IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 39

WCC No. 2006-1638

CHARLES LANES

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Notice of Appeal filed November 7, 2007
Affirmed 09/03/08 - 2008 MT 306

Summary: Although Respondent accepted liability for Petitioner's left knee occupational disease, it has denied liability for Petitioner's subsequent occupational disease claim for his right knee. At the time of his left knee claim, Petitioner worked as an electrician for Respondent's insured. At the time of his right knee claim, Petitioner worked as a minister. Respondent alleges that Petitioner's church is the employer of last injurious exposure. Petitioner contends that his work for his church did not permanently aggravate his right knee condition.

Held: The aggravation to Petitioner's right knee caused by his work as a minister was merely temporary additional pain that would alleviate with rest and does not constitute a significant aggravation or contribution. However, Petitioner's work as an electrician significantly aggravated or contributed to his right knee condition. Therefore, Respondent, as the insurer of the employer where Petitioner suffered his last injurious exposure, is liable.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-408.** In *Romero v. Liberty Mut. Fire Ins. Co.*, 2001 MTWCC 5, ¶ 61 (*aff'd* 2001 MT 303N), this Court determined that even a significant aggravation or contribution would not satisfy § 39-72-408, MCA,

because a physician's testimony established that the claimant's left arm condition would inevitably deteriorate regardless of her employment because any activity she engaged in required her to use the arm. The same circumstances are present in the instant case, where Petitioner's treating physician opined that Petitioner overloads his right knee to compensate for the left and the activities which Petitioner performed as a minister are the activities of daily living. Like Romero, Petitioner had to overuse his other limb to compensate for the injured limb, and therefore the overloading would have caused the development of problems in that limb, regardless of whether he engaged in subsequent employment.

Causation: Medical Condition. Where Petitioner's treating physician opined that Petitioner overloads his right knee to compensate for the left and the activities which Petitioner performed as a minister are the activities of daily living, Petitioner had to overuse his other limb to compensate for the injured limb, and therefore the overloading would have caused the development of problems in that limb, regardless of whether he engaged in subsequent employment.

Injury and Accident: Causation. Where Petitioner's treating physician opined that Petitioner overloads his right knee to compensate for the left and the activities which Petitioner performed as a minister are the activities of daily living, Petitioner had to overuse his other limb to compensate for the injured limb, and therefore the overloading would have caused the development of problems in that limb, regardless of whether he engaged in subsequent employment.

Injury and Accident: Aggravation: Temporary Aggravations. Petitioner testified that the tasks he performed as a minister would aggravate his right knee, but that it would return to his previous state after he rested it. His treating physician opined that walking on various surfaces aggravated Petitioner's knee condition, but that the aggravation was only temporary additional pain and not a permanent aggravation of a preexisting condition. For an aggravation or contribution to rise to the level of "significant," it must be more than merely temporary or transient.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-102. Aches and pains alone do not constitute an occupational disease. In order to constitute "harm" or "damage" as contemplated by the definition of "occupational disease" in § 39-72-102, MCA, something more significant, such as a condition requiring medical diagnosis and treatment, must be present. *Mack v. Montana State Fund*,

2005 MTWCC 48, ¶ 18 (citations omitted). While Petitioner's treating physician opined that walking on different surfaces while performing his job duties aggravated Petitioner's knee condition, he further opined that this aggravation was only temporary additional pain. Therefore the Court concludes that these job duties did not significantly aggravate or contribute to Petitioner's right knee condition.

Benefits: Permanent Total Disability Benefits: Generally. While Petitioner asked the Court to determine whether he is entitled to PTD benefits, he has presented no evidence that he is at maximum medical healing, or MMI, regarding his right knee condition. He is therefore not eligible for PTD benefits until MMI has been reached and if, at that time, he also has no reasonable prospect of physically performing regular employment. His request is therefore denied.

Penalties: Particularization. Petitioner failed to file with the Court a particularization of the grounds upon which he bases his request for a penalty as required by this Court's Scheduling Order. Claimants must particularize the basis of any claim for a penalty no later than the time specified for final exchange of exhibits and witness lists, setting forth which actions or inactions of the insurer were unreasonable.

Attorney Fees: Request for. Petitioner failed to file with the Court a particularization of the grounds upon which he bases his request for attorney fees as required by this Court's Scheduling Order. Claimants must particularize the basis of any claim for attorney fees no later than the time specified for final exchange of exhibits and witness lists, setting forth which actions or inactions of the insurer were unreasonable.

