IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 17

WCC No. 2014-3383

HAZEL ATCHLEY

Petitioner

vs.

LOUISIANA PACIFIC CORP.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner seeks death benefits from Respondent, contending that her husband died from asbestos-related disease and that his last injurious exposure to Libby asbestos occurred in the course of his 9-year employment at Respondent's lumbermill, which was located approximately 2 miles outside of Libby. Respondent denied Petitioner's claim, contending that the decedent was not exposed to an injurious amount of Libby asbestos while working at its mill and did not develop asbestos-related disease as a result of working at its lumbermill.

Held: The decedent had an OD and was exposed to Libby asbestos in amounts greater than the Libby background level during his 9 years of employment at Respondent's lumbermill. Under the potentially causal standard of *In re Mitchell*, he suffered his last injurious exposure to asbestos at Respondent's lumbermill. The decedent's OD caused his death, and Respondent is therefore liable for death benefits.

¶ 1 The trial in this matter began on May 26, and continued on May 27 and 28, 2015, at the Flathead County Justice Center in Kalispell. On June 12, 2015, counsel delivered closing arguments and this Court deemed the matter submitted for decision. Jon Heberling, Laurie Wallace, Dustin Leftridge, and Ethan Welder represented Petitioner Hazel Atchley (Hazel). Todd A. Hammer and Benjamin J. Hammer represented Respondent/Insurer Louisiana Pacific Corp. (LP).

Exhibits: This Court admitted Exhibits 2, 3, 5 through 9, 12 through 14, 16, 17, A, B, E through G, J, K, M, N, P, V through X, Z, CC, and DD without objection. This Court admitted Exhibits 4, 11, and 15 after LP withdrew its objections. This Court admitted

Exhibits C, D, H, I, L, AA, and BB after Hazel withdrew her objections. This Court admitted Exhibit 1 over LP's objections. This Court admitted Exhibit Y over Hazel's objections. This Court sustained LP's objections to Exhibit 10 and did not admit it.

¶ 2 Witnesses and Depositions: This Court admitted the depositions of Hazel, Alan C. Whitehouse, MD, Gregory Allen Rice, MD, Patrick Geer, Guy Boileau, Gregory Carson, Michael James Parker, Darryl Judkins, Robert McLeod, Glynda Kay Olson, Phillip Dean Spencer, Larry Allen McQueen, and two depositions of Terry Spear, PhD. Dr. Whitehouse, Dr. Spear, Elias Harmon, Robert Sheriff, and Dana Headapohl, MD, MPH, were sworn and testified at trial.

¶ 3 Issues Presented: This Court considers the following issues:

Issue One: Did Edward Atchley sustain an occupational disease?

Issue Two: Is Louisiana Pacific Corp. liable to Hazel Atchley for Edward Atchley's occupational disease?

Issue Three: Was Edward Atchley's death caused by an occupational disease?

Issue Four: Is Hazel Atchley entitled to her costs, attorney fees, and/or a penalty?

FINDINGS OF FACT

¶ 4 The following facts are established by a preponderance of the evidence.

¶ 5 From the 1920s to 1990, Zonolite Company and then W.R. Grace operated a vermiculite mine, which was 7 miles northeast of Libby, near Rainy Creek. The vermiculite contained a unique, amphibole-type asbestos, called "Libby amphibole" or "Libby asbestos," and is oftentimes abbreviated "LA." The open pit mining, and the processing and transportation of the vermiculite, released dust containing many tons of Libby asbestos into the atmosphere each day.[1] The Libby asbestos fibers are microscopic and remain airborne for hours once introduced into the air. The dust drifted and was blown, oftentimes for miles, until it settled and contaminated whatever it landed upon.

[1] Hazel's expert industrial hygienist, Terry Spear, PhD, cited a 1968 study showing that the large stack at W.R. Grace's dry mill released approximately 24,000 pounds of asbestos each day. LP's expert industrial hygienist, Robert Sheriff, testified it was his understanding that the mining released approximately 10,000 pounds of dust into the atmosphere each day.

¶ 6 All types of asbestos are hazardous, but Libby asbestos is extremely toxic, meaning it results in higher disease rates to those exposed to it compared to other types of asbestos. It can cause lung cancer and asbestos-related disease (ARD), an umbrella term that describes several conditions in which lung tissue is damaged, including pleural thickening, pleural plaques, and interstitial fibrosis, each of which results in a loss of respiratory function that worsens over time.

¶ 7 Because of the mine's proximity to Libby, the town had a hazardous "background" or "ambient" level of asbestos when the mine operated. In the mid-1970s, the level was measured at 1 fiber per cubic centimeter, which exceeds the current OSHA limit. Approximately 7 to 9% of residents with no occupational or familial exposure – i.e., exposure from a member of the household who brought asbestos home on his clothes – developed ARD.

Edward's Exposures to Asbestos Before 1985

¶ 8 Edward Atchley (Edward) experienced many exposures to asbestos during his lifetime.

¶ 9 From 1951 to 1955, Edward served in the U.S. Navy. He was onboard the USS Herbert J. Thomas, a ship that contained copious amounts of asbestos. He worked in an engine room and part of his job was repairing lagging, which contained asbestos. This work created a highly-contaminated cloud of dust which remained suspended for long periods. The dust in the engine room was so thick it was described as looking like a "snowstorm." Edward frequently woke up coughing, with his lungs "burning." The Naval industrial hygiene division conducted studies finding levels of asbestos on ships between 48 and 200 asbestos fibers per cubic centimeter, which greatly exceeds the current OSHA standard, which is 0.1 fibers per cubic centimeter of air for an eight-hour time-weighted average. A substantial number of the servicemen who served on these ships developed ARD.

¶ 10 After he left the Navy, Edward moved to Libby, where he lived and worked for most of the rest of his life and was exposed to the background Libby asbestos.

¶ 11 In 1955, from 1958 to 1959, and again from 1963 to 1971, Edward worked for J. Neils Lumber Co., at its large plywood mill in Libby, which is referred to here as the "Stimson Lumbermill," as Stimson Lumber was the last company to operate a mill on the site. The Stimson Lumbermill was contaminated with Libby asbestos in amounts beyond the Libby background.

¶ 12 Edward worked at the W.R. Grace vermiculite mine for two to four weeks, an area that was highly contaminated with Libby asbestos.

Edward's Employment at the LP Lumbermill

¶ 13 In 1985, Edward began working as a security guard, employed by Watson Security, at the lumbermill owned by LP (LP Lumbermill) in Libby. After 1986, Edward worked directly for LP as the full-time dayshift security guard at the LP Lumbermill.

¶ 14 The LP Lumbermill was a "stud mill," which cut small logs into dimensional lumber. Logs from the area around the W.R. Grace mine were delivered to the LP Lumbermill. The LP Lumbermill produced 250,000 board feet per day when it ran two shifts. The LP Lumbermill also had a chipping operation, which processed wood chips for landscaping.

¶ 15 The LP Lumbermill was located approximately 2 miles northeast of downtown Libby, between Highway 2 and the Kootenai River. During Edward's employment, the site included two log yards; one was in the southwest part of the property, while the other was in the northeast part of the property. The seven buildings were in the southeast part of the property. The LP Lumbermill had two dry debarkers, machines that cut the bark off the logs, which were located just outside the mill buildings. The debarkers created a large cloud of thick dust.

¶ 16 The railroad track ran roughly northwest-southeast, along the southern border of the property. A railroad spur ran onto the property, which was used for railcars transporting wood chips from the LP Lumbermill. This area was also extremely dusty.

¶ 17 Edward worked from a guard shack, which was in the southwest corner of the property, west of the log yard, and approximately 100 yards from the railroad tracks. The guard shack sat next to an unpaved road near the entrance, and any vehicle entering or exiting the mill passed directly by it. In addition to employee traffic and trucks carrying finished lumber from the LP Lumbermill, about 40 logging trucks entered the LP Lumbermill during each day shift, although it could be as few as 20 or as many as 100. Edward registered each vehicle that entered or exited the property, and inspected trucks leaving with finished lumber. Edward also performed an hourly security check by walking throughout the property, looking for security issues and fire hazards. He routinely walked near the debarkers. Although LP sporadically used a water truck to keep the amount of dust from the road down, it was not effective, and the area around the road was extremely dusty, particularly in the late spring, summer, and early fall.

¶ 18 Edward worked full-time at the LP Lumbermill until it ceased operations in 1997, a period of 9 years. Edward did not obtain other employment after he left the LP Lumbermill.

¶ 19 On March 31, 1997, an asbestos inspector inspected the buildings at the LP Lumbermill for asbestos-containing materials (ACMs), such as pipe wrap, insulation, floor

tiles, and roofing cement. He did not identify any ACMs in the buildings. Thereafter, the buildings were demolished. There were no soil samples done at this time.

Edward's Diagnosis of ARD and his VA Claim

¶ 20 On April 5, 2001, Edward – who was experiencing significant trouble breathing and a frequent cough, underwent a screening at the Center for Asbestos-Related Disease (CARD) clinic with Brad Black, MD, which revealed lung abnormalities consistent with ARD. A CT scan taken April 16, 2001, confirmed Dr. Black's ARD diagnosis. Dr. Black also diagnosed obstructive disease, noting that Edward smoked two packs of cigarettes a day for approximately 50 years.

¶ 21 On April 17, 2001, Edward applied for benefits with the Department of Veterans Affairs (VA), alleging that his ARD arose from his military service. He wrote that in the Navy, he worked with ACMs, and when the ship's guns were fired, his bunk was covered in white dust from the insulation above it. Edward submitted letters from former shipmates who corroborated his statements that he was exposed to asbestos. He stated, "I truly believe that this constituted the most hazardous exposure to asbestos fibers I ever experienced." He denied any other occupational exposure to asbestos. He contended that his lungs had deteriorated since then, culminating in his ARD diagnosis.

¶ 22 On October 16, 2001, Ramandeep Brar, MD, at the Spokane VA Medical Center confirmed the ARD diagnosis and opined that it was related to asbestos exposure during Edward's military service.

¶ 23 On March 6, 2002, Dr. Black wrote a letter regarding Edward's exposures to asbestos, noting that he was exposed "very significantly" in the Navy, and had "some other exposure in the Libby area" when he worked at the W.R. Grace mine and the Stimson Lumbermill, which had vermiculite insulation and asbestos-wrapped steam pipes.

¶ 24 On March 14, 2002, Edward wrote to the VA to clarify Dr. Black's letter dated March 6, 2002, because Edward did not recall asbestos exposure at the W.R. Grace mine. Edward explained that he worked on the construction of a building, but never worked inside the mine. He also was not aware of working around ACMs at the Stimson Lumbermill. He contrasted these alleged exposures with his time onboard ship in the Navy, where dust from asbestos insulation was constantly visible.

¶ 25 The VA concluded that Edward was entitled to a 30% disability rating for service-connected ARD.

