IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 56

WCC No. 2001-0309

LIBERTY NORTHWEST INSURANCE CORPORATION

Petitioner

DECKER COAL COMPANY

Employer

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant suffered a herniated disk in a February 2000 work-related accident for which the State Fund was responsible. He underwent back surgery, recovered to the point that he had minimal symptoms, and was determined to be a maximum medical improvement on September 1, 2000. On September 7, 2000, he began driving a heavy coal truck for his employer. Over the next two and a half days he experienced increasing pain and had to stop driving. A new MRI disclosed a reherniation of his disk and he has since undergone two additional back surgeries. In September Liberty was the responsible insurer. It has paid benefits but brought the present action for indemnification from the State Fund, alleging that the claimant's reherniation was caused by his original, February 2000 injury.

Held: Uncontradicted medical evidence establishes that claimant's truck driving in September 2000 caused the reherniation and that the reherniation would not have occurred had claimant continued working in the light-duty job he was doing for the several month period prior to the truck driving. Under principles laid out in *Belton v. Carlson Transport* and *Caekaert v. State Compensation Mut. Ins. Fund,* Liberty is liable for claimant's resulting medical expenses and compensation benefits.

Topics:

> **Proof: Burden of Proof: Between Insurers.** In subsequent injury cases, where one of two insurers is liable for claimant's condition and the only question is which one,

the insurer which is at risk for the occupational injury or disease which claimant asserts is the cause of the disabling medical condition bears the burden of proving that the other insurer is liable. Where that insurer is the second insurer, it must prove either that the claimant did not reach maximum medical improvement from the first injury or that the first injury is the cause of the disabling condition. If the insurer is the first insurer, then it must prove that claimant reached maximum medical improvement following the first injury or disease and thereafter suffered a work-related injury or exposure which permanently aggravated the pre-existing condition.

Injury and Accident: Aggravation: Occupation Disease. Where claimant suffers an industrial injury but reaches maximum medical healing with respect to the injury and thereafter suffers an occupational exposure which permanently aggravates the underlying injury-related condition, the insurer at risk at the time of the subsequent occupational exposure is liable for the medical condition and disability resulting from the aggravation. *Caekaert v. State Compensation Mut. Ins. Fund* and *Liberty Northwest Ins. Corp. v. Champion Intern. Corp.* applied.

Cases Discussed: *Caekaert v. State Fund*. Where claimant suffers an industrial injury but reaches maximum medical healing with respect to the injury and thereafter suffers an occupational exposure which permanently aggravates the underlying injury-related condition, the insurer at risk at the time of the subsequent occupational exposure is liable for the medical condition and disability resulting from the aggravation. *Caekaert v. State Compensation Ins. Mut. Fund* and *Liberty Northwest Ins. Corp. v. Champion Intern. Corp.* applied.

¶1 The trial in this matter was held in Columbus and Billings, Montana, on July 23, 2001. Petitioner, Liberty Northwest Insurance (Liberty), was represented by Mr. Larry W. Jones. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Greg E. Overturf. Claimant, Robert Waurio, was not represented, however, he was present during the Columbus proceedings.

¶2 Exhibits: Exhibits 1 through 23 were admitted without objection.

¶3 Witnesses and Depositions: Claimant and Dr. Stuart G. Goodman testified. In addition, the parties submitted depositions of claimant, Barbara Turner, Wayne Kadarmes, Don Reynolds, and Dr. Stuart G. Goodman for the Court's consideration.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are:

- Whether the claimant's back problems for which Liberty Northwest has paid workers' compensation benefits are, in whole or in part, the liability and responsibility of the State Fund.

- Whether the State Fund should reimburse Liberty Northwest for some or all of the workers' compensation benefits it has paid the claimant relating to his back claim while liberty insured Decker Coal Company.

¶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 I find claimant's testimony in this matter to be wholly credible and I have accepted his testimony where in conflict with that of others.

¶7 Claimant is a long time employee of Decker Coal Company (Decker). He went to work for Decker on April 4, 1988, as a heavy equipment mechanic. Over the next 12 years he did a variety of mechanical work. He worked on heavy equipment engines and transmissions. He also worked on pickups and lighter equipment. (Waurio Dep. at 22-26.)

¶8 On February 17, 2000, claimant was working as a field mechanic, which required that he repair heavy trucks and equipment in the field. While repairing a coal hauler, he injured his low back. (*Id.* at 38, 43.)