Procedure: Pretrial Order. Notwithstanding Petitioner's failure to file a particularization of the grounds upon which he bases his request for attorney fees and a penalty as required by the Court's Scheduling Order, the issue of whether Petitioner was entitled to attorney fees and a penalty was set forth in the Pre-Trial Order. The Pre-Trial Order supersedes all other pleadings and controls the course of the trial. ARM 24.5.318(6). Therefore, these issues were properly before the Court and determined on their merits.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24-5-318. Petitioner failed to file with the Court a particularization of the grounds upon which he bases his request for a penalty and attorney fees as required by this Court's Scheduling Order. Claimants must particularize the basis of any claim for a penalty or attorney

fees no later than the time specified for final exchange of exhibits and witness lists, setting forth which actions or inactions of the insurer were unreasonable. Notwithstanding Petitioner's failure to file a particularization of the grounds upon which he bases his request for attorney fees and a penalty as required by the Court's Scheduling Order, the issue of whether Petitioner was entitled to attorney fees and a penalty was set forth in the Pre-Trial Order. The Pre-Trial Order supersedes all other pleadings and controls the course of the trial. ARM 24.5.318(6). Therefore, these issues were properly before the Court and determined on their merits.

¶ 1 The trial in this matter was held on November 2, 2006, in the Workers' Compensation Court, Helena, Montana. Petitioner Charles Lanes was present and represented by Bernard J. Everett. Respondent was represented by Leo S. Ward.

¶ 2 Exhibits: Petitioner's Exhibits 1 through 4 and Respondent's Exhibits 1 through 6 were admitted without objection. Respondent's Exhibit 7 was introduced at trial and admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Petitioner and Nicholas Blavatsky, M.D., were submitted to the Court and can be considered part of the record. Petitioner and Sandra L. Lanes were sworn and testified at trial.

¶ 4 Issue Presented: The Court restates the issues in the Pre-Trial Order as follows:

¶ 4a Whether Respondent is required to accept responsibility for Petitioner's right knee occupational disease;

¶ 4b Whether Petitioner is entitled to temporary total disability (TTD) benefits for his right knee occupational disease;

¶ 4c Whether Petitioner is entitled to permanent total disability (PTD) benefits for his right knee occupational disease;

¶ 4d Whether Petitioner is entitled to his costs and attorney's fees; and

¶ 4e Whether Petitioner is entitled to a 20 percent penalty pursuant to § 39-71-2907, MCA.[1]

[1] Pre-Trial Order at 3.

FINDINGS OF FACT

¶ 5 Petitioner began working as an electrician for MSE Technology in 1991. His job duties ranged from light to heavy industrial work. Although his daily activities varied, he spent the majority of each day standing, kneeling, crawling, and climbing and rarely sat down. He lifted 40 to 50 pounds on a regular basis, and more on occasion.[2]

¶ 6 Petitioner has a bachelor of arts degree in ministry and bible theology.[3] Concurrent with and subsequent to his employment at MSE Technology, Petitioner held a minister position with the Whitehall Assembly of God Church in Whitehall, Montana. Petitioner began performing minister duties for the Whitehall church in 1988 and at first received $400 per month for his services. Shortly thereafter, the church was unable to pay him that amount and, except for two years when he performed minister duties at another church, he continued to perform minister duties for the Whitehall church without pay until February 2005.[4]

¶ 7 Petitioner sustained an occupational disease to his left knee on May 2, 2001, while in the course and scope of his employment as an electrician for MSE Technology in Butte, Montana.[5] Respondent accepted liability for Petitioner's left knee condition.[6]

¶ 8 From the time Petitioner filed his occupational disease claim for his left knee in May 2001, until he had surgery on that knee in April 2004, he continued to work as an electrician.[7] Petitioner underwent left knee surgery on April 26, 2004, with Dr. Nicholas Blavatsky, an orthopedic surgeon. Following healing from that surgery, Petitioner returned to work for MSE Technology. He accepted a reduction-in-force buyout from MSE Technology in January 2005.[8] When Petitioner accepted the buyout, he was released to full duty and he was still able to perform his job. He would have continued to work for MSE Technology if the buyout had not been offered.[9]

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[2] Trial Test.

[3] Petitioner Dep. 6:12-13.

