the cause for the purpose of making the increase provided herein.

In *Mintyala v. State Compensation Insurance Fund,* 276 Mont. 521, 527, 917 P.2d 442, 445-446 (1996), the Montana Supreme Court held that "the penalty provision is available to the claimant from the moment the insurer's delay in payment becomes unreasonable."

¶58 CNA failed to act on the demand for payment of the medical bills for over three years. During that time it ignored repeated demands for payment of the bills. When seeking independent medical examination (IME) evaluations, it failed to ask for a comprehensive review of medical information to determine whether claimant's hospitalization was caused in whole or part by his asbestosis, rather it limited its questions to the relationship of cardiomyopathy to asbestosis. When requesting Dr. Pistorese to evaluate the case, CNA's attorneys failed to supply him with complete records, leading him to erroneously conclude that the claimant suffered from ischemia.

¶59 Dr. Pistorese did provide testimony which supports CNA's position that claimant's heart condition and hospitalization were unrelated to his asbestosis. However, while conflicting medical opinions ordinarily raise issues of fact which are appropriately submitted to the Workers' Compensation Court for resolution, the fact that the insurer has obtained an IME opinion supporting its denial does not preclude a finding that its denial was unreasonable. An insurer must fairly and reasonably evaluate all facts and opinions with respect to medical issues.

¶60 In evaluating conflicting medical opinions, an insurer must consider the expertise and qualifications of the physicians providing the opinions and must consider the rule requiring that deference be given the treating physician's opinions. In *Wall v. Nat'l Union Fire Ins. Co.,* 1998 MTWCC 11, I found the insurer's denial of medical benefits unreasonable where the treating physician not only treated the claimant but had far greater expertise regarding the medical condition which was at issue.

¶61 It is well established that a treating physician's opinions are entitled to greater weight than those of a non-treating physician.

It has been a long-standing rule that while not conclusive, the treating physician's opinions are entitled to "greater evidentiary weight" than the testimony of non-treating physicians. *Kloepfer v. Lumbermen's Mutual Casualty Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996). At minimum, the rule requires this Court to defer to the treating physician where the evidence is evenly balanced. *Key v. Liberty Northwest Ins. Co.*, 2001 MTWCC 53, ¶ 30.

McCauley, supra., ¶ 41. In this case, Dr. Whitehouse was the claimant's treating physician. As I noted earlier, CNA's attorney asserted at trial that Dr. Whitehouse was not claimant's treating physician in this case, rather the cardiologist who examined claimant was. That argument, which I have already characterized as frivolous, is in itself evidence of unreasonableness. While the cardiologist also became a treating physician, Dr. Whitehouse was the admitting physician for claimant's July 1999 hospitalization and followed the claimant during the hospitalization and thereafter. As a pulmonologist treating Libby asbestosis cases, he diagnoses and treats related conditions, including cor pulmonale, and seeks the help of other specialists where appropriate. Not only did CNA disregard Dr. Whitehouse's role as a treating physician and the treating physician rule as in

Wall, supra., it failed to give due regard to his greater expertise in treating Libby asbestosis cases, including cor pulmonale.

¶62 CNA also failed to give proper consideration to the tenuous nature of the foundation for Dr. Pistorese's opinion. Dr. Pistorese's opinion was based on the July 14, 1999 echocardiogram, especially the ejection fraction of the left ventricle. The quality of the exam was characterized as only "fair" by the cardiologist. Dr. Whitehouse's testimony, which was unrebutted, questioned the validity of the exam. Moreover, Dr. Pistorese could not explain the remarkable improvement in the claimant's cardiac function following the first echo.

¶63 In summary, CNA's delay in responding to the request for benefits was unreasonable. Its failure to request its medical consultants to consider the ultimate question of the relatedness of the July 1999 hospitalization was unreasonable. Its failure to provide Dr. Pistorese with complete, relevant medical records was unreasonable. Its ultimate denial of benefits was unreasonable.

JUDGMENT

¶64 The medical bills set forth in Exhibit 15 totaling $24,301.82 are causally related to the claimant's asbestosis. CNA is liable for those bills and shall promptly pay them in accordance with fee schedules.

¶65 CNA shall pay the claimant a penalty of twenty percent of the medical bills in question.

¶66 CNA shall pay the claimant's attorney his attorney fees in an amount to be determined by the Court in further proceedings.

¶67 CNA shall pay the claimant his costs in an amount to be determined by the Court in further proceedings.

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

¶69 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 10th day of November, 2004.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Tom L. Lewis
Mr. David M. Sandler
Submitted: July 13, 2004

1. The lungs are beneath the ribs and are over (cover) the heart, which is posterior to the lungs.

2. In the case of Libby asbestosis, the pleura surrounding the lungs is thickened.

3. I do not have the actual echo report for the second study.

4. Section 39-72-704, MCA (1989), provided:

> **39-72-704. Medical and hospital expenses.** In addition to the compensation provided by this chapter, an employee who becomes either totally or partially disabled from an occupational disease is entitled to receive for treatment of the occupational disease, without limitation as to length of time or dollar amount, reasonable medical services, hospitalization, medicines, and other treatment approved by the department.

The reference to the "department" is to the Department of Labor and Industry.

5. CNA has not challenged the reasonableness of the medical expenses, only the relatedness of the expenses to claimant's asbestosis.

6. Unlike section 39-71-612, MCA (1989), section 39-71-2907, MCA (1989), does not expressly refer to chapter 72, which is the Occupational Disease Act, however, the Supreme Court held in *Ingbretson v. Louisiana-Pacific Corp.,* 272 Mont. 294, 301-302, 900 P.2d 912, 917 (1995), that the penalty prescribed in § 39-71-2907, MCA, applies to occupational disease disputes over which the Workers' Compensation Court has original jurisdiction.