IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 5

WCC No. 2015-3623

JAMIE L. ROSLING,
as Personal Representative of the Estate of David Lee McMillan

Petitioner

vs.

ASSOCIATED LOGGERS EXCHANGE

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: The decedent was exposed to Libby asbestos for most of his life and diagnosed with asbestos-related disease almost seven years before working for Respondent's insured. However, his condition was stable and he continued to work as a logger. After beginning to work for Respondent's insured, where he suffered a significant exposure to Libby asbestos, decedent's ARD significantly and rapidly worsened and he ultimately had to quit his job because he could no longer physically perform it. Prior to his death, he filed an OD claim, contending that his ARD was an OD and that he was last injuriously exposed to the hazard of his OD while employed at Respondent's insured. Respondent asserts that Petitioner did not timely file his claim. In the alternative, Respondent asserts that Petitioner's employment for its insured did not cause his OD.

Held: The decedent timely filed his claim. The decedent's ARD was an OD because his exposure to Libby asbestos during his lifetime of employment was the major contributing cause of his ARD and because his exposure while working for Respondent's insured was the major contributing cause of the rapid acceleration of his ARD, which resulted in his inability to work. Respondent is liable for Petitioner's OD because it was the insurer at risk at the time decedent was last injuriously exposed to Libby asbestos. Thus, Respondent is liable for OD benefits.

¶ 1 The trial in this matter began on November 23, 2015, in Kalispell. On December 17, 2015, counsel delivered closing arguments. On August 2, 2017, Respondent Associated Loggers Exchange (ALE) filed a post-trial supplemental brief by leave of Court and this Court deemed the matter submitted for decision. Laurie Wallace,

Ethan Welder, Dustin Leftridge, and Jon L. Heberling represented Petitioner (McMillan).[1] Larry W. Jones represented ALE.

¶ 2 Exhibits: This Court admitted Exhibits 2, 16, and 17 without objection. This Court admitted Exhibits 1 and 3 through 13 over the parties' respective relevancy objections. ALE withdrew Exhibits 14 and 15.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of McMillan, Brad Black, MD, Dale and Suzanne Riggles, and Gregory Michael Loewen, MD. McMillan, Kerri Wilson, and Terry Spear, PhD, were sworn and testified at trial.

¶ 4 Issues Presented: Based upon the parties' statement of "Issues to be Determined by Court" and their contentions in the Pretrial Order, and their arguments at trial, this Court considers the following issues:

Issue One: Did McMillan timely file his occupational disease claim?

Issue Two: Did McMillan sustain an occupational disease?

Issue Three: If McMillan sustained an occupational disease, is Associated Loggers Exchange liable for it?

Issue Four: If Associated Loggers Exchange is liable for McMillan's occupational disease, is McMillan entitled to medical benefits and an impairment award?

Issue Five: If Associated Loggers Exchange is liable for McMillan's occupational disease, is McMillan entitled to permanent total disability benefits pursuant to § 39-71-702, MCA?

Issue Six: Is McMillan entitled to costs, attorney fees and/or a penalty?

FINDINGS OF FACT

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

[1] At the time of trial, Petitioner was the claimant, David Lee McMillan. On December 23, 2015, this Court substituted Jamie L. Rosling, as Personal Representative of the Estate of David Lee McMillan, as Petitioner due to the claimant's death.

History of Asbestos in the Libby Area

¶ 6 From the 1920s to 1990, Zonolite Company and then W.R. Grace operated a vermiculite mine, which was seven miles northeast of Libby. The vermiculite contained a unique, amphibole-type asbestos, called "Libby amphibole" or "Libby asbestos."

¶ 7 The open pit mining, and the processing and transportation of the vermiculite, released dust containing many tons of Libby asbestos into the atmosphere each day. Libby asbestos fibers are microscopic and remain airborne for hours once introduced into the air.

¶ 8 The dust contaminated the air in Libby and the town had a hazardous "background" level of asbestos when the mine operated. The residents of Libby suffered a "community exposure" to asbestos.

¶ 9 The dust drifted and was blown, oftentimes for miles, until it settled and contaminated whatever it landed upon, including the forest, duff, and soil in the area surrounding the mine. Studies conducted from 2005 through 2013 showed that the areas closer to the W.R. Grace mine had the highest concentrations of Libby asbestos contamination, but that Libby asbestos was detected in forest duff as far as 16.9 miles from the mine.

¶ 10 In the time between 2009 and 2014, researchers discovered that logging activities, such as falling trees, hooking, skidding, and processing, that disturb the contaminated tree bark, duff, or soil released Libby asbestos into the air and exposed those in the area.

¶ 11 All types of asbestos are hazardous, but Libby asbestos is more toxic than other types, i.e., it takes a much lower quantity of Libby asbestos to cause asbestos-related disease (ARD) or "asbestosis," umbrella terms that describe several conditions in which lung tissue is damaged and scarred, including pleural thickening, pleural plaques, and interstitial fibrosis. The scar tissue is inelastic, which causes decreased respiratory function that worsens over time.

McMillan's Exposures to Asbestos, Employment History, and Diagnosis of ARD

¶ 12 McMillan grew up in Libby and lived most of his life in Libby. McMillan's family has been particularly hard hit by ARD, as McMillan's father, who worked for a time at the W.R. Grace mine and had direct contact with vermiculite, died of ARD. In addition, his three brothers and his sister died from ARD. McMillan was exposed to Libby asbestos at his home and to the Libby background asbestos while residing in Libby.

¶ 13 In 1973, when he was 17 years old, McMillan worked for Bothman Logging, which logged in the Kootenai National Forest. He was exposed to Libby asbestos during this work.

¶ 14 From 1974 to 1976, McMillan served in the Army. He was not exposed to asbestos during his service.

¶ 15 In 1976, McMillan returned to Libby, and returned to logging, primarily in the Kootenai National Forest, in areas contaminated with Libby asbestos. He was exposed to Libby asbestos during this work.

¶ 16 From 1980 to 1983, he worked in the oil business. He was not exposed to asbestos during this work.

¶ 17 McMillan returned to Libby in 1983 and, for the next 28 years, worked in the logging industry for several employers. He worked as a skidder operator, a sawyer, and worked the landings. McMillan also helped build logging roads, including installing culverts.

¶ 18 During this time, McMillan primarily worked in the areas within 10 miles of the former W.R. Grace mine. When he worked for Owens Ventures, he worked near the vermiculite loading facility. McMillan and his coworkers had to push piles of vermiculite left by dump trucks out of the way to access logs used to make a landing. He consistently worked in the dust created by this work, which was contaminated with Libby asbestos.

¶ 19 On September 24, 2001, McMillan underwent an asbestos screening at the Center for Asbestos Related Disease (CARD) Clinic in Libby. As part of the screening process, McMillan filled out a questionnaire which asked him questions about past employments, residences, and recreational activities – including questions about logging.

¶ 20 Brad Black, MD, the medical director of the CARD clinic, found pleural changes in McMillan's lungs. A follow-up CT scan revealed findings consistent with ARD, and Dr. Black recommended more diagnostic testing.

¶ 21 On December 3, 2001, Alan C. Whitehouse, MD, a physician at the CARD clinic with significant experience treating patients with ARD caused by Libby asbestos, reviewed a chest x-ray, which showed "some minimal pleural thickening," and a CT scan, which showed "one small area of irregular, what appears to be pleural plaque." Dr. Whitehouse stated, "These do appear to be consistent with asbestos related disease."

¶ 22 Dr. Black testified that to diagnose ARD, one factor is the "latency period," which is the time that passes between an exposure of Libby asbestos and objective medical findings of ARD, such as a chest x-ray or a CT scan. Dr. Black testified that the latency

period for ARD from Libby asbestos is 10-20 years, although he explained that with technological advances in scanning, the latency period is getting shorter.

¶ 23 On May 17, 2006, Dr. Black saw McMillan for a follow-up visit. Dr. Black noted, "David has been short of breath but continues to work in the woods." Dr. Black noted that McMillan had not smoked for a year and had had less shortness of breath since then. He also noted that McMillan's ARD was relatively stable. Dr. Black noted that McMillan's pulmonary function tests (PFTs), which are objective medical findings, were "virtually identical" to his 2005 tests and in the normal range. Dr. Black also noted, "I reviewed his 2005 CT scan and he has very obvious findings of sub-pleural interstitial fibrosis along with pleural thickening scattered throughout much of his chest."

¶ 24 On July 25, 2007, a physician at the CARD clinic examined McMillan and found him radiographically and functionally unchanged but noted concern that his PFTs had declined. The physician noted that McMillan continued to work in the woods as a sawyer and that he was able to keep up "[f]or the most part," with some episodic shortness of breath with exertion.

