IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 15

WCC No. 2010-2474

CLARENCE GRANDE

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

APPEALED TO MONTANA SUPREME COURT - 08/22/11
AFFIRMED 3/20/12 - 2012 MT 67

Summary: Petitioner left his job as a truck driver due to arthritic conditions in his hands and filed an occupational disease claim. Respondent denied Petitioner's claim, arguing that the conditions were not caused by Petitioner's employment and that aggravations of non-work-related conditions are not compensable as occupational diseases.

Held: Petitioner has proven that his job duties are the major contributing cause of his condition and he is therefore suffering from a compensable occupational disease. He has further proven that his occupational disease currently precludes him from returning to his time-of-injury employment. Petitioner is entitled to TTD benefits, reasonable medical benefits, and his costs.

Topics:

Injury and Accident: Aggravation: Occupational Disease. Section 39-71-407(2)(a), MCA, provides for the compensability of an aggravation to an underlying condition caused by an injury, but does not contain any language providing for the compensability of an aggravation caused by an OD. Although the word "aggravation" does not appear in the statutory definition of "occupational disease" at § 39-71-119(2)(d), MCA, the statutory requirement that the work-related aspect of an occupational disease be the "major contributing cause" would be meaningless if

permanent aggravations of underlying conditions can no longer be considered occupational diseases even if work-related factors are the major contributing cause of the condition.

Occupational Disease: Subsequent Disease. Section 39-71-407(2)(a), MCA, provides for the compensability of an aggravation to an underlying condition caused by an injury, but does not contain any language providing for the compensability of an aggravation caused by an OD. Although the word "aggravation" does not appear in the statutory definition of "occupational disease" at § 39-71-119(2)(d), MCA, the statutory requirement that the work-related aspect of an occupational disease be the "major contributing cause" would be meaningless if permanent aggravations of underlying conditions can no longer be considered occupational diseases even if work-related factors are the major contributing cause of the condition.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. In order to qualify as a compensable OD, the leading cause contributing to the result, when compared to all other contributing causes, must be related to the claimant's employment pursuant to § 39-71-407(13), MCA. Here, Petitioner's treating physician is board-certified in rheumatology and testified that Petitioner's pre-existing osteoarthritis was permanently aggravated by his work driving a truck, and on a more probable than not basis, his job duties were the leading cause of the worsening of Petitioner's osteoarthritis.

Occupational Disease: Causation. In order to qualify as a compensable OD, the leading cause contributing to the result, when compared to all other contributing causes, must be related to the claimant's employment pursuant to § 39-71-407(13), MCA. Here, Petitioner's treating physician is board-certified in rheumatology and testified that Petitioner's pre-existing osteoarthritis was permanently aggravated by his work driving a truck, and on a more probable than not basis, his job duties were the leading cause of the worsening of Petitioner's osteoarthritis.

Benefits: Temporary Total Disability Benefits. The Court concluded Petitioner was entitled to TTD benefits where it was undisputed he no longer had a commercial driver's license because he was unable to pass the physical examination, and the lack of a CDL precluded him from returning to his time-of-injury employment.

¶ 1 Petitioner Clarence Grande and Respondent Montana State Fund have submitted this matter for determination on briefs.

¶ 2 Exhibits: The parties have stipulated to Exhibits 1 through 12 and they are admitted.[1]

¶ 3 Witnesses and Depositions: The parties have submitted the depositions of Grande and Bernadette M. Van Belois, M.D., and they are admitted.

¶ 4 Issues Presented: Grande sets forth the following issues:[2]

> ¶ 4a Whether Petitioner suffered from an occupational disease arising out of and in the course and scope of his employment with City Service Valcon.
>
> ¶ 4b Whether Petitioner is entitled to payment of temporary total disability benefits and reasonable medical benefits related to the treatment of his occupational disease.
>
> ¶ 4c Whether Petitioner is entitled to his costs under §§ 39-71-611, -612, MCA.