[4] Trial Test.

[5] Pre-Trial Order at 2.

[6] *Id*.

[7] Trial Test.

[8] Pre-Trial Order at 2.

[9] Petitioner Dep. 55:2-19.

¶ 9 Petitioner testified that for a period of time after the surgery, his left knee improved. Over time, however, he experienced progressively more pain in that knee. Petitioner developed a limp from the pain in his left knee and put more weight on his right knee to compensate for it. He would stand with his weight on his right leg to relieve the pain in his left knee while performing his job duties as an electrician.[10]

¶ 10 After Petitioner accepted the reduction-in-force buyout, he put his name on the union list. Petitioner wanted to rest his knees, so he planned not to accept any jobs for six months. However, in June 2005 Petitioner did not feel that his knees were well enough for him to return to work and, by the fall of 2005, he had removed his name from the union list because he did not believe he would be physically able to perform an electrician job.[11]

¶ 11 At some point after Dr. Blavatsky released Petitioner to full duty on his left knee, Petitioner began to experience problems with his right knee.[12] Dr. Blavatsky understood that the right knee had no previous problems and that it did not start to bother Petitioner until after he ceased working as an electrician.[13]

¶ 12 From February 2005 until November 2005, the Whitehall Assembly of God Church paid Petitioner a salary of $800 per month. During that time, Petitioner estimates that he worked 30 hours per week as a minister. Petitioner spent some hours studying the Bible and preparing his weekly sermon. Petitioner also attended funerals and weddings, preached during Sunday services, led a weekly Bible study, visited the sick and elderly, and provided ministry to congregants. Petitioner testified that the physical requirements of the job were approximately the same as the physical requirements of daily living, including walking, standing, and sitting.[14]

¶ 13 The physical tasks Petitioner performed as a minister included walking on various surfaces and standing during Sunday services for a 45-minute sermon and for brief moments at other points during the service. The Wednesday Bible study and his sermon preparations were done while sitting. Petitioner testified that standing for his Sunday sermon would aggravate the pain he felt in both knees after about 30 minutes. He would lay down immediately following the service to rest his knees and the pain would return to its normal level. Petitioner testified that this pain would always alleviate with rest and he

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[10] Trial Test.

[11] *Id*.

[12] Blavatsky Dep. 6:7-10.

[13] Blavatsky Dep. 6:11-20.

[14] Trial Test.

does not believe it permanently worsened while performing his duties as a minister. Generally, Petitioner's ministerial duties allowed him to avoid staying in a single position for a prolonged period of time to keep the pain in his knees from increasing.[15]

¶ 14 In November 2005, Petitioner gave up the full-time minister position because he felt that his knees prevented him from fulfilling his duties. He had difficulty with his left knee giving way and being unable to support his weight.[16]

¶ 15 Petitioner has treated with Dr. Blavatsky since shortly after his May 2001 knee injury. Petitioner saw Dr. Blavatsky on November 11, 2005, at which time Dr. Blavatsky noted that Petitioner was complaining of more discomfort in his left knee as well as his right knee. Dr. Blavatsky noted that Petitioner had been unloading from the left to the right and that previous examinations of his right knee had shown some changes, although not as advanced as those in his left knee. At that time, Dr. Blavatsky also apparently reviewed job analyses for Petitioner's electrician and minister jobs and approved the minister job only, stating that Petitioner was not employable in a position which required standing for any length of time, nor could he stoop, bend, climb, or regularly use ladders or stairs.[17] The job analysis classified the minister position as sedentary.[18] Petitioner agreed that the job analysis for the minister position which Dr. Blavatsky approved is an accurate reflection of his job duties as a minister.[19]

¶ 16 On April 20, 2006, Dr. Blavatsky wrote a letter to Petitioner's counsel in which he opined:

> [I]t is my feeling that Mr. Lanes developed his knee complaints based on his occupational exposure as an electrician.
>
> I do not feel that other sedentary activities described by the patient in the course of his pursuit of the Ministry would be responsible for the complaints in his knee. Rather, the frequent stooping, bending, lifting and crawling

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[15] *Id*.

[16] *Id*.

[17] Petitioner's Ex. 1 at 38, 138.

[18] Petitioner's Ex. 1 at 114.

[19] Trial Test.

