

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 35

WCC No. 2001-0432

HERBERT MacNEELEY
Petitioner

vs.

EVEREST NATIONAL INSURANCE COMPANY
Respondent/Insurer for

DICK OLSON CONSTRUCTION

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, a carpenter for 27 years, was diagnosed in the summer of 2000 as suffering from a wrist condition which ultimately required surgery. His symptoms first came on in January 2000. His treating orthopedic surgeon, as well as a medical panel physician designated by the Montana Department of Labor and Industry (Department), opined that claimant's condition was an occupational disease and that his latest employment contributed to the disease. The insurer, relying on an IME physician it designated, denied liability.

Held: Claimant is suffering from an occupational disease for which the insurer of his last employer is liable. He is entitled to medical and temporary total disability (TTD) benefits but not to attorney fees.

Topics:

Proof: Conflicting Evidence: Medical. Opinions of a treating orthopedic physician are more persuasive than that of an physician designated by the insurer where the treating physician has more expertise, both by way of specialization and actual years of practice, in the area of medicine involved in the case; his opinions are supported by those of an occupational disease specialist who conducted an independent medical panel examination at the request of the Department; and the emergence of claimant's symptoms was more consistent with his opinions than those of the insurer's physician.

Occupational Disease: Disease. Where claimant's degenerative wrist condition is the result of repetitive tasks as a carpenter, he suffers from an occupational disease.

Occupational Disease: Responsible Insurer. Under the last injurious exposure rule, where an occupational disease is diagnosed the insurer for the employer for whom claimant last worked and was last exposed to repetitive trauma contributing to his occupational disease is liable for the disease.

Occupational Disease: Last Injurious Exposure. Under the last injurious exposure rule, where an occupational disease is diagnosed the insurer for the employer for whom claimant last worked and was last exposed to repetitive trauma contributing to his occupational disease is liable for the disease.

Attorney Fees: Occupational Disease Cases. Claimant suffering from an occupational disease is not entitled to attorney fees since the legislature repealed the attorney fee provision of the OD Act in 1999 and he would not qualify for fees under the Workers' Compensation Act (if applicable) since the insurer did not act unreasonably.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-72-303, MCA (1999). Under the last injurious exposure rule, where an occupational disease is diagnosed the insurer for the employer for whom claimant last worked and was last exposed to repetitive trauma contributing to his occupational disease is liable for the disease.

¶1 The trial in this matter was held on April 3, 2002, in Great Falls, Montana. Petitioner, Herbert MacNeeley (claimant), was present and represented by Ms. Charla K. Tadlock. Respondent, Everest National Insurance Company (Everest), was represented by Mr. Leo S. Ward.

¶2 Exhibits: Exhibits 1, 3 through 10, and 12 through 16 were admitted without objection. Exhibit 2 was withdrawn. Exhibits 11, 17, and 18 were admitted over objection.

¶3 Witnesses and Depositions: Claimant, Daniel Johnstone, Sandy Mayernik, and David Barrick testified at trial. In addition, the parties submitted the depositions of Michael R. Yorgason, M.D., Charles Jennings, M.D., and the claimant for the Court's Consideration.

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

1. Whether Petitioner suffered a compensable occupational disease as a result of his employment with Dick Olson Construction.
2. Whether Petitioner is entitled to temporary total disability benefits beginning on 9/25/00, and continuing to the present.
3. Whether Petitioner is entitled to payment of past and future medical benefits.
4. Whether Petitioner is entitled to future benefits allowed by the Workers' Compensation/Occupational Disease Acts.
5. Whether Petitioner is entitled to his attorney fees, costs, and penalty in this action.

(Pre-trial Order at 2.)

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

FINDINGS OF FACT

¶6 Claimant is 48 years old. He is a carpenter by trade and has worked in the construction industry for 27 years, all of it as a carpenter except for a short stint as a roofer early in his career.

¶7 Claimant moved to Montana approximately five years ago. He has worked for three construction firms in Montana, the latest of which is Dick Olson Construction (Olson). He started working for Olson June 11, 1999. (Ex. 1.)

¶8 Sometime in January 2000 claimant experienced a sharp pain in his right wrist while "mudding" drywall on an Olson job. He did not recall it being associated with any specific event, only that he experienced sudden pain while working.

¶9 Claimant reported the onset of his pain to Dan Johnstone (Johnstone) the next day. Johnstone is a vice president of Olson. Notice is not an issue in the case.

¶10 Claimant continued working but continued to experience pain in his right wrist. Finally, on April 25, 2000, he went to see his family physician, Dr. Mark H. Nicholson. (Ex. 8 at 3.) Dr. Nicholson noted that claimant was complaining his right wrist was "really sore especially after a day of working." He diagnosed tendinitis and prescribed a splint.