FINDINGS OF FACT

¶ 5 Grande has not been employed since August 2009.[3] His career prior to that time primarily consisted of driving a truck for various employers.[4] Most recently, Grande worked fifteen hours per day for City Service Valcon, totaling 60 hours every seven days.[5] He estimated that over 90% of his shifts were spent actually driving his truck.[6] Grande left his job with City Service Valcon due to his arthritic condition.[7] Grande

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[1] *See* Stipulated Exhibits, Docket Item No. 22.

[2] Petitioner's Brief in Support of his Claim for Occupational Disease Benefits (Grande's Opening Brief) at 1-2, Docket Item No. 20.

[3] Grande Dep. 11:6-9.

[4] Grande Dep. 28:5-8.

[5] Grande Dep. 25:12-25.

[6] Grande Dep. 26:1-6.

[7] Grande Dep. 13:13-18.

testified that he no longer has a valid commercial driver's license because he was unable to pass the physical examination.[8]

¶ 6 Grande's hobbies included fishing, hunting, four-wheeling, trapping, photography, fly fishing, and golf.[9] He testified that he can no longer fly fish or golf, but he hunted last year with assistance.[10] He has not trapped in four or five years.[11] Grande also enjoys knapping – making replica arrowheads and war lances – and occasionally pursues that hobby, taking breaks when he has pain.[12]

¶ 7 On August 12, 2009, Grande filed a claim with State Fund, alleging: "Driving duties have aggravated my rheumatoid and osteoarthritis to the point where I can no longer drive."[13]

¶ 8 Bernadette M. Van Belois, M.D., is board-certified in rheumatology and internal medicine.[14] She first saw Grande on August 22, 2007, as a referral for hand arthritis.[15] When she examined Grande, Dr. Van Belois found spurs on his fingers that were characteristic of osteoarthritis.[16] She also found evidence of rheumatoid arthritis in the joints of his hands and fingers.[17] Dr. Van Belois stated that the causes of rheumatoid arthritis include both a genetic predisposition and an environmental trigger.[18]

¶ 9 On August 3, 2009, Dr. Van Belois wrote a letter "To Whom It May Concern" in which she stated that Grande was under her care for rheumatoid arthritis and that he also had osteoarthritis. She noted that on July 27, 2009, Grande had significant pain and swelling in his right hand which impaired his ability to safely drive a truck and she advised him to stop working. She stated that Grande continued to have joint pain,

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[8] Grande Dep. 47:3-8.

[9] Grande Dep. 8:6-12.

[10] Grande Dep. 8:17 – 9:10.

[11] Grande Dep. 10:18-24.

[12] Grande Dep. 20:4-12.

[13] Ex. 1 at 1.

[14] Van Belois Dep. 6:9-15.

[15] Van Belois Dep. 6:19 – 7:1.

[16] Van Belois Dep. 8:16-24.

[17] Van Belois Dep. 9:14 – 10:9.

[18] Van Belois Dep. 10:10-18.

swelling, stiffness, and decreased range of motion and that he required medication which might make him drowsy or impair his senses. She opined that he could not be employed in any occupation for the foreseeable future due to the rheumatoid arthritis in his hands and joints.[19]

¶ 10 On August 26, 2009, Dr. Van Belois wrote to Grande's counsel and opined it was more probable than not that Grande's job did not cause his arthritis. She further opined, however, that Grande's job duties aggravated his arthritis.[20] At her August 2, 2010, deposition, Dr. Van Belois testified that the activities which she believes aggravated Grande's condition include the repetitive use of his hands for shifting gears and gripping the steering wheel, as well as twisting hoses on and off while making deliveries. Dr. Van Belois opined that these activities can aggravate both osteoarthritis and rheumatoid arthritis. Dr. Van Belois opined that Grande cannot safely drive a truck.[21] She opined that the amount of repetitive use of his hands that his truck driving job required would accelerate both his osteoarthritis and his rheumatoid arthritis.[22]