¶9 At the time of February 17, 2000 injury, Decker was insured by the State Compensation Insurance Fund (State Fund), which accepted liability for the injury.

¶10 Following the accident, claimant experienced low-back and right leg pain. (Ex. 5 at 3.) He was diagnosed as suffering from a large herniated disk and underwent a right L4-5 microdiskectomy on March 20, 2000. (*Id.* at 9-10.)

¶11 Claimant was off work during the three months following his surgery. During that time he made a good recovery.

¶12 Claimant returned to work on June 12, 2000, in a light-duty capacity as an "oiler." His primary duty was changing the oil in pickup trucks.

¶13 By September 1, 2000, claimant had minimal discomfort even with activity. (Goodman Dep. at 12; Ex. 5 at 18.) On that date, Dr. Goodman released him to return to work but physically restricted him to lifting a maximum of 75 pounds and to lifting 25 pounds on a "regular lifting basis." (*Id.*)

¶14 Meanwhile, claimant and his supervisors discussed claimant driving heavy coal hauling trucks. Claimant had previously driven trucks at Decker for at least a short time. (Waurio Dep. at 66.) Claimant noted that the trucks have good seats and felt that he would not have a problem driving. (*Id.* at 67.)

¶15 On September 1, 2000, claimant discussed driving with Dr. Goodman. The doctor approved his working as a driver, noting:

> He is going to return to his work, which is driving large trucks. The trucks described as having excellent seats and he is not driving on rough roads. I think it is very reasonable that he can return to this line of work.

(Ex. 5 at 18.)

¶16 Claimant began driving on September 7, 2000. He drove 11½ hours that day. (Reynold's Dep. Ex. 2 at 93.) Even though the seats of the trucks claimant drove were good ones, claimant was nonetheless bounced around while driving, especially when his truck was empty, and by the end of the day of September 7th, his back was stiff.

¶17 Claimant again drove 11½ hours on September 8, 2000. (*Id*. at 92.) By the end of his shift, his back was "pretty sore."

¶18 Claimant's final day as a driver was September 9, 2000. He drove only four hours that day (*id*. at 91), even though scheduled for a full shift. He was unable to continue driving because of back pain. He finished his shift by working in the shop cleaning. (*Id*.) He never returned to truck driving.

¶19 Claimant reported his inability to continue truck driving to his supervisors. At the end of the day he was required to fill out a time card. The time card requires the worker to circle "yes" or "no" as to "personal injury" occurring on a work shift. Claimant was told by his supervisor not to report a new injury on his time card and to mark "no injury." Instead of marking "no" as instructed on September 9th, he circled neither "yes" nor "no." (*Id*.)

¶20 Claimant thereafter experienced continued back pain and began taking Percocet, which is a narcotic analgesic. On September 18, 2001, Dr. Goodman imposed further restrictions on claimant's work, limiting him to jobs which allowed him to adjust his activities as needed. (Goodman Tr. Test.; Goodman Dep. Ex. 1 at 156[(1)].) Claimant went back to working as an oiler, then a mechanic.

¶21 On October 16, 2000, Dr. Goodman's nurse noted a telephone call from claimant. He complained of low-back pain radiating down his right leg. (Goodman Dep. Ex. 1.)

¶22 On October 18, 2000, an MRI of claimant's lumbar spine was done. It disclosed recurrent disk herniation at the L4-5 level, specifically a 'large focal herniated nucleus pulposus at L4-L5 on the right which dorsally displaces the right L5 nerve root . . . [and] causes severe "right lateral recess" stenosis.' (*Id*. at 152.) Dr. Goodman opined that while claimant's February 2000 injury and resultant surgery predisposed him to the new herniation (a "1 in 20 chance") (Goodman Dep. at 25, 32-33), the October truck driving caused the actual herniation (*id*. at 21.) On a more likely than not medical basis, he further opined that claimant would **not** have suffered the new herniation had he continued to do

light-duty shop work rather than driving. (Goodman Dep. at 21, 37.) Dr. Goodman's opinions were unrebutted.

¶23 Claimant continued working until October 30, 2000. On that date he was using a pipe wrench on a brake cylinder of a truck when he felt something in his back. Within an hour or so he was experiencing severe pain and had to leave work. The next day he underwent an epidural steroid aimed at alleviating his pain. (Ex. 5 at 36-37.)

