IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 34

WCC No. 2011-2751

MARLON CLAPHAM

Petitioner

vs.

TWIN CITY FIRE INSURANCE COMPANY

Respondent/Insurer.

ORDER RESOLVING RESPONDENT'S MOTION IN LIMINE AND
FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner suffered a work-related back injury in 2002. In 2010, he changed jobs. He later filed an occupational disease claim against his new employer. Respondent denied Petitioner's claim on the grounds that his employment did not cause his back condition. Petitioner contends that he developed a compensable occupational disease while working for Respondent's insured.

Held: Petitioner has not proven that he developed an occupational disease while working for Respondent's insured. He is therefore not entitled to the benefits he seeks.

Topics:

> **Witnesses: Experts: Disclosure.** Where Petitioner disclosed that his expert was expected to offer testimony consistent with her previously documented diagnoses, treatment recommendations, and causation opinions, the Court granted Respondent's motion to exclude testimony at the expert's second deposition in which she opined for the first time that Petitioner's aggravation was permanent and not temporary.
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> **Discovery: Experts.** Where Petitioner disclosed that his expert was expected to offer testimony consistent with her previously documented diagnoses, treatment recommendations, and causation opinions, the Court granted Respondent's motion to exclude testimony at the expert's

second deposition in which she opined for the first time that Petitioner's aggravation was permanent and not temporary.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Where Petitioner's treating physician opined that his work was the fourth in importance of five factors which contributed to his degenerative disk disease, the Court concluded that Petitioner's work was not the "leading cause" as set forth in § 39-71-407(13), MCA.

Occupational Disease: Proximate Cause. Where Petitioner's treating physician opined that his work was the fourth in importance of five factors which contributed to his degenerative disk disease, the Court concluded that Petitioner's work was not the "leading cause" as set forth in § 39-71-407(13), MCA.

Injury and Accident: Aggravation: Temporary Aggravations. Where Petitioner's treating physician opined that his condition was a temporary aggravation of his pre-existing condition, another medical expert opined that Petitioner's job duties did not aggravate his back condition, and Petitioner acknowledged that he had never been pain free since a previous industrial accident and that he suffers frequent, temporary exacerbations of his condition with innocuous activity, the Court concluded that Petitioner's work activities only caused a temporary aggravation of his pre-existing condition and that liability for any medical treatment would rest with the insurer liable for Petitioner's previous industrial injury.

¶ 1 The trial in this matter occurred on January 10, 2012, at the Workers' Compensation Court in Helena, Montana. Petitioner Marlon Clapham was present and was represented by David T. Lighthall. Joe C. Maynard represented Respondent Twin City Fire Insurance Company (Twin City).

¶ 2 Exhibits: I admitted Exhibits 1 through 25 without objection.

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of Clapham, Linda Slavik, Robert Vincent, M.D., Richard Hibbs, Cole Johanssen, Gregory D. Hutton, M.D., Elizabeth "Liz" McDonald, RN, CCM, and two depositions of Valerie Chyle, APRN, FNP, can be considered part of the record.[1] Clapham was sworn and testified.

[1] I will consider Chyle's depositions subject to my ruling on Twin City's Motion in Limine.

¶ 4 Issues Presented: The Final Pretrial Order sets forth the following issues:[2]

Issue One: Whether Petitioner suffered a compensable occupational disease in his employment with Crown Parts pursuant to §§ 39-71-407(9) and (10), MCA.

Issue Two: Whether Respondent complied with the statutory requirements of § 39-71-608, MCA.

Issue Three: If Respondent did not comply with the statutory requirements of § 39-71-608, MCA, whether its noncompliance constitutes a waiver of its defenses and acceptance of the claim.

Issue Four: If Respondent did not comply with the statutory requirements of § 39-71-608, MCA, whether a penalty should be assessed on all benefits payable to Petitioner pursuant to § 39-71-2907, MCA.

Issue Five: If Respondent did not comply with the statutory requirements of § 39-71-608, MCA, whether Petitioner should be awarded his reasonable attorney's fees pursuant to §§ 39-71-611 or -612, MCA.

Issue Six: Whether Petitioner suffered a non-work related injury on or about November 27, 2010, which proximately caused his current condition.

Issue Seven: Whether the non-work related injury on or about November 27, 2010, severed liability per § 39-71-407, MCA.

Issue Eight: Whether Petitioner's condition was caused and/or aggravated by driving from Stevensville to Billings.

RESPONDENT'S MOTION IN LIMINE

¶ 5 On December 21, 2011, Twin City filed a motion in limine and asked the Court to exclude opinions offered by Valerie Chyle, APRN, FNP, during her December 16, 2011, deposition. In particular, Twin City objected to two pieces of Chyle's testimony: her opinion that Clapham was not at maximum medical improvement (MMI) when he felt a "pop" in his back while preparing to shovel snow at home, and her opinion that

[2] Final Pretrial Order at 13.