¶ 11 Dr. Van Belois opined that the major contributing cause of Grande's osteoarthritis is repetitive use of his hands.[23] She stated that it would be hard to sort out whether genetic predisposition or repetitive use of his hands would be the major contributing cause of the rheumatoid arthritis.[24] Dr. Van Belois opined that Grande's job duties permanently aggravated his preexisting osteoarthritis and temporarily aggravated his rheumatoid arthritis.[25] Dr. Van Belois further opined that it was more probable than not that Grande's job duties, when compared to all other contributing causes, were the leading cause of the worsening or accelerating of his osteoarthritis because Grande spent most of his time doing his work-related activities repetitively.[26] Dr. Van Belois testified that activities of daily living can aggravate arthritic conditions, but to a lesser degree, because an individual can moderate how much time he spends doing those

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[19] Ex. 6 at 10.

[20] Ex. 6 at 12.

[21] Van Belois Dep. 16:22 – 17:14.

[22] Van Belois Dep. 25:18 – 26:3.

[23] Van Belois Dep. 22:24 – 23:6.

[24] Van Belois Dep. 23:7-11.

[25] Van Belois Dep. 46:7 – 47:15.

[26] Van Belois Dep. 49:3-9.

activities in a way that he cannot in a work environment which requires repetitive movement.[27]

¶ 12 Janet Schroeder, MS, CRC, LCPC of Vocational Management Services, Inc., completed a job analysis of Grande's truck driver position with City Services Valcon. The job was classified as heavy duty. Schroeder described the job as follows:

> Operates tractor/trailer to transport propane over the road in western Montana, Idaho, and eastern Washington: Performs pre-trip inspection. Drives tractor/trailer to pick up propane in Canada and delivers to customers. Drives truck into position to load at filling rack. Opens valves or starts pumps to fill tank. Reads gauges or meters and records quantity loaded. Drives truck and delivers propane to customer's businesses. Pulls hose from a storage tube along side of tank. Pulls hose from a storage tube on side of truck. Opens valves to drain tank. Records amount delivered. Returns hose to hose tubes. Maay [sic] have to chain up during adverse weather conditions. Maintains driver's log according to DOT regulations.[28]

¶ 13 Schroeder further noted that Grande worked up to 14 hours per day, five days per week. His job required him to climb/balance, torso twist, or bend/stoop occasionally, squat/crouch, kneel, or crawl rarely, and rotate, flex, and extend his neck continuously. On rare occasions, Grande was required to lift up to 100 pounds. His job entailed a significant amount of push/pull estimated at up to 50 pounds of force.[29] She further explained, "Employee reaches wai[s]t to chest height on a continual basis to steer vehicle; use of clutch and break [sic] as well as accelerator is used continuously. Employee must use right arm to shift truck." Schroeder noted that Grande used grip/grasp to steer and shift the truck, to pull the hose, and for other duties.[30]

¶ 14 On February 18, 2010, John C. Schumpert, M.D., M.P.H., FACOEM, conducted a medical records review of Grande's case.[31] Dr. Schumpert opined that Grande did not have an occupational disease. He explained, "Although there are conditions that are felt to be caused by driving truck, osteoarthritis . . . is not one of them." He further

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[27] Van Belois Dep. 17:15 – 18:1.

[28] Ex. 11 at 1.

[29] Ex. 11 at 1-2.

[30] Ex. 11 at 2.