¶24 On October 30, 2000, Decker's safety supervisor, Don Reynolds (Reynolds), completed a First Report of Occupational Injury or Occupational Disease. In that report he wrote that claimant had surgery on March 20, 2000, had returned to work on June 6, 2000, and later "drove a coal hauler [truck] for two days and complained his back was hurting." (Ex. 19, capitalized in original.) Reynolds further noted that claimant had "recently had an MRI which disclosed a bulging disc." As pertains to the issue in this case, he wrote, "THERE WASN'T ANY TRAUMATIC HAPPENING OR ACCIDENT!" (*Id.*) There was no mention of the October 30th incident.

¶25 By the time claimant commenced his truck driving for Decker, and thereafter, Decker was insured by Liberty Northwest Insurance Corporation (Liberty). The October 30th report was therefore submitted to Liberty. Claimant did not see or sign the report prior to its submission. (Waurio Dep. at 91-92.)

¶26 On December 27, 2000, pursuant to section 39-71-608, MCA, Liberty agreed to pay claimant benefits under a reservation of rights. It thereafter brought the present petition seeking indemnification from the State Fund. It seeks a determination that the claimant's disability and medical expenses are the State Fund's responsibility and prays for indemnification.

¶27 Following the October 30th incident, Dr. Goodman ordered yet another MRI. That MRI was done on November 29, 2000, and confirmed a right-sided herniation at the L4-5 level which "produces significant deformity of the thecal sac with mass effect upon the traversing right L5 and S1 nerve roots." (Ex. 1.) Dr. Goodman characterized the herniation as "worse" in comparison to the October 18, 2000 MRI, and decided to operate for a second time. (Ex. 5 at 26.)

¶28 The second surgery was in two parts on two different dates. The first consisted of a posterior hemilaminotomy and diskectomy at the L4-5 level performed on December 12, 2000. (Ex. 5 at 26-28; Goodman Dep. Ex. 1 at 68.) The second was an anterior fusion of the L4 through S1 disks done on January 22, 2001. (Goodman Dep. Ex. at 62.)

¶29 At the time of trial, claimant had not recovered from his surgery and had not returned to work. Dr. Goodman testified at trial that the fusion attempted on January 22nd is not solid. He will re-evaluate claimant's condition in three months. If, at that time, there is unacceptable movement of the spinal segments he will consider doing a posterior fusion.

¶30 Dr. Goodman testified that as a result of the reherniation the claimant will have a greater impairment than that which followed his first surgery. As with his other opinions, the opinion is unrebutted.

¶31 The facts of this case are straightforward and need little elaboration. The opinions of Dr. Goodman, who testified both by deposition and personally, were not only persuasive but unrefuted by other medical evidence. Those opinions establish the following:

> ¶31a As of September 1, 2000, claimant had reached maximum medical improvement (MMI) from his prior back injuries.
>
> ¶31b The claimant suffered a new, reherniation of the L4-5 disk while driving coal trucks for Decker on October 7 through 9, 2000.
>
> ¶31c The reherniation was a direct and proximate result of the truck driving. On a more probable than not basis, it would not have occurred had claimant been performing the job he had been performing during the months immediately prior to his driving.
>
> ¶31d As a result of the reherniation, claimant required additional surgery and suffered additional impairment. His condition was permanently and materially worsened.

CONCLUSIONS OF LAW

¶32 The law in effect at the time the claimant's alleged aggravations governs, therefore the 1999 version of the Workers' Compensation Act (WCA) and Occupational Disease Act (ODA) apply.

¶33 Liberty and State Fund do not dispute that one or the other is liable for claimant's compensation and medical benefits paid since October 7, 2000. The question for the Court is, which one is liable?

¶34 The seminal case concerning liability for successive work-related injuries is *Belton v. Carlson Transport,* 202 Mont. 384, 658 P.2d 405 (1983). Claimant in that case had injured his low back in 1977 when Hartford Accident and Indemnity Company insured his employer. Hartford accepted liability and paid benefits. Claimant returned to work and reinjured his low back in a 1979 fall at work. Transport Indemnity Company insured the employer at that time.