Clapham's alleged occupational disease is a permanent aggravation of an underlying condition.[3]

¶ 6 Twin City argues that Chyle's testimony should be excluded because it is untimely. Twin City points out that at the time of the exchange deadline in this case, Clapham had disclosed the following regarding Chyle:

> Valerie Chyle, APRN, is expected to testify concerning her diagnoses and treatment of Petitioner's low back condition, and the causation opinions she offered in response [to] a letter form Linda Slavik dated December 29, 2010, and in response to a letter from David Lighthall dated March 28, 2011. Ms. Chyle is expected to offer testimony consistent with the diagnoses, treatment recommendations, and causation opinions documented in her treatment notes and the above-referenced letters, which are presumed to be in Respondent[']s possession. The grounds for Ms. Chyle's opinions are her treatment of Petitioner for his low back condition, Petitioner's history of how his condition developed, Ms. Chyle's review of Petitioner's prior treatment records, and her education, training, and expertise as an Advanced Practice Registered Nurse[.][4]

¶ 7 Twin City argues that, although Chyle possessed the medical records concerning the "pop" incident, she never mentioned these records in her treatment notes or records nor, prior to her December 16, 2011, deposition, did she offer the opinion that Clapham had not reached MMI prior to the "pop" incident. Twin City further contends that, prior to this deposition, Chyle repeatedly and consistently characterized Clapham's back condition as a temporary aggravation of a chronic pre-existing condition, and that Clapham failed to disclose that Chyle had changed her opinion prior to this deposition. Twin City therefore asks the Court to exclude Chyle's December 16, 2011, deposition testimony on these two items. Twin City alleges that permitting Clapham to offer two new expert opinions long past the exchange deadline would be highly prejudicial as Twin City was deprived of the opportunity to "explore the topic" or obtain rebuttal opinions.[5]

¶ 8 Clapham objects to Twin City's motions. He argues that Chyle's testimony is relevant and admissible, that Chyle was timely disclosed as an expert witness, and that the subject matter of her potential testimony at trial was likewise disclosed in a timely

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[3] Motion in Limine, Docket Item No. 51.

[4] Ex. 2 at 3 to Motion in Limine.

[5] Motion in Limine at 2-3.

manner.[6] Twin City does not dispute that Chyle's testimony is relevant, or that she was timely disclosed as an expert witness. The only issue is whether the subject matter of Chyle's potential testimony was timely disclosed; therefore, I address only that portion of Clapham's brief.

¶ 9 Arguing that Chyle's opinion testimony should not be excluded, Clapham relies upon *Uffalussy v. St. Patrick Hospital and Health Sciences Center*[7] and *Ostermiller v. Alvord*.[8] In *Uffalussy*, the insurer objected to a doctor providing any opinion outside the scope of his treatment notes. Uffalussy's expert witness disclosure regarding the doctor stated, in pertinent part:

> We would expect the medical care providers and evaluators to testify based upon their personal observations as well as the cumulative medical records. We would expect them to testify consistent with their medical records and reports . . . .[9]

I characterized Uffalussy's disclosure as "broad" and noted that if the insurer had objected to the adequacy of the disclosure in accordance with the Scheduling Order, I may well have found the objection well-taken. However, from the record it appeared that the insurer had never followed the procedure for objecting to an allegedly inadequate disclosure, and I found that the opinions offered by the expert witness at trial fell within the broad parameters set forth in Uffalussy's disclosure.[10]

¶ 10 In *Ostermiller*, the Montana Supreme Court rejected the appellant's argument that the testimony of his treating physician, called to testify by the respondent, should have been excluded on the grounds that the respondent failed to list the treating physician in its response to the appellant's interrogatory regarding the names of expert witnesses to be called at trial. The court noted that the respondent had identified the doctor as a witness in another interrogatory, and further stated:

> Dr. Black was listed by the defendant as a witness in the pretrial order dated February 20, 1985. Further, Dr. Black was deposed by both parties prior to trial. Dr. Black was a treating physician for the plaintiff and in no way could be classed as a surprise witness. Plaintiff has not contended

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[6] Petitioner's Brief in Response to Respondent's Motion in Limine (Response to Motion in Limine), Docket Item No. 55.

[7] *Uffalussy*, 2007 MTWCC 45.

[8] *Ostermiller*, 222 Mont. 208, 720 P.2d 1198 (1986).

[9] *Uffalussy*, ¶ 65.

[10] *Uffalussy*, ¶ 66.