> during the course of his work as an electrical contractor and electrician would most likely be the source of his current complaints.[20]

¶ 17 On June 9, 2006, Dr. Blavatsky wrote a letter to Respondent's claims adjuster in which he opined:

> Mr. Lanes has gone on to develop arthritic changes in his right knee. I think there are several underlying factors that have exacerbated his condition including his age and his rather marked state of deconditioning.
>
> I would agree that his employment as a minister walking on several types of surfaces following employment at MSE aggravated his underlying knee condition.[21]

¶ 18 At his September 27, 2006, deposition, Dr. Blavatsky testified that he diagnosed Petitioner with evolving osteoarthritic changes in his right knee.[22] He testified that this is a degenerative condition which started even before the May 2001 left knee injury.[23] Dr. Blavatsky opined that a "component" of the development of this condition was Petitioner's work as an electrician.[24]

¶ 19 Dr. Blavatsky opined that Petitioner's weight and deconditioning contribute to his right knee difficulties, and that the left knee's degenerative changes account for 50 percent or more of the right knee problems due to overloading the right knee.[25] Dr. Blavatsky attributed 50 percent of Petitioner's right knee condition to his left knee, 20 percent to deconditioning and weight, and one third to work-related activities.[26]

¶ 20 Dr. Blavatsky further opined that if Petitioner's minister duties involved standing for long periods and walking on different surfaces, it would probably aggravate the right knee

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[20] Petitioner's Ex. 1 at 125.

[21] Petitioner's Ex. 1 at 105.

[22] Blavatsky Dep. 16:9-12.

[23] Blavatsky Dep. 16:13-17.

[24] Blavatsky Dep. 16:18-20.

[25] Blavatsky Dep. 9:10 - 10:9.

[26] Blavatsky Dep. 12:3-10.

condition.[27] He also stated that the aggravation Petitioner's minister duties caused to his right knee was temporary additional pain and did not permanently aggravate the preexisting condition.[28]

¶ 21 Petitioner testified that his right knee is currently more painful than his left, but he has constant pain in both knees. The pain worsens if he spends too much time walking or standing. Petitioner explained that walking from the parking lot to the back of a department store and back is too much walking and standing for his knees.[29]

¶ 22 After Petitioner gave up the minister position, his wife, who is also an ordained minister, became the minister of their church. From then forward, Petitioner's wife received an $800 monthly salary from the church. Petitioner continues to provide about five hours of volunteer work with the church each week, including leading Bible studies and giving sermons one or two Sundays a month.[30]

¶ 23 Petitioner continued to see Dr. Blavatsky for his left knee condition. On January 6, 2006, Dr. Blavatsky diagnosed Petitioner as having osteoarthritis in his right knee.[31] Petitioner filed an occupational disease claim for his right knee against MSE Technology and Respondent on January 6, 2006. Respondent has denied liability for Petitioner's right knee occupational disease.[32]

CONCLUSIONS OF LAW

¶ 24 The law in effect on an employee's last day of work governs the resolution of a claim under the Occupational Disease Act (ODA). In the present case, the 2003 statutes apply.[33]

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[27] Blavatsky Dep. 13:1-10.

[28] Blavatsky Dep. 18:7-14.

[29] Trial Test.

[30] *Id*.

[31] Pre-Trial Order at 2.

[32] Pre-Trial Order at 2.

[33] *Hardgrove v. Transportation Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citation omitted).

¶ 25 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[34]

¶ 26 At issue is whether Respondent is liable for Petitioner's right knee occupational disease even though Petitioner was employed in another position subsequent to leaving the employ of Respondent's insured. Respondent argues that under the "last injurious exposure" rule, Petitioner's subsequent employer should be liable, while Petitioner argues that his right knee occupational disease resulted from his employment with Respondent's insured and that any aggravation his subsequent employment may have caused was only temporary.

¶ 27 Although not cited by either party, I find the case of *Romero v. Liberty Mutual Fire Ins. Co.*[35] to be on point and its thorough analysis guides the outcome of the case at hand. In *Romero*, the claimant (Romero) injured her right shoulder on February 26, 1992, while working for Commercial Building Maintenance (CBM). CBM's insurer, Montana State Fund (MSF), accepted liability.[36] As set forth in detail in the *Romero* findings, after Romero injured her right shoulder, she continued to have difficulties in her right shoulder and arm which never allowed her to use her right arm fully.[37] She was placed at maximum medical improvement (MMI) on April 16, 1993, with a 2 percent impairment rating although her right arm remained painful and swollen.[38]

¶ 28 On December 2, 1994, Romero's treating physician, Dr. Richard A. Nelson, noted that she was having **left** shoulder problems which he attributed to Romero's reliance on her left arm since she was unable to use her right arm.[39] By October 13, 1997, Dr. Nelson had opined that Romero suffered from low-grade thoracic outlet syndrome and that her left shoulder and arm complaints were due to overuse of that arm due to Romero's inability to fully use her right arm.[40]

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[34] *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).

