IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 69

WCC No. 2003-0926

CLAUDE PAUL

Petitioner

vs.

TRANSPORTATION INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: This is an asbestosis case arising out of W. R. Grace's operation of a mine near Libby, Montana. The claimant worked at the mine until he retired in 1988 at the age of 64. His retirement was unrelated to his asbestosis, which did not manifest itself until many years later. However, he is now suffering from the ravaging effects of his asbestos exposure at the mine. He has been paid an impairment award of 50% on account of his disease but seeks an additional 25% impairment award. He also seeks an additional 25% award for permanent partial disability and permanent total disability benefits.

Held: The claimant has presented persuasive evidence of a 75% impairment rating and is therefore entitled to a 75% impairment award. His requests for additional permanent partial and permanent total disability benefits are barred by section 39-71-710, MCA (1987).

Topics:

> **Benefits: Impairment Awards.** In an asbestosis case where the impairment rating is based on the claimant's total lung capacity, and a 40% total lung capacity equates to a 50% impairment, the impairment rating for less than 40% total lung capacity should be proportionate between the 40% and the minimum percentage compatible for life. In this case, the persuasive medical evidence establishes the minimum percentage compatible with life at 30%. The claimant's capacity has varied but the worst measurement was 35%, which the Court adopts in light of the progressive nature of his disease. Since a 30% capacity is the minimum amount compatible with life, the claimant's impairment rating must be calculated based on the difference between the 40% and 30% lung capacities. Since a 40% capacity

equates to a 50% impairment rating, and a 30% lung capacity is equivalent to a 100% impairment, the claimant is entitled to a 75% impairment rating and award.

Impairment: Impairment Ratings. In an asbestosis case, where the impairment rating is based on the claimant's total lung capacity, and a 40% total lung capacity equates to a 50% impairment, the impairment rating for less than 40% total lung capacity should be proportionate between the 40% and the minimum percentage compatible for life. In this case, the persuasive medical evidence establishes the minimum percentage compatible with life at 30%. The claimant's capacity has varied but the worst measurement was 35%, which the Court adopts in light of the progressive nature of his disease. Since a 30% capacity is the minimum amount compatible with life, the claimant's impairment rating must be calculated based on the difference between the 40% and 30% lung capacities. Since a 40% capacity equates to a 50% impairment rating, and a 30% lung capacity is equivalent to a 100% impairment, the claimant is entitled to a 75% impairment rating and award.

Benefits: Occupational Diseases. Under 1987 laws, a claimant suffering from an occupational disease is entitled to the same benefits as an injured worker whose benefits are governed by the Workers' Compensation Act if those benefits are greater than provided under the Occupational Disease Act. *Stavenjord v. Montana State Fund,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229.

Benefits: Permanent Partial Disability Benefits: Retirement. Under 1987 laws, a worker who has retired is not entitled to wage loss benefits but is entitled to an impairment award.

Benefits: Permanent Total Disability Benefits: Retirement. Under 1987 laws, a worker who has retired is not entitled to permanent total disability benefits.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-703, MCA (1987). In an asbestosis case where the claimant's impairment rating is based on the total lung capacity, and a 40% total lung capacity equates to a 50% impairment, the impairment rating for less than 40% total lung capacity should be proportionate between the 40% and the minimum percentage compatible for life. In this case, the persuasive medical evidence establishes the minimum percentage compatible with life at 30%. The claimant's capacity has varied but the worst measurement was 35%, which the Court adopts in light of the progressive nature of his disease. Since a 30% capacity is the minimum amount compatible with life, the claimant's impairment rating must be calculated based on the difference between the 40% and 30% lung capacities. Since a 40% capacity equates to a 50% impairment rating, and a 30% lung capacity is equivalent to a 100% impairment, the claimant is entitled to a 75% impairment rating and award.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-710, MCA (1987). A claimant who has retired or is deemed retired is not entitled to permanent partial disability benefits other than an impairment award.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-710, MCA (1987). A claimant who has retired or is deemed retired is not entitled to permanent total disability benefits.

¶1 The trial in this matter was held in Kalispell, Montana, on June 10, 2004. Petitioner, Claude Paul (claimant), was present and represented by Ms. Laurie Wallace and Mr. Jon L. Heberling. Respondent, Transportation Insurance Company (Transportation), was represented by Mr. David M. Sandler.

¶2 Exhibits: Exhibits 1 through 5 and 7 through 11 were admitted without objection. There is no Exhibit 6.