> that he was surprised in any respect by the testimony of Dr. Black. He has only argued that defendant failed to list Dr. Black as an expert witness. We find that such an argument is hyper-technical in view of the information furnished to the plaintiff. We conclude that the admission of Dr. Black's testimony was proper.[11]

¶ 11 In his response brief, Clapham acknowledges that Chyle previously characterized the aggravation of his pre-existing low-back condition as temporary on multiple occasions, including during a previous deposition in this case.[12] There is no question that Chyle's later testimony that Clapham suffered a permanent aggravation is at odds with Clapham's disclosure, which stated in part, "Ms. Chyle is expected to offer testimony ***consistent with*** the diagnoses, treatment recommendations, and causation opinions documented . . . ."[13] The cases Clapham cites are readily distinguishable from the present case. Unlike the situation in *Uffalussy*, in which the disclosure was vague, Chyle repeatedly opined that the aggravation of Clapham's pre-existing back condition was temporary. There is nothing "hyper-technical" about Twin City's objection to Chyle offering testimony which was anything but "consistent with the . . . causation opinions documented."

¶ 12 Twin City's motion is **granted**. Chyle's testimony at her December 16, 2011, deposition in which she opined that Clapham's alleged occupational disease is a permanent aggravation of an underlying condition, is excluded. As for Chyle's opinion regarding Clapham's MMI status at the time he felt a "pop" in his back, as set forth below, I have not reached Issues Six and Seven. Therefore, Chyle's opinion regarding Clapham's MMI status at that time is irrelevant.

FINDINGS OF FACT

¶ 13 Clapham testified at trial. I did not find Clapham's testimony wholly credible. However, for purpose of these findings I have taken Clapham's testimony as true. The outcome of the case does not hinge on Clapham's credibility but rather on the medical evidence presented.

¶ 14 Clapham is a general machinist.[14] In March 1992, he began working for Smurfit Stone Container Corp. (Smurfit Stone) in Missoula.[15] He averaged 50 to 60 hours of

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[11] *Ostermiller*, 222 Mont. at 212, 720 P.2d at 1201.

[12] Response to Motion in Limine at 2-3.

[13] *See* ¶ 6, above. (Emphasis added.)

[14] Trial Test.

work per week. Clapham testified that he regularly lifted 10 to 15 pounds, and rarely lifted more than 20 to 25 pounds because he used a crane to move heavier pieces.[16]

¶ 15 Clapham testified that he first aggravated his back on October 15, 2002. He initially treated with Georgia Milan, M.D., and he also sought chiropractic treatment. He did not miss any work from the injury.[17]

¶ 16 On May 19, 2003, Clapham underwent a lumbar MRI which revealed mild to moderate degenerative changes from L3 through S1 with a slight narrowing of the canal at L3-4, disk desiccation and diffuse bulging of the disk annulus without focal protrusion at L4-5, and disk desiccation and diffuse bulging of the disk annulus at L5-S1 with more focal central disk protrusion extending to the ventral surface of the thecal sac.[18]

¶ 17 On June 3, 2003, Clapham signed a First Report of Injury (FROI), claiming that on October 15, 2002, he strained his lower back while lifting a lathe bed into position.[19]

¶ 18 On August 18, 2003, Chriss A. Mack, M.D., opined that Clapham was at MMI for acute myofascial pain syndrome. Dr. Mack opined that Clapham's symptoms were caused by one of two bulging disks and he assigned Clapham a 7% whole person impairment rating.[20] Clapham testified that he continued to have periodic flare ups of his back condition after Dr. Mack placed him at MMI.[21]

¶ 19 On August 23, 2004, John C. Schumpert, M.D., MPH, issued an independent medical examination (IME) report regarding Clapham's condition and whether Clapham's ongoing chiropractic care should be considered "maintenance or curative in nature." Dr. Schumpert opined that chiropractic care would be palliative in nature and that it was helpful in maintaining Clapham's level of functioning. Dr. Schumpert further opined that Clapham was at MMI and he did not believe more aggressive treatment was warranted.[22]

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[15] Trial Test.

[16] Trial Test.

[17] Trial Test.

[18] Ex. 1 at 135.

[19] Ex. 1 at 152.

[20] Ex. 1 at 130.

[21] Clapham Dep. 53:13-15.

[22] Ex. 1 at 115-120.