¶ 25 McMillan started working for P&S Contracting (P&S) on August 1, 2008. McMillan built and maintained logging roads and worked as a logger. He operated heavy machinery, including a skidder. For much of this time, he worked in areas within 10 miles of the vermiculite mine. This work was extremely dusty; at times, McMillan had to wear a mask.

¶ 26 McMillan was exposed to Libby asbestos in amounts far greater than the Libby background level during this work. However, McMillan did not know he was being exposed to Libby asbestos.

¶ 27 At P&S, McMillan worked with Dale Riggles, who started at P&S in 2009 and quit shortly after he was diagnosed with ARD on November 9, 2010. Riggles and his wife testified together at a deposition. Riggles remembered that McMillan had a difficult time breathing and frequently coughed and McMillan saying that he had ARD. Riggles knew they were working in specific areas known to be contaminated with Libby asbestos, but he did not discuss this with McMillan. However, Riggles testified that, while they worked at P&S, McMillan stated that he was generally aware that the forest around Libby was contaminated.

¶ 28 A February 11, 2009, x-ray revealed that McMillan's ARD continued to be stable, and primarily unchanged since 2007. However, on February 25, 2009, Dr. Black noted that McMillan's ARD was advancing, as exhibited by a decline in his pulmonary function tests, including 30% decline in his diffusion capacity for carbon monoxide (DLCO) – a test which measures the lungs' ability to transfer oxygen into the bloodstream – since 2001.

¶ 29 On February 24, 2010, Dr. Black noted, "Dave has noticed a significant drop in his breathing over this last year. He cannot get up the hills readably [sic] as he has in the past." Dr. Black noted a decline in McMillan's PFTs. In his assessment, Dr. Black wrote: "Asbestos related disease – he has experienced significant volume loss and his chest x-ray suggest possibly [sic] of some increased scarring that could be parenchymal, in addition to his pleural disease."

¶ 30 On March 12, 2010, a CT scan revealed a "marked change" in McMillan's lungs. In his record dated March 15, 2010, Dr. Black noted that the CT scan showed "diffuse pleural changes, along with subpleural fibrosis in both lungs starting high in the chest and going all the way down to the diaphragm level." Dr. Black noted that the radiographic progression "certainly explains his problems with increasing dyspnea on exertion." McMillan was due to return to work later that spring, but was concerned because he became short of breath within minutes while getting firewood and noted that walking uphill was particularly difficult.

¶ 31 ALE started insuring P&S on July 1, 2010.

¶ 32 Dr. Black testified that after a person is diagnosed with ARD, any ongoing, significant exposures to asbestos contribute to the worsening of the disease. During his deposition, Dr. Black was asked about the effects of ongoing exposure to Libby asbestos for those already diagnosed with ARD. Dr. Black testified:

> Well, if there's ongoing exposure and it's significant enough, it would – it would contribute to worsening of the disease over time. But, once again, from that exposure there's a time frame before that would become evident because of the new entry of particles. And, you know, you assume there's going to be a delay before there's the sequence of molecular responses to the fibers, there's going to be a latency from the new exposures, but then you would anticipate that they would further increase the disease severity over time.

¶ 33 Dr. Black did not tell McMillan which exposure pathway caused his ARD because, in the clinical setting, Dr. Black "couldn't tell source wise how much came [from] here, how much came [from] there."

¶ 34 On December 17, 2011, McMillan stopped working for P&S because he could no longer do the work as a result of his ARD. ALE was still P&S's insurer.

¶ 35 McMillan did not obtain other employment after leaving P&S.

¶ 36 On January 23, 2012, McMillan was seen for follow-up at the CARD clinic. His chest x-ray revealed prominent interstitial fibrosis in both lungs and pleural thickening. His PFTs demonstrated a decline in function over the last two years.

¶ 37 On February 17, 2012, Dr. Black wrote a letter in which he opined that McMillan's ARD had progressed to a point that impacted his ability to work and to carry on activities of daily living. During his deposition, Dr. Black explained that, because of his decreased lung function, McMillan suffered from severe physical and mental fatigue. Dr. Black estimated that the farthest McMillan could walk on a level surface was 100 feet and that McMillan could not do any repeated lifting. Dr. Black opined that it was remarkable that McMillan had remained in his job as long as he had, and Dr. Black had encouraged McMillan to leave his job sooner because of exhaustion due to living with ARD. When asked if McMillan had the ability to engage in gainful employment, Dr. Black testified:

> David's [sic] is significantly impaired with his lung disease. As a matter of fact, he's – he ended up working way past what I would have considered – you know, what I would have expected based on the severity of his lung disease.
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> And so he finally, you know, decided that he couldn't keep up with what he was doing, and those are always hard for these guys working, I mean they have a horrible time giving up their work, and he finally made that – realized he couldn't do it. I encouraged him earlier, because I could see how exhausted he was.
>
> So I would – I don't see him as employable. I don't know who would employ him with the severity of his problems with his lungs.

¶ 38 This Court finds that McMillan was unable to physically perform regular employment as of the day he quit working for P&S.

McMillan's Claim

¶ 39 In late 2012, Cheryl Wolleats, a former coworker at P&S, told McMillan that several former P&S employees were having trouble breathing and were filing occupational disease (OD) claims against P&S. Wolleats told McMillan that he "could have" been exposed to Libby asbestos while working for P&S. McMillan testified that this was the first time he heard that "asbestos was in the logging industry." Wolleats told McMillan that he should file a claim to "cover" himself.

¶ 40 When asked where he thought he had been exposed before this conversation, McMillan testified, "Here in town, at our old log house, I mean I was raised around it." This Court finds this testimony credible.

¶ 41 On June 1, 2013, McMillan filed a First Report of Injury or Occupational Disease for exposure to asbestos while working for P&S. At that time, McMillan did not "officially" know he had been exposed to Libby asbestos while working for P&S but filed his claim so as to "cover all the bases."

¶ 42 ALE initially denied liability because McMillan's first report stated that the date of injury was in 2012, after McMillan quit working for P&S. On July 14, 2014, ALE denied liability, asserting it was "unable to determine liability regarding the relationship, if any, of this claim to employment at P&S Contracting." After receiving a demand letter from one of McMillan's attorneys, ALE obtained McMillan's medical records in early 2015. ALE determined that the medical records did not support McMillan's claim that his exposure to Libby asbestos while working for P&S caused his ARD. Kerri Wilson, ALE's claims adjuster, testified that she noted that McMillan was diagnosed with ARD before he started working for P&S. Wilson also testified that ALE continued to deny liability for McMillan's claim based upon Dr. Black's testimony that ARD had a ten-year latency period. From this testimony, Wilson concluded that McMillan could not have developed ARD as a result of working for P&S.

McMillan's Death

¶ 43 McMillan's lungs continued to worsen and by early 2015, he required supplemental oxygen full-time.

¶ 44 McMillan died as a result of his ARD on December 3, 2015.

Terry Spear, PhD

¶ 45 Terry Spear, PhD, testified as an expert for McMillan. Dr. Spear has a PhD in industrial hygiene and is a professor emeritus at Montana Tech.

¶ 46 Dr. Spear began researching asbestos contamination in the Libby area in 1996. Dr. Spear has co-authored at least seven peer-reviewed articles pertaining to Libby asbestos, including several showing that tree bark, duff, and soil in the forest around Libby was contaminated with Libby asbestos. The first such article was published in 2006. Dr. Spear was also part of studies in which the researchers simulated collecting firewood and building fire lines in the forest around the mine to determine if these activities released asbestos into the air. The studies showed that activities such as cutting trees with a chainsaw and digging trenches released asbestos fibers into the air.

¶ 47 Dr. Spear issued his expert report in this case on October 8, 2015.

¶ 48 Dr. Spear determined that McMillan had suffered non-occupational and occupational exposures to Libby asbestos.

¶ 49 Non-occupationally, Dr. Spear determined that McMillan was exposed to Libby asbestos just by living in Libby. Dr. Spear also noted McMillan grew up in Libby in a log house with vermiculite attic insulation, which leaked into the living space. He played on the ball fields, which were contaminated, and in vermiculite piles by the ball fields. McMillan played inside the railroad cars by the lumber mill, which was contaminated. McMillan also hunted and fished in the Rainy Creek drainage, an area that was heavily contaminated.

¶ 50 Occupationally, Dr. Spear opined that McMillan suffered a "severe exposure to asbestos fibers" while working as a logger for 30-plus years because of the large volume of asbestos contained within the tree bark, duff, and soil in the areas where he worked – asbestos that became airborne when disturbed. Dr. Spear noted McMillan worked in many areas close to the mine site, areas that were contaminated with Libby asbestos. McMillan's work area was dusty, and he was exposed to contaminated dust from log-processing activities, dusty logging roads, and soil-disturbing activities. During his employment with Owens-Hurst Logging, McMillan worked in an area where W.R. Grace dumped piles of vermiculite, which McMillan and his coworkers pushed out of the way to access logs. McMillan told Dr. Spear that they were "knee deep in vermiculite." Additionally, McMillan's operation of heavy equipment caused significant soil disturbance and caused asbestos in contaminated soil to become airborne.