[31] Ex. 9.

opined that Grande's hand arthritis was caused by rheumatoid arthritis – "an autoimmune disorder unrelated to employment as a truck driver."[32]

¶ 15 Dr. Schumpert opined that Grande's job duties did not aggravate his rheumatoid arthritis. He further opined that osteoarthritis of the hand may be aggravated by isolated high-intensity vibrations, but that truck driving is associated with whole-body vibration.[33] Dr. Schumpert also opined that Grande could continue to work as a truck driver because his hand condition remained unchanged after two and a half months off work.[34]

¶ 16 Dr. Van Belois disagreed with Dr. Schumpert's conclusion that Grande was not suffering from an occupational disease. She testified that truck driving involves repetitive use of hands with force, which is known to cause and aggravate osteoarthritis.[35] She further disagreed with Dr. Schumpert's conclusion that Grande could continue to work as a truck driver, opining that he could not safely drive a truck given the amount of arthritis he has in his hands.[36] She added that Grande has significant inflammation and decreased range of motion which probably make it unsafe for him to drive a truck, and that these job duties would also aggravate his arthritis.[37]

¶ 17 On March 5, 2010, State Fund denied liability for Grande's claim, stating that the medical evidence did not establish that Grande had an occupational disease.[38]

CONCLUSIONS OF LAW

¶ 18 Grande's last day of work for City Service Valcon was August 7, 2009. Therefore, the 2009 Workers' Compensation Act applies to his claim. [39]

¶ 19 Grande bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[40] Grande has met his burden.

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[32] Ex. 9 at 10.

[33] Ex. 9 at 11.

[34] Ex. 9 at 12.

[35] Van Belois Dep. 50:12-23.

[36] Van Belois Dep. 52:2-15.

[37] Van Belois Dep. 52:16-24.

[38] Ex. 2.

[39] *Grenz v. Fire and Cas. of Conn.*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

Issue One: Whether Petitioner suffered from an occupational disease arising out of and in the course and scope of his employment with City Service Valcon.

¶ 20 The parties do not dispute that Grande's osteoarthritis and rheumatoid arthritis preexisted his employment with City Service Valcon. The parties disagree as to whether Grande's job duties aggravated his arthritic conditions and, if so, whether an aggravation is compensable as an occupational disease.

¶ 21 Prior to 2005, the Occupational Disease Act of Montana (ODA) was codified in Title 39, chapter 72, of the Montana Code Annotated (MCA). The Legislature repealed the ODA in 2005 and made the Workers' Compensation Act (WCA), codified in Title 39, chapter 71, of the MCA, applicable to both injuries and occupational diseases occurring from July 1, 2005, forward.[41] Under the older statutory scheme, this Court and the Montana Supreme Court issued several decisions which clarified the way in which occupational diseases arising from the aggravation of underlying conditions may be compensable under the ODA. In *Polk v. Planet Ins. Co.*,[42] the Montana Supreme Court reversed and remanded a decision in which this Court concluded that a claimant's chronic pulmonary condition was not compensable under the ODA because medical experts failed to agree on the claimant's diagnosis and the cause of his condition. In reaching its conclusion, the Montana Supreme Court relied in part on § 39-72-706(1), MCA (1989-2003), which stated:

> If an occupational disease is aggravated by any other disease or infirmity not itself compensable or if disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable under this chapter must be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease as a causative factor bears to all the causes of such disability or death.

¶ 22 In reaching its decision in *Polk*, the Montana Supreme Court also stated:

> [T]his Court has held that "an employer accepts his employee with all of his injuries and diseases" and, thus, that the test for compensability is

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[40] *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).

[41] *See* Compiler's Comments, WCA.

[42] *Polk*, 287 Mont. 79, 951 P.2d 1015 (1997).

whether the job-related incident significantly aggravated the preexisting condition.[43]

¶ 23 In support of this principle, the court relied upon older cases, including *Gaffney v. Indus. Accident Board*, in which the court held that a claimant's industrial accident was compensable because it contributed to his disability, even though the claimant's underlying health conditions also contributed to his condition.[44] In its decision, the court stated:

> The employer takes the employee subject to his physical condition when he enters his employment. Compensation laws and payments are not made solely for the protection of super physical persons nor for employees in normal physical condition, but for those also who are in subnormal condition who are accepted for employment. . . .
>
> . . . The fact that an employee was suffering from a pre-existing disease or disability does not preclude compensation if the disease or disability was aggravated or accelerated by an industrial injury which arose out of and in the course of the employment.[45]