Noble Excavating and the EPA's Soil Testing

¶ 26 The Environmental Protection Agency (EPA) contracted with Noble Excavating (Noble) to supply soil from the LP Lumbermill property for remediation projects for properties in Libby contaminated with Libby asbestos.

¶ 27 In May 2001, the EPA tested three samples of "soil-like" material from the property, which was labeled as "fill," for asbestos contamination using polarized light microscopy (PLM). The data does not say whether the material was from the surface or subsurface. The EPA did not detect any asbestos in these three samples of "fill." However, PLM is not as powerful as transmission electron microscopy (TEM) and is not as reliable for detecting levels of Libby asbestos in soil. Indeed, the engineering firm which prepared the Remedial Investigation Report for the EPA for the Libby Asbestos Super Fund Site explains that soils that test "non-detect" for Libby asbestos via PLM can release Libby asbestos into the air when disturbed:

> ***LA Levels in Soil that is Non-detect by PLM***
>
> The EPA uses PLM-VE to estimate levels of LA in soil in Libby. This is a semi-quantitative method that reports a sample as a non-detect when the microscopist cannot observe any LA in the sample. However, from the studies of outdoor soil disturbance, it is evident that soils that are non-detect can release LA fibers to air. For this reason, the EPA used more powerful electron microscopy methods to estimate the average level of LA in soils that were reported as non-detect by PLM-VE. The results were variable between samples, but the average LA concentration was approximately 0.05% by mass.

¶ 28 Noble substantially excavated the property to obtain clean fill material. Noble dug borrow pits – i.e., pits from which material is taken for use as fill in another location. The pits were approximately 50 feet deep. Noble stored the fill material from the borrow pits in stockpiles.

¶ 29 Patrick Geer, who was the plant manager at the LP Lumbermill from 1990 to 1997, testified that Noble dug up the aggregate materials, i.e., rock and sand, and used some of the material out of the ground, screened the material if they needed a smaller size, and crushed the material if they needed a fractured material. Greer testified that the EPA tested the surface soils and the stockpiles and explained: "when you designated a source that you were going to furnish to the government, they would go run their samples prior to awarding that material, and then when it was in stockpiles, before it was delivered, they would take samples." He further explained: "prior to them awarding the contract, they would – you had to designate a source, and you had to – and then they would go out and

physically view the source and take their own samples and determine whether it is suitable or not."

¶ 30 However, there is nothing in the test data indicating that the EPA tested the surface soil from the time the LP Lumbermill operated. The test data states that from 2006 to 2013, the EPA tested 303 samples of "soil" and "soil-like" material from the Noble pit for asbestos with PLM. The test data states that the samples were taken from the "borrow source" and/or the stockpiles. Of the 303 samples, 144 were labeled "topsoil." But, all of the samples were deemed to be "subsurface." The Remedial Investigation Report prepared for the EPA dated June 2014, states, in relevant part, as follows:

> Once LA-contaminated soil is removed from properties [in Libby], various types of fill materials are used to backfill excavated areas. In general, fill materials consist of topsoil and topsoil amendments, common fill, structural fill, and sand. Prior to use, samples are collected from borrow sources, either *in situ* or stockpiled, to determine if it contains LA, organic, and inorganic contaminants (above background levels), and to ensure it meets project-specific physical characteristics. ***Given the agitated nature of borrow sources, all samples collected are considered subsurface***.[2]

¶ 31 The vast majority of the samples were deemed "non-detects," meaning the microscopist saw no asbestos contamination; only six of the samples tested positive for trace amounts of Libby asbestos. The EPA did not test the samples with TEM.

¶ 32 In 2007 and 2009, the EPA tested surface soil from properties next to Noble, which had not been excavated, via PLM. Out of the 16 tests, three tested positive for Libby asbestos.

Industrial Hygiene Evidence

Terry Spear, PhD

¶ 33 Hazel retained Dr. Spear to investigate whether Edward was exposed to asbestos during his work at the LP Lumbermill. Dr. Spear has a PhD in industrial hygiene and is a professor emeritus at Montana Tech. Dr. Spear began researching asbestos contamination in the Libby area in 1996. Dr. Spear has co-authored at least seven peer-reviewed publications pertaining to asbestos, including several regarding contaminated tree bark in the Libby area. Dr. Spear was also part of studies in which the researchers simulated collecting firewood and building fire lines in the forest around the mine to determine if these activities releases asbestos into the air. The studies showed that

[2] Emphasis added.

activities such as cutting trees with a chainsaw and digging trenches released asbestos fibers into the air.

¶ 34 Dr. Spear opined that the air at the LP Lumbermill was contaminated with Libby asbestos in amounts beyond the Libby background. Dr. Spear concluded that Edward was exposed to airborne Libby asbestos, in amounts greater than the Libby background, while working at the LP Lumbermill. He identified two sources for asbestos contamination at the LP Lumbermill beyond the Libby background: tree bark from the trees delivered to the LP Lumbermill and the railroad.

¶ 35 Dr. Spear explained that the tree bark in the forest surrounding the W.R. Grace mine became contaminated with Libby asbestos. In 2004, he was part of a team that investigated whether loggers risked exposure to asbestos from contaminated tree bark in the forests surrounding the W.R. Grace mine. The peer-reviewed results, published in 2006,[3] demonstrated that tree bark is a reservoir for asbestos fibers. Tree bark nearer to the mine had the highest concentration of asbestos fibers, but asbestos existed in tree bark many miles away, with the most significant contamination found within roughly 11 miles from the mine. Dr. Spear also noted a study showing that trees and duff in the Flower Creek drainage, which is approximately 10 miles southwest of the W.R. Grace mine, which was downwind, was contaminated with asbestos. Dr. Spear noted that the EPA's bark and duff sampling continued into 2013 and showed contamination. Dr. Spear explained that the results of the sampling were variable, and depended on many factors, including whether the area is shielded by a hillside. Thus, he agreed that not every tree within 11 miles of the mine was contaminated. However, given the high levels of contamination in the area, and given the fact that the contamination was widespread, Dr. Spear testified, "my opinion is that any timber harvesting within this area that we've been describing certainly has a high probability of being contaminated with asbestos fibers."

¶ 36 Dr. Spear determined that the LP Lumbermill received logs contaminated with asbestos. Dr. Spear noted that when Edward worked at the LP Lumbermill, there was a substantial amount of logging in the area surrounding the mine, including in the Rainy Creek drainage, and the drainages adjacent to the mine, including Alexander Creek and Jackson Creek. Dr. Spear interviewed loggers, logging truck drivers, and mill workers, who told him that logs from the area surrounding the mine were delivered to the Stimson Lumbermill and to the LP Lumbermill.

¶ 37 Dr. Spear also reviewed depositions in this case in which the deponents testified that logs from the area surrounding the mine were hauled to the LP Lumbermill. Michael James Parker was a log hauler. Parker hauled logs from the Rainy Creek drainage – an

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[3] Ward, Tony J., *Trees as reservoirs for amphibole fibers in Libby, Montana*, Sci. of the Total Env't 367: 460-65 (2006).

area that is heavily contaminated with Libby asbestos – to the LP Lumbermill from 1988 to 1994. Parker explained that when he referred to the Rainy Creek drainage, he was referring to a large area which includes Fleetwood Creek, Jackson Creek, Alexander Creek, Bristow Creek, Bear Creek, and Souse Gulch. Likewise, Darryl Judkins, who worked at the LP Lumbermill from 1989 to 1995, recalled that logs came to the LP Lumbermill from the area surrounding the mine. He explained, "we're talking millions of board feet of logs, the whole area around here."

¶ 38 Dr. Spear also relied upon contracts between LP and W.R. Grace, and LP and the State of Montana, and timber sale documents between LP and the United States Forest Service, under which LP purchased timber from the area within 11 miles of the mine between 1986 and 1997. When asked why he thought this timber was delivered to the LP Lumbermill in Libby instead of LP's mill in Moyie Springs, Idaho, Dr. Spear explained that in addition to the workers who told him that timber from the area around the mine was delivered to the LP Lumbermill, it was more logical to think that the timber would be delivered to the closest mill, as it would be more economical.

¶ 39 In addition to these documented sales, Dr. Spear identified other ways in which the LP Lumbermill obtained contaminated logs: sales from private logging companies, purchases of timber from privately-owned land, purchases of small logs from the Stimson Lumbermill, and purchases of logs harvested by private individuals.

¶ 40 Dr. Spear opined that Libby asbestos fibers from the bark were released into the air when contaminated logs were brought into the LP Lumbermill and when LP processed the contaminated logs. Dr. Spear explained that processing logs is an "aggressive operation." Indeed, he explained it is much more aggressive than collecting firewood with a chainsaw or digging trenches in the forest, which releases asbestos fibers into the air. The logs were brought to the LP Lumbermill on logging trucks, off-loaded, scaled, and then stored. This process resulted in pieces of bark being knocked off the logs, which resulted in dust and debris. Dr. Spear also explained that the dry debarking created a tremendous amount of visible dust which contained Libby asbestos. He explained: "And so, basically, any fibers associated with this material on the trees or on the bark would be thrown in every direction, and it would contaminate a large area." He explained that when visible dust is present, "you have intense exposure to whatever's in that dust."

¶ 41 As to how the railroad contaminated the LP Lumbermill, Dr. Spear explained that W.R. Grace transported vermiculite from its mine to expanding plants in Great Falls, and in Washington, California, and Arizona, via the railroad. The trains carrying vermiculite west out of Libby travelled on the track adjacent to the LP Lumbermill. Typically, three trains travelled past the LP Lumbermill each day. When the vermiculite was hauled on open box cars, dust blew off the cars. And, when the vermiculite was transported in covered cars, there were leaks. Consequently, the areas adjacent to the railroad tracks

in Libby were heavily contaminated with Libby asbestos, in amounts greater than was generally found in and around Libby. Dr. Spear pointed to a study showing that, at a location 7 miles west of Libby, the trees next to the railroad tracks were highly contaminated with Libby asbestos. Dr. Spear also visited the expanding plants in Washington, California, and Arizona, and found that the trees in the neighborhoods of the plants were contaminated with asbestos. Dr. Spear opined that the railroad caused asbestos contamination at the LP Lumbermill in amounts greater than the Libby background level because of the mill's close proximity to the tracks. Dr. Spear noted that the LP Lumbermill guard shack sat approximately 100 yards from the railroad tracks.

¶ 42 Dr. Spear also opined that the level of airborne asbestos at the LP Lumbermill guard shack would have been higher than residential exposure in Libby because of the traffic on the dirt road, which kicked up dust containing Libby asbestos. Dr. Spear explained that when the airborne asbestos from the contaminated logs and the railroad fell, it contaminated the ground at the LP Lumbermill. Dr. Spear relied on a study showing that when soil contaminated with low levels of asbestos is disturbed, it can release hazardous amounts of asbestos into the air.[4]

¶ 43 Dr. Spear opined that the EPA's soil testing at the Noble site did not undercut his conclusions because the soil the EPA tested "wasn't the original soil that was there when [Edward] was working there" and "was not representative of the surface dust contamination at the time that [Edward] worked there." Dr. Spear noted that the EPA did not obtain contemporary soil samples at the LP Lumbermill; it obtained and tested subsurface samples from the "borrow sources" and stockpiles nearly a decade after the LP Lumbermill closed. Dr. Spear explained that asbestos that contaminated the LP Lumbermill from the contaminated logs and from the railroad stayed at or near the surface. Dr. Spear explained, "I wouldn't expect to see asbestos at 50 feet below ground, but . . . I would expect to see surface contamination, particularly if samples were done at the time that the LP mill was operating."