¶ 51 Dr. Spear explained, "[McMillan] was in areas that he was working in and around materials that were contaminated with amphibole asbestos, and that the activities that he performed disturbed these materials, releasing fibers into his breathing zone. And so he was at risk to [sic] an asbestos-related disease."

¶ 52 Dr. Spear also explained that McMillan had a "take-home exposure" to Libby asbestos, i.e., asbestos contaminated his work clothes which, in turn, contaminated his home. Dr. Spear considered McMillan's "take-home exposure" to be an occupational exposure and opined that during the entirety of his logging career, it contributed to his exposure.

¶ 53 Dr. Spear also opined that McMillan's work as a logger exposed him to levels of airborne Libby asbestos fibers well above the background level in Libby. Thus, Dr. Spear opined that McMillan's occupational exposure "was significantly above the background exposure that would occur in the town of Libby" and "greatly exceeded" his community exposure.

¶ 54 Dr. Spear opined that McMillan's work as a logger exposed him to a sufficient amount of Libby asbestos to cause an ARD.

¶ 55 As for McMillan's work for P&S, Dr. Spear opined that McMillan had a "severe exposure to asbestos while working . . . for P&S," which was the same type and kind of exposure to Libby asbestos he had had with his previous employers in the logging industry. Dr. Spear noted that McMillan worked a total of 2,473.25 hours for P&S, with many of those hours spent in the drainages near the former W.R. Grace mine. Dr. Spear explained:

> Mr. McMillan worked as an equipment operator, a sawyer, and doing road construction. His job duties put him around many dust generating activities in areas contaminated with asbestos. During his employment, he was exposed to a dusty environment from numerous sources, including: dust emanating from the log processing activities at the logging sites, dust emanating from the logging roads, and other activities that disturbed asbestos fibers.
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> Many of the areas in which Mr. McMillan performed logging activities and road and culvert construction were within 17 miles of the former Vermiculite mine. Every step of the harvesting, transportation, and road building process was dusty; from the time the logs were cut, stacked, and loaded on trucks the asbestos dust on the bark was entrained into the air and breathed in by workers. Mr. McMillan was exposed to this dusty environment during his time harvesting these contaminated logs in areas known to be contaminated with asbestos. The most important factor influencing the extent of airborne exposure to LA [in] Libby is the disturbance of contaminated source materials by human activity. Through his work as a sawyer, equipment operator and road builder, Mr. McMillan was constantly surrounded by disturbances of contaminated soil and dust, bark, and vermiculite dust.

¶ 56 When asked at trial how McMillan was exposed at P&S, Dr. Spear testified:

> Well, again, through his work in the forest, being out in areas that were contaminated with Libby Amphibole, disturbing contaminated materials, whether it be duff, soil, trees, driving on dusty logging roads, wearing the same clothes to and from work, basically putting asbestos fibers from where he was working into his vehicle, and then being in that vehicle and then going home with the same clothes and bringing asbestos fibers into his home, and adding to whatever fibers could have already been there.

¶ 57 Dr. Spear opined that McMillan's work at P&S "exposed him to a level of asbestos fibers which would have contributed to his fiber burden" and was sufficient to either cause, contribute to, or significantly aggravate his ARD.

Gregory Michael Loewen, MD

¶ 58 McMillan retained Gregory Michael Loewen, MD, to investigate his case and offer opinions regarding his claim. Dr. Loewen is board certified in internal medicine, pulmonary disease, and critical care. He has published numerous peer-reviewed papers, including more than ten related to asbestos exposure. He has worked at the CARD clinic since 2012, where his main duties are evaluating patients for the presence of ARD and, for the patients who have ARD, providing treatment. Dr. Loewen did not treat McMillan.

¶ 59 Dr. Loewen issued his expert report on September 1, 2015.

¶ 60 Dr. Loewen explained that lodged asbestos fibers cause an inflammatory response in the lungs, which results in a scarring process, which, in turn, causes difficulty breathing. In his report, Dr. Loewen explains the mechanism of injury from Libby asbestos as follows:

> 10. In relative terms of their length to width (aspect ratio), Libby asbestos fibers are often long and sharp, like needles. The fibers breathed in are microscopic, as are the alveoli (tiny air sacs) in the lungs. When breathed in, the fibers lodge in the structure around the alveoli, and are too small to be expelled. Asbestos fibers irritate and inflame the lung tissue structure around the air sacs (the interstitia). Scarring in the interstitia is interstitial disease. When the interstitia are significantly scarred, they can no long[er] expand or contract fully, and breathing is restricted.
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> 11. The amphibole fibers also migrate to the outside portion of the lung, where they scar and inflame the pleura (the lung lining) and cause pleural disease. . . . Pleural disease seems particularly pronounced with Libby asbestos fibers.
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> 12. The normal pleura is actually thinner than a blown up balloon. It is a very thin membrane, and it can expand like a balloon. Asbestos fiber scarring causes the pleura to look much like the orange portion of an orange rind, and can be just as thick. . . . When the lung lining becomes as thick as an orange rind, it can no longer expand freely and breathing is severely restricted. Asbestos disease is generally a restrictive lung disease.

¶ 61 Dr. Loewen explained that ARD has a "latency period," meaning that there is a time between the exposure to Libby asbestos, which causes immediate harm, and the time ARD is detectable with a chest x-ray or a CT scan. In his report, Dr. Loewen explains:

> There is a latency period between exposure and the first appearance of asbestos disease on chest x-ray or CT. During the latency period, microscopic asbestos fibers are working at a microscopic level, until scarring becomes detectible on chest x-ray or CT. ATS (2004),[2] p.695, suggests a minimum latency period of 15 years, based largely on chrysotile studies. Based on clinical observation, asbestos pleural disease from exposure to Libby asbestos has appeared radiographically in as little as three years. With Libby asbestos, the range generally appears to be about 3 to 50 years to diagnosis.

¶ 62 Dr. Loewen explained that ARD is a progressive disease, though the rate of progression is variable. Dr. Loewen agreed that once a person has ARD, he will not get any better. Dr. Loewen also explained that ARD is "cumulative," meaning that the asbestos fibers that lodge in the lung are there for life and that with additional exposure, more asbestos fibers accumulate in the lungs, which further damages the lungs. Dr. Loewen explained, "The more you're exposed, the more fiber burden you carry around in your lung."

¶ 63 Relying on Dr. Spear's report, Dr. Loewen opined that McMillan had a non-occupational exposure to Libby asbestos due to growing up and living in Libby. Dr. Loewen also opined that McMillan had a direct and intense exposure to asbestos while working in the logging industry. Since ARD is a cumulative disease, Dr. Loewen explained that some of McMillan's condition can be attributed to his childhood exposure. However, Dr. Loewen opined that McMillan's occupational exposure contributed "even more."

¶ 64 Dr. Loewen opined that McMillan's occupational exposures from the entirety of his career as a logger were a contributing cause of his ARD and sufficient alone to cause his ARD. Dr. Loewen also opined that, when compared to all other exposures, McMillan's occupational exposure was the leading cause of his ARD.

¶ 65 Dr. Loewen opined that McMillan's asbestos exposure at P&S was sufficient to be a contributing cause of his ARD by contributing to his fiber burden and accelerating his disease process. Dr. Loewen further opined that McMillan's "intense exposure" to Libby asbestos while working for P&S from 2008 to 2012 fueled a rapid acceleration of his ARD, and particularly his interstitial lung disease. He testified:

> I think that, in Mr. McMillan's case, there is a temporal relationship between this intense exposure that he had between 2008 and 2012 and the

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[2] American Journal of Respiratory and Critical Care Medicine, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, Vol. 170, pp. 691-715 (2004).

> acceleration of his disease that we observed as his doctors, and so it makes sense to me that that's the most likely cause of the acceleration of his disease in his particular case.

Relying on McMillan's PFTs, Dr. Loewen noted a "precipitous and alarming loss in lung function" between 2010 and 2015 and explained, "the most plausible explanation for the acceleration of his disease, which is alarming, is his intense exposures that he was subject to from 2008 to 2012," the time McMillan was working for P&S.

¶ 66 Dr. Loewen also assigned McMillan a 40% whole person impairment rating under the 6th edition of the AMA Guides.

Dispositive Findings Regarding Cause and Worsening of McMillan's ARD

¶ 67 ALE did not have any witness counter Dr. Spear's nor Dr. Loewen's opinions. And, its cross-examination did not undercut either Dr. Spear's or Dr. Loewen's opinions. Accordingly, this Court gives Dr. Spear's and Dr. Loewen's opinions weight and finds as follows:

A. McMillan suffered a severe exposure to Libby asbestos during his 30-plus years as a logger. McMillan also suffered an exposure to Libby asbestos while living in Libby, but his occupational exposure greatly exceeded his non-occupational exposure.