[35] *Romero v. Liberty Mut. Fire Ins. Co.,* 2001 MTWCC 5 (aff'd 2001 MT 303N).

[36] *Romero*, ¶ 6.

[37] See *Romero*, ¶¶ 13-32.

[38] *Romero*, ¶ 21.

[39] *Romero*, ¶ 27.

[40] *Romero*, ¶ 33.

¶ 29 From November 25, 1997, until March 3, 1998, Romero worked for County Market.[41] Her duties included packaging bakery goods, stocking shelves, and cleaning.[42] County Market was insured by Liberty Mutual Fire Insurance Company (Liberty).[43] During that time, she suffered increasing pain in her **left** arm and her physician took her off work.[44]

¶ 30 Both Romero and MSF argued that her left arm problems were caused by her work at County Market. Liberty argued that Romero's left arm problems were not caused by her employment at County Market, but rather Romero's overuse of her left arm to compensate for her right arm injury for which MSF was liable.[45] This Court determined that Romero's left arm condition was a consequence of her overuse of that arm due to her right arm injury and that her left arm condition was therefore a consequence of her 1992 industrial injury.[46]

¶ 31 In reaching its decision, this Court considered Romero's work history and her duties at CBM and County Market, Romero's other activities, her medical history, and the medical opinions of various doctors, including Dr. Nelson, who testified by deposition. Regarding Dr. Nelson's testimony, this Court found:

> Dr. Nelson is the only physician testifying in this case. He testified that claimant's left arm problems were caused by her 1992 industrial accident. According to Dr. Nelson, the limited use of her right arm, which resulted from the accident, required her to rely more on her left arm, thus causing her to overuse her left arm. This in turn led to her developing left-sided thoracic outlet syndrome. Thus, claimant's left arm problems are a direct result and natural progression of her right arm limitations, which, in turn, are due to the 1992 injury. While claimant's work at County Market may have contributed to her condition, Dr. Nelson's testimony indicates her work was neither a significant nor unique contribution to her left arm condition. In his opinion, any activity requiring her to use her arms resulted in the overuse of her left arm, thence the development of her left arm condition. In Dr. Nelson's

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[41] *Romero*, ¶¶ 8-9.

[42] *Romero*, ¶ 34.

[43] *Romero*, ¶ 10.

[44] *Romero*, ¶ 9.

[45] *Romero*, ¶ 10.

[46] *Romero*, ¶ 12.

> opinion, however, claimant's 15 weeks of work at County Market did accelerate her left arm deterioration.[47]

The Court further noted that Dr. Nelson's testimony "also establishes that any activity requiring claimant to use her arms will inevitably lead to further deterioration of her left arm condition."[48]

¶ 32 This Court also recited some of Dr. Nelson's testimony regarding whether Romero's County Market employment was a significant contribution to her left arm condition, including:

> Q. And given the history and findings, is it your opinion that it was a significant aggravation, the County Market experience?
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> A. It would have been significant in comparison to what she had several years prior to that, yes.
>
> . . . .
>
> Q. So, Doctor, is it your opinion that her work at County Market permanently worsened Ms. Romero's condition?
>
> A. Well, I think it worsened it, and what it permanently means is that since this condition fluctuates with intensity, that it has worsened to the extent that it required some surgery, but now we have, as I said, some unfortunate complications going on.[49]

¶ 33 With those facts before it, the Court in *Romero* concluded that the claimant's left arm condition did not develop as a result of her work at County Market, but was already present when she began to work for that employer. Therefore, the Court determined that Romero's claim for occupational disease benefits from County Market rested on proof of aggravation of her left arm condition.[50] Although County Market was Romero's more recent employer, and Dr. Nelson opined that Romero's work at County Market accelerated and permanently aggravated Romero's left arm condition, this Court noted that the medical evidence also

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[47] *Romero*, ¶ 46.