¶35 It was undisputed that the 1979 accident aggravated the claimant's 1977 injury, however, the insurer for the second incident - Indemnity - argued that the first insurer - Hartford - continued to be liable for claimant's low-back condition, including the aggravation, because claimant had not "completely healed" after the first accident. The Supreme Court rejected a "completely healed" rule and held that the second insurer is

liable for an aggravation of a prior injury which occurs after the claimant has reached MMI with respect to the prior injury. The Court went on to determine which insurer has the burden of proof in such cases: "We hold that the burden of proof is properly placed on the insurance company **which is on risk at the time of the accident in which a compensable injury is claimed**." *Id.* at 392, 658 P.2d at 409-410 (emphasis added).

¶36 Subsequent cases demonstrate that the insurer at risk may be either the first or the second insurer. In both *Perry v. Tomahawk,* 226 Mont. 318, 320, 735 P.2d 308, 310 (1987), and *Richter v. Simmons Drilling,* 241 Mont. 518, 522, 788 P.2d 308, 310 (1990), the Court determined that the second, subsequent insurer was at risk and bore the burden of proving that the first insurer was liable for claimant's condition. But in *EBI/Orion Group v. State Compensation Mut. Ins. Fund,* 249 Mont. 449, 452-53, 816 P.2d 1070, 1072 (1991) and *Chaney v. U.S. Fidelity & Guar.,* 276 Mont. 513, 520, 917 P.2d 912, 916 (1996), the burden was placed on the first insurer to prove that claimant had reached MMI and thereafter suffered a new injury or aggravation. The cases are reconcilable. In *Perry* and *Richter* the claimants alleged that a second injury was the cause of disability. In *EBI/Orion* and *Chaney* the claimants asserted that the first injury was the cause of disability. Thus, it appears that insurer which the claimant alleges is responsible bears the burden of proof.

¶37 *Liberty* argues that subsequent injury and disease cases decided since *Belton* are inconsistent. Specifically, it urges that under *Belton* it would be liable for the claimant's continuing disability and medical expenses while under *Briney v. Pacific Employers Ins. Co.,* 283 Mont. 346, 942 P.2d 81 (1997) and *Romero v. Liberty Mutual Fire Ins. Co. and State Compensation Ins. Fund, 2001 MTWCC 5*, it would not be. (Liberty's Post-Trial Brief at 9.) It asks the Court to consider, clarify, and reconcile the case law. In oral argument, Liberty urged the Court to establish a "bright line" for determining which insurer is liable in subsequent injury/aggravation cases.

¶38 After reading the cases cited by the parties, as well as other cases involving subsequent injury and disease issues, I am unpersuaded that the cases are inconsistent or that a different result is required under *Belton* than under *Briney* and *Romero*.

¶39 *Belton* and its progeny did not change the rule that a new injury or aggravation of a prior injury relieves the prior insurer of liability for medical expenses and disability resulting from the new injury or aggravation. 'A limitation not at issue in *Belton*, but clearly set forth therein, is that the second injury must be "an aggravation of a pre-existing injury."' *Kuntz v. Nationwide Mut. Fire Ins. Co.,* 1998 MT 5 at ¶19, 287 Mont. 142, 146, 952 P.2d 423, 424. *Belton* addressed only the "completely healed" rule, which it rejected, and the allocation of burden of proof as between insurers.

¶40 Belton also does not address other issues arising in subsequent injury and disease cases. First, it did not discuss who bears the burden of proof as between the claimant and

insurer. Secondly, it does not address what constitutes an injury or aggravation sufficient to relieve the prior insurer of liability.

¶41 *Briney,* which Liberty cites as conflicting with *Belton*, is one of three similar cases. The other two are *Walker v. United Parcel Service,* 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993) and *Burgland v. Liberty Mutual Fire Ins. Co.*, 286 Mont. 134, 136, 950 P.2d 1371, 1372 (1997). In each of the three cases the claimant had suffered a previous work-related injury. In each case the claimant returned to his time-of-injury job following the injury, worked at that job for a number of years but ultimately was unable to continue working in the time-of-injury job. In each case the claimant then brought a petition for permanent partial disability (PPD) benefits. The insurers in each case denied liability for PPD benefits, arguing that the disability was due to aggravations of the initial condition occurring over the intervening years. The insurers in *Burgland* and *Briney* affirmatively accepted liability for claimant's current condition as a subsequently occurring occupational disease. The insurer in *Walker* offered to do so.