B. McMillan's occupational exposure to Libby asbestos was sufficient to cause his ARD.

C. Of all the causes of McMillan's ARD, his occupational exposure to Libby asbestos was the major contributing cause, as defined in § 39-71-407(16), MCA; i.e., when compared to his non-occupational exposure to Libby asbestos, his occupational exposure was the leading cause of his ARD.

D. While McMillan worked for P&S, he suffered a severe occupational exposure to Libby asbestos. McMillan's occupational exposure to Libby asbestos while working for P&S greatly exceeded his non-occupational exposure during that time. McMillan's exposure to Libby asbestos while working for P&S contributed to his fiber burden and was sufficient to cause, contribute to, and significantly aggravate and worsen his ARD.

E. McMillan's occupational exposure to Libby asbestos while working for P&S was the same type and kind of exposure to Libby asbestos he had had in his previous employment in the logging industry.

F. McMillan's exposure to Libby asbestos while working at P&S was the major contributing cause of the rapid acceleration of the progression of McMillan's ARD from 2010 to 2015, as shown by the rapid decrease in his lung function between 2010 and 2015, as shown by his pulmonary function tests, and was the major contributing cause of McMillan's inability to physically perform regular employment as of December 18, 2011.

CONCLUSIONS OF LAW

¶ 68 Generally, the law in effect when a claimant files his claim, or on his last day of work, whichever is earlier, governs an OD claim.[3] This Court applies the 2011 Workers' Compensation Act (WCA), since that was the law in effect on McMillan's last day of employment.[4]

Issue One: Did McMillan timely file his occupational disease claim?

¶ 69 ALE asserts that McMillan did not file his claim within one year of when he knew or should have known that his work at P&S caused his alleged OD, as required by § 39-71-601(3), MCA. ALE relies on Riggles' testimony that McMillan stated he was aware that the forest around Libby was contaminated with asbestos while they worked together at P&S, which was in 2009 and 2010.

¶ 70 McMillan asserts that the statute of limitations did not begin running until late 2012, when Wolleats contacted him and told him that he could have been exposed to Libby asbestos while working at P&S.

¶ 71 Because of the differences between ODs and injuries, the Legislature has stated:

> [F]or occupational disease claims, because of the nature of exposure, workers should not be required to provide notice to employers of the disease as required of injuries and that the requirements for filing of claims reflect consideration of when the worker knew or should have known that the worker's condition resulted from an occupational disease. The legislature recognizes that occupational diseases in the workplace are caused by events occurring on more than a single day or work shift and that

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

[4] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

it is within the legislature's authority to define an occupational disease and establish the causal connection to the workplace.[5]

¶ 72 Section 39-71-601(3), MCA, states, in relevant part:

> When a claimant seeks benefits for an occupational disease, the claimant's claims for benefits must be in writing, signed by the claimant or the claimant's representative, and presented to the employer, the employer's insurer, or the department within 1 year from the date that the claimant knew or should have known that the claimant's condition resulted from an occupational disease.

¶ 73 In *Dvorak v. Montana State Fund*,[6] the Montana Supreme Court held that the statute of limitations starts running when the claimant "has some specific knowledge of a specific pathological condition stemming from employment and requiring diagnosis and treatment."[7] Although Montana State Fund argued that Dvorak should have known she was suffering from an OD before her doctor diagnosed her with an OD, the Montana Supreme Court questioned this, stating: "If her doctor did not conclude she had an occupational disease until March or April 2011, a material question of fact arises as to when Dvorak—who is not trained in medicine—should have known she was suffering from an occupational disease."[8]

¶ 74 This Court followed *Dvorak* in *Monroe v. MACO Workers Comp Trust*.[9] Monroe worked for W.R. Grace at the mine from 1967 to 1990.[10] He filed an OD claim in 2001, asserting that his ARD was "caused by years of exposure to tremolite asbestos dust."[11] Monroe settled that claim on a disputed liability basis.[12] From 1997 to 2008, Monroe worked for Lincoln County on its road crew, where, unbeknownst to him, he was again exposed to Libby asbestos "far above the background levels for the Libby area."[13] Monroe was diagnosed with mesothelioma in 2010, which Monroe and his wife attributed to his

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[5] § 39-71-105(6)(b), MCA.

[6] 2013 MT 210, 371 Mont. 175, 305 P.3d 873.

[7] *Dvorak*, ¶ 21 (citing *Corcoran v. Mont. Sch. Grp. Ins. Auth.*, 2000 MTWCC 30, ¶¶ 52, 53).

[8] *Dvorak*, ¶ 30.

[9] 2014 MTWCC 7.

[10] *Monroe*, ¶ 6 [sic].

[11] *Monroe*, ¶ 5 [sic].

[12] *Id.*

[13] *Monroe*, ¶ 13.

work for W.R. Grace.[14] He died in 2010, as a result of his ARD.[15] In 2012, Monroe's widow filed a beneficiary's claim, asserting that MACO was liable for his OD under the last injurious exposure rule.[16]

¶ 75 MACO asserted that Monroe's widow's claim was untimely under § 39-71-601(3), MCA. However, this Court found that, under the reasonable person standard, neither Monroe nor his widow could have known that he was injuriously exposed to Libby asbestos while working for Lincoln County until Dr. Spear opined that the dust to which Monroe was exposed while working on the road crew contained Libby asbestos beyond the Libby background level and until a physician opined that this exposure was sufficient to contribute to his mesothelioma.[17] Because Monroe's widow filed her claim within one year of learning that Monroe was injuriously exposed to Libby asbestos while working for Lincoln County and learning that this exposure contributed to his ARD, this Court concluded that her claim was timely.[18]

¶ 76 Here, ALE did not meet its burden of proving that McMillan knew that his ARD resulted from an OD more than a year before he filed his claim, which was on June 1, 2013.[19] While McMillan knew in 2001 that he had ARD, he did not know it "stemmed from employment." This Court has found that before McMillan spoke to Wolleats in late 2012, he thought his ARD was caused by his exposure by living in a home contaminated with Libby asbestos, and by his community exposure, which was reasonable under the circumstances. In fact, the research showing that logging activities released Libby asbestos into the breathing zone of loggers did not occur for years after McMillan was first diagnosed. Moreover, this Court has ruled that evidence from experts is required to prove that a claimant was exposed to Libby asbestos during his lifetime of employment and while working for a particular employer.[20] The facts that McMillan was exposed to

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[14] *Monroe*, ¶¶ 19, 49.

[15] *Monroe*, ¶ 6 [sic].

[16] *Id.*

[17] *Monroe*, ¶ 53.

[18] *Id.*; *see also Keller v. Mont. State Fund*, WCC 2012-2879 (Minute Book Hearing No. 4393, Docket Item No. 21, May 8, 2012) (ruling that claimant, who logged in the mountains outside of Libby for nearly 20 years without knowledge that other loggers had developed an OD and was the first logger to bring an ARD claim to this Court, timely filed his OD claim because, under the reasonable person standard, he could not have known that his ARD was caused by his employment until his attorney advised him that his ARD was an OD).

[19] *Preston v. Transp. Ins. Co.*, 2002 MTWCC 23, ¶ 30 (citations omitted), *aff'd in part, rev'd in part on other grounds, and remanded*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527 ("As with other affirmative defenses, the party – here the insurer – asserting that a claim is time barred bears the burden of proof.").

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

Libby asbestos during his lifetime of employment and while working for P&S and that his exposure at P&S fueled the acceleration of his ARD were developed via the expert opinions of Dr. Spear and Dr. Loewen in 2015, two years after he filed his claim. As in *Monroe*, this was when McMillan had actual knowledge that his ARD was an OD.

¶ 77 Moreover, ALE did not present sufficient evidence indicating that McMillan should have known that his ARD was caused by his years of work as a logger, that he was exposed while working at P&S, and that his exposure while working at P&S fueled the acceleration of his ARD more than a year before he filed his claim. Although McMillan may have learned that areas in the forest around Libby were contaminated, ALE did not present any evidence from which this Court could have found that McMillan should have known that his work activities were releasing Libby asbestos into the air and contributing to his fiber burden. As in *Dvorak*, the fact that Dr. Black could not determine that McMillan's ARD was an OD when he was treating McMillan, and the fact that expert testimony is required to prove exposure to Libby asbestos, shows that McMillan could not reasonably have known that his ARD was an OD until Dr. Spear and Dr. Loewen issued their reports. Even if McMillan had a suspicion that he was exposed to Libby asbestos while he was working at P&S, the statute of limitations would not begin running until his suspicion was confirmed by his physician.[21] After his conversation with Wolleats in late 2012, in which she told him that he "could have" been exposed to Libby asbestos while working for P&S, McMillan acted with due diligence and filed his OD claim within a year, even though he did not have sufficient evidence at that time to prevail on an OD claim.