¶3 Witnesses and Depositions: The claimant and Norman W. Johnson testified in person. With the agreement of counsel, Drs. Dana Headapohl and Alan Whitehouse testified telephonically. In addition, the depositions of the claimant, Norman W. Johnson, and Dr. Alan Whitehouse were submitted for the Court's consideration.

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

¶4a Whether the claimant is entitled to additional impairment benefits.

¶4b Whether the claimant is entitled to additional permanent partial disability (PPD) benefits in addition to his impairment award.

¶4c Whether the claimant is entitled to permanent total disability (PTD) benefits.

¶4d Whether the claimant is entitled to attorney fees and a penalty.

¶5 Bench ruling: At trial I ruled that the claimant is entitled to a 75% impairment award and that he is not entitled to either attorney fees or a penalty. Those rulings are reaffirmed.

¶6 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:

FINDINGS OF FACT

¶7 The claimant is 81 years old.

¶8 For almost two decades-1969 until January 1988-claimant worked for W.R. Grace & Co. at its zonolite mine near Libby, Montana.

¶9 During his almost twenty years of employment at the Libby mine, the claimant was exposed to and inhaled tremolite asbestos. Exposure to tremolite asbestos does not have an immediate effect on persons exposed to it, rather, its effect is insidious and long-term.

¶10 The long-term effect of tremolite exposure is described in my decision in *Fellenberg v. Transportation Ins. Co.*, 2004 MTWCC 29, as follows:

> ¶ 16 . . . . Tremolite fibers are needle like and penetrate the lung more deeply than other, more common types of asbestos fibers which have a serpentine structure. They [the tremolite fibers] are too small to be expelled, therefore they lodge in the inner surfaces of the lung and slowly migrate outward until they reach the pleura, which is the thin membrane which covers the outside of the lungs. . . . As tremolite fibers penetrate and impregnate the pleura, the pleura thickens and takes on an orange-rind appearance. The thickening causes the pleura to be less elastic and expansive, thus limiting inspiration (inhaling).
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> ¶17 Tremolite asbestos disease is primarily a "restrictive" airway disease, restrictive meaning that inspiration is compromised or diminished. An "obstructive" airway disease, for example "Chronic Obstructive Pulmonary Disease," is one in which the ability to exhale air from the lungs is compromised. . . .
>
> ¶18 As the disease progresses it becomes more difficult for individuals suffering from tremolite asbestos disease to sufficiently oxygenate their blood, especially when engaged in activity. The disease is irreversible and ultimately leads to respiratory failure and death. However, the disease has a long latency period, ranging from ten to twenty years. Once evident, it progresses slowly, thus the individuals with the disease may die of other causes rather than their tremolite asbestos disease.

¶11 Based on his asbestos exposure at the Libby mine, the claimant filed an occupational disease claim on November 8, 2001. Transportation, which insured W.R. Grace, initially denied the claim but thereafter accepted liability for the claim. The present proceeding is therefore limited to the amount of benefits due the claimant.

¶12 The claimant retired from W.R. Grace in January 1988. At the time he retired, the claimant was 64 years old. By his own admission, his retirement was voluntary and unrelated to his asbestos disease, which had not yet manifested itself. At the time he retired, the claimant did not intend to return to work in the future.

¶13 Since his retirement, the claimant has never sought work for wages. He claims, however, that he and his wife took in foster children until 2001, and that his care for those children should be considered gainful employment. However, the claimant's involvement in foster care "was mainly to make sure the kids had places to play in the yard" and to care

for the children "when his wife was out of the house." (Petitioner's Proposed Findings of Fact, Conclusions of Law and Judgment, ¶ 21.) I am unconvinced that he had substantial involvement in caring for the foster children or that it constituted gainful employment.

¶14 In the years since his retirement, the tremolite asbestos fibers to which the claimant was exposed during his employment with W.R. Grace have progressively scarred his lungs and reduced his lung function. Stated simply, the claimant's asbestosis disease has severely impaired his breathing ability. He is still able to engage in limited activities but becomes breathless and has to rest after even minimal physical activity. He is physically unable to work at any sort of employment and is therefore presently PTD.

¶15 Dr. Alan Whitehouse, a pulmonologist, who is treating and following many of the employees of the Libby mine rated the claimant's current impairment at 75% of the whole person. Dr. Dana Headapohl, a specialist in occupational and environmental medicine, also provided an impairment rating at the request of Transportation. She rated the claimant at 51%.

¶16 Both physicians based their ratings on the 5th edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. Both physicians agreed that the claimant's impairment is best rated based on his lung diffusion capacity, which in medical terminology is known at DLCO. DLCO measures total lung capacity.