¶ 44 Dr. Spear relied in part on the similarities between the Stimson Lumbermill and the LP Lumbermill to support his conclusion that the LP Lumbermill was contaminated beyond the Libby background. Dr. Spear explained that in situations in which industrial hygienists do not have testing data for one workplace, they look to similar situations to determine whether the workplace was contaminated. Thus, when asked how the data from the Stimson Lumbermill supported his opinion that the LP Lumbermill was contaminated, Dr. Spear explained:

[4] Addison, J., The Release of Dispersed Asbestos Fibres from Soils (1988).

> [I]t involves LP, because in the field of industrial hygiene, if we have two plants that are similar industries, for example, and one we have data for, where workers have been evaluated or the contamination has been evaluated, and then we have a similar industry or plant where we don't have any information, it's very common practice in our field to extrapolate information from one plant to the other, so that was my methodology.

¶ 45 Dr. Spear explained that the Stimson Lumbermill had several sources of asbestos contamination, two of which were contaminated logs and the railroad. The Stimson Lumbermill processed and debarked logs which came from the area around the mine, many of which were contaminated, releasing dust containing asbestos fibers into the air, which contaminated the Stimson Lumbermill. Dr. Spear noted that a majority of the samples of waste bark at the Stimson Lumbermill were contaminated with Libby asbestos. Dr. Spear explained it was a "very similar exposure mechanism" at the LP Lumbermill, where Edward "was exposed to Libby Amphibole asbestos in the dust generated from the processing of lumber or timber." In response to a question regarding whether he took into account that not every tree in the forest in the 11-mile radius of the W.R. Grace mine was contaminated, Dr. Spear explained: "my methodology was to apply what was known from a lumber mill, which is the same industry in the Libby area which was receiving forested products from the same area and what was associated with the wood chips and the bark from that mill." Dr. Spear also explained that the railcars brought Libby asbestos to the Stimson Lumbermill.

¶ 46 Dr. Spear opined that Edward's exposures to asbestos in the Navy, at the Stimson Lumbermill, at the W.R. Grace mine, and at the LP Lumbermill were all significant and sufficient, individually, to have caused his ARD. Dr. Spear disagreed with Edward's belief that the Navy was his only significant exposure to asbestos and explained that Edward could not have known that the dust at the LP Lumbermill may have exposed him to airborne asbestos fibers. Dr. Spear opined that Edward's occupational exposures in the Navy, at the Stimson Lumbermill, at W.R. Grace, and at the LP Lumbermill, as well as exposure from his residing and recreating in the Libby area, contributed to his fiber burden, which is cumulative. Dr. Spear opined that any inhalation of airborne asbestos fibers is "significant" and there is no safe level of exposure, particularly with Libby asbestos, which is extremely toxic. Dr. Spear explained that he could not quantify "the extent to which each of these employment exposures contributed to his asbestos-related disease." He explained: "We have an occupational activity that is bringing asbestos into the site on top of the mining background levels." Dr. Spear explained that given the background level of exposure in Libby, "a person working in Libby in a job that exposes him or her to asbestos fibers, then, essentially, they are adding those fibers on top of the background exposure in Libby. So we're increasing the risk."

Robert Sheriff

¶ 47 LP retained Robert E. Sheriff, MS, CIH, CSP, who is the CEO of Atlantic Environmental, Inc., an industrial hygiene, safety, and environmental consulting firm based in Dover, New Jersey. Sheriff is certified by the American Board of Industrial Hygiene as an industrial hygienist and has approximately 40 years' experience in the field of industrial hygiene.

¶ 48 Sheriff agreed with many of the facts Dr. Spear relied upon for Dr. Spear's ultimate opinion. But Sheriff disagreed with Dr. Spear's ultimate opinion that Edward was exposed to asbestos beyond the Libby background while working at the LP Lumbermill.

¶ 49 As for Dr. Spear's opinion that tree bark was a source of asbestos contamination at the LP Lumbermill, Sheriff acknowledged that the forest around the W.R. Grace mine was contaminated and could have contaminated the LP Lumbermill if those trees had been delivered to the LP Lumbermill. Sheriff testified:

> Well, Dr. Spear and his workers did some pretty extensive sampling of the presence of Libby asbestos in bark samples. That's not surprising. I think they said during the operation of the Grace mine there was approximately five tons a day of dust emissions from the activities of the mine and the screening plant. So certainly you would expect to have asbestos materials in the wood bark, and that that material could be brought into a lumber mill if it was on those logs.

Sheriff also acknowledged that the EPA conducted studies in 2007, 2008, and 2013, which revealed contaminated tree bark and duff 13 miles away from the W.R. Grace mine.

¶ 50 However, Sheriff opined that there was insufficient evidence to conclude that the logs delivered to the LP Lumbermill were contaminated. Although Sheriff had "no reason to doubt" Parker's and Judkins' testimony that logs from the area near the mine were hauled to the LP Lumbermill, he concluded that there was insufficient data to conclude that *any* logs harvested within 11 miles of the mine came to the LP Lumbermill. And although LP directly purchased some timber in this area from the U.S. Forest Service, Sheriff speculated that LP may have sent this timber to its mill in Moyie Springs, Idaho because it had done so before opening the mill in Libby. Sheriff further found insufficient evidence to indicate that the LP Lumbermill purchased any private timber contracts because no records of such transactions were found. Thus, when asked whether there were contaminated logs processed at the LP Lumbermill, Sheriff testified, "I can't say that one way or another." Sheriff also noted that there was no contemporaneous testing on the logs delivered to the LP Lumbermill and opined that even if there were some

contaminated logs delivered to the LP Lumbermill, there is insufficient evidence to conclude that it was a sufficient amount to increase the risk of Libby asbestos exposure.

¶ 51 As for Dr. Spear's opinion that the railroad contaminated the LP Lumbermill, Sheriff admitted to the possibility and agreed that the railroad and adjacent properties were contaminated with asbestos that blew off the open railroad cars. He explained:

> The railroad was pretty contaminated. I mean, that was identified as, I think, it's Operating Unit 6 was the railroad. Because the ore after it came down off the mill down Rainy Creek and to the screening plant, it was transported across the river to waiting railroad cars, and it was loaded in cars. Most of those cars were open cars. That's probably part of the five tons a day of dust. And those were transported into town where they went into the rail yard and/or went to the export plant. So there was [a] significant amount of asbestos associated with the rail yard. And the EPA had to do quite a significant cleanup of the railroad property and adjacent properties because of that contamination.

When asked if the railroad was a potential source of asbestos contamination at the LP Lumbermill, Sheriff conceded the possibility:

> Yes, I think the possibility exists. I mean, there's quite a bit of information that says that the railroad transported the ore in open cars in that area, and there were numerous trains per day for the entire life of the mine that transported asbestos, Libby asbestos, through that area. And I think there's information on testing and soil testing that identifies the presences of asbestos along the rail lines.

Sheriff was also aware of the study on which Dr. Spear relied showing that, at a location 7 miles west of Libby, trees next to the railroad were contaminated with asbestos.

¶ 52 However, Sheriff would not opine that the LP Lumbermill was contaminated by the railroad because there was no testing of the railroad bed adjacent to the LP Lumbermill. He opined that the study showing contamination next to the railroad farther west of Libby than the LP Lumbermill did not in any way indicate that the LP Lumbermill was contaminated by the railroad.

¶ 53 Sheriff stated that it is possible for an individual to suffer an asbestos exposure due to asbestos fibers in dirt becoming airborne, but not likely. Thus, he did not believe that Edward would have been exposed to asbestos from vehicle traffic raising dust on the unpaved roads at the LP Lumbermill.

¶ 54 Sheriff placed great weight on the EPA's soil tests. He testified that soil sampling for asbestos is usually constrained to the top six inches of soil, and that the first two or three inches of soil usually indicate what is on the surface. Sheriff conceded that Noble's excavation of the site was "significant," and nothing existed from the LP Lumbermill at the time of the EPA's testing except "maybe a few open areas." However, Sheriff concluded that the EPA samples were indicative of the time when the LP Lumbermill operated. Indeed, Sheriff testified that it was his understanding that every test the EPA labeled "topsoil" was the surface soil that existed when the LP Lumbermill was in operation because "they removed the topsoil layer and put it in a pile, and this is what was sampled." Sheriff testified that he was "reasonably confident" from the information he reviewed that the EPA's tests included topsoil that was there from the original stockpiling of the soil." When confronted on cross-examination with the statement in the EPA's Remedial Investigation Report that all of the samples were classified as "subsurface," Sheriff stated he disagreed because he thought there "could be soils that still remain there from the original stockpiling of the soil."

¶ 55 Sheriff agreed with Dr. Spear that industrial hygienists oftentimes do not have direct evidence of an exposure and have to look at other evidence, including other similar workplaces: "[t]he ideal situation . . . is that you would actually monitor the individual when he's doing his work. But very often, that's not available, so you have to use what information may be available on stuff that are activities that are similar to that." Sheriff also explained that when trying to determine if a particular individual was exposed to asbestos, "generally, the actual monitoring of that individual doesn't exist, so you look at other similar activities, and similar operations, such as other lumber mills of where such monitoring was -- had taken place."

¶ 56 Therefore, like Dr. Spear, Sheriff compared the Stimson Lumbermill to the LP Lumbermill, explaining that to retrospectively determine whether a worker was exposed to asbestos at a particular jobsite in the absence of contemporaneous testing, he looked at "other similar activities, and similar operations, such as other lumber mills where such monitoring was – had taken place." But Sheriff concluded that the differences between the mills supported his conclusion that the LP Lumbermill was not contaminated beyond the Libby background.

¶ 57 Sheriff agreed with Dr. Spear on three points concerning the Stimson Lumbermill. First, Sheriff agreed that lots of logs from the area within an 8- to 11-mile radius of the mine were delivered to the Stimson Lumbermill and that the contaminated tree bark served as a source of asbestos contamination at the Stimson Lumbermill. Indeed, Sheriff explained that the majority of waste bark samples at the Stimson Lumbermill were contaminated. Second, Sheriff agreed that the railroad spur at the Stimson Lumbermill contributed to the contamination because cars from the mine "came into the Stimson mill, as well, with residual material in them." Third, Sheriff agreed that activity-based sampling

at the Stimson Lumbermill showed that workers at the Stimson Lumbermill were exposed to asbestos.