[48] *Romero*, ¶ 52.

[49] *Romero*, ¶ 51.

[50] *Romero*, ¶ 54.

demonstrated that a worsening of Romero's left arm condition, which originated from her right shoulder injury, was inevitable whether or not she worked.[51] Ultimately, the Court concluded that Romero was not suffering from an occupational disease, but that her right *and* left arm conditions were the result of her 1992 industrial accident for which MSF was liable.[52]

¶ 34 While the factual similarities between *Romero* and the present case are obvious, two distinguishing facts require closer examination. First, unlike Petitioner, Romero began to exhibit symptoms in her other limb **prior to** going to work for her last employer. However, although Petitioner's symptoms had not yet manifested, Dr. Blavatsky opined that the degenerative condition of Petitioner's right knee began before his May 2001, left knee injury. Second, while Dr. Blavatsky opined that Petitioner's work as a minister only temporarily aggravated his right knee condition, the doctors in *Romero* opined that Romero's work at County Market significantly aggravated or contributed to her left arm condition and that her employment accelerated her condition.

¶ 35 Ultimately, this Court in *Romero* did not look to either the chronology of Romero's symptoms nor whether her employment at County Market significantly aggravated or contributed to her left arm condition, but rather the Court determined that even a significant aggravation or contribution would not satisfy the proximate causation statute, § 39-72-408, MCA, because Dr. Nelson's testimony established that Romero's left arm condition would inevitably deteriorate regardless of her employment because any activity Romero engaged in required her to over use her left arm.[53] The same circumstances are present in the situation at hand. Dr. Blavatsky opined that Petitioner overloads his right knee to compensate for the left, and the activities which Petitioner performed as a minister – sitting, standing, and walking on different surfaces – are activities of daily living. Like Romero, Petitioner had to over use his other limb to compensate for the injured limb, and therefore, the overuse or overloading of the uninjured limb would have caused the development of problems in that limb, regardless of whether he engaged in subsequent employment.

¶ 36 Furthermore, unlike the situation in *Romero*, in the case before me the evidence does not indicate that Petitioner's work as a minister substantially aggravated or contributed to his right knee condition. Recently, in *Oksendahl v. Liberty Northwest Ins. Corp.*,[54] I determined that the legal standard for proximate causation under § 39-72-408, MCA, is

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[51] *Romero*, ¶ 63.

[52] *Romero*, ¶ 69.

[53] *Romero*, ¶ 61.

[54] *Oksendahl v. Liberty Northwest Ins. Corp.,* 2007 MTWCC 24.

whether a claimant's employment significantly aggravated or contributed to his alleged occupational disease.[55] I subsequently applied this standard in *Kratovil v. Liberty Northwest Ins. Corp*.[56] The same rule and analysis applies here.

¶ 37 It would seem axiomatic that in order for an aggravation or contribution to rise to the level of "significant," it must be more than merely temporary or transient. The evidence in this case consists of Petitioner's testimony and the records and opinions of Dr. Blavatsky. It is undisputed that Petitioner's job as an electrician was physically demanding and that this work resulted in an occupational disease developing in Petitioner's left knee. As set forth above, Petitioner testified that even after his left knee surgery, he favored that knee because of pain and put more weight on his right leg to compensate. Dr. Blavatsky concurred that overloading was one factor in the development of Petitioner's right knee problems.

¶ 38 Petitioner further testified that while the tasks he performed as a minister would aggravate his right knee, his right knee would return to its previous state after he rested it. This Court has held that aches and pains alone do not constitute an occupational disease, and that in order to constitute "harm" or "damage" as contemplated by the definition of "occupational disease" in § 39-72-102(10), MCA, something more significant, such as a condition requiring medical diagnosis and treatment, must be present.[57] Likewise, while Dr. Blavatsky opined that walking on various surfaces while performing his minister duties aggravated Petitioner's knee condition, Dr. Blavatsky opined that this aggravation was only temporary additional pain and not a permanent aggravation of the preexisting condition.

¶ 39 Therefore, applying the same reasoning as this Court used in *Romero*, I conclude that Petitioner's right knee condition was not proximately caused by his work as a minister pursuant to § 39-72-408, MCA. I further conclude that Petitioner's work as a minister did not significantly aggravate or contribute to his right knee condition.