¶ 24 In *Montana State Fund v. Murray*, the Montana Supreme Court reiterated that the test for compensability under the ODA was whether occupational factors significantly aggravated a preexisting condition. The court specifically rejected the need for the aggravation to be "substantial" in order to be compensable.[46] The court noted that the medical opinions in *Murray* placed the claimant's work activities at a 30- to 40-percent contribution to his knee condition; the court concluded that this was a "significant aggravation" and that the knee condition was compensable under the ODA.[47]

¶ 25 More recently, the Montana Supreme Court upheld this Court's decision in *Oksendahl v. Liberty Northwest Ins. Corp.*, in which this Court found the claimant's osteoarthritis of the basilar thumb joints was compensable as an occupational disease because his employment aggravated and accelerated his underlying condition.[48]

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[43] *Polk*, 287 Mont. at 84, 951 P.2d at 1018.

[44] *Gaffney*, 129 Mont. 394, 398, 287 P.2d 256, 258 (1955).

[45] *Gaffney*, 129 Mont. at 401, 287 P.2d at 259. (Citations omitted.)

[46] *Murray*, 2005 MT 97, ¶ 23.

[47] *Murray*, ¶¶ 25-26.

[48] *Oksendahl*, 2007 MTWCC 24, ¶¶ 34-36 (***aff'd*** 2008 MT 132N).

¶ 26 Under the current statutes, an occupational disease is defined as "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."[49] Under § 39-71-407(9), MCA, occupational diseases are considered to arise out of or be contracted in the course and scope of employment if the occupational disease is established by objective medical findings and the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease. Section 39-71-407(13), MCA, defines "major contributing cause" as "a cause that is the leading cause contributing to the result when compared to all other contributing causes."

¶ 27 State Fund alleges that if Grande's work aggravated an underlying arthritic condition it is not compensable because, "in the absence of an occupational disease or an injury, the aggravation factor is without legal significance."[50] Section 39-71-407(2)(a), MCA, establishes when an injury is compensable under the WCA, and § 39-71-407(2)(a)(ii), MCA, provides that an injury which aggravates a preexisting condition is compensable. While these statutory provisions provide for the compensability of an aggravation to an underlying condition caused by an injury, they do not contain any language providing for the compensability of an aggravation caused by an occupational disease. State Fund argues that the absence of such a provision means that while industrial injuries which aggravate preexisting conditions are compensable, occupational diseases which aggravate preexisting conditions are not. State Fund further argues that the aggravation rule set forth in *Polk* and *Oksendahl* no longer applies. State Fund contends, "Contrary to the *Polk/Oksendahl* standard, for occupational diseases to be compensable under the post-2005 statute, the work has to be the *major contributing cause* of the condition."[51]

¶ 28 Grande agrees that under the post-2005 WCA, the Court must determine whether his employment was the major contributing cause of the occupational disease in relation to other factors. Grande maintains, however, that the Court need not distinguish between a condition caused by employment and one aggravated by it.[52] Grande further argues that State Fund misconstrues the "major contributing cause" standard to mean that a cause must be 51% responsible for the condition in order to be the "leading cause" under § 39-71-407(13), MCA. Grande argues that a cause may be the leading cause when compared to all other causes – as required by § 39-71-407(13),

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[49] § 39-71-116(20)(a), MCA.

[50] Montana State Fund's Opening Brief (State Fund's Opening Brief) at 4, Docket Item No. 19.

[51] State Fund's Opening Brief at 5. (Emphasis in original.)

[52] Grande's Opening Brief at 7-8.

MCA – so long as it is the most contributory of all the causes as opposed to being 51% of the total.