¶ 78 Accordingly, McMillan's OD claim is timely under § 39-71-601(3), MCA.

Issue Two: Did McMillan sustain an occupational disease?

¶ 79 In 2005, the Montana Legislature repealed the Occupational Disease Act, which was then codified in Title 39, chapter 72 of the Montana Code Annotated, and enacted new sections in the WCA to continue coverage for ODs. The 2005 Legislature kept part of the then-existing OD law, but changed other parts.

¶ 80 The 2005 Legislature kept the definition of "occupational disease." Section 39-71-116(23)(a), MCA (2011), defines an OD as "harm, damage, or death arising out of or

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to render an opinion as to his asbestos exposures or whether his exposure at the particular employment could have caused his OD).

[21] *Evans v. Liberty Nw. Ins. Corp.*, 2007 MTWCC 23, ¶ 28 (ruling, "The determination as to whether a claimant 'knew or should have known' he or she may be suffering from an occupational disease may not always require a formal diagnosis. In the present case, however, I cannot conclude that a lay person's idle speculation supports a finding that Petitioner knew or should have known that he was suffering from an occupational disease. I therefore conclude that Petitioner knew or should have known that he was suffering from the carpal tunnel syndrome as an occupational disease on March 6, 2006, when Dr. Johnson diagnosed the condition and opined that it was caused by Petitioner's work in the tire industry.").

contracted in the course and scope of employment caused by events occurring on more than a single day or work shift."[22]

¶ 81 However, the 2005 Legislature changed the standard to determine whether a claimant has an OD. Before the 2005 change, the standard was proximate cause pursuant to § 39-72-408, MCA.[23] The Montana Supreme Court explained that under § 39-72-408, MCA, the "standard for determining proximate causation for compensability of an ODA claim [is] whether claimant's employment significantly aggravated or contributed to the occupational disease."[24]

¶ 82 The standard in the 2005-present WCA is major contributing cause. Section 39-71-407(12), MCA (2011), provides:

> An insurer is liable for an occupational disease only if the occupational disease:
>
> (a) is established by objective medical findings; and
>
> (b) arises out of or is contracted in the course and scope of employment. An occupational disease is considered to arise out of or be contracted in the course and scope of employment if 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 occupational disease.

"Major contributing cause" is defined in § 39-71-407(16), MCA, as "a cause that is the leading cause contributing to the result when compared to all other contributing causes."

¶ 83 McMillan argues that his ARD, which was indisputably established by objective medical findings, is a compensable OD under the 2011 WCA under two theories of liability. First, McMillan argues that his occupational exposure to Libby asbestos during his 30-plus years of employment in logging is the major contributing cause of his ARD, which meets the standard under § 39-71-407(12)(b) and (16), MCA. Second, McMillan

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[22] *Compare to* § 39-72-102(10), MCA (2003) (defining OD, in relevant part, as "harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift").

[23] Section 39-72-408(1), MCA (2003), states: "(1) Occupational diseases are considered to arise out of the employment if: (a) there is a direct causal connection between the conditions under which the work is performed and the occupational disease; (b) the disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment; (c) the disease can be fairly traced to the employment as the proximate cause; (d) the disease comes from a hazard to which workers would not have been equally exposed outside of the employment."

[24] *Kratovil v. Liberty Nw. Ins. Corp.*, 2008 MT 443, ¶¶ 21-24, 347 Mont. 521, 200 P.3d 71 (citing *Polk v. Planet Ins. Co.*, 287 Mont. 79, 951 P.2d 1015 (1997); *Schmill v. Liberty Nw. Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290; *Mont. State Fund v. Murray*, 2005 MT 97, 326 Mont. 516, 111 P.3d 210).

argues that he has a compensable OD under *Montana State Fund v. Grande*,[25] where the Supreme Court held that although Grande had preexisting arthritis, he had a compensable OD under the 2005-present WCA because his employment was the major contributing cause of the progression of his arthritis to the point he was unable to work; i.e., while Grande's employment was not the cause of the onset of his arthritis, his employment was the major contributing cause of the result. McMillan points to Dr. Loewen's opinion that his occupational exposure to Libby asbestos while working for P&S was the major contributing cause of the rapid acceleration of the progression of his ARD, which resulted in his inability to perform regular employment.

¶ 84 ALE counters that McMillan is incorrect on both theories of liability. ALE first argues that McMillan cannot establish a compensable OD claim under the 2005-present WCA by proving that his occupational exposure to Libby asbestos during his lifetime of employment was the major contributing cause of his ARD. Because this case involves "a single claimant with a single OD claim against a single insurer," and because proximate cause is not the liability standard, ALE asserts that to prevail in his OD claim under the 2011 WCA, McMillan most prove that his exposure to Libby asbestos while working for P&S was the major contributing cause of his ARD, which he equates to the cause-in-fact of his ARD. Thus, relying upon the standard for negligence claims set forth in *Busta v. Columbus Hospital Corp*., ALE argues that to prove he had an OD for which P&S is liable, McMillan must prove that he would not have developed ARD "but for" his employment at P&S.[26] ALE asserts that because McMillan was diagnosed with ARD in 2001, almost seven years before he began working for P&S, McMillan failed to prove that his employment at P&S was the cause of his ARD. ALE also points to the long latency period of ARD and argues that McMillan's exposure to Libby asbestos while working for P&S would not cause any harm to him until long after he filed his OD claim.

¶ 85 ALE also argues that McMillan does not have a compensable OD from his employment at P&S under *Grande*. With the Legislature's repeal of the Occupational Disease Act, including § 39-72-408, MCA (2003), and proximate cause no longer being the standard to prove an OD, ALE asserts that McMillan must prove more than that his employment at P&S contributed to or aggravated his ARD. ALE again points to the latency period of ARD and argues that McMillan's exposure to Libby asbestos while

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[25] 2012 MT 67, 364 Mont. 333, 274 P.3d 728.

[26] 276 Mont. 342, 371, 916 P.2d 122, 139 (1996) ("In those cases which do not involve issues of intervening cause, proof of causation is satisfied by proof that a party's conduct was a cause-in-fact of the damage alleged. As stated in *Prosser and Keeton on Torts* § 41, at 266 (5th ed. 1984), a party's conduct is a cause-in-fact of an event if 'the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.' ").

working for P&S from 2008 to 2011 was not the major contributing cause of the decrease in McMillan's pulmonary functioning in 2011 nor resulted in his inability to work.

¶ 86 Under established law, McMillan is correct that his ARD is an OD under both of his theories of liability.

¶ 87 First, although the 2005 Legislature changed the standard for determining whether a claimant has an OD from proximate cause, as set forth in § 39-72-408, MCA (2003), to major contributing cause, as set forth in § 39-71-407(12)(b) and (16), MCA (2011), the Legislature did not change the framework under which OD claims are analyzed. Under established Montana law, the first step is to determine whether McMillan had a compensable OD under §§ 39-71-116(23)(a) and -407(12) and (16), MCA (2011), which is determined by his lifetime of employment, and not a particular employer. If he had a compensable OD, the second step is to determine which employer is liable under § 39-71-407(13), MCA (2011), which sets forth the last injurious exposure rule.

¶ 88 This Court addressed the framework under which OD claims are analyzed under the 2005-present statutes in *Liberty Northwest Ins. Corp. v. Montana State Fund (In re Mitchell).*[27] In Issue Three, this Court addressed, "Whether the major contributing cause burden of proof in § 407 applies to a lifetime of employment or to employment with an individual employer." Liberty Northwest made essentially the same argument ALE makes in this case; i.e., Liberty Northwest argued that under the 2005-present version of §§ 39-71-116(23)(a) and -407, MCA, an employer is liable for an OD only if the claimant's exposure while working for that employer was the major contributing cause of the claimant's disease and was the last injurious exposure.[28] This Court rejected Liberty Northwest's argument, explaining that under the plain language of these statutes, the major contributing cause standard applies not to any specific employer but rather to the employee's lifetime of employment, which is compared to non-occupational contributing causes.[29] This Court explained that the Legislature intentionally used the word "employment" to set the standard to determine if the claimant has an OD and the word "employer" to set the standard to determine who is liable for an OD:

> The plain meaning of § 39-71-407(9), MCA [(2005)], contains no requirement that the 'employment,' which is the major contributing cause of a claimant's OD, derive from a particular employer. Rather, the statute calls for a comparison between occupational and non-occupational factors as part of the determination as to whether the OD is considered to "arise out

[27] 2008 MTWCC 54.

[28] *In re Mitchell*, 2008 MTWCC 54, ¶¶ 38-39.

[29] *In re Mitchell*, 2008 MTWCC 54, ¶ 39.