¶ 58 However, Sheriff opined that this evidence did not support Dr. Spear's opinion that tree bark or the railroad contaminated the LP Lumbermill, relying on the soil testing. Sheriff explained approximately one-third of the EPA's soil samples at the Stimson Lumbermill tested positive for Libby asbestos, which tended to confirm that the processing of contaminated logs released asbestos which then contaminated the soil at the Stimson Lumbermill. In contrast, Sheriff explained that the testing results at the Noble pit were consistent with soil testing in Libby and was "just background level." Sheriff opined that if the logs delivered to the LP Lumbermill had been contaminated, or if the railroad had contaminated the LP Lumbermill, the EPA's soil testing would have shown asbestos contamination "far greater than the extent to which we saw these trace amounts."

¶ 59 Sheriff also pointed out sources of Libby asbestos at the Stimson Lumbermill that did not exist at the LP Lumbermill. Unlike the Stimson Lumbermill, which had "tremendous quantities" of visible vermiculite on site, the LP Lumbermill did not have any visible vermiculite. Unlike the buildings at the Stimson Lumbermill, which had "tremendous quantities" of ACMs, none of the buildings at the LP Lumbermill contained ACMs.

¶ 60 Sheriff also emphasized an absence of data to support Dr. Spear's opinion that the LP Lumbermill was contaminated. Sheriff testified that the air sampling at the Stimson Lumbermill revealed hazardous levels of airborne asbestos, but that there was no air sampling at the LP Lumbermill. Sheriff testified that activity-based sampling at the Stimson Lumbermill showed that the activities at that mill caused asbestos to be released, but that there was no activity-based sampling at the LP Lumbermill. Sheriff testified that indoor dust samples at the Stimson Lumbermill contained detectible levels of Libby asbestos, but that there was no such testing at the LP Lumbermill. Sheriff testified that while there was contamination found in the waste bark at the Stimson Lumbermill when it was tested in 2007, the waste bark at the LP Lumbermill was not tested.

¶ 61 Sheriff agreed with Dr. Spear that Edward was not qualified to "quantify" his exposures. Sheriff opined that Edward's exposure in the Navy was "significant," and one cause of his ARD. Sheriff also found Edward's exposure at the Stimson Lumbermill was significant and contributed to his ARD. Sheriff also opined that Edward's non-occupational exposure as a Libby resident was significant and contributed to his ARD. However, Sheriff opined that Edward's exposure at the LP Lumbermill was insufficient to contribute to his ARD because Edward was not exposed to more airborne asbestos there than the Libby background level.

Medical Evidence

Edward's Treating Physician

¶ 62 Alan C. Whitehouse, MD, treated Edward, beginning in 2001. Dr. Whitehouse, who is board-certified in internal medicine and pulmonary disease, is recognized by this Court as an expert regarding ARD.[5]

¶ 63 Dr. Whitehouse opined that all of Edward's exposures to asbestos contributed to his ARD. In addition to his own investigation, Dr. Whitehouse relied on Dr. Spear's opinions, including Dr. Spear's opinion that Edward was exposed to Libby asbestos at the LP Lumbermill in excess of the Libby background level. Dr. Whitehouse opined that Edward suffered four occupational exposures to asbestos: the Navy, the Stimson Lumbermill, the W.R. Grace mine, and the LP Lumbermill. Dr. Whitehouse concluded that Edward's exposure at each occupation was significant and injurious, and that each occupational exposure was in addition to the asbestos exposure generally incurred in Libby during that time period. Dr. Whitehouse opined that the occupational and non-occupational exposures all contributed to the fiber load in Edward's lungs and his development of ARD, and Edward's asbestos exposure at the LP Lumbermill was sufficient to cause, contribute to, and aggravate his ARD. Dr. Whitehouse also testified that the 15 years from the start of Edward's employment at the LP Lumbermill to his diagnosis in 2001 was a sufficient latency period for his ARD.

LP's IME Physicians

¶ 64 LP retained Dana Headapohl, MD, MPH, and Richard Sellman, MD. Dr. Headapohl is the chair and medical director of the occupational medicine department at St. Patrick Hospital in Missoula, Montana, and is board-certified in occupational medicine and preventive medicine. Dr. Sellman is board-certified in pulmonary and critical care medicine.

¶ 65 LP asked Dr. Headapohl and Dr. Sellman to determine "whether or not [Edward] suffered from asbestos related disease, and if so, whether or not any asbestos related disease arose out of employment or was contracted in the course and scope of his employment with Louisiana-Pacific, or from other occupational or nonoccupational exposures or a combination thereof." LP also asked, "whether or not his death can be traced to work connected with asbestos exposure related to his employment at Louisiana-Pacific."

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[5] *See Fleming v. Int'l Paper Co.*, 2005 MTWCC 34, ¶¶ 39-45.

¶ 66 Dr. Headapohl reviewed Edward's medical records, his file from his application for VA benefits, and the pre-demolition asbestos inspection from the LP Lumbermill. Dr. Headapohl opined that Edward had ARD and lung cancer due to cigarette smoking and his "significant" asbestos exposure in the Navy. Although she opined that Edward's work at the W.R. Grace mine and non-occupational exposures in the Libby area may have contributed to his ARD in a minor way, Dr. Headapohl denied that Edward's employment at the LP Lumbermill contributed to his ARD. Dr. Headapohl based her opinions on the fact that the mill buildings had no ACMs within them, an absence of direct evidence that Edward was exposed to asbestos in the course of his employment at LP, and on Edward's statement in his VA application that he was not exposed to asbestos while working at LP. Thus, Dr. Headapohl concluded that Edward's death was not connected to his employment with LP.

¶ 67 On August 11, 2014, Dr. Sellman issued his report. Dr. Sellman agreed that Edward had, *inter alia*, chronic obstructive pulmonary disease (COPD) and ARD. Dr. Sellman disagreed that sepsis was not a cause of Edward's death, and found "error in the way the death certificate was filled out." Dr. Sellman opined, "The underlying questions is, could this patient's exposure to asbestos particles at his workplace cause his death. My answer is no. There is already documentation that his exposure to asbestos was while in the military. Also, industrial hygienist reports indicate no significant asbestos particles where he worked."

¶ 68 On December 8, 2014, Drs. Headapohl and Sellman issued another report, as they had reviewed additional materials, including the EPA soil test results and most of the lay witness depositions. But these materials did not change their opinions. They found no evidence that Edward was exposed to asbestos beyond the typical Libby background level while working at the LP Lumbermill. They concluded that Edward's work at the LP Lumbermill was not the cause of his ARD. They attributed his ARD to his exposure in the Navy but noted that his "general Libby background exposure was high enough to have increased his risk for asbestos related disease."

¶ 69 Dr. Headapohl testified at trial. Dr. Headapohl confirmed that Edward had ARD, which was consistent with a large exposure to asbestos. However, based upon her view that the industrial hygiene evidence did not show that the LP Lumbermill was contaminated beyond the Libby background, she opined that Edward was not "injuriously exposed" to asbestos at the LP Lumbermill.

¶ 70 As for Dr. Spear's opinion that tree bark was a source of asbestos contamination at the LP Lumbermill, Dr. Headapohl opined that there is insufficient evidence to find that any of the trees delivered to the LP Lumbermill were contaminated with asbestos. Although Dr. Headapohl read the depositions of the loggers who testified they delivered logs from the Rainy Creek drainage to the LP Lumbermill, she testified that the asbestos

contamination in the forest was “highly variable,” “dependent upon location,” and not a “blanket.” She testified that there were some areas that were “completely devoid of asbestos fibers in the tree bark.” Since the logs delivered to the LP Lumbermill were not tested, she noted that there is no data showing the extent of contamination, if any.

¶ 71 As for Dr. Spear’s opinion that the railroad was a source of contamination at the LP Lumbermill, Dr. Headapohl opined that there is insufficient evidence to find that that railroad contaminated the LP Lumbermill. She testified that she could not extrapolate from the fact asbestos was detected on the property adjacent to the track at the site 7 miles west of Libby that the LP Lumbermill was also contaminated. Dr. Headapohl testified that she would need tests of the rail line directly adjacent to the LP Lumbermill to determine whether it was contaminated.

¶ 72 Like Sheriff, Dr. Headapohl placed great weight on the EPA’s soil tests. Dr. Headapohl interpreted the EPA’s testing of “topsoil” to mean the surface soil from the time the LP Lumbermill operated. Relying upon samples that the EPA “clearly labeled” as “topsoil,” and Geer’s testimony, which she interpreted to mean that he thought the EPA tested surface soil for Libby asbestos, she opined that the EPA’s testing did not show contamination beyond the Libby background. Dr. Headapohl also opined that the soil testing on the neighboring properties could not be used to show that the LP Lumbermill was contaminated beyond the Libby background.

¶ 73 Dr. Headapohl disagreed with Dr. Spear’s and Sheriff’s opinions that it is proper to look at other similar operations, such as the Stimson Lumbermill, as evidence of whether the LP Lumbermill was contaminated. Notwithstanding, she waffled on this point, and testified that in the absence of direct evidence of exposure – such as the “gold standard” of personal dosimetry, meaning actually measuring the number of fibers in the employee’s breathing zone – she has to look at the “available information” to determine whether an exposure occurred.

¶ 74 Dr. Headapohl did not think the available evidence from the Stimson Lumbermill was sufficient to conclude that Edward was exposed at the LP Lumbermill beyond the Libby background. She compared the mills and testified that the Stimson Lumbermill was much different than the LP Lumbermill. She pointed out that the Stimson Lumbermill had ACMs, but the LP Lumbermill did not. She testified that the Stimson Lumbermill had contaminated topsoil, but that the EPA’s soil testing, in her view, showed that the LP Lumbermill did not. Dr. Headapohl pointed out that the Stimson Lumbermill had visible vermiculite, but the LP Lumbermill did not. Dr. Headapohl did not agree with Dr. Spear’s or Sheriff’s opinions that Edward’s work on the planer at the Stimson Lumbermill contributed to his ARD, or that any exposure he had at Stimson was injurious because she had not seen any activity-based data showing that the planers were exposed to asbestos.

¶ 75 Dr. Headapohl found that Edward's Navy exposure was "massive," and the cause of his ARD because the latency period fits with his Navy exposure. Dr. Headapohl also testified that by living in Libby in the 1970s, at which time the background level of asbestos was hazardous, Edward was exposed to a potentially harmful level of asbestos.

¶ 76 Dr. Headapohl opined that Edward's employment at the LP Lumbermill did not contribute to his ARD for two reasons. First, Dr. Headapohl opined that he was not exposed to asbestos at the LP Lumbermill beyond the Libby background. She explained, "[t]here's no evidence that there were airborne asbestos fibers at his work site, other than what might have been in Libby at the time. There's nothing specific or unique to that property or those work activities." Second, Dr. Headapohl opined that even if Edward was exposed to Libby asbestos in an amount greater than the Libby background, there is insufficient evidence to conclude that it caused his ARD. She explained that while there is a threshold at which asbestos is hazardous to a particular person, she could not say that the amount of asbestos to which Edward was exposed at the LP Lumbermill, whatever the amount, was "injurious" to him, because not everyone exposed to asbestos develops ARD.