¶ 20 Clapham testified that in March 2005, he began to experience numbness in his legs. He reduced his recreational activities because he did not want to further aggravate his condition. Clapham testified that he did not miss any work from October 2002 through March 2005, but he worked through significant pain and flare ups.[23]

¶ 21 Clapham testified that in March 2006, he exacerbated his back condition when he attempted to build a fire while recreating on his snowmobile. After that incident, he missed a few days of work and reduced his recreational activities.[24]

¶ 22 On March 14, 2006, Clapham underwent a repeat lumbar MRI. The findings indicated that Clapham had a small hemangioma within the L3 vertebral body with mild degenerative disk disease at L4 and L5-S1, a mild central disk protrusion with associated posterior annular tear at L4-5, a mild central disk protrusion at L5-S1 mildly contacting the descending right S1 nerve root without significant spinal canal stenosis, and mild relative canal stenosis at L3-4.[25]

¶ 23 On May 15, 2006, Dana Headapohl, M.D., MPH, conducted an IME. Dr. Headapohl diagnosed Clapham with mechanical low-back pain with intermittent right leg parethesias and mild degenerative disk disease at L4-5 and L5-S1 with a posterior annular tear at L4-5 and relative spinal canal stenosis and mild bilateral recess stenosis. Dr. Headapohl opined that the 2002 industrial injury was the major contributing cause for Clapham's ongoing need for medical treatment, noting that Clapham was found at MMI in 2004 "with ongoing symptoms, lumbar radiculopathy, and need for ongoing maintenance therapy." Dr. Headapohl opined that Clapham had returned to preinjury baseline from his March 2006 exacerbation.[26]

¶ 24 On November 27, 2007, Dr. Milan treated Clapham for an acute exacerbation of his low-back pain, noting that Clapham had an acute onset of pain while pulling a cart. Dr. Milan prescribed a pain reliever and aggressive physical therapy.[27] On April 21, 2008, Dr. Milan opined that Clapham had returned to his pre-exacerbation baseline and that any back problems he was now experiencing related to his 2002 industrial injury.[28]

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[23] Trial Test.

[24] Trial Test.

[25] Ex. 1 at 133-34.

[26] Ex. 1 at 63-77.

[27] Ex. 1 at 138.

[28] Ex. 1 at 137.

¶ 25 Clapham testified that after Smurfit Stone ceased paying for his chiropractic treatment under his 2002 claim, he sought chiropractic care under his health insurance. Clapham testified that he typically went several times each month, but decreased his visits when he participated in physical therapy.[29] Clapham testified that if he did not get physical therapy or chiropractic care on a regular basis, his back condition deteriorated and he experienced increased stiffness and pain.[30]

¶ 26 In January 2010, Clapham was laid off from his job at Smurfit Stone.[31] On July 19, 2010, Clapham began working for Crown Parts.[32] Clapham testified that he ceased the chiropractic treatment and physical therapy prior to beginning work at Crown Parts because he felt like he had reached a maintainable level of comfort. However, although Clapham alleged that he chose to stop treatment because he did not believe he needed it, he admitted that he stopped receiving treatment when his workers' compensation insurer stopped paying for it, and that the inability to afford treatment limited his mobility and increased his back pain. Clapham further acknowledged that at times, his back pain flared up while he was receiving chiropractic treatment and physical therapy. Clapham admitted that he occasionally took vacation time off work because of sudden flare ups of his back condition, and that he experienced acute pain shooting down into his legs before he began working at Crown Parts.[33]

¶ 27 Clapham testified that he has never had a pain-free day since his 2002 industrial injury. Clapham testified that his average pain level at Smurfit Stone was between a three out of ten and a five out of ten, but by 2005, his baseline pain was about a five out of ten and it would increase to eight or nine. Clapham testified that when he was unemployed before going to work for Crown Parts, his pain was approximately a three out of ten and he found that he could ignore the pain unless he twisted the wrong way.[34]

¶ 28 When Clapham worked for Crown Parts, he commuted to Billings from his home in Stevensville. Once he began working the night shift, he either drove to Billings on Sunday night or Monday morning, and his shift started at 2:00 p.m. on Monday. He

[29] Clapham Dep. 56:23 – 57:10.

[30] Clapham Dep. 59:24 – 60:10.

[31] Trial Test.

[32] Trial Test.

[33] Trial Test.