¶42 As should be apparent from the foregoing factual summary, in each case the first and second insurers were one and the same. The allegations of subsequent disease were interposed in an attempt to limit the insurer's liability to the $10,000 maximum available under section 39-72-405, MCA, rather than the 500 weeks which were potentially available with respect to the claimants' original injuries.[(2)]

¶43 In each of the three cases, the claimant mustered substantial evidence that the first injury caused the permanent partial disability for which compensation was sought. The Supreme Court held that with the production of that evidence the burden of proof shifted to the insurer to prove that a subsequent injury or disease caused the disabling condition. Discussing the respective burdens, the Court in *Briney* said:

> [I]t is important to note the parties' respective burdens of proof in the Workers' Compensation Court. The Workers' Compensation Court correctly concluded that the claimant has the burden of proving that he is entitled to workers' compensation benefits by a preponderance of the probative, credible evidence (citing *Ricks v. Teslow Consol.* (1973), 162 Mont. 469, 483, 512 P.2d 1304, 1312; *Dumont v. Wickens Bros. Const. Co.* (1979), 183 Mont. 190, 201, 598 P.2d 1099, 1105). **However, once the claimant has proven a work-related injury and produced evidence that that injury is a cause of a present disability, an insurer who alleges that subsequent events are the actual cause of the claimant's current disability has the burden of proving that allegation, which is in the nature of an affirmative defense, by a preponderance of the evidence.** *Walker v. United Parcel Serv*. (1993), 262 Mont. 450, 456, 865 P.2d 1113, 1117. [Emphasis added.]

Briney at 351, 942 P.2d at 84. As the quoted text indicates, the basic burden shifting rule was established in *Walker*.

¶44 In *Chaney*, a case mentioned in my earlier discussion of *Belton*, the Court followed a similar analysis where the claimant alleged that USF&G, the first of two insurers, was liable for his condition. The first insurer - U.S. Fidelity - was liable for a wrist injury claimant suffered in 1983. Applying the *Walker* rule, the Court held that USF&G bore the burden of proof with respect to the claimant's claim against it:

> Because Chaney's claim was accepted and his initial burden of proof satisfied, the burden of proof shifted to USF & G to show that other injuries caused the extent of his current condition. *Walker v. United Parcel Serv.* (1993), 262 Mont. 450, 456, 865 P.2d 1113, 1117. To avoid further liability, USF & G was required to show that Chaney had attained a condition of maximum healing and that Chaney sustained an injury after he reached maximum healing. *See Caekaert v. State Comp. Mut. Ins. Fund* (1994), 268 Mont. 105, 115, 885 P.2d 495, 500-01; *Lapp v. W.R. Grace/Bomac Drilling* (1992), 254 Mont. 237, 240, 836 P.2d 602, 604; *EBI/Orion Group v. State Comp. Mut. Ins. Fund* (1991), 249 Mont. 449, 452-53, 816 P.2d 1070, 1072; *Belton v. Hartford Accident & Indem. Co.* (1983), 202 Mont. 384, 392, 658 P.2d 405, 409-10.

276 Mont. at 519, 917 P.2d at 915.

¶45 The proof required to establish a subsequent occupational disease as the cause of a medical condition and disability is outlined in *Caekaert v. State Compensation Ins. Fund,* 268 Mont. 105, 885 P.2d 495 (1994). The claimant in *Caekaert* had developed carpal tunnel syndrome in 1988 while working as a plumber and had undergone bilateral carpal tunnel surgery. The State Fund insured his 1988 employer and accepted his condition as an occupational disease. In 1992 claimant needed additional carpal tunnel surgeries. The State Fund denied liability for the surgeries and concomitant disabilty, urging that claimant's work in a home poultry business had aggravated his carpal tunnel syndrome and therefore created the need for the second surgeries. This Court found for the insurer, however, on appeal the Supreme Court reversed.

¶46 Initially, the Supreme Court held that the aggravation rule which had previously been applied to injury cases is also applicable to occupational diseases. Adopting a "last injurious exposure rule", it held that the insurer liable for a prior work-related occupational disease is not liable for a second, post-MMI injurious exposure which "materially or substantially contributed" to the condition requiring treatment or giving rise to disability; however, if the condition which gives rise to treatment or disability is a mere recurrence of the condition caused by the first occupational disease or injury, and "is a direct and natural result" of that first disease or injury, then the primary insurer remains liable. *Id.* at 112, 885 P.2d at 499. As a factual matter, the Supreme Court in *Caekaert* found that the evidence was insufficient to establish that claimant had either reached MMI after his first surgeries or that claimant's work in his poultry business caused his second surgeries.[(3)] To the

contrary, it found that medical testimony by claimant's surgeon established that the second surgeries were required on account of the original, 1988 condition.