Resolution of Whether Edward was Exposed to Asbestos at the LP Lumbermill in Excess of the Libby Background Level

¶ 77 This Court finds that Edward was exposed to asbestos during his service in the Navy. This Court also finds that Edward was exposed to Libby asbestos in amounts greater than the Libby background during his employment at the Stimson Lumbermill and at the W.R. Grace mine. This Court finds that each of these occupational exposures significantly contributed to his ARD.

¶ 78 This Court also finds that Edward was consistently exposed to air and dust contaminated with Libby asbestos, in amounts exceeding the background level found in Libby, while working at the LP Lumbermill during the 9-year course of his full-time employment for LP. This Court finds that one source of the contamination was contaminated logs delivered to the LP Lumbermill from the area surrounding the W.R. Grace mine and that the processing of the logs, including debarking, released asbestos fibers from the bark into the air, which contaminated the areas in which Edward worked. This Court finds that another source of contamination was the railroad. Furthermore, this Court finds that asbestos from these two sources settled on the dirt roads at the mill and was regularly kicked up by vehicle traffic, adding to Edward's continuous exposure. This Court finds that Edward's exposure to Libby asbestos at the LP Lumbermill significantly aggravated and contributed to his ARD.

¶ 79 This Court finds Dr. Spear's testimony far more persuasive than Sheriff's. At the outset, Dr. Spear has stronger educational credentials and specific expertise regarding the asbestos contamination in the Libby area.

¶ 80 And, Dr. Spear's opinions are supported by other evidence, while Sheriff's are not, and Dr. Spear made reasonable inferences, while Sheriff did not. Dr. Spear's opinion that the LP Lumbermill was contaminated by the processing of logs from the area around the W.R. Grace mine is supported by the evidence. Parker and Judkins testified that logs from around the mine were delivered to the LP Lumbermill, with Judkins explaining it was "millions of board feet." While Sheriff had no reason to doubt Parker's and Judkins' testimony, he ignored their testimony, initially claiming there was insufficient evidence to find that logs from the area surrounding the mine were delivered to the LP Lumbermill. Sheriff's speculation that the logs from the area around the W.R. Grace mine may have been delivered to LP's mill in Moyie Springs, Idaho, was unfounded and demonstrates that he did not fairly evaluate the evidence. Both Dr. Spear and Sheriff testified that under the standards in the field of industrial hygiene, they compared the LP Lumbermill to the Stimson Lumbermill, as it was a similar operation. Dr. Spear and Sherriff agreed that the processing of contaminated logs resulted in Libby asbestos contamination at the Stimson Lumbermill. Sheriff agreed that if contaminated logs had been brought to the LP Lumbermill, the processing could have contaminated the LP Lumbermill. But Sheriff did not offer a credible explanation as to how it could be that the LP Lumbermill was spared of the contaminated logs. The evidence shows that there was a substantial amount of logging in the area around the W.R. Grace mine and that logs from that area were delivered to the LP Lumbermill. This Court finds that contaminated logs were delivered to the LP Lumbermill and is convinced that the processing of those logs contaminated the LP Lumbermill with Libby asbestos beyond the Libby background, just as it did at the Stimson Lumbermill.

¶ 81 Likewise, Dr. Spear's opinion that the LP Lumbermill was contaminated by the railroad is supported by the evidence. Dr. Spear and Sheriff agreed that the railroad caused heavy contamination along the rail line and adjacent properties because asbestos blew off the cars, and the railroad caused contamination at the Stimson Lumbermill because railcars had residual material on them. While Sheriff was not convinced that the railroad contaminated the area in which Edward worked because the area was not tested, he did not say there were areas along the tracks that were not contaminated nor explain how it could be that the LP Lumbermill would be spared from the contamination from dust blowing off the railcars as the trains traveled past the LP Lumbermill. This Court finds that the railroad contaminated the LP Lumbermill and the area in which Edward did most of his work, as the guard shack was only approximately 100 yards from the tracks.

¶ 82 Furthermore, Dr. Spear's testimony that Libby asbestos from the processing of contaminated logs and the railroad that fell on the road would have been re-released into

the air by traffic kicking up dust is corroborated by other evidence. In the Remedial Investigation Report, the EPA explains:

> ***Releases from Outdoor Soil to Air***
>
> When outdoor soil that contains LA is disturbed (e.g. by raking, mowing, or digging), LA fibers are released into the breathing zone of the person who is causing the soil disturbance. The concentration of fibers that is released into the air is highly variable, both within and between differing types of disturbance activities, but there is a clear trend for levels in air to increase as the levels in soil (as measured by PLM-VE) increase.

This Court finds that the traffic on the dirt roads at the LP Lumbermill, including the road next to the guard shack, kicked up dust that was contaminated with Libby asbestos.

¶ 83 Contrary to Sheriff's opinion, the EPA's soil testing does not establish the absence of asbestos contamination at the LP Lumbermill. It is clear that PLM testing is insufficient to establish the absence of Libby asbestos. And, this Court is not persuaded that any of the EPA's tests from 2001, and from 2006 to 2013, were of the surface soil that existed from 1985 to 1997, the time Edward worked at the LP Lumbermill. It is undisputed that the LP Lumbermill property was substantially excavated in the 9-year period between Edward's last day of work and the testing of the majority of the topsoil. The evidence does not support Sheriff's testimony the EPA tested the surface soil from the time the LP Lumbermill operated or that the tests labeled "topsoil" were of the surface soil from the time the LP Lumbermill operated. In fact, the test data states the samples of topsoil came from the borrow source; i.e., the pits that were approximately 50-feet deep, or the stockpiles, which were created with material from the borrow source. And, the EPA classified those samples as "subsurface." Thus, while Sheriff equated "topsoil" to "surface soil," this Court is convinced that when the EPA labeled soil as "topsoil," it was referring to the type of soil, and not the location from which it came.

¶ 84 LP emphasizes an "absence of data" and argues that there is insufficient evidence for this Court to find that the LP Lumbermill was contaminated. It argues that there is direct evidence that the Stimson Lumbermill was contaminated beyond the Libby background by several sources of Libby asbestos, but there is no direct evidence that the LP Lumbermill was contaminated. However, the absence of data cuts both ways. While there was no direct evidence that the LP Lumbermill was contaminated in amounts exceeding the Libby background, there is no direct evidence that it was not. There is more than sufficient circumstantial evidence and expert opinion evidence for this Court to find that the LP Lumbermill was contaminated with Libby asbestos beyond the Libby background. And, when arguing "absence of data," LP makes several attacks on a straw man. LP emphasizes that unlike the Stimson Lumbermill, the LP Lumbermill did not have

stockpiles of vermiculite stored on site and did not have ACMs in the buildings. However, Dr. Spear did not opine that the LP Lumbermill was contaminated by stored vermiculite or by ACMs; he consistently testified that the LP Lumbermill was contaminated by logs from the area surrounding the W.R. Grace mine and the railroad and that the traffic on the dirt roads kicked up contaminated dust.

¶ 85 For the same reasons this Court gives Dr. Spear's opinions more weight than Sheriff's, this Court gives more weight to Dr. Spear's opinions than Dr. Headapohl's and Dr. Sellman's opinions regarding the contamination at the LP Lumbermill. Like Sheriff, Dr. Headapohl disregarded the evidence that a substantial amount of logs from the area surrounding the W.R. Grace mine were delivered and processed at the LP Lumbermill. While it is undisputed that the contamination in the forest was variable, Dr. Headapohl greatly minimized the amount of contamination in the forest and offered no explanation as to how the LP Lumbermill would be spared from contaminated logs; i.e., she failed to explain how it could be that the logs delivered to the LP Lumbermill would have come from areas in which there was no contamination. Dr. Headapohl also misapprehended the EPA's soil testing; like Sherriff, she equated "topsoil" to the "surface soil" that existed when the LP Lumbermill operated which, again, is unsupportable under the test data. Dr. Headapohl emphasized Geer's testimony, but this Court places more weight on the test data because there was no foundation as to how Geer would know what material the EPA tested for Libby asbestos. Moreover, it is unclear from Geer's testimony as to whether he was saying that the EPA tested the surface soil for Libby asbestos or for the appropriateness of the aggregate material, or both. Dr. Headapohl also minimized the extent of contamination along the railroad and adjacent properties and did not explain how it could be that the LP Lumbermill would be spared from the contamination from the railroad.

¶ 86 This Court also finds that Edward's occupational exposure to asbestos was greater than his non-occupational exposure, which was limited to him being a resident of Libby and recreating in the area. While Edward's non-occupational exposure as a Libby resident was, in the words of Dr. Headapohl and Dr. Sellman, "high enough to have increased the risk for" ARD, the evidence establishes that Edward spent more than 20 years working in jobs, including in the Navy, at the Stimson Lumbermill, at the W.R. Grace Mine, and at the LP Lumbermill, in which he was continuously exposed to significant amounts of airborne asbestos, amounts that were greater than the Libby background; indeed, while working in the Navy and at the LP Lumbermill, he was consistently exposed to visible clouds of dust containing asbestos.

¶ 87 Prior to trial, LP made a *Daubert*[6] challenge to Dr. Spear's testimony, arguing that the testimony was unreliable because he relied upon data from the Stimson Lumbermill and upon tree bark sample testing which was conducted years after the LP Lumbermill closed. LP further maintains that since Dr. Spear's scientific studies only investigated whether contaminated tree bark could affect U.S. Forest Service employees, he cannot reasonably hypothesize that this danger would extend to mill workers. LP also points out that Dr. Spear's tree bark samples were taken within 8 miles of the mine site; however, the documented U.S. Forest Service sales occurred within an 11-mile radius. LP argues that the timber from these sales may have been harvested more than 8 miles from the mine, and thus Dr. Spear cannot support his hypothesis that these logs were contaminated.

¶ 88 Hazel responds that Dr. Spear utilized accepted industrial hygiene methods in reaching his conclusions. She argues that Dr. Spear's studies demonstrated that Forest Service workers who disturbed contaminated tree bark could be exposed to asbestos fibers, and it is reasonable to conclude that other occupational groups, such as loggers and mill workers, would also be exposed to asbestos fibers if they disturbed contaminated tree bark. Hazel further argues that LP's *Daubert* challenge attempts to set a new standard that would require the ultimate opinion specific to this case to be the subject of peer-review and extensive testing before this Court could rely on it. Hazel argues that this standard exceeds the scope of what is required by law, and would effectively eliminate expert witness testimony if such witnesses were required to publish their opinions before offering them as evidence.