¶11 Dave Barrick (Barrick), an Olson foreman who has worked for Olson for 25 years, and Dan Johnstone testified that claimant complained about his wrist prior to January 2000. According to Johnstone, he complained "from day 1." They also testified that claimant bragged that he had been in a lot of "tough-man" tournaments and been involved in karate and kick boxing in California. Claimant readily admitted to being involved in one tough man contest four years prior to his symptoms but denied involvement in other tough-man contests or in karate or kick boxing. He also admitted that he had been involved in an incident at the Other Place Bar where he hit his head when pulled off a bar stool but testified that the incident occurred before he went to work for Olson and denied that he hurt his wrist.

¶12 There was not a shred of direct evidence showing that claimant engaged in other tough-man competitions, karate or kick boxing, or that he injured his wrist at the Other Place Bar. I find it noteworthy that the only witnesses called by the insurer regarding a prior history of wrist problems were supervisory personnel. I further take special note of testimony by Johnstone in which he admitted telling Olson employees that "we can't have any workmen's comp, it costs money." Claimant was a credible witness; Barrick and Johnstone were not. Despite the insurer's suggestion otherwise, I find claimant had no history of wrist problems prior to January 2000, and especially note that there is not a shred of medical evidence showing that claimant sought medical treatment for his wrists prior to April 2000. [\(1\)](#)

¶13 While claimant continued working after seeing Dr. Nicholson in April, he continued to have pain. On July 31, 2000, claimant returned to Dr. Nicholson, who ordered x-rays and referred him to Dr. Steven P. Akre, a rheumatologist. The x-ray showed a "[s]capholunate ligament disruption with dorsal intercalated segmental instability."⁽²⁾ (Ex. 8 at 2.) Dr. Acre saw claimant on August 3, 2000, and diagnosed "osteoarthritis of the wrist, localized and likely secondary to old trauma," elaborating that "[i]t would appear that he has localized degenerative disease likely on the basis of some ligamentous instability." (Ex. 8 at 1.) He prescribed a nonsteroidal anti-inflammatory and recommended an orthopedic evaluation if claimant did not experience significant improvement.⁽³⁾

¶14 Claimant did not experience significant relief and was referred to Dr. Charles D. Jennings. Dr. Jennings is an orthopedic surgeon specializing in hand surgery. (Jennings Dep. at 3.) Following his orthopedic residency he had a fellowship in hand surgery. He has been practicing in Great Falls for 27 years.

¶15 Dr. Jennings examined claimant on September 25, 2000. (Ex. 3.) Claimant gave Dr. Jennings a history consistent with his trial testimony. Dr. Jennings wrote:

He does not remember a specific traumatic event leading to the problem. However, at the time he first noticed it, he was doing drywall work at Beckman's for Dick Olson Construction. He was doing the same thing on that day that he had been doing for many days prior to that, but felt sudden pain in his wrist associated with swelling. . . .

(Ex. 3 at 1.) The doctor diagnosed "chronic scapholunate instability with secondary capitulunate arthritis" and went on to say, "I would tend to place his condition in the category of occupational disease as I believe it is the result of repetitive stress on his right wrist over many months or even years of construction work." (*Id.* at 2.)

¶16 Following Dr. Jennings' examination, the claimant filed an occupational disease claim. (Ex. 1.) Everest, which insured Olson, denied the claim by letter dated October 27, 2000. (Ex. 13)

¶17 Everest thereafter set up an independent medical examination (IME) of claimant by Dr. Michael R. Yorgason. Dr. Yorgason is an orthopedic surgeon who has practiced for three years. He has a sub-specialty in foot and ankle surgery.

¶18 Dr. Yorgason examined claimant on December 18, 2000, and reported his findings to Everest. His diagnosis of claimant's wrist condition was consistent with that of Dr. Jennings. (Ex. 10.) However, he opined that the type of wrist condition which claimant had was "[m]ost commonly . . . traumatic in nature." (*Id.* at 4.) But he went on to say,

However, considering the fairly advanced arthritic changes on x-ray, I would say that the scapholunate ligament injury occurred many years ago. As Dr. Jennings has also indicated, this could have been due to an overuse type situation or an occupational disease, but as I have stated this process has been present for many years, and would not be causally related to his current employer or work

situation. He certainly had some incident back in January, but I suspect that this was a minor sprain type aggravation of his preexisting condition.

(*Id.* at 4.) When asked about a non-occupational cause of the condition, Dr. Yorgason replied that it was "possible." (*Id.* at 5.)

¶19 Following Dr. Yorgason's IME, Everest persisted in its denial. The Department designated Dr. Ronald M. Peterson, who specializes in occupational and sports medicine, to conduct an occupational disease evaluation. Dr. Peterson examined claimant on July 13, 2001. (Ex. 6.) He concluded that claimant was suffering from an occupational disease 75% attributable to his employment, and that he was permanently incapable of returning to work as a carpenter. (*Id.* at 4.)