¶47 In *Liberty Northwest Ins. Corp. v. Champion International Corp.,* 285 Mont. 76, 945 P.2d 433 (1997), the Supreme Court applied *the* last injurious exposure rule to an injury-disease situation. In that case, the claimant injured his back in 1992 while working for Champion, which was self-insured. Claimant recovered from his injury, was declared at MMI with "minimal" problems, and was released to return to work. *Id*. at 78, 945 P.2d at 434. Subsequent to his return to work, he worked in a light-duty position, however, he was then transferred to a heavier position. His work in that position led to increasing back pain which was eventually disabling. By that time his employer was insured by Liberty Northwest, which commenced paying benefits but petitioned the Court for indemnification from Champion. After trial, I denied Liberty's petition, finding that the evidence affirmatively established that claimant's subsequent work had "accelerated and significantly aggravated his preexisting degenerative disc disease, and that his disability was not a mere result of the natural progression of his underlying condition." *Id*. at 79, 245 P.2d at 435. On appeal the Supreme Court followed *Caekaert* but affirmed. This Court, as well as the Supreme Court, reached a different result in *Champion* not because of any different legal analysis but simply because the evidence and facts in the case were different. In *Caekaert* the evidence failed to support a finding of a subsequent occupational disease as the cause of claimant's condition. In *Champion* the facts did.

¶48 *Romero v. Liberty Mutual Fire Ins. Co. and State Compensation Ins. Fund, 2001 MTWCC 5,* which Liberty says is another inconsistent case, simply follows and applies *Caekaert*. The claimant in that case suffered a work-related right arm injury in 1992, which the *State Fund* accepted as compensable. Claimant thereafter developed difficulties in both arms, leading to a diagnosis of thoracic outlet syndrome. Claimant was off work for a substantial period of time but worked at the County Market bakery for 15 weeks in 1997. Her physician took her off work after 15 weeks because she was having difficulty using her arms. She then filed an occupational disease claim alleging that her work at County Market aggravated her condition. Liberty Mutual, which insured claimant, denied liability. After trial I found that claimant's ongoing arm problems were caused by her 1992 injury and its sequela, not by her work at County Market:

> While Dr. Nelson's evidence and the history of claimant's left arm complaints leave me with little doubt that her left arm condition was caused by her 1992 injury, Dr. Nelson's testimony indicates that her work at County Market made the thoracic outlet syndrome involving her left arm worse. However, his testimony also establishes that <u>any</u> activity requiring claimant to use her arms will inevitably lead to further deterioration of her left arm condition. Indeed, claimant's overuse of her left arm had already caused left sided thoracic outlet syndrome, albeit "low-grade" (Nelson Dep. at 61), before claimant started work for County Market. . . .

. . . .

> ¶61 Claimant and the State Fund have failed to persuade me that the left arm condition, and the disability resulting from it, is not the result of claimant's 1992 injury. While Dr. Nelson testified that the claimant's job at ShopKo worsened claimant's left arm condition, his testimony also establishes that at best it may have accelerated her condition but that deterioration of her left arm condition and disability were inevitable because any activity requiring claimant to use her arms required her to overuse her left arm, thereby aggravating the left arm condition that preexisted her County Market job.

Romero, ¶¶ 52 and 61.

¶49 *Romero* is reconcilable with *Champion* and *Caekaert*. It is in accord with the rule, previously discussed, that the insurer for a work-related injury or disease remains liable for the medical condition and disability resulting from the injury or disease, including conditions and disability that are the "direct and natural result." If a work-related condition deteriorates prior to the claimant reaching MMI, then the insurer remains liable for the condition irrespective of any subsequent aggravation. After MMI, liability for the condition shifts to a subsequent insurer only if claimant suffers another work-related injury or exposure which "materially or substantially" worsens the claimant's condition, leading to additional treatment and disability. If the aggravation is only temporary, then liability shifts back to the first insurer once the aggravation has completely healed, *see Allen v. Treasure State Pluming,* 246 Mont. 105, 110, 803 P.2d 644, 647 (1990),[(4)] otherwise the first insurer is relieved of further liability for subsequent medical expenses and disability.