¶ 89 In a separate hearing, this Court denied LP's *Daubert* challenge and advised it would more fully set forth its reasoning here. In *McClue v. Safeco Ins. Co. of Illinois*, the Montana Supreme Court explained *Daubert* is "not generally applicable in Montana" and "does not apply to all expert testimony; instead, it applies only to 'novel scientific evidence.' "[7]

¶ 90 There is nothing novel about the evidence Dr. Spear relied upon, including the tree bark data from his own peer-reviewed investigations, in which researchers tested samples of tree bark and discovered that it was contaminated with asbestos, and then simulated forestry and logging activities to discover that such activities caused this asbestos to become airborne. In fact, this Court has allowed this evidence, and Dr. Spear's opinions, in earlier cases.[8] Furthermore, there is no merit to LP's claim that

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[6] *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

[7] 2015 MT 222, ¶ 21, 380 Mont. 204, 354 P.3d 604 (citation omitted).

[8] *See, e.g.*, *Baeth v. Liberty NW Ins. Corp.*, 2014 MTWCC 10; *Peterson v. Liberty NW Ins. Corp.*, 2013 MTWCC 26.

Dr. Spear's opinion was novel and unreliable because he relied in part on data from the Stimson Lumbermill. Dr. Spear and Sheriff agreed that in the absence of contemporaneous evidence, industrial hygienists will compare other similar operations to determine if a worker was exposed.

¶ 91 LP's challenge goes to the way Dr. Spear used evidence to form his opinions, which was subject to cross-examination. Thus, LP's arguments go to the weight rather than the admissibility of these opinions.[9]

Edward's Death

¶ 92 Edward quit smoking in 2006, but his lung condition worsened over time.

¶ 93 In April 2009, a cancerous lesion in his left lung was surgically excised and his lung was resectioned. Dr. Black opined that the synergistic effect of ARD and cigarette smoking caused Edward's lung cancer.

¶ 94 On April 26, 2012, Edward was admitted to the intensive care unit at St. John's Lutheran Hospital in Libby. Gregory Allen Rice, MD, a physician who is board-certified in family medicine, treated Edward. Dr. Rice opined that Edward had a severe hypoxic episode at home, caused by ARD and pneumonia, which caused tissue and organ damage. Edward's chronic lung disease damaged the right side of his heart, making it unable to function sufficiently.

¶ 95 Edward was transferred to hospice care, where he died on April 30, 2012.

¶ 96 On May 12, 2012, Dr. Rice signed Edward's death certificate. Under Cause of Death, he listed sepsis and heart failure due to lung cancer, ARD, and cigarettes. Although Dr. Rice diagnosed sepsis, of the two blood cultures performed, one was negative and the other tested positive for a skin organism that was probably a contaminant. Therefore, Dr. Rice later concluded that Edward may not have had sepsis.

¶ 97 Dr. Rice opined that ARD and smoking were "major players" in Edward's death. While lung cancer played a role, it was a smaller contributor than the ARD and smoking, although the ARD and smoking caused the lung cancer. Dr. Rice opined that Edward also had metastatic prostate cancer, but it was not a major contributor to his death.

¶ 98 Dr. Whitehouse opined that Edward's ARD was, at a minimum, a significant and major factor in his death. Although Dr. Whitehouse agreed that Edward's smoking and asbestos exposures contributed to his obstructive disease, Dr. Whitehouse explained that

[9] *See Hagemann v. Mont. Contractor Comp. Fund*, 2008 MTWCC 35, ¶¶ 41-44.

Edward's obstructive disease was relatively stable and in terms of severity was moderate. Thus, Dr. Whitehouse stated, "And his COPD was never a rapidly progressive course, and he would not have – at the rate he was going, he probably would not have even died of it if he didn't have the asbestosis." Dr. Whitehouse explained that Edward's asbestos-related lung cancer contributed to his death and that Edward had cor pulmonale, i.e., right-side heart failure, which was "all due to his asbestosis" and the cause of his death.

¶ 99 This Court finds that Edward's death was caused by his ARD. This Court is persuaded by Dr. Whitehouse's testimony that Edward's ARD caused his death, which is entitled to more weight[10] and which was not rebutted by Dr. Headapohl nor Dr. Sellman.

CONCLUSIONS OF LAW

¶ 100 Generally, the law in effect when a claimant files his claim, or on his last day of work, whichever is earlier, governs an occupational disease (OD) claim.[11] This Court applies the 1995 Occupational Disease Act (ODA), since that was the law in effect on Edward's last day of employment.[12]

¶ 101 A claim for death benefits is an independent cause of action, and Hazel may pursue her claim even though Edward did not make a claim against LP during his lifetime.[13]

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[10] *See, e.g.*, *Kloepfer v. Lumbermen's Mut. Cas. Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996) (citations omitted) (As a general rule, treating physicians' opinions are entitled to greater weight, although the Workers' Compensation Court remains the finder of fact.).

[11] *Hardgrove v. Transp. Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citing *Grenz v. Fire & Cas.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996)); *Bouldin v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 8. *But see Nelson v. Cenex, Inc.*, 2008 MT 108, ¶¶ 30, 33, 342 Mont. 371, 181 P.3d 619 (worker's later employment was irrelevant to his hazardous exposure and OD, and the court therefore applied the ODA in effect on the date in which the period of employment which included his last injurious exposure ended).

[12] The parties could not determine Edward's last day of work at the LP Lumbermill. However, since the mill had closed and its buildings were inspected for demolition on March 31, 1997, this Court finds that Edward's employment terminated prior to October 1, 1997, while the 1995 ODA was in effect. *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA. Also, the 1995 and 1997 Workers' Compensation Act (WCA) and ODA are identical in all respects pertinent to this decision.

[13] § 39-72-403, MCA; *Manweiler v. The Travelers Ins. Co.*, 1996 MTWCC 41; *see also Van Vleet v. Mont. Assoc. of Cntys. Workers' Comp. Trust*, 2004 MTWCC 8, ¶¶ 28-29 (death benefits are not payable to an estate but are directly payable to a decedent's beneficiaries and a beneficiary is a proper party to such an action) (*rev'd and remanded on other grounds* 2004 MT 367, 324 Mont. 517, 103 P.3d 544).

Issue One: **Did Edward Atchley sustain an occupational disease?**

¶ 102 Generally, an injured worker bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[14] Thus, Hazel has the burden of proving that Edward sustained an OD.

¶ 103 It is undisputed that Edward developed ARD. However, the parties disagree whether this constitutes an OD for which LP can be liable because they disagree as to the interplay of §§ 39-72-102(10) and -408, MCA, on the one hand, and § 39-72-303(1), MCA, on the other.

¶ 104 Section 39-72-102(10), MCA, defines an OD as "harm, damage, or death . . . 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." Section 39-72-408, MCA states:

> Occupational diseases shall be deemed to arise out of the employment only if:
>
> (1) there is a direct causal connection between the conditions under which the work is performed and the occupational disease;
>
> (2) the disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
>
> (3) the disease can be fairly traced to the employment as the proximate cause;
>
> (4) the disease does not come from a hazard to which workmen would have been equally exposed outside of the employment;
>
> (5) the disease is incidental to the character of the business and not independent of the relation of employer and employee.

¶ 105 Section 39-72-303(1), MCA, sets forth the last injurious exposure rule for cases in which the claimant is exposed to the hazards of an OD at multiple employers. It states, in relevant part:

> **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.

¶ 106 LP argues that this Court must apply § 39-72-408, MCA, specifically to Edward's employment at the LP Lumbermill and determine whether that specific employment was

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[14] *Dumont v. Wickens Bros. Constr. Co*., 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979).

the proximate cause of Edward's ARD. LP argues that if Hazel does not prove that Edward's employment at the LP Lumbermill was the proximate cause of his ARD, then Edward did not have an OD for which it can be liable. LP argues that if Hazel proves that Edward's employment at LP was the proximate cause of his ARD, then this Court can consider whether any exposure to asbestos at the LP Lumbermill constitutes a last injurious exposure under § 39-72-303(1), MCA.

¶ 107 Hazel maintains that she must first prove that Edward's lifetime of employment was the proximate cause of his ARD, thereby proving that he had an OD pursuant to §§ 39-72-102(10) and -408, MCA. She argues that if she proves that Edward had an OD, the second step is to determine which employer is liable under the last injurious exposure rule, at § 39-72-303(1), MCA.

¶ 108 Under case law from the Montana Supreme Court and this Court, Hazel's interpretation of the interplay of these statutes is correct.

¶ 109 In *Kratovil v. Liberty Northwest Ins. Corp.*,[15] for example, Kratovil worked as a plumber/pipefitter for approximately 30 years, the last of which was working for Liberty's insured. While working for Liberty's insured, Kratovil experienced a marked increase in pain and numbness in his hands and wrists.[16] After he was laid off, Kratovil's physician diagnosed him with an OD of his hands and wrists, and opined that Kratovil's work as a plumber/pipefitter had caused, over time, his OD.[17] Liberty denied liability for Kratovil's OD, and made the same argument LP makes: Liberty argued that, under § 39-72-408, MCA (2003), it was not liable unless Kratovil proved that his employment with its insured was at least 51% of the cause of his OD.[18] Kratovil made the same argument Hazel makes: he argued that under § 39-72-408, MCA (2003), he was first required to prove that his 30 years of work as a plumber/pipefitter proximately caused his OD.[19] Kratovil argued that the second step was to prove that Liberty was liable under § 39-72-303(1), MCA (2003), because he was last injuriously exposed to the hazard of the disease while employed by Liberty's insured.[20]

¶ 110 The Montana Supreme Court agreed with Kratovil. The court held that Kratovil had an OD under the proximate cause standard in § 39-72-408, MCA (2003), because

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[15] 2008 MT 443, ¶¶ 4, 5, 9, 347 Mont. 521, 200 P.3d 71.

[16] *Kratovil*, ¶¶ 7, 10.

[17] *Kratovil*, ¶ 10.

[18] *Kratovil*, ¶¶ 15, 16.

[19] *Kratovil*, ¶ 18

[20] *Id.*

his 30 years of "work as a plumber/pipefitter significantly aggravated or contributed to his hand and wrist conditions."[21] The Court then explained that because an "occupational disease frequently manifests over several years and possibly several employers, § 39-72-303, MCA (2003), is used to determine which employer is liable for the OD. The court then held that Liberty was liable under § 39-72-303(1), MCA (2003), even though Kratovil had worked for Liberty's insured for only one year, because it was the insurer for the employer at the time he was last injuriously exposed to the hazard of his OD.[22]

¶ 111 In short, as a matter of Montana law, the first step is to determine if the claimant has an OD under §§ 39-72-102(10) and -408, MCA; if the claimant has an OD, the second step is to determine which insurer is liable for the OD under § 39-72-303, MCA.[23]

¶ 112 Here, Hazel met her burden of proving that Edward had an OD under §§ 39-72-102(10) and -408, MCA. In *Kratovil*, the Montana Supreme Court relied on its decisions in *Polk v. Planet Ins. Co*.,[24] *Schmill v. Liberty Northwest Ins. Corp*.,[25] and *Montana State Fund v. Murray*,[26] and rejected the insurer's argument that a claimant must prove that his work was responsible for at least 51% of his condition; rather, the court held that under § 39-72-408, MCA (2003), "the correct standard for determining proximate causation for compensability of an ODA claim [is] whether claimant's employment significantly aggravated or contributed to the occupational disease."[27] It is undisputed that Edward had ARD, and this Court has found that he was exposed to asbestos during his service in the Navy and exposed to Libby asbestos in amounts greater than the Libby background while working at the Stimson Lumbermill, at W.R. Grace, and at the LP Lumbermill.