¶17 Dr. Headapohl provided testimony that a DLCO of 40% or less places the claimant in category 4 of the *Guides to the Evaluation of Permanent Impairment*. That category provides for a minimum impairment rating of 50%.

¶18 Measurements of the claimant's DLCO has varied. Dr. Headapohl based her rating on a measurement of 38%. However, one of the claimant's DLCO ratings was 35%.

¶19 Dr. Headapohl provided a convincing analytical basis for determining the claimant's impairment rating. She testified that the rating should be based on comparing the claimant's actual DLCO to the 40% which is the threshold for a 50% rating. However, the scale is not between 40% and 0% since death ensues somewhere in between those two extremes. I questioned Dr. Headapohl concerning the lowest DLCO compatible with life and she indicated that, based on her discussions with a pulmonologist, it could be as low as 15%. However, Dr. Whitehouse, who is a pulmonologist, testified that the lowest he has measured is in the low 30's and the lowest he is aware of is 29%. He opined that test results referenced by the pulmonologist Dr. Headapohl consulted were faulty.

¶20 As a pulmonologist, Dr. Whitehouse regularly supervises DLCO testing. I found his

testimony to be more persuasive as to DLCO levels compatible with life. I therefore find that the spread to be considered in determining the claimant's impairment rating is between the 40% threshold which places in category 4 and 30%. I further find that in light of the degenerative nature of the claimant's asbestos disease, that the 35% DLCO measured at one time is the best measure for determining his current impairment. If 35% underestimates his current DLCO, barring death on account of other causes, his degenerative asbestosis will ultimately result in his reaching that point in any event.

¶21 Therefore, adopting Dr. Headapohl's persuasive analysis and the minimum DLCO levels established by Dr. Whitehead, I find that the claimant's impairment is 75%. That is what Dr. Whitehead rated him, albeit without the persuasive logic provided by Dr. Headapohl. The 75% rating is based on 100% disability (death) at 30% and 50% at 40%.

¶22 Transportation's refusal to pay additional benefits to the claimant was not unreasonable. The claimant's request for additional benefits raised legitimate issues of fact and law.

CONCLUSIONS OF LAW

¶23 This case is governed by the 1987 version of the Montana Workers' Compensation Act since that was the law in effect at the time the claimant retired from W.R. Grace. *Cf., Buckman v. Montana Deaconess Hospital,*224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶24 The 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).

¶25 The claimant's request for PPD benefits, including an impairment award, is governed by section 39-72-405, MCA (1985-1987), which limits benefits for permanent disability less than total disability to a maximum $10,000 award. That limitation, however, was struck down in *Stavenjord v. Montana State Fund,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229.[(1)] Under *Stavenjord,* if the PPD benefits prescribed under the 1987 Workers' Compensation Act (WCA) are greater than the amount under section 39-72-405, MCA, then the claimant is entitled to WCA PPD benefits.

¶26 Under the 1987 WCA, the claimant is entitled to both an impairment award and wage supplement benefits "equal to 66 2/3% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half the state's average weekly wage at the time of injury." § 39-71-703, MCA (1987).[(2)]

¶27 Transportation does not dispute the claimant's entitlement to an impairment award.[(3)]

However, it disputes the amount of the award, contending it should be limited to 50%. I have found, however, that the claimant's impairment is 75% rather than the 50% contended by Transportation. Transportation is therefore liable for the 75% impairment award.

¶28 That leaves an additional 25% available under the wage supplement provision of section 39-71-703, MCA (1987). The availability of those benefits, however, is qualified by section 39-71-710, MCA (1987), which provides:

> **Termination of benefits upon retirement.** (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive full social security retirement benefits, the claimant is considered to be retired. **When the claimant is considered retired, the liability of the insurer is ended for payment of wage supplement**, permanent total disability, and rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.
> (2) If a claimant who is eligible to receive social security retirement benefits and is gainfully employed suffers a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and medical benefits. [Emphasis added.]

The claimant retired in 1988 at age 64, long before his asbestosis became disabling. Under section 39-71-710(1), MCA (1987), he is ineligible for wage supplement benefits.[(4)] His PPD benefits are therefore limited to the 75% impairment award.

¶29 Section 39-71-710(1), MCA (1987), similarly proscribes the claimant's eligibility for PTD benefits. While I have concluded he is presently unable to work and is therefore PTD, claimant retired long before becoming PTD.