> of ***employment*** or be contracted in the course and scope of ***employment***." If such a determination is made, then the analysis moves forward to § 39-71-407(10), MCA [(2005)], to assign liability to the ***employer*** of last injurious exposure. If I were to accept Liberty Northwest's interpretation, a worker who unquestionably had an OD may not be entitled to benefits if the ***employer*** of last injurious exposure is not also the ***employment*** that was the major contributing cause of the OD. Nothing in the statutory framework indicates that the Legislature intended such a result.[30]

¶ 89 On appeal, the Montana Supreme Court approved of this approach. The Supreme Court noted that this Court first "considered whether Mitchell was suffering from an OD," as defined in § 39-71-116(20), MCA (2005), and under the major contributing cause standard in § 39-71-407(9)(a) and (b), MCA (2005). The Supreme Court then explained that under the major contributing cause standard and the objective medical evidence, this Court found that "Mitchell suffered from an OD whose major contributing cause was Mitchell's ***lifetime of heavy-labor employment***."[31] The Supreme Court noted that this Court "then turned to the question of which employer was liable for Mitchell's low-back condition" under the last injurious exposure rule, codified at § 39-71-407(10), MCA (2005).[32]

¶ 90 Under this framework, and the standard, McMillan met his burden of proving that his ARD was an OD. McMillan's ARD meets the definition of OD in § 39-71-116(23)(a), MCA, because it was caused by exposure to Libby asbestos over many work shifts and days. McMillan met his burden of proving that his ARD was substantiated by objective medical findings, including x-rays and CT scans, thereby satisfying § 39-71-407(12)(a), MCA. McMillan met his burden of proving that his lifetime of employment was the major

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[30] *In re Mitchell*, 2008 MTWCC 54, ¶ 39 (emphasis in original) (citation omitted); *see also Baeth v. Liberty Nw. Ins. Corp.*, 2014 MTWCC 10, ¶¶ 72-83 (first ruling that claimant had an OD under § 39-72-408, MCA (1993), and then determining which employer was liable for the OD under § 39-72-303, MCA (1993)); *Wommack v. Nat'l Farmers Union Prop. & Cas. Co.*, 2017 MTWCC 8, ¶ 82 (citations omitted) (rejecting the last insurer's argument that it was not liable for the claimant's OD because he did not prove that his exposure while it was the insurer at risk was the "major contributing cause" of his OD because "under § 39-72-408, MCA (1997) . . . [the claimant] has established a direct causal connection between the conditions under which his work was performed and his OD. Indeed, the parties do not dispute that he has an OD. Once the claimant has proven that he has an OD, the standard to apply to determine which insurer is liable is the potentially causal standard, as set forth in *In re Mitchell*.").

[31] *Liberty Nw. Ins. Corp. v. Montana State Fund (In re Mitchell)*, 2009 MT 386, ¶ 9, 353 Mont. 299, 219 P.3d 1267 (emphasis added).

[32] *In re Mitchell*, 2009 MT 386, ¶ 10; *see also Kratovil*, ¶¶ 20, 29-30 (holding that under the 2003 WCA and ODA, the first step was to determine if claimant's 30 years of employment as a plumber/pipefitter resulted in an OD under the proximate cause standard in § 39-72-408, MCA (2003), and because "occupational disease frequently manifests over several years and possibly several employers," the second step was to determine which employer was liable under the last injurious exposure rule, then codified at § 39-72-303, MCA (2003)); *Johnson v. Liberty Nw. Ins. Corp.*, 2009 MTWCC 20 (ruling that claimant had an OD as a result of his employment under § 39-72-408, MCA (2001), and then determining which of claimant's employers was liable under § 39-72-303(1), MCA (2001)).

contributing cause of his ARD through the testimony of Dr. Spear and Dr. Loewen, thereby satisfying § 39-71-407(12)(b) and (16), MCA. Thus, McMillan's ARD was an OD.

¶ 91 There is no merit to ALE's argument that the standard for proving an OD under §§ 39-71-116(23)(a) and -407(12) and (16), MCA, is different because McMillan made a claim only from his employment at P&S. The standard for determining whether a condition is an OD — which is separate from the standard for determining which employer is liable for a OD in cases in which the claimant was exposed to the hazards of the disease at multiple employers — is set by the plain language of these statutes and remains the same regardless of whether the claimant names one insurer or two or more insurers; i.e., the first step is to determine whether the claimant has an OD under the major contributing cause standard and, if so, the second step is to determine which employer and insurer is liable.

¶ 92 Second, McMillan has a compensable OD under *Grande*. Like others in his family, Grande suffered from rheumatoid arthritis and osteoarthritis.[33] The physicians testified that the cause of these diseases is unknown, but that there is likely a genetic component.[34] However, Grande's treating physician opined that his lifetime of work as a truck driver, which required constant use of his hands and repetitive, firm gripping and twisting, aggravated and accelerated the progression of his arthritis.[35] She also opined that Grande's job duties, when compared to other contributing causes, were the leading cause of the worsening and accelerating of his arthritis because he repetitively used his hands at work more than in his activities of daily living.[36] Grande's arthritis progressed to the point that he could no longer work as a truck driver.[37] This Court ruled that Grande suffered from a compensable OD.[38]

¶ 93 On appeal, State Fund argued that this Court erroneously used the pre-2005 proximate cause standard for determining the compensability of an OD when the claimant has a preexisting condition, which, as noted above, is "whether occupational factors significantly aggravated a pre-existing condition, not whether occupational factors played the major or most significant role in causing the claimant's resulting disease."[39] State Fund argued that under the 2005 amendments, the claimant's employment must be the major contributing cause of the onset of the condition and that a work-related aggravation

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[33] *Grande*, ¶ 12.

[34] *Id.*

[35] *Grande*, ¶¶ 8, 9, 16, 41.

[36] *Grande*, ¶ 42.

[37] *Grande*, ¶¶ 14, 15.

[38] *Grande*, ¶ 18.

[39] *Grande*, ¶ 31 (citing *Polk*, 287 Mont. at 85, 951 P.2d at 1018).

of a personal health condition is not compensable unless the aggravation is due to a compensable injury or occupational disease.[40] State Fund argued that "the post-2005 occupational disease statutes require[] that the damage or harm arise out of or be contracted in the course and scope of the claimant's employment which in turn requires the workplace events to be the major contributing cause of the claimant's condition." Since the physicians agreed that Grande's work did not cause the onset of his arthritis, State Fund argued that he did not have a compensable OD.[41]

¶ 94 Grande argued that where the harm complained of is evidenced by objective medical findings and the job duties were the leading cause contributing to that harm, the claimant has a compensable OD regardless of whether the harm is a new condition or the aggravation of a pre-existing condition.[42]

¶ 95 The Supreme Court agreed with Grande. The Supreme Court explained that under the plain language of the 2005-present WCA, a claimant can have a compensable OD even if the claimant has a preexisting condition. The Supreme Court explained that by its definition of "major contributing cause," the Legislature clearly expressed "that *all* contributing factors be considered in determining whether a condition qualifies as an occupational disease."[43] The Supreme Court explained that a preexisting condition and a preexisting disposition to the disease are contributing factors to be considered.[44] The Supreme Court also noted that the Legislature kept the last injurious exposure rule, which provides that the only employer liable for an OD "is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease."[45] The Court explained, "This language contemplates that an employer may be liable for an occupational disease even if the employee had the disease prior to working for that employer."[46]

¶ 96 The Supreme Court also explained that because the "definition of 'major contributing cause' is tied to the *result*," a claimant with a preexisting disease has a compensable OD when his work is the leading cause of the disease's progression.[47] The Court explained:

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[40] *Grande*, ¶ 21.

[41] *Grande*, ¶ 32.

[42] *Grande*, ¶ 22.

[43] *Grande*, ¶ 35 (emphasis in original) (citing § 39-71-407(13), MCA (2009)).

[44] *Grande*, ¶¶ 34-35.

[45] *Grande*, ¶ 35 (citing § 39-71-407(10), MCA (2009)).

[46] *Grande*, ¶ 35.

[47] *Grande*, ¶ 36 (emphasis in original).