[34] Trial Test.

worked four 12-hour shifts and then spent the night in an apartment in Billings. He drove home to Stevensville each Friday morning and spent the weekend with his wife.[35]

¶ 29 Clapham testified that his job duties at Crown Parts required him to be in front of his lathe for his entire shift except for breaks. On some days, Clapham only sat down on his 20-minute dinner break. Occasionally, a machining job allowed him to sit or lean for periods of time. Clapham testified that constant standing aggravated his back pain.[36]

¶ 30 Clapham testified that from July 19, 2010, into September 2010, he believed his back was doing well. He did not notice an increase in back pain when he drove to Billings at the start of each work week. He also did not notice an increase in back pain when he drove back to Stevensville at the end of the week. Clapham testified that he always stopped frequently to walk around while driving long distances.[37]

¶ 31 Clapham testified that by the third week of October, he felt stiffer and increased his dosages of muscle relaxant and over-the-counter pain reliever. Clapham testified that he continued to manage the drive to Billings and back without any significant increase in stiffness or pain. His back felt normal during his weekends off. Clapham testified, however, that he was never pain free and that he had never been pain free since his October 2002 industrial injury.[38]

¶ 32 In early November 2010, Clapham noticed increasing stiffness and a decrease in his range of motion. Clapham testified that at that time, he typically felt well on Monday and Tuesday, but by Wednesday he would increase his medications. The intensity of his pain and stiffness increased by Thursday afternoon.[39]

¶ 33 Clapham testified that during the week of Thanksgiving in November 2010, he drove to Billings on Monday morning and completed his first shift without incident. On Tuesday, Clapham felt very stiff and his pain levels were increasing prior to the start of his shift. Afterward, he had difficulty getting out of his car at his Billings apartment. On Wednesday, Clapham experienced increased pain and stiffness prior to his lunch break and he took more than his usual dosage of medication. After his lunch break, Clapham

[35] Trial Test.

[36] Trial Test.

[37] Trial Test.

[38] Trial Test.

[39] Trial Test.

had difficulty standing up. Clapham returned to his lathe and finished the piece he had been working on.[40]

¶ 34 After Clapham's shift ended, he sat in his car for a few minutes before driving away. When he arrived at his Billings apartment, he had to use his hands to lift his legs out of the vehicle. He fell when he attempted to stand up. Clapham testified that he crawled into his apartment and went straight to bed. He awoke on Thanksgiving morning and decided to drive home as soon as possible because he believed he was going to continue to stiffen.[41]

¶ 35 Clapham testified that he had a "miserable" drive from Billings to Stevensville. He stopped frequently and attempted to walk around. On many of his stops, he simply got out of the car and stood holding on to the vehicle. By the time Clapham reached home, he was experiencing pain more severe than he had ever felt previously. Clapham took a hot shower, ate dinner, and went to bed.[42]

¶ 36 The following morning, Clapham was still in a great deal of pain. He spent the day on the couch. If he bent over, he had muscle spasms when he tried to straighten up.[43]

¶ 37 Clapham testified that from November 25, 2010, through November 27, 2010, he spent his time resting on the couch or in bed and was not doing any bending or twisting.[44] On the morning of November 27, 2010, he decided to use his hot tub. He was retrieving a broom to brush snow off the walkway leading to the hot tub when he had a severe muscle spasm. His wife helped him onto the couch and he spent the rest of the day there. Clapham testified that he never actually swept any snow with the broom.[45]

¶ 38 On Sunday, November 28, 2010, Clapham went to the emergency room at his wife's insistence because he was unable to get out of bed without assistance that morning.[46]

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[40] Trial Test.

[41] Trial Test.

[42] Trial Test.

[43] Trial Test.

[44] Trial Test.

[45] Trial Test.

[46] Trial Test.

¶ 39 Clapham testified that the prescribed medication relieved his symptoms. The next day, he saw Gregory D. Hutton, M.D., because he wanted a work release. Clapham testified that he told Dr. Hutton about having a spasm the day before while intending to shovel snow so that he could use his hot tub. Clapham testified that he did not tell Dr. Hutton that he had a snap or a pop in his back and that he does not recall hearing a pop in his back.[47]

¶ 40 Dr. Hutton is a physician certified by the American Board of Family Practice.[48] Dr. Hutton saw Clapham on one occasion: November 29, 2010.[49] Dr. Hutton noted that Clapham had intermittent flare ups of low-back pain since his 2002 industrial injury. He noted that Clapham felt a "pop" or "snap" in his back when he was walking outdoors while planning to shovel snow. Dr. Hutton diagnosed Clapham with an acute exacerbation of chronic lower back pain and took him off work for two weeks.[50]

¶ 41 On November 29, 2010, Clapham signed a FROI claiming, "Work activities have aggravated back and caused increasing back pain over last couple of months."[51] Clapham has not returned to work since November 2010.[52]

¶ 42 Valerie Chyle, APRN, FNP,[53] is board-certified as a family nurse practitioner.[54] Her practice specialty is the rehabilitation and pain management of injured workers.[55] On December 15, 2010, Chyle saw Clapham for an initial evaluation. Clapham was referred by the nurse consultant with the Carey Law Firm for evaluation and possible assumption of care. Chyle reported that although Clapham had suffered an industrial injury to his low back in October 2002, he had been doing fairly well until he began his job at Crown Parts in July 2010. Chyle reported that Clapham experienced worsening pain with numbness and tingling into his right leg and foot. Chyle performed a physical examination of Clapham and her impression was of chronic low-back pain with right L5-S1 radiculopathy with recent aggravation at work and multilevel lumbar degenerative

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[47] Trial Test.