¶ 29 Unlike industrial injuries, occupational diseases are not caused by a specific event on a single day or during a single work shift.[53] Occupational diseases occur over time. The applicable statutes recognize that an occupational disease's origin may be multifactorial. Although the word "aggravation" does not appear in the statutory definition of "occupational disease," the statutory requirement that the work-related aspect of an occupational disease be the "major contributing cause" would be meaningless if, as State Fund urges, permanent aggravations of underlying conditions can no longer be considered occupational diseases even if work-related factors are the major contributing cause of the condition.

¶ 30 It is unlikely that the ***only*** contributing factor to an occupational disease will be the employee's job duties. This is precisely why § 39-71-407, MCA, provides that for an occupational disease to be compensable under the WCA, only "the leading cause contributing to the result" must be related to the employment. Section 39-71-407(13), MCA, requires that the "leading cause" must be compared to "***all other*** contributing causes."[54] A preexisting condition certainly falls within the ambit of "all other contributing causes." State Fund's argument would require the Court to read the statute as: "'major contributing cause' means a cause that is the leading cause contributing to the result when compared to all other contributing causes ***except preexisting conditions***." In the construction of a statute, it is not the province of the Court to insert what has been omitted.[55]

¶ 31 I next turn to the question of whether Grande's condition is, in fact, a compensable occupational disease under the statutes; specifically, whether Grande's work is the leading cause of his condition when compared to all other contributing causes. State Fund argues that in order for Grande's work to be the leading cause of his condition, the work must constitute a majority of the cause. I disagree. Webster's defines "leading" as "coming or ranking first." A horse can "lead" a race by a nose; he doesn't have to double the distance of the rest of the field to be considered "in the lead." Similarly, a "leading cause" under the statute is that cause which ranks first among all causes "contributing to the result" – i.e., the condition for which benefits are sought – regardless of the respective percentages of the multiple contributing causes.

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[53] *See* § 39-71-119(2)(d), MCA.

[54] (Emphasis added.)

[55] § 1-2-101, MCA.

¶ 32 Specific to Grande's claim, Dr. Van Belois has opined that Grande's job duties caused his osteoarthritis to worsen and to progress at an accelerated rate. Dr. Van Belois found Grande to have significant inflammation, reduced range of motion, and the development of spurs characteristic of osteoarthritis. Dr. Van Belois opined that it was more probable than not that Grande's job duties, when compared to all other contributing causes, were the leading cause of the worsening or accelerating of his osteoarthritis.

¶ 33 Dr. Schumpert opined that Grande's employment was not responsible for Grande's osteoarthritis. He opined that osteoarthritis of the hand may be aggravated by isolated high-intensity vibrations, but that truck driving is associated with whole-body vibration. However, Grande's job duties were not limited to driving a truck. As noted in Schroeder's job analysis, Grande's job required him to climb/balance, torso twist, or bend/stoop occasionally, squat/crouch, kneel, or crawl rarely, and rotate, flex, and extend his neck continuously, lift up to 100 pounds, and perform a significant amount of push/pull estimated at up to 50 pounds of force.

¶ 34 As a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses. However, a treating physician's opinion is not conclusive. To presume otherwise would quash this Court's role as fact-finder in questions of an alleged injury.[56] In assigning relative weight to expert medical opinions, this Court has previously taken into account whether the experts have physically examined the claimant,[57] as well as the expert's background and experience working with the particular disease at issue in occupational disease cases.[58] In Grande's case, this leads me to assign greater weight to Dr. Van Belois' opinion than to Dr. Schumpert's. Dr. Van Belois has treated Grande, has physically examined him, and is board-certified in rheumatology. For the reasons set forth above, I conclude that Grande has suffered from an occupational disease arising out of and in the course and scope of his employment with City Service Valcon.

Grande's Constitutional Challenge

¶ 35 Grande argues in the alternative that the "major contributing cause" standard of § 39-71-407(9), MCA, is unconstitutional.[59] Because I do not hold Grande's claim for

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[56] *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶¶ 12-13, 288 Mont. 356, 957 P.2d 1134. (Citation omitted.)