> Section 39-71-407(13), MCA (2009), does not require the job to be the leading cause of the *onset* of the disease, but the leading cause contributing to the *result*, which in this case is the disease's progression to the point where Grande is unable to work.
>
> An employer cannot be required to take an employee as he finds him, while at the same time be allowed to ignore the impact of work-related factors on preexisting conditions. It is only by finding that the statute requires the consideration of preexisting conditions on the development of occupational diseases that courts can give meaning to the statutory requirement to determine the "major contributing cause" of the claimant's condition.[48]

The Supreme Court also explained:

> It is unlikely that the only contributing factor to an occupational disease will be the employee's job duties, and that 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. Moreover, § 39-71-407(13), MCA, requires that the "leading cause" must be compared to "all other contributing causes," and a preexisting condition certainly falls within the ambit of "all other contributing causes."[49]

¶ 97 The Supreme Court also rejected State Fund's argument that "leading cause" means greater than 50%. Following this Court's reasoning, the Supreme Court stated: "The WCC pointed out that just as a horse can 'lead' a race by a nose, 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 multiple contributing causes."[50]

¶ 98 Relying upon Grande's treating physician's opinion that Grande's job duties were the leading cause of the worsening and accelerating of his arthritis, when compared to the other possible cause, which was his activities of daily living, the Supreme Court held that Grande's arthritis was a compensable OD.[51]

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[48] *Grande*, ¶ 36-37 (emphasis in original).

[49] *Grande*, ¶ 39.

[50] *Grande*, ¶ 40.

[51] *Grande*, ¶ 42.

¶ 99 Under *Grande*, McMillan had an OD caused by his work at P&S. Based on Dr. Spear's report and testimony and Dr. Loewen's report and testimony, this Court has found that McMillan's severe exposure to Libby asbestos while working for P&S was the major contributing cause of the rapid progression of his ARD, as shown by his "alarming loss in lung function" between 2010 and 2015, as shown by his PFTs which are objective medical findings, and of McMillan's resulting inability to work.

¶ 100 ALE, however, argues that *Grande* is distinguishable. ALE points to the latency period of ARD and maintains that while medical science supports the position that repetitive work can aggravate arthritis, medical science does not support the position that additional exposure to asbestos can aggravate ARD or accelerate its progression within a year and a half. ALE claims, "There's still a latency period between the exposure and the physical change to the lungs in an ARD case that constitutes the occupational disease and the aggravation." ALE also argues, "And in Mr. McMillan's case, it was 19 months between when he worked for P&S while insured by ALE before he became unable to work because of ARD. And that disability is not a result of 19 months of employment with P&S while ALE was at risk."

¶ 101 However, ALE does not understand the medical science of Libby asbestos exposure. Neither Dr. Loewen nor Dr. Black stated that latency means that a person who inhales Libby asbestos does not suffer harm until a later date; rather, they explained that a person's lungs are immediately harmed when the person inhales Libby asbestos fibers, as the asbestos fibers lodge in the lungs, which irritates the lungs and starts an inflammatory and scarring process. They explained that this harm cannot be seen on x-ray or CT scan until a later date, which is the latency period. Dr. Loewen explained, "During the latency period, microscopic asbestos fibers are working at a microscopic level, until scarring becomes detectible on chest x-ray or CT." Dr. Loewen also testified that McMillan's exposure to Libby asbestos while working for P&S fueled the rapid acceleration of his ARD, resulting in his inability to work. In short, McMillan met his burden of proving that exposure to Libby asbestos while working for P&S harmed him and was the major contributing cause of the rapid acceleration of the progression of his disease, to the point that McMillan was unable to work.

¶ 102 In sum, McMillan's ARD was an OD.

Issue Three: If McMillan sustained an occupational disease, is Associated Loggers Exchange liable for it?

¶ 103 As set forth above, because McMillan had an OD, the second step of the analysis is to determine whether P&S is the employer liable for it and, by extension, whether ALE is the insurer liable, under the last injurious exposure rule. This rule is codified at § 39-71-407(13), MCA, which states:

> 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.[52]

¶ 104 In *In re Mitchell*, the Supreme Court addressed the standard to be applied in cases in which the issue is the initial liability for an OD claim for a claimant who has worked for successive employers, and was arguably exposed to the hazard of the OD at each employment.[53] The Supreme Court held that the standard to apply is the "potentially causal" standard.[54] The Supreme Court explained:

> Under this approach, the claimant who has sustained an OD and was arguably exposed to the hazard of an OD among two or more employers is not required to prove the degree to which working conditions with each given employer have actually caused the OD in order to attribute initial liability. Instead, the claimant must present objective medical evidence demonstrating that he has an OD and that the working conditions during the employment at which the last injurious exposure was alleged to occur, were the type and kind of conditions which could have caused the OD.[55]

¶ 105 In *In re Mitchell*, Mitchell worked heavy labor for his entire life, which was the major contributing cause of his low-back condition.[56] For two months in 2005, he worked heavy labor for Industrial Services, Inc.[57] Because his back pain worsened and he was unable to work, he filed an OD claim, asserting that either State Fund, which insured the employer for which he worked before Industrial Services, or Liberty Northwest, which insured Industrial Services, was liable.[58] Applying the potentially causal standard, the Supreme Court held that Liberty Northwest was liable even though he worked for Industrial Services for only two months.[59] The Supreme Court reasoned:

> Because Mitchell demonstrated that he had an OD and that the working conditions at Industrial were the same type and kind of heavy-duty labor

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

[53] *In re Mitchell*, 2009 MT 386, ¶¶ 19, 24.

[54] *In re Mitchell*, 2009 MT 386, ¶¶ 17-18, 23-24.

[55] *In re Mitchell*, 2009 MT 386, ¶ 24.

[56] *In re Mitchell,* 2009 MT 386, ¶¶ 2, 5, 6, 7.

[57] *In re Mitchell,* 2009 MT 386, ¶ 6.

[58] *In re Mitchell,* 2009 MT 386, ¶¶ 2, 6.

[59] *In re Mitchell*, 2009 MT 386, ¶ 25.

> which led to the development and diagnosis of his OD, this exposure provided a basis upon which liability could be assessed against Liberty pursuant to § 39-71-407(10), MCA (2005). . . . The objective medical evidence established that while Mitchell's work with Industrial was not the major contributing cause of his OD, it was of the same type and kind which led to the development and eventual diagnosis of that OD. . . . Under our application of the last injurious exposure rule, this evidence is sufficient to support the WCC's determination that Mitchell's last injurious exposure to the hazard of the OD occurred during his employment with Industrial.[60]

¶ 106 Under the potentially causal standard, McMillan is correct that P&S is the employer liable for his OD because McMillan was last exposed to the hazard of ARD when he worked for P&S. McMillan's exposure to Libby asbestos while working for P&S was the same type and kind of exposure that caused his ARD, namely exposure to airborne Libby asbestos. Because ALE insured P&S for the last year and a half of McMillan's employment with P&S, ALE is the insurer liable for McMillan's OD.

¶ 107 ALE makes eight arguments in support of its claim that it is not the insurer liable for McMillan's OD under § 39-71-407(3), MCA. However, none have merit.

¶ 108 First, ALE argues that this Court cannot do a last injurious exposure analysis under *In re Mitchell* because McMillan made his claim against only P&S. However, a claimant need not name multiple employers to invoke the last injurious exposure rule. To be sure, a claimant names only the last employer at his own peril, as this Court could find that he was not exposed to the hazard of the disease while working for that employer. However, in cases where the claimant is confident that he was last exposed to the hazard of the disease while working for a particular employer, such as this case, there is no reason to force him to bring a frivolous claim against prior employers simply to invoke the last injurious exposure rule.

¶ 109 Second, ALE argues that because McMillan was diagnosed with ARD seven years before he started working for P&S, P&S cannot be the employer liable for his OD under

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[60] *In re Mitchell*, 2009 MT 386, ¶ 25; *see also Banco*, ¶ 13 (emphasis in original) (Under the "potentially causal" standard "the issue to be reviewed is not whether contribution to the OD is established, but whether [the claimant's] working ***conditions*** at [her last employer] were of the same type and kind after she left [her other employment]."); 9 Authur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 153.02[7][a] at 153-19-20 (2004) (footnotes omitted) ("Traditionally, courts applying the last injurious exposure rule have not gone on past the original finding of some exposure to weigh the relative amount or duration of exposure under various carriers and employers. As long as there was some exposure of a kind that could have caused the disease, the last insurer at risk is liable for all disability from that disease."); *Johnson*, ¶ 102 (quoting *Larson's*, § 153.02[7][a] at 153-19-20 (2004) (emphasis in original): "before the last-injurious-exposure rule can be applied, there must have been *some* exposure of a kind contributing to the condition"). Although this Court decided *Johnson* prior to the Montana Supreme Court's decision in *In re Mitchell*, *Johnson* is consistent with the latter decision.

the last injurious exposure rule. However, ALE's argument is without merit under Montana law. In *Grande*, the Montana Supreme Court explained that the language of § 39-71-407(13), MCA,[61] "contemplates that an employer may be liable for an occupational disease even if the employee had the disease prior to working for that employer."[62]