¶30 Finally, I determine that the claimant is not entitled to attorney fees or a penalty. An award of attorney fees and a penalty require proof that the insurer acted unreasonably in denying benefits. §§ 39-71-611-612, -2907, MCA (1987). The claimant's request for additional impairment benefits raised significant issues of fact. Although I have found in the claimant's favor, the insurer's denial of the additional benefits was based on reasonable medical opinions. As to the other benefits he requests, even if I am wrong in rejecting his requests, the insurer's denial of those benefits was based on a reasonable and legitimate interpretation of the Montana statutes governing his claim.

JUDGMENT

¶31 The claimant is entitled to a 75% impairment award and Transportation shall pay that award in full. The Court reserves jurisdiction to determine the amount due in the event the

parties are unable to agree on the amount.

¶32 The claimant is not entitled to further PPD benefits or to PTD benefits.

¶33 The claimant is not entitled to attorney fees or a penalty. He is, however, entitled to costs and shall submit a memorandum of costs in accordance with this Court's rules.

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

¶35 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 7th day of October, 2004.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Ms. Laurie Wallace
Mr. Jon Heberling
Mr. David M. Sandler
Submitted: June 10, 2004

1. The limitation was struck down only with respect to the 1987 and later statutes. Challenges to limitation prior to 1987 are pending in the Supreme Court.

2. § 39-71-703, MCA (1987) states in its entirety:

> **Compensation for permanent partial disability - impairment awards and wage supplements.** (1) The benefits available for permanent partial disability are impairment awards and wage supplements. A worker who has reached maximum healing and is not eligible for permanent total disability benefits but who has a medically determined physical restriction as a result of a work-related injury may be eligible for an impairment award and wage supplement benefits as follows:
> (a) The following procedure must be followed for an impairment award:
> (i) Each percentage point of impairment is compensated in an amount equal to 5 weeks times 66 2/3% of the wages received at the time of the injury, subject to a maximum compensation rate of one-half of the state's average weekly wage at the time of injury.
> (ii) When a worker reaches maximum healing, an impairment rating is rendered by

one or more physicians as provided for in 39-71-711. Impairment benefits are payable beginning the date of maximum healing.
(iii) An impairment award may be paid biweekly or in a lump sum, at the discretion of the worker. Lump sums paid for impairments are not subject to the requirements set forth in 39-71-741, except that lump-sum conversions for benefits not accrued may be reduced to present value at the rate set forth by the division in 39-71-741(5).
(iv) If a worker becomes eligible for permanent total disability benefits, the insurer may recover any lump-sum advance paid to a claimant for impairment, as set forth in 39-71-741(5). Such right of recovery does not apply to lump-sum benefits paid for the period prior to claimant's eligibility for permanent total disability benefits.
(v) If a worker suffers additional injury, an impairment award payable for the additional injury must be reduced by the amount of a previous award paid for impairment to the same site on the body.
(b) The following procedure must be followed for a wage supplement:
(i) A worker must be compensated in weekly benefits equal to 66 2/3% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half the state's average weekly wage at the time of injury.
(ii) Eligibility for wage supplement benefits begins at maximum healing and terminates at the expiration of 500 weeks minus the number of weeks for which a worker's impairment award is payable, subject to 39-71-710. A worker's failure to sustain a wage loss compensable under subsection (1)(b)(i) does not extend the period of eligibility. However, if a worker becomes eligible for temporary total disability, permanent total disability, or total rehabilitation benefits after reaching maximum healing, the eligibility period for wage supplement benefits is extended by any period for which a worker is compensated by those benefits after reaching maximum healing.
(2) The determination of permanent partial disability must be supported by a preponderance of medical evidence.
(3) Notwithstanding subsection (1), beginning July 1, 1987, through June 30, 1989, the maximum weekly compensation benefits for permanent partial disability may not exceed $149.50, which is one-half the state's average weekly wage established July 1, 1986.

3. In *Stavenjord v. Montana State Fund,* 2003 MT 67, 314 Mont 466, 67 P.3d 229, the Supreme Court held that claimants suffering from occupational diseases after the enactment of the 1987 amendments to the ODA are entitled to the same PPD benefits as injured workers under the WCA if those benefits are greater. Impairment awards are part of PPD benefits. While the retroactivity of *Stavenjord* is still at issue, *see* 2004 MTWCC 62,

Transportation has not raised the retroactivity issue as a defense to the claimant's request for PPD benefits.

4. Claimant challenges the constitutionality of section 39-71-710, MCA (1987), on equal protection grounds. I have considered and rejected similar challenges in *Black v. MDMC/Benefis Healthcare*, 2001 MTWCC 47 and *Reesor v. Montana State Fund*, 2003 MTWCC 51. *Reesor* is presently on appeal to the Montana Supreme Court. I decline to reconsider my prior decisions in light of the appeal.