[57] *Petritz v. Montana State Fund*, 2010 MTWCC 17, ¶ 40.

[58] *Johnson v. Liberty Northwest Ins. Corp.*, 2009 MTWCC 20, ¶ 86.

[59] Grande's Opening Brief at 8.

compensation barred under the current major contributing cause standard, I do not reach Grande's equal protection challenge.

Issue Two: Whether Petitioner is entitled to payment of temporary total disability benefits and reasonable medical benefits related to the treatment of his occupational disease.

¶ 36 Under § 39-71-701(1), MCA, a worker is eligible for temporary total disability (TTD) benefits when he suffers a total loss of wages as a result of an injury and until he reaches MMI, or until he has been released to return to the employment in which he was engaged at the time of the injury or to employment with similar physical requirements. Grande argues that he is entitled to TTD benefits pursuant to § 39-71-701, MCA, because Dr. Van Belois has taken him off work due to his arthritic conditions. Grande argues that as his treating physician, Dr. Van Belois' opinion should carry greater weight with the Court than the opposing view of Dr. Schumpert.[60]

¶ 37 State Fund responds that it is not liable for TTD benefits because Grande is not suffering an occupational disease, but further contends that this Court should not grant Grande TTD benefits in any event because Dr. Schumpert has opined that Grande can continue to drive a truck.[61]

¶ 38 As set forth in the findings above, Grande testified that he no longer has a valid commercial driver's license because he was unable to pass the physical examination. Dr. Van Belois treated Grande's rheumatoid arthritis and conducted a physical examination of him. She opined that either Grande's osteoarthritis or his rheumatoid arthritis, taken alone, would preclude his ability to return to work as a truck driver. In discussing Grande's employability, Dr. Van Belois repeatedly expressed concern that Grande's arthritis in his hands would preclude him from operating a truck in a safe manner. Dr. Schumpert has not treated Grande and has not physically examined him. After a records review, Dr. Schumpert opined that Grande could continue to work as a truck driver because his arthritic conditions remained unchanged over the course of a few months. Dr. Schumpert approached Grande's ability to return to either his time-of-injury position or to employment with similar physical requirements from the perspective that the job duties were not worsening Grande's physical condition; however, Dr. Schumpert's opinion does not address whether he believes Grande is physically capable of performing his job duties.

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[60] Grande's Opening Brief at 10-11.

[61] Montana State Fund's Reply Brief at 6, Docket Item No. 24.

¶ 39 As set forth above, I find Dr. Van Belois' opinions entitled to greater weight than Dr. Schumpert's as regards Grande's case. Furthermore, State Fund does not dispute Grande's testimony that he no longer has a commercial driver's license because he was unable to pass the physical examination; this would preclude him from returning to this employment in any event. From the evidence presented, I conclude Grande is entitled to TTD benefits.

¶ 40 Under § 39-71-704(1)(a), MCA, an injured worker is entitled to certain reasonable medical benefits for his work-related injury. Since I have found that Grande's employment is the major contributing cause of his current condition, Grande is entitled to reasonable medical benefits related to the treatment of his osteoarthritis.

Issue Three: Whether Petitioner is entitled to his costs under §§ 39-71-611, -612, MCA.

¶ 41 As the prevailing party, Grande is entitled to his costs.[62]

JUDGMENT

¶ 42 Petitioner suffers from an occupational disease arising out of and in the course and scope of his employment with City Service Valcon.

¶ 43 Petitioner is entitled to payment of temporary total disability benefits and reasonable medical benefits related to the treatment of his occupational disease.

¶ 44 Petitioner is entitled to his costs under §§ 39-71-611, -612, MCA.

¶ 45 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.

[62] §§ 39-71-611, -612, MCA.

DATED in Helena, Montana, this 17th day of June, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Laurie Wallace
Kevin Braun
Submitted: October 15, 2010