¶20 Meanwhile, on April 25, 2001, Dr. Jennings performed a partial fusion of claimant's wrist bones. (Ex. 4 at 1.) Maximum medical improvement (MMI) has not yet been indicated.

Medical Testimony

¶21 While Dr. Jennings' operative report for the April 25, 2001 surgery is not part of the record, Dr. Jennings testified as to his operative findings, which included

complete loss of cartilage from the proximal capitate and distal lunate. There was also complete loss of cartilage from the dorsal proximal margin of the scaphoid.

There was a complete tear of the scapholunate ligament and the scaphoid was malrotated in a vertical position.

There was evidence of inflammatory change of the synovial layer of the joint, better known as synovitis.

(Jennings Dep. at 5-6.) Dr. Jennings testified that claimant's condition was

caused by two things: Number one, the stress that had been applied to the wrist over a period of years in his work as a contractor, and also some underlying weakness of the scapholunate ligament that he was born with.

(*Id.* at 6.) He went on to testify that claimant's condition is "commonly due to repetitive stress", that his employment was the proximate cause of his condition, and that since claimant "did not have significant difficulty with the wrist until December of 1999 [sic]" when working for Olson, claimant's condition was partially attributable to his employment with Olson. (*Id.* at 6-7.) Dr. Jennings also reviewed and concurred in Dr. Peterson's opinion that claimant is suffering an occupational disease. (*Id.* at 10.)

¶22 Dr. Yorgason testified that he did not think claimant's condition was related to his employment with Olson "[b]ecause he [claimant] reported to me that he had worked there for a year and a half, and I felt the changes shown on his x-ray would take longer than that period of time to develop."⁽⁴⁾ (Yorgason Dep. at 9.) He further testified that the incident in January 2000, when claimant experienced pain in his wrist, was a temporary

aggravation of a preexisting condition and that claimant's employment with Olson did not cause any permanent change in his condition. (*Id.* at 10.) He did concede, however, that claimant's condition could have developed "over time with heavy use." (*Id.* at 11.) And, on cross examination, he testified that he believed that claimant's employment with Olson had "some effect in advancing his arthritic process." (*Id.* at 19.)

Resolution of Conflicting Opinions

¶23 The opinions of Drs. Jennings and Peterson are more persuasive. Initially, I note that in addition to being the treating physician, Dr. Jennings by far has greater expertise in hand and wrist conditions than does Dr. Yorgason. Moreover, his opinions were supported by Dr. Peterson. Dr. Peterson specializes in occupational diseases and conducted an IME at the behest of the Department. Finally, Dr. Jennings' and Dr. Peterson's opinions are supported by the fact that claimant did not have a prior history of wrist complaints or treatments; objectively, it appears that his wrist condition, though preexisting, was lit up and made symptomatic by his work in January 2000.

Temporary Total Disability

¶24 The medical evidence is overwhelming that claimant was unable to perform regular carpentry work on and after September 25, 2000, and that he was temporarily totally disabled from that time onward. In fact, he has not worked since that date except for a minor, inconsequential job. The fact that he applied for and obtained unemployment does not undermine my finding. The insurer denied his claim and he had no income, circumstances that can compel conscientious individuals to seek employment exceeding their medical restrictions or to seek alternative, lesser employment although not required to do so by the Workers' Compensation Act (WCA).

Insurer's Conduct

¶25 Although I find and conclude that claimant is suffering from an occupational disease for which Everest is liable, the insurer's denial of liability was not unreasonable. It obtained and relied upon a medical opinion that claimant's wrist condition was more likely the result of an earlier injury and not his work at Olson's. While I found that opinion unpersuasive, the fact remains that the opinion created a triable issue of fact.

CONCLUSIONS OF LAW

¶26 This case is governed by the 1999 version of the Montana WCA since that was the law in effect at the time of the claimant's occupational disease. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶27 Claimant 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).

¶28 An occupational disease is "harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by

events occurring on more than a single day or work shift." § 39-72-102(10), MCA (1999). In the present case, a preponderance of evidence establishes that claimant's wrist condition was the result of repetitive trauma over a period of time and that most of that repetitive trauma (75% according to Dr. Peterson) occurred during claimant's carpentry work. Dr. Peterson addressed the proximate cause factors, § 39-72-408, MCA (1), MCA (1999), in his evaluation of claimant, and Dr. Jennings concurred in Dr. Peterson's report. Thus, the claimant has carried his burden of proving that he suffers from an occupational disease.

¶29 Section 39-72-303, MCA (1999), governs which employer is liable for the claimant's disease. The provision, popularly known as the last injurious exposure rule, see *Caekaert v. State Compensation Mut. Ins. Fund*, 105 Mont. 105, 111, 885 P.2d 495, 499 (1994), provides:

39-72-303. Which employer liable. (1) Where 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.