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[21] *Kratovil*, ¶ 29.

[22] *Kratovil*, ¶ 30; *see also Mont. State Fund v. Murray*, 2004 MTWCC 33 (ruling that to determine whether a condition is an OD under § 39-72-408, MCA, and as defined in § 39-72-102, MCA, this Court considers all employments, including military service) (*aff'd* 2005 MT 97, 326 Mont. 516, 111 P.3d 210).

[23] *See also Johnson v. Liberty Northwest Ins. Corp.*, 2009 MTWCC 20 (ruling that claimant had occupational disease as a result of his employment under § 39-72-408, MCA (2001), and then determining which of claimant's employers was liable under § 39-72-303(1), MCA (2001); *Baeth,* ¶¶ 72-83 (first ruling that claimant had an OD under § 39-72-408, MCA (1993), and then determining which employer was liable for the OD under § 39-72-303, MCA (1993)); *Wommack v. Nat'l Farmers Union Prop. & Cas. Co.*, 2017 MTWCC 8, ¶ 82 (rejecting the last insurer's argument that it was not liable for the claimant's OD because he did not prove that his exposure while it was the insurer at risk was the "major contributing cause" of his OD because "under § 39-72-408, MCA (1997) . . . [the claimant] has established a direct causal connection between the conditions under which his work was performed and his OD. Indeed, the parties do not dispute that he has an OD. Once the claimant has proven that he has an OD, the standard to apply to determine which insurer is liable is the potentially causal standard, as set forth in *In re Mitchell*.").

[24] 287 Mont. 79, 951 P.2d 1015 (1997).

[25] 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

[26] 2005 MT 97, 326 Mont. 516, 111 P.3d 210.

[27] *Kratovil*, ¶¶ 21-24; *see also Johnson*, ¶ 93 (holding that under *Kratovil*, the standard for determining whether a claimant has an OD is whether the claimant's employments "significantly aggravated or contributed to the occupational disease."); *Baeth*, ¶ 77 (same).

Based upon Dr. Spear's and Dr. Whitehouse's testimony, this Court has found that Edward's employments in the Navy, at the Stimson Lumbermill, at W.R. Grace, and at the LP Lumbermill each significantly contributed to and aggravated his ARD. Sheriff agreed that Edward's Naval service and his employments at Stimson Lumbermill and at W.R. Grace significantly contributed to his ARD. Dr. Headapohl and Dr. Sellman opined that his service in the Navy significantly contributed to his ARD. Indeed, LP conceded in its closing argument that Edward had an OD from the Navy and "very possibly or probably" from his employment at the Stimson Lumbermill. It is clear that Edward's employments significantly contributed to his ARD, thereby meeting the proximate cause standard in § 39-72-408, MCA, as set forth in *Kratovil*, *Polk*, and *Murray*.

¶ 113 LP emphasizes that under § 39-72-408(4), MCA, one element for an OD is that "the disease does not come from a hazard to which workmen would have been equally exposed outside of employment." LP acknowledges that in *Kratovil*, *Polk*, and *Murray*, the Montana Supreme Court has held that the standard is whether the employment significantly contributed to or aggravated the condition but argues that these cases are distinguishable because they are not asbestos cases. LP also argues that because Dr. Spear admitted there was no evidence of the amount of fiber burden from Edward's residential exposure nor from his occupational exposures and because Dr. Spear and Dr. Whitehouse did not quantify in terms of a percentage that Edward's residential exposure and each occupational exposure contributed to his disease, this Court cannot find that Edward had a greater occupational exposure.

¶ 114 However, this Court applied the significantly contributed to or aggravated standard in *Johnson v. Liberty Northwest Ins. Corp.* and in *Baeth v. Liberty NW Ins. Corp.*, both of which are Libby asbestos cases, in which this Court concluded that while the claimants were exposed to the background Libby asbestos, they satisfied the proximate cause standard in § 39-72-408, MCA, as interpreted in *Kratovil*, because they proved through industrial hygiene and medical evidence that their employments at the Stimson Lumbermill significantly aggravated and contributed to their ARDs.[28] Through this same type of evidence, Hazel proved that Edward's employments significantly contributed to and aggravated his ARD. Moreover, as in *Johnson*, Hazel introduced sufficient evidence for this Court to find that Edward's occupational exposures were greater than his non-occupational exposure as a Libby resident.[29] While Dr. Spear and Dr. Whitehouse did not

[28] *Johnson*, 2009 MTWCC 20, ¶ 93; *Baeth*, 2014 MTWCC 10, ¶ 73-79 (relying on Baeth's treating physicians' opinions that her "work at the plywood plant was a significant factor in her development of ARD, and was a more significant exposure than anything else that she reported").

[29] *Johnson*, ¶¶ 24-25, 85 (finding that while claimant was exposed to Libby asbestos as a resident of Libby, that exposure was "clearly" less than his exposure at the Stimson Lumbermill, where he was continuously exposed to airborne Libby asbestos, including a visible dust containing Libby asbestos).

quantify Edward's exposures in terms of percentages, this Court weighed all of the expert testimony and has found that although all of Edward's exposures contributed to his ARD, his occupational exposures were greater than his non-occupational exposure to the Libby background. Neither the Montana Supreme Court nor this Court have required evidence quantifying the exposures to the hazard of an OD in terms of a percentage for the claim to be compensable, evidence that, given the nature of ODs, this Court has recognized would be nearly impossible to obtain, as well as imprecise and unscientific.[30] Thus, this Court concludes that Hazel met every element of proximate cause set forth in § 39-72-408, MCA.

¶ 115 Because LP's argument that Hazel must prove proximate cause for each employment is without merit under Montana law, and because Hazel met her burden of proving that the proximate cause of Edward's ARD was his employments in the Navy, at the Stimson Lumbermill, at W.R. Grace, and at the LP Lumbermill, Edward sustained an OD.

Issue Two: Is Louisiana Pacific Corp. liable to Hazel Atchley for Edward Atchley's occupational disease?

¶ 116 As set forth above, because Edward had an OD, the second step of the analysis is to determine which employer is liable under the last injurious exposure rule, codified at § 39-72-303(1), MCA.[31] In *Liberty Northwest Ins. Corp. v. Montana State Fund (In re Mitchell)*, the Montana Supreme Court held that the standard to apply is the potentially causal standard, under which an insurer is liable if it was the insurer at risk when the claimant was last exposed to the type and kind of conditions which could have caused the OD.[32] Liberty, which insured the last employer, made the same argument LP makes in this case; Liberty argued that "the last employer in a series of employers is liable for an OD only if the last employment materially or substantially contributed to the OD" and that this Court "erroneously concluded the 'last injurious exposure rule' required only proof of

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[30] *See Wommack*, ¶ 83 (noting that it is "nearly impossible" to determine which employment or employments contributed in what measure to an OD); *Berglund v. Liberty Mut. Ins. Co*., 1996 MTWCC 60, ¶ 11 (emphasizing physician's testimony that there was not a scientific way to quantify the multiple factors causing claimant's L5-S1 spondylosis, but that claimant's work was a "significant factor" because it accelerated the degenerative process); *see also Vaughn v. Insulating Servs.*, 598 S.E.2d 629, 632 (N.C. Ct. of Appeals 2004) (alteration in original) (citation and internal quotation marks omitted) (explaining while analyzing whether claimant had OD, "It is unreasonable to assume that the legislature intended an employee to bear the burden of making [toxicity] measurements during his employment in order to lay the groundwork for a worker's compensation claim").

[31] *See also Banco v. Liberty Northwest Ins. Corp*., 2012 MT 3, ¶ 10, 363 Mont. 290, 268 P.3d 13 (holding that, under 2003 law, the last injurious exposure rule, as codified in § 39-72-303(1), MCA, applies "where multiple employers may have contributed to the condition").

[32] 2009 MT 386, ¶ 24, 353 Mont. 299, 219 P.3d 1267.

'some degree' of OD causation during the claimant's last employment – however miniscule."[33] The Montana Supreme Court rejected Liberty's argument, holding:

> [T]he claimant who has sustained an OD and was arguably exposed to the hazard of an OD among two or more employers is not required to prove the degree to which working conditions with each given employer have actually caused the OD in order to attribute initial liability. Instead, the claimant must present objective medical evidence demonstrating that he has an OD and that the working conditions during the employment at which the last injurious exposure was alleged to occur, were the type and kind of conditions which could have caused the OD.[34]

¶ 117 Here, Edward's working conditions at the LP Lumbermill were the type and kind of conditions which could have caused his ARD. In short, Edward was exposed to airborne Libby asbestos, in amounts greater than the Libby background, while working for LP at the LP Lumbermill, a job he worked full-time for 9 years. Thus, LP is liable for his OD.

¶ 118 LP raises five arguments in support of its position that it is not liable under the last injurious exposure rule. However, none have merit.

¶ 119 First, LP argues that the potentially causal standard of *In re Mitchell* is inapplicable under the 1995 law and argues for a higher standard of proof than the potentially causal standard. However, the Montana Supreme Court has already applied *In re Mitchell*'s potentially causal standard to a case under the 2003 laws,[35] which are identical to the 1995 laws at issue here in all relevant respects. Thus, this argument lacks merit.

¶ 120 Second, LP reiterates its argument that Dr. Whitehouse's and Dr. Spear's opinions are insufficient to prove last injurious exposure because they did not quantify Edward's asbestos exposures and opine which exposure contributed the most to his fiber burden. However, there is no relevance to Dr. Whitehouse and Dr. Spear declining LP's invitations to quantify each of Edward's exposures and rank them. Under the last injurious exposure rule, such ranking would be meaningless because, as the court explained in *In re Mitchell*:

> Traditionally, courts applying the last injurious exposure rule have not gone on past the original finding of some exposure to weigh the relative amount or duration of exposure under various carriers and employers. As long as there was some exposure of a kind that could have caused the disease, the

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[33] *In re Mitchell*, ¶ 14.

[34] *In re Mitchell*, ¶ 24.

[35] *Banco*, 2012 MT 3, ¶¶ 6-7.

> last insurer at risk is liable for all disability from that disease. Thus, insurers or employers who have been at risk for relatively brief periods have nevertheless been charged with full liability for a condition that could only have developed over a number of years.[36]

This Court recently explained that under case law on which the Supreme Court relied in *In re Mitchell*, "the purpose of the potentially causal standard was to 'render it unnecessary in cases of occupational diseases to make the nearly impossible determination as to which employment or employments contributed in what measure to the disease."[37] Therefore, even if Edward's exposures to asbestos could be quantified, and it was determined that an occupational exposure other than the LP Lumbermill was the largest exposure, this would not allow LP to escape liability.[38] It is sufficient that this Court found that Edward was exposed to airborne asbestos during his work at the LP Lumbermill in amounts that exceeded the Libby background.