¶50 Ascertaining whether a subsequent work-related injury or exposure has "materially or substantially" aggravated or worsened a condition caused by a prior work-related injury or exposure turns on the particular facts of each case, and especially upon the medical testimony and evidence. While no bright line may be drawn, *Caekaert* establishes that a mere worsening in symptoms while working is not in and of itself material and substantial. In *Caekaert* the second round of surgeries were required even before claimant's work in his poultry business. In *Romero* the medical testimony indicated that claimant's arm conditions were destined to deteriorate with any activity. Thus, in both cases the claimants' subsequent work did not substantially and materially contribute to their conditions.

¶51 In this case the facts are clear and it makes no difference which insurer bears the burden of proof. The real issue is whether the reherniation of the claimant's disk and his resulting disability is the result of an occupational disease that arose after he reached MMI. I proceed upon the assumption that the State Fund bears the burden of proof.[(5)]

¶52 The facts of this case are more like those in *Champion* than in *Caekaert* and *Romero*, and far more compelling. Dr. Goodman's opinions, on a more probable than not basis,

established that claimant had reached MMI and that his truck driving in September 2000 caused a reherniation of his disk. Dr. Goodman further opined that the recurrence was unlikely had claimant continued to do light-duty work. His opinions were unrefuted. Thus, the evidence establishes a series of incidents at work which satisfy the definition of an occupational disease. "'Occupational disease' means 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).

¶53 I am perplexed by Liberty's assertion that it would be liable under *Belton* but not under *Briney* and *Romero v. Liberty Mutual Fire Ins. Co. and State Compensation Ins. Fund, 2001 MTWCC 5.* As I noted earlier, *Belton* dealt with the burden of proof and the general principal concerning liability as between two insurers. I find nothing inconsistent between the legal principles set out in *Belton* and those applied in *Briney* and *Romero*. Each case simply turns on its particular facts.

¶54 In summary, the evidence in this case affirmatively establishes that the reherniation of claimant's disk in September 2000, and his resultant disability are the result of his truck driving on September 7, 8, and 9, 2000. Accordingly, Liberty is liable for his medical expenses and compensation benefits. It is not entitled to indemnification from the State Fund.

JUDGMENT

¶55 From and after September 9, 2000, Liberty is liable for medical expenses for the treatment of claimant's herniated disk and associated conditions and for compensation benefits. Liberty is not entitled to indemnification from the State Fund.

¶56 The parties are responsible for their own costs and attorney fees.

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

¶58 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 October, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Larry W. Jones
Mr. Greg E. Overturf
Submitted: September 14, 2001

1. The Court has numbered the pages of Exhibit 1 to Dr. Goodman's deposition since it would otherwise be difficult to find the exhibits cited in the decision.

2. The original injuries were all pre-1987.

3. Consistent with the *Walker* line of cases discussed earlier, the Court held that the insurer for claimant's 1988 injury bore the burden of proving that he had reached MMI and that he sustained a subsequent injury or disease. 268 Mont. at 114, 885 P.2d at 500-501.

4. In *Allen* the Supreme Court said:

> We disagree with ECU's application of Belton to the facts in this case. In Belton, it was undisputed that an injury suffered by the claimant in 1979 aggravated a prior injury sustained in 1977. Belton, 202 Mont. at 386, 658 P.2d 405. The 1979 injury rendered the claimant permanently, totally disabled. In the case now before us, however, Mr. Allen's doctor testified that his back condition was not permanently aggravated by his second injury. Rather, as stated by the Workers' Compensation Court, this second injury only temporarily aggravated his pre-existing injury.
>
> In harmony with Belton, the Workers' Compensation Court required Charter Oak to pay temporary benefits for the temporary aggravation to Mr. Allen's back caused by the 1977 injury. However, because it found that his permanent partial disability was caused by the 1974 injury, the court correctly held that ECU was responsible for payment of those benefits. We hold this was a correct interpretation and application of Belton and accordingly the Workers' Compensation Court is affirmed on this issue.

246 Mont. at 110, 803 P.2d at 647.

5. In this case, it is not clear who has the ultimate burden of proof since claimant has not expressed a position as to which insurer should be liable. He did not file the occupational disease claim, rather his employer filed it for him.