(2) 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.

Whether subsection (1) or (2) is applicable, Everest is liable for claimant's occupational disease. The medical reports of Drs. Peterson and Jennings, along with Dr. Jennings' testimony and the actual work claimant was performing in January 2000, establish that claimant continued to be exposed to the repetitive carpentry work while working for Olson. Dr. Jennings testified that claimant's work for Olson contributed to his condition, and even Dr. Yorgason acknowledged as much in his cross-examination. (See ¶ 18.)

¶30 Since claimant is suffering from an occupational disease for which Everest is liable, he is entitled to payment for all medical expenses connected to his condition. Section 39-72-704, MCA (1999), provides:

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, payment of medical expenses under Title 39, chapter 71.

I have previously held that medical expenses are not subject to apportionment under section 39-72-706(1), MCA. *Thomas J. Davis v. Liberty Northwest Ins. Corp.*, WCC No. 9312-6974, Decision and Judgment (September 6, 1994).

¶31 Pursuant to section 39-72-701, MCA (1999), which provides for TTD benefits to the same extent as available under the WCA⁽⁵⁾, claimant is also entitled to TTD benefits from September 25, 2000 until such time as he reaches MMI or otherwise becomes ineligible for such benefits, excepting only the short time he worked. In accordance with my decision in *Schmill v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 36, in which I determined that the apportionment provision of section 39-72-706, MCA, is unconstitutional, the insurer is not entitled to reduce benefits on account of non-occupational factors.

¶32 I have not attempted to calculate the amounts due as the parties can undoubtedly do so without my assistance. However, I reserve jurisdiction to determine the amount should the parties be unable to do so.

¶33 Finally, claimant is not entitled to attorney fees. Prior to 1999 the ODA contained an express provision governing attorney fees. Section 39-71-613, MCA (1979-1997). That provision was repealed in 1999. 1999 Mont. Laws, ch. 442, § 26. If the attorney fee provisions of the WCA apply, there is still no basis for an attorney fee award since those provisions require proof that the insurer acted unreasonably. §§ 39-71-611 and -612, MCA. I have found as a matter of fact that it did not act unreasonably.

¶34 Claimant is entitled to his costs since he prevailed in this action. *See Polk v. Planet Ins.*, 2001 MTWCC 44A (May 3, 2002) (holding that it is unconstitutional to deny claimants in occupational disease cases their costs while allowing costs in workers' compensation cases).

JUDGMENT

¶35 Claimant is suffering from an occupational disease arising out of his carpentry work over a number of years. He was employed by Everest's insured at the time of his last injurious exposure, therefore Everest is liable for his occupational disease.

¶36 Claimant is entitled to, and Everest shall pay, past and future medical benefits associated with claimant's occupational disease. Payment shall be without reduction for the contribution of non-occupational factors

¶37 Claimant is entitled to TTD benefits retroactive to September 25, 2000, and continuing until such time as he reaches MMI or otherwise becomes ineligible for such benefits, excepting only the short period claimant was engaged in remunerative work after September 25, 2000. Payment shall be without reduction for the contribution of non-occupational factors.

¶38 The Court retains continuing jurisdiction to determine the amounts due claimant if the parties are unable to do so by agreement.

¶39 The claimant is not entitled to attorney fees.

¶40 The claimant is entitled to costs and shall file his memorandum of costs in accordance with the rules of this Court.

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

¶42 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 12th day of June, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Charla K. Tadlock
Mr. Leo S. Ward
Submitted: April 3, 2002

1. Everest has provided not a scintilla of evidence that claimant is concealing his medical history.
2. The x-ray showed a "separation of the scaphoid and lunate" bones of the upper wrist. The bones, which are adjacent, were apparently further apart than they should have been.
3. Drs. Nicholson and Acre submitted claims to claimant's health insurer, which then asked claimant for further information. Claimant replied on August 29, 2000, indicating his wrist began hurting while doing drywall work. (Ex. 17 at 7-11.)
4. Claimant had actually worked for Olson for seven months (see Ex. 1) prior to his experiencing pain, a fact that Dr. Yorgason said strengthened his opinion. (Yorgason Dep. at 9.)
5. Section 39-71-701(1), MCA (1999), provides:
 - (1) The compensation to which an employee temporarily totally disabled or permanently totally disabled by an occupational disease other than pneumoconiosis, or the beneficiaries and dependents of the employee in the case of death caused by an occupational disease other than pneumoconiosis, are entitled under this chapter shall be the same payments which are payable to an injured employee, and such payments shall be made for the same period of time as is provided in cases of temporary total disability, permanent total disability, and in cases of injuries causing death under the Workers' Compensation Act.