[48] Hutton Dep. 6:7-9.

[49] Hutton Dep. 7:23 – 8:2.

[50] Ex. 16 at 1.

[51] Ex. 1 at 156.

[52] Trial Test.

[53] Some of the trial exhibits bear Chyle's former name, "Valerie Benzschawel." For the sake of clarity, she is referred to Chyle throughout the Findings of Fact, Conclusions of Law and Judgment.

[54] Chyle (8/18/11) Dep. 9:20-25.

[55] Chyle (8/18/11) Dep. 9:3-6.

disk disease. Chyle recommended a repeat lumbar MRI, prescription medication, and physical therapy.[56]

¶ 43 On January 4, 2011, Chyle responded to questions posed by Linda Slavik, the initial claims adjuster for Specialty Risk Services on Clapham's Crown Parts claim. Chyle opined that Clapham's back pain was a temporary aggravation of his 2002 industrial injury.[57] After receiving Chyle's opinion letter, Slavik chose to pursue an IME before making a liability determination.[58] Slavik testified that she considered Clapham's case to be complex due to his previous industrial injury and she believed it was prudent to seek the opinion of a specialist or physician to determine causation.[59]

¶ 44 On January 17, 2011, Clapham underwent a repeat lumbar MRI. The report compares this MRI to the 2006 films and notes findings at T11-12 through L5-S1, including disk bulging with impingement on the central spinal canal at L1-2 and L2-3; disk bulging with impingement and significant stenosis and moderate biforaminal stenosis with disk bulging abutting the exiting nerve roots bilaterally at L3-4; a disk protrusion and significant stenosis at L4-5, with a mild increase in disk protrusion since the 2006 MRI; and a disk protrusion with significant stenosis at L5-S1, with a mild decrease in the disk protrusion since the 2006 MRI.[60]

¶ 45 Robert J. Vincent, M.D., is board-certified in internal medicine and in preventive medicine with a subspecialty in occupational medicine.[61] Currently, Dr. Vincent does not treat patients, but confines his practice to IMEs.[62] Dr. Vincent conducted an IME of Clapham on February 8, 2011.[63] In his subsequent report, Dr. Vincent noted that Clapham performed his job at Crown Parts without significant difficulties, although he suffered from chronic low-back pain. Dr. Vincent noted that Clapham reported a gradual worsening of back pain during his employment at Crown Parts. Dr. Vincent further noted that Clapham opined that his commute was the primary aggravator of his back pain. After a physical examination, Dr. Vincent opined that Clapham had an exacerbation of chronic low-back pain secondary to long-distance driving, multilevel degenerative disk disease which pre-existed November 2010, right extremity pain and

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[56] Ex. 1 at 164-69.

[57] Ex. 1 at 176-77.

[58] Slavik Dep. 41:20 – 42:4.

[59] Slavik Dep. 42:11-12, 43:2-17, 44:8-11.

[60] Ex. 1 at 183-84.

[61] Vincent Dep. 9:4-9.

[62] Vincent Dep. 12:9-20.

[63] Vincent Dep. 13:20 – 14:1.

tingling primarily in the S1 distribution, and probable depression. Dr. Vincent opined that "nothing" in Clapham's job history or work duties suggested that his job aggravated his back condition. Dr. Vincent further opined that Clapham's work at Crown Parts was not the major contributing cause of his back pain, but rather his pain was caused by a combination of the natural progression of his underlying degenerative disk disease and his commute. Dr. Vincent further opined that Clapham did not sustain an aggravation of his 2002 industrial injury and that he remained at MMI.[64]

¶ 46 Dr. Vincent testified that he found objective medical findings of multilevel degenerative disk disease, chronic low-back pain, and radicular findings in the lower extremity consistent with x-ray findings.[65] Dr. Vincent testified that he reviewed Clapham's most recent MRI, compared his findings to the reports from the previous MRIs, and concluded that there were some changes consistent with a natural progression of degenerative changes.[66] Dr. Vincent testified:

> And Mr. Clapham told me – I asked him several times, to get it straight, what at his work was causing his back to be worse, and he repeatedly told me that he didn't think it was anything different about Crown Parts than the work he had done at Stone and that he could get through that with his medication and his regimen of treatment.
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> What he told me was that his driving the six and a half hours between Billings and Missoula was, in his opinion, what was aggravating his back and what causes it to get worse.
>
> And I asked him that in different ways on several occasions, and I even repeated it back to him, because obviously that's the crux of this issue.
>
> I believe the man has a better handle on what makes his back worse than I will ever know reading a job analysis or his medical chart.[67]

¶ 47 Clapham testified that he never told Dr. Vincent that his commute was the source of his back aggravation. Rather, Clapham testified that Dr. Vincent told Clapham that the commute was causing his aggravation.[68]

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[64] Ex. 1 at 193-206.