¶ 40 Pursuant to § 39-72-303(1), MCA, where compensation is payable for an occupational disease, the only employer liable is the one in whose employment the employee was last injuriously exposed to the hazard of the disease. It is clear from the testimony and medical evidence in this case that Petitioner was last injuriously exposed to the hazard of the occupational disease he developed in his right knee while he was working for Respondent's insured.

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[55] *Oksendahl*, ¶ 25.

[56] *Kratovil v. Liberty Northwest Ins. Corp.,* 2007 MTWCC 30, ¶ 28.

[57] *Mack v. Montana State Fund*, 2005 MTWCC 48, ¶18 (citing *Corcoran v. Montana Schools Group Ins. Auth.*, 2000 MTWCC 30, ¶¶ 52-53).

¶ 41 Petitioner has met his burden of proof. Therefore, as the insurer of the employer where Petitioner was last injuriously exposed to the hazards which caused his occupational disease, Respondent is liable for payment of occupational disease benefits to Petitioner.

¶ 42 Petitioner has further asked this Court to determine whether he is entitled to PTD benefits. To be eligible for PTD benefits, a claimant must reach maximum medical healing and have no reasonable prospect of physically performing regular employment. In the case at hand, Petitioner has presented no evidence that he is at maximum medical healing, or MMI, regarding his right knee condition. He is therefore not eligible for PTD benefits until such healing has been reached and if, at that time, he also has no reasonable prospect of physically performing regular employment. His request for PTD benefits for his right knee occupational disease is therefore denied.

¶ 43 Petitioner alternatively argues that he is entitled to TTD benefits. While Respondent argues that it is not liable for Petitioner's occupational disease, and points out that Petitioner is not entitled to PTD benefits because he is not at MMI, Respondent is silent on the issue of whether, if Respondent is liable, Petitioner is then entitled to TTD benefits. I presume that if there were a reason to determine that Petitioner is not eligible for TTD benefits, Respondent would have so argued. Since Petitioner has not been released to return to work as an electrician, I conclude he is entitled to TTD benefits.

¶ 44 Petitioner further requests his costs, attorney's fees, and a penalty. At trial, I noted that Petitioner had failed to file with the Court a particularization of the grounds upon which he bases his request for attorney's fees and a penalty as required by this Court's Scheduling Order.[58] It is this Court's long-held practice that claimants must particularize the basis of any claim for penalty and attorney's fees no later than the time specified for final exchange of exhibits and witness lists, setting forth which actions or inactions of the insurer were unreasonable.[59] Notwithstanding Petitioner's failure to timely file a particularization, however, the issue of whether Petitioner was entitled to attorney's fees and a penalty was set forth in the Pre-Trial Order. The Pre-Trial Order supersedes all other pleadings and controls the course of the trial.[60] Therefore, these issues are properly before this Court and will be determined on their merits.

¶ 45 I conclude Petitioner is not entitled to attorney's fees or a penalty. To be entitled to his attorney's fees, Petitioner must prove that the insurer's actions in denying liability or

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[58] Docket Item No. 2.

[59] *The Montana Lawyer*, December 2002, Vol. 28, No. 4, p. 24.

[60] ARM 24.5.318(6).

terminating benefits was unreasonable.[61] This Court may, in its discretion, increase by 20 percent the full amount of benefits due to a claimant if an insurer unreasonably delays or refuses to pay benefits.[62] Given the specific facts in this case, I do not find Respondent's refusal to accept liability for Petitioner's right knee occupational disease to be unreasonable.

¶ 46 Petitioner is, however, entitled to his costs in the judgment of this Court since he prevailed on the substantive issues of this action.[63]

JUDGMENT

¶ 47 Respondent is liable for payment of occupational disease benefits to Petitioner.

¶ 48 Petitioner is entitled to TTD benefits.

¶ 49 Petitioner is not entitled to PTD benefits.

¶ 50 Petitioner is entitled to his costs.

¶ 51 Petitioner is not entitled to attorney's fees.

¶ 52 Petitioner is not entitled to a penalty pursuant to § 39-71-2907, MCA.

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

¶ 54 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 10th day of September, 2007.

(SEAL) \s\ James Jeremiah Shea
JUDGE

c: Bernard J. Everett
Leo S. Ward
Submitted: November 2, 2006

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[61] § 39-71-611, MCA.

[62] § 39-71-2907, MCA.

[63] *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand* at 1996 MTWCC 33).