¶ 121 Third, LP argues that this Court should rely on Edward's belief, and his VA physician's opinion, that his Navy exposure caused his ARD. LP also points out that Dr. Black did not identify the LP property as contaminated with Libby asbestos in his letter to the VA. Nevertheless, although Edward's military exposure was sufficient to cause his ARD, as discussed above, Montana law places liability on the *last* injurious exposure.[39] Therefore, since Edward was first diagnosed with ARD decades after he left the Navy and engaged in other employments,[40] under Montana law, this Court must determine the last employment where Edward was injuriously exposed to the hazard of the disease – not the first.[41] And, Dr. Brar concluded that Edward's military exposure caused his ARD shortly after his diagnosis in 2001. However, Dr. Brar was not informed that Edward was exposed to Libby asbestos during his employment at the LP Lumbermill. Likewise, there is no evidence from which Dr. Black could have known in 2002 that the LP Lumbermill was contaminated. Finally, Dr. Spear and Sheriff agreed that Edward was unqualified to

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[36] *In re Mitchell*, ¶ 20 (quoting *Fleming*, ¶ 51).

[37] *Wommack*, ¶ 83 (citing *Wood v. Harry Harmon Insulation*, 511 So.2d 690, 692 (Fla. Dist. Ct. App. 1987)).

[38] *See Wommack*, ¶ 80 (although worker likely experienced less exposure to asbestos in his later job, this does not relieve later insurer of liability under the last injurious exposure rule).

[39] *In re Mitchell*, ¶ 24.

[40] *See Banco v. Liberty Northwest Ins. Corp*., 2011 MTWCC 13, ¶ 21 (*aff'd* 2012 MT 3, 363 Mont. 290, 268 P.3d 13) (last injurious exposure applies where worker was exposed to the hazard of her OD at two jobs which she worked concurrently until discontinuing one employment); *Johnson*, ¶¶ 100-06 (last injurious exposure rule applies where worker was diagnosed with a single OD while working for his final employer before retirement); *Fleming*, ¶ 47 (last injurious exposure rule applies where worker was diagnosed with a single OD after he retired).

[41] § 39-72-303, MCA.

determine when he was exposed to asbestos, a point with which this Court agrees.[42] Thus, Edward's belief, Dr. Brar's causation opinion, and Dr. Black's letter carry little weight.

¶ 122 Fourth, LP argues that it cannot be liable for Edward's OD because ARD has a long latency period, at least for lower exposures, and Edward was diagnosed in 2001. However, in *In re Mitchell*, the Montana Supreme Court noted that this is the minority rule and rejected a last-injurious-exposure decision from the Minnesota Supreme Court, which considered the " 'lag time' of five to ten years between exposure to asbestos and the development of asbestosis."[43] Instead, the *In re Mitchell* court relied upon decisions that have rejected the latency argument.

¶ 123 For example, in *Wood v. Harry Harmon Insulation*,[44] – a case on which the Montana Supreme Court relied in *In re Mitchell* – Wood was exposed to asbestos throughout his career in insulation, which lasted from 1949 through 1973.[45] He was diagnosed with mesothelioma 11 years after he last worked for Harry Harmon Insulation.[46] Harry Harmon Insulation denied that Wood's exposure to asbestos while he worked there was "injurious" because the latency period for mesothelioma was 15-45 years, i.e., it generally takes that long following exposure for the disease to develop.[47] Thus, it argued that Wood's injurious exposure occurred at one of his employments 15-45 years before he was diagnosed, though its experts could not pinpoint which exposure caused the disease.[48] The court rejected this argument, holding that the purpose of the last injurious exposure rule is to:

> fix liability on employers in such a way as to render it unnecessary in cases of occupational diseases to make the nearly impossible determination as to which employment or employments contributed in what measure to the disease. This purpose is effected by attaching liability to the employer in

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[42] *See Carlock v. Liberty NW Ins. Corp.*, 2015 MTWCC 19 (claimant's belief that he suffered a "significant" exposure to asbestos at a particular employment was insufficient to grant summary judgment to insurer of another potentially liable employer because no evidence was presented that claimant had sufficient knowledge and expertise to render an opinion as to his asbestos exposures).

[43] *In re Mitchell*, ¶¶ 20, 24 (rejecting the rule announced in *Busse v. Quality Insulation*, 322 N.W.2d 206 (Minn. 1982)).

[44] 511 So.2d 690 (Fla Dist. Ct. App. 1987).

[45] *Wood*, 511 So.2d at 691.

[46] *Id*.

[47] *Wood*, 511 So.2d at 691-92.

[48] *Wood*, 511 So.2d at 692.

> whose employment the claimant was last injuriously exposed to the hazards of the occupational disease.[49]

The court also explained "so long as the exposure in question, independent of other causes, could over extended time lead to development of the disease, then that exposure is 'injurious.' "[50] Thus, the latency period of ARD is irrelevant.

¶ 124 Finally, LP argues that, given Edward's earlier and larger exposures to asbestos, Hazel cannot prove that Edward was exposed to enough asbestos at the LP Lumbermill for it to have been injurious. LP argues: "All the Court can state, if it accepts the testimony of [Hazel's] experts, is that all exposures, including the non-occupational exposure, contributed to [Edward's] disease or death. That is insufficient under the law." However, this Court has concluded that Edward had an OD because his occupational exposures significantly contributed to and aggravated his ARD and that Edward's occupational exposure at the LP Lumbermill was the type and kind of exposure that can cause ARD. Under Montana law, this is sufficient for LP to be liable.[51]

¶ 125 To be sure, there has been criticism of the last injurious exposure rule on the grounds that the last insurer can be liable even though the claimant had greater exposures during earlier employments. In *In re Mitchell*, the court noted that some jurisdictions "require that the exposure be a substantial contributing cause of the OD before liability can be assigned to an employer under the last injurious exposure rule" and that other jurisdictions have a "lower degree of causation," such as "an exposure which proximately augmented the disease to any extent, however slight."[52] In his concurrence in *In re Mitchell*, Justice Rice stated that while none of the standards are "clearly superior," he would adopt a higher degree of causation for deciding last injurious exposure cases because the potentially causal standard does not account for the word "injurious" and "necessarily shifts a disproportionate burden to the last insurer" because as the last in line, it stands to be liable for the OD even if earlier employers may have contributed more to the development of the OD.[53] However, it is clear that the majority adopted the

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[49] *Wood*, 511 So.2d at 692 (citation omitted).

[50] *Wood*, 511 So.2d at 693; *see also State ex rel. Pilkington N. Am., Inc. v. Indus. Comm'n of Ohio*, 887 N.E. 2d 317, 318-19 (Ohio 2008) (rejecting use of latency period in mesothelioma case because, "The last-injurious-exposure principle is a practical, workable method for assigning responsibility in multiple-employer situations. Pilkington's suggestion to deduct the average latency period from the year of diagnosis and assign liability to the employer that corresponds to that year is no more than a first-injurious-exposure rule, which we decline to adopt.").

[51] *See, e.g.*, *In re Mitchell*, ¶ 25 (although worker's last employment was not the major contributing cause of his OD, it was of the same type and kind which led to the development of his OD, and therefore that insurer was liable under the last injurious exposure rule); *Wommack*, ¶ 80 (even though worker likely experienced less exposure to asbestos in his last employment, it was still an injurious amount and subject to the last injurious exposure rule).

[52] *In re Mitchell*, ¶ 22 (citations omitted).

[53] *In re Mitchell*, ¶ 31 (Rice, J., concurring).

potentially causal standard and, thus, if Edward's exposure to asbestos at the LP Lumbermill contributed to his OD, even if earlier employers may have contributed more to the development of Edward's OD, LP is nonetheless liable as the insurer at risk at the time of Edward's last injurious exposure.

¶ 126 In sum, Edward was exposed to airborne asbestos in amounts exceeding the Libby background in the course of his 9-year employment at the LP Lumbermill – the same type and kind of conditions which cause ARD. Therefore, LP is liable to Hazel for Edward's OD under § 39-72-303(1), MCA.

Issue Three: Was Edward Atchley's death caused by an occupational disease?

¶ 127 This Court has found that Edward's death was caused by his OD. LP is therefore liable for OD benefits under § 39-72-701(1), MCA, and § 39-71-721(1)(a), MCA.

Issue Four: Is Hazel Atchley entitled to her attorney fees, costs, and/or a penalty?

¶ 128 Since Hazel is the prevailing party, she is entitled to her costs.[54]

¶ 129 As to her claim for her attorney fees, pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, this Court later adjudges the claim compensable, and this Court determines the insurer's actions in denying liability were unreasonable. As for her claim for a penalty, § 39-71-2907, MCA, provides that this Court may increase by 20% the full amount of benefits due a claimant when an insurer unreasonably delays or refuses to pay benefits before or after an order granting benefits from this Court.

¶ 130 Hazel argues that LP's position that Edward was not exposed to Libby asbestos while working at the LP Lumbermill was unreasonable. However, although this Court found sufficient evidence to determine that Edward's last injurious exposure to Libby asbestos occurred during his employment at the LP Lumbermill, the evidence was not so one-sided as to reasonably preclude the possibility that this Court could reach the opposite finding.

¶ 131 Hazel also argues that LP's legal interpretation of the last injurious exposure rule was unreasonable. However, an insurer's legal interpretation may be incorrect without being unreasonable, and the existence of a genuine doubt, from a legal standpoint, that

[54] § 39-71-611, MCA.

liability exists constitutes a legitimate excuse for denial of a claim.[55] While LP's legal arguments were without merit under existing case law, they were not unreasonable given the language of § 39-72-408(4), MCA.

¶ 132 Since this Court has not found LP unreasonable in refusing to pay benefits, Hazel is not entitled to her attorney fees nor a penalty under the applicable statutes.

JUDGMENT

¶ 133 Edward Atchley sustained an occupational disease.

¶ 134 Edward Atchley's death was caused by an occupational disease.

¶ 135 LP is liable to Hazel Atchley for Edward Atchley's occupational disease.

¶ 136 Hazel Atchley is entitled to her costs pursuant to § 39-71-611, MCA.

¶ 137 Hazel Atchley is not entitled to her attorney fees.

¶ 138 Hazel Atchley is not entitled to a penalty.

¶ 139 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 26th day of September, 2018.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Jon L. Heberling, Laurie Wallace, Dustin Leftridge, and Ethan Welder
Todd A. Hammer and Benjamin J. Hammer

Submitted: June 12, 2015

[55] *Marcott v. La. Pac. Corp.*, 275 Mont. 197, 204-05, 911 P.2d 1129, 1134 (1996) (citing *Holton v. F.H. Stoltze Land & Lumber Co.*, 195 Mont. 263, 269, 637 P.2d 10, 14 (1981)).