[65] Vincent Dep. 28:3-14.

[66] Vincent Dep. 30:2-14.

[67] Vincent Dep. 44:8 – 45:1.

¶ 48 On March 28, 2011, in response to a letter from Clapham's counsel, Chyle opined that Clapham suffered a temporary aggravation of a pre-existing low-back condition in his employment at Crown Parts. Chyle opined that Clapham's job duties were the major contributing cause of his condition.[69]

¶ 49 Chyle was deposed on two occasions – August 18, 2011, and December 16, 2011. I attended the August 18 deposition in person and attended the December 16 deposition via videoconferencing. Although I found Chyle's testimony to be credible, I did not find it to be persuasive. As set forth below, I found her testimony to be at times internally inconsistent and therefore I cannot assign it great weight.

¶ 50 Chyle testified that Clapham had intermittent flare ups of his back condition after he reached MMI for his 2002 industrial injury, including some which were not employment-related.[70] Chyle agreed that Clapham's back condition was "easily aggravated" in the years following his 2002 industrial injury.[71]

¶ 51 Chyle testified that she believed Clapham's work activities caused a temporary aggravation because she did not see any novel symptoms and she believed that a proper regimen of physical therapy and medication would allow him to return to baseline and return him to work.[72] Chyle opined that 50% to 75% of Clapham's back condition could be attributed to his 2002 industrial injury, 50% could be attributed to pre-existing degenerative disk disease, less than 5% could be attributed to his commute to and from Billings, and 20% could be attributed to his work at Crown Parts.[73] She further testified that his non-work activities contribute 20% to 25% of his back condition.[74] Chyle testified that if she were to list all of the contributing causes of Clapham's current back conditions without assigning percentages, she would consider his work at Crown Parts to be at the top of the list.[75]

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[68] Trial Test.

[69] Ex. 1 at 221-22.

[70] Chyle (8/18/11) Dep. 31:25 – 32:6.

[71] Chyle (8/18/11) Dep. 38:2-5.

[72] Chyle (8/18/11) Dep. 85:3-13.

[73] Chyle (8/18/11) Dep. 87:4-20.

[74] Chyle (8/18/11) Dep. 88:1-4.

[75] Chyle (8/18/11) Dep. 118:16 –119:4.

CONCLUSIONS OF LAW

¶ 52 An employee's last day of work is the point in time from which an occupational disease claim must flow.[76] Clapham's last day of work with Crown Parts was on November 24, 2010.[77] Therefore the 2009 statutes apply. Clapham bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[78]

ISSUE ONE: Whether Petitioner suffered a compensable occupational disease in his employment with Crown Parts pursuant to §§ 39-71-407(9) and (10), MCA.

¶ 53 An "occupational disease" is harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift.[79] An occupational disease is considered to arise out of employment or to be contracted in the course and scope of employment if: (a) the occupational disease is established by objective medical findings; and (b) the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the disease.[80] "Major contributing cause" is the leading cause contributing to the result when compared to all other contributing causes.[81]

¶ 54 Under § 39-71-407(10), MCA, when 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.

¶ 55 In *Montana State Fund v. Grande*,[82] the Montana Supreme Court affirmed this Court's decision and set forth its interpretation of § 39-71-407, MCA (2009). The court noted that it is unlikely that the only contributing factor to an occupational disease would be the employee's job duties, and noted that for an occupational disease to be compensable under the Workers' Compensation Act, it need only be "the leading cause

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[76] *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶ 27, 346 Mont. 141, 194 P.3d 77.

[77] Amended Petition for Hearing, ¶ 8, Docket Item No. 22.

[78] *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

[79] § 39-71-116(20)(a), MCA.

[80] § 39-71-407(9), MCA.

[81] § 39-71-407(13), MCA.