¶ 110 Third, ALE again points to latency and argues that McMillan's exposure while working for P&S was not injurious. ALE explains: "It's not last exposure. It's last injurious exposure." However, as explained above, latency does not mean that McMillan was not harmed when he was exposed to Libby asbestos while working for P&S. Here, McMillan was harmed by his exposure to Libby asbestos while working for P&S. Indeed, relying on evidence from Dr. Whitehouse, a pulmonologist with a long history of treating Libby asbestos patients, who has opined that "a person's lungs are immediately injured by the inhalation of asbestos fibers" and that "additional asbestos exposure is damaging to the lungs '[b]ecause the more you get, the more fiber load you have, and the worse the disease,' " this Court has previously rejected the same latency argument that ALE now makes.[63]

¶ 111 Moreover, in *In re Mitchell*, the Montana Supreme Court rejected a last-injurious-exposure decision from the Minnesota Supreme Court, which considered the " 'lag time' of five to ten years between exposure to asbestos and the development of asbestosis."[64] Instead, the Montana Supreme Court relied upon decisions that have rejected the latency argument. For example, in *Wood v. Harry Harmon Insulation*,[65] — a case on which the Montana Supreme Court relied in *In re Mitchell* — Wood was exposed to asbestos throughout his career in insulation, which lasted from 1949 through 1973.[66] He was diagnosed with mesothelioma 11 years after he last worked for Harry Harmon Insulation.[67] Harry Harmon Insulation denied that Wood's exposure to asbestos while he worked there was "injurious" because the latency period for mesothelioma was 15-45 years, i.e., it

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[61] § 39-71-407(10), MCA, in the 2009 WCA, which was interpreted in *Grande*.

[62] *Grande*, ¶ 35; *see also Monroe*, ¶¶ 36-45 (holding that second employer was liable for claimant's OD even though he was first diagnosed with his OD years before he started working for second employer).

[63] *Johnson*, ¶¶ 73, 105; *Fleming v. Int'l Paper Co.,* 2005 MTWCC 34, ¶¶ 3d, 38-45; *Young v. Liberty Nw. Ins. Corp*., 2005 MTWCC 37, ¶ 3 (rejecting insurer's latency argument because "the period of the claimant's alleged exposure to asbestos while working for Stimson is not so insignificant as to require dismissal of his petition under any of the last injurious exposure standards identified in this Court's decision in *Fleming*"); *Schull v. Int'l Paper Co.*, 2005 MTWCC 36, ¶3.

[64] *In re Mitchell*, 2009 MT 386, ¶¶ 20, 24 (rejecting the rule announced in *Busse v. Quality Insulation*, 322 N.W.2d 206 (Minn. 1982)).

[65] 511 So.2d 690 (Fla. Dist. Ct. App. 1987).

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

[67] *Id*.

generally takes that long following exposure for the disease to develop.[68] Thus, it argued that Wood's injurious exposure occurred at one of his employments 15-45 years before he was diagnosed, though its experts could not pinpoint which exposure caused the disease.[69] The court rejected this argument, holding that the purpose of the last injurious exposure rule is to:

> fix liability on employers in such a way as to render it unnecessary in cases of occupational diseases to make the nearly impossible determination as to which employment or employments contributed in what measure to the disease. This purpose is effected by attaching liability to the employer in whose employment the claimant was last injuriously exposed to the hazards of the occupational disease.[70]

The court also explained "so long as the exposure in question, independent of other causes, could over extended time lead to development of the disease, then that exposure is 'injurious.' "[71] Thus, the latency period of ARD is irrelevant to a last injurious exposure analysis.

¶ 112 Fourth, ALE argues that the opinions of Dr. Loewen, Dr. Black, and Dr. Spear are insufficient to prove that it is the insurer liable for McMillan's ARD because they looked at the entire period of time that McMillan worked for P&S, and not just for the final 19 months while ALE was the insurer at risk. However, under § 39-71-407(13), MCA, the issue is which employer is liable. Here, that is P&S. ALE cites no authority under which the insurer which insured P&S during the first 22 months of McMillan's employment would be liable. And, McMillan's exposure during his last 19 months of employment at P&S was the same type and kind of exposure that could cause ARD. Thus, ALE is liable.

¶ 113 Fifth, ALE points to *In re Abfalder*, a case in which the issue was which of two insurers was liable for Abfalder's OD.[72] Citing its decision in *Caekaert v. State Compensation Mutual Ins. Fund*,[73] the Supreme Court explained: "When an employee has been disabled due to an occupational disease, and suffers a second injury or

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

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

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

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

[72] 2003 MT 180, ¶ 1, 316 Mont. 415, 75 P.3d 1246.

[73] 268 Mont. 105, 885 P.2d 495 (1994).

disability, the first insurer is liable for the claim only if the disability or injury is a recurrence of the initial disability or injury."[74] The first insurer argued that when Abfalder reached maximum medical improvement (MMI) for his degenerative disc disease caused by repetitive lifting, his OD ended and that a new OD began thereafter, when the second insurer was at risk.[75] On appeal, the Supreme Court affirmed this Court's conclusion that the first insurer was liable because, "the disease was a continuous process involving repetitive trauma" and because Abfalder "did not suffer from a new disease subsequent to healing from his 1994 injury."[76]

¶ 114 ALE maintains that this case falls under *In re Abfalder*. ALE points out that McMillan was at MMI for his ARD when he was diagnosed in 2001.[77] Since ARD is a continuous process caused by repetitive exposure, ALE argues McMillan's ARD was an OD in 2001 and that he did not thereafter develop a new OD for which it could be liable. ALE infers that whatever insurer insured McMillan's employer in 2001 is the only insurer that could be liable for his ARD.

¶ 115 However, in *In re Mitchell*, the Supreme Court explained that there is a different standard for, on the one hand, cases in which the issue is which of two insurers is liable for an OD for which liability has been previously determined and, on the other hand, cases in which the issue is the initial assignment of liability for an OD. The court explained:

> In cases where an OD has already been diagnosed, liability for the OD has been determined, and the question is whether a recurrence of the OD condition is attributable to the original employer or is attributable to a second employer based on an intervening exposure to the hazard of the OD, the *Caekaert* and *Lanes* [*v. Montana State Fund*[78]] approach will continue to apply.[79]

However, the Supreme Court made it clear that the potentially causal standard was the standard to apply when a claimant had worked for successive employers, and was

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[74] *In re Abfalder*, ¶ 12.

[75] *In re Abfalder*, ¶¶ 17, 18.

[76] *Id.*

[77] *Fellenberg v. Transp. Ins. Co*., 2004 MTWCC 29, ¶ 43 ("He also has reached MMI and indeed was at MMI at the time of his initial diagnosis in 1985 since his disease is a degenerative one and he will never get better no matter what medical treatment is afforded him."); *see also Baeth*, ¶ 90 (relying on *Fellenberg* and ruling that Libby asbestos claimant was at MMI on the date of diagnosis).

[78] 2008 MT 306, 346 Mont. 10, 192 P.3d 1145.

[79] *In re Mitchell*, 2009 MT 386, ¶ 24.

arguably exposed to the hazard of the OD during each employment, and the issue is initial liability for the OD claim.[80]

¶ 116 In *Monroe*, this Court addressed a nearly identical situation to this case. This Court ruled that the potentially causal standard applied even though Monroe had been diagnosed with ARD "years before he was last injuriously exposed" because, "although [Monroe] had made other ARD claims, there was no prior OD claim for which liability had either been accepted or otherwise determined."[81]

¶ 117 Likewise, because McMillan had no other OD claim for his ARD for which liability had been determined, the potentially causal standard applies in this case and neither *Caekaert*, *In re Abfalder*, nor *Lanes* has any application to this case.

¶ 118 Sixth, ALE cites this Court's decision in *Wommack v. National Farmers Union Property & Casualty Co.*,[82] and asserts that it supports its position "that a work comp [sic] insurer can only be liable for what has occurred when it was at risk." *Wommack*, however, does not support ALE; in fact, it is additional authority supporting McMillan's case.

¶ 119 Wommack was exposed to asbestos during his 30 years of employment at the Cenex refinery, a period in which Cenex had four workers' compensation insurers.[83] After Wommack retired, Cenex became part of CHS, Inc., which was a self-insured employer.[84] Wommack brought claims against the four insurers who insured Cenex when he worked there and a claim against CHS, Inc., even though he never worked for CHS, Inc. Relying upon *Nelson v. Cenex, Inc.*,[85] in which the Supreme Court stated that liability for an OD claim "should correspond with the period in which the injurious exposure occurred,"[86] this Court ruled that CHS, Inc. could not be liable for Wommack's OD under the last injurious exposure rule because Wommack never worked for CHS when it was a self-insured employer; i.e., Wommack was not exposed to any asbestos as an employee when CHS was the insurer at risk.[87] This Court applied the last injurious exposure rule, and ruled

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[80] *In re Mitchell*, 2009 MT 386, ¶¶ 19, 24.

[81] *Monroe*, ¶ 44.

[82] 2017 MTWCC 8.

[83] *Wommack*, ¶¶ 6-24, 52