[82] *Grande*, 2012 MT 67, 364 Mont. 333, 274 P.3d 728.

contributing to the result."[83] The court rejected the argument that for the injured worker's employment to be the leading cause of his condition, the occupational factors must weigh heavier than any of the other individual contributors to the occupational disease. The court affirmed this Court's interpretation that "a 'leading cause' under the statute is that cause which ranks first among all causes . . . ."[84]

¶ 56 In the present case, while Clapham's treating physician, nurse Chyle, testified that Clapham's employment at Crown Parts was the leading cause of his condition, she testified that she believed that: 50% to 75% of his condition could be attributed to his 2002 industrial injury, 50% could be attributed to pre-existing degenerative disk disease, 20% to 25% of his condition could be attributed to non-work activities, 20% could be attributed to his work at Crown Parts, and less than 5% could be attributed to his commute to and from Billings.[85] I note at the outset that the multiple percentages Chyle assigned to the factors contributing to Clapham's condition add up to between 140% and 175%; more important than the arithmetic is the fact that Clapham's work at Crown Parts ranks fourth on a list of five factors which Chyle considered to be contributive to Clapham's condition. Fourth out of five does not constitute the "leading cause" as set forth in § 39-71-407(13), MCA, and as interpreted by this Court and the Montana Supreme Court in *Grande*.

¶ 57 Moreover, Chyle opined that Clapham's condition was a temporary aggravation of his pre-existing condition.[86] Dr. Vincent opined that Clapham's job duties did not aggravate his back condition.[87] Twin City argues that Clapham has suffered from chronic low-back pain since his 2002 industrial injury and that he suffered from frequent flare ups of this pain.[88] Twin City argues that, given Clapham's pre-existing back condition, "[w]ith respect to work activities, pain was to be expected" and that Clapham typically returned to baseline when the activity ceased.[89] This argument is consistent with Chyle's repeated opinions that Clapham's work at Crown Parts temporarily aggravated his pre-existing condition.

¶ 58 Clapham acknowledges that he has never been pain free since his 2002 industrial accident and that he suffers frequent, temporary exacerbations of his

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[83] *Grande*, ¶ 39.

[84] *Grande*, ¶ 40.

[85] *See* ¶ 51, above.

[86] *See, e.g.,* Chyle (8/18/11) Dep. 85:3-13.

[87] Ex. 1 at 193-206.

[88] [Respondent's] Trial Brief, Docket Item No. 57, at 27.

[89] *Id*.

condition with "otherwise harmless and innocuous activity."[90] He argues that Crown Parts should be liable for his condition as the employer in whose employment he was last injuriously exposed, but he bases this argument on a contention that Chyle opined that his work activities at Crown Parts substantially and permanently aggravated his pre-existing back condition – a change in opinion which I have found inadmissible.[91] The difficulty with Clapham's position is that Chyle initially, and consistently, maintained that Clapham's back problems were only a temporary aggravation of his pre-existing condition. Consequently, liability for any medical treatment would have remained with the insurer liable for his 2002 industrial injury.

¶ 59 Clapham has not met the requirements of § 39-71-407(9), MCA, and therefore he has not proven that he suffered a compensable occupational disease while employed by Crown Parts.

Issue Two: Whether Respondent complied with the statutory requirements of § 39-71-608, MCA.

Issue Three: If Respondent did not comply with the statutory requirements of § 39-71-608, MCA, whether its noncompliance constitutes a waiver of its defenses and acceptance of the claim.

Issue Four: If Respondent did not comply with the statutory requirements of § 39-71-608, MCA, whether a penalty should be assessed on all benefits payable to Petitioner pursuant to § 39-71-2907, MCA.

Issue Five: If Respondent did not comply with the statutory requirements of § 39-71-608, MCA, whether Petitioner should be awarded his reasonable attorney's fees pursuant to §§ 39-71-611, or -612, MCA.

¶ 60 I resolved Issues Two, Three, Four, and Five in a previous Order.[92]

Issue Six: Whether Petitioner suffered a non-work related injury on or about November 27, 2010, which proximately caused his current condition.

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[90] Petitioner's Trial Brief, Docket Item No. 58, at 17.

[91] See ¶ 12, above. However, even assuming *arguendo* that Chyle's change in opinion was admissible, she offered no explanation for how Clapham's aggravation allegedly became permanent and therefore I would have assigned her new opinion little weight.

[92] *Clapham v. Twin City Fire Ins. Co.*, 2012 MTWCC 27.

Issue Seven: Whether the non-work related injury on or about November 27, 2010, severed liability per § 39-71-407, MCA.

Issue Eight: Whether Petitioner's condition was caused and/or aggravated by driving from Stevensville to Billings.

¶ 61 In light of my ruling on Issue One, above, I need not reach these issues.

JUDGMENT

¶ 62 Petitioner did not suffer a compensable occupational disease in his employment with Crown Parts pursuant to §§ 39-71-407(9) and (10), MCA.

¶ 63 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 in Helena, Montana, this 16th day of October, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: David T. Lighthall
Joe C. Maynard
Submitted: January 6, 2012, and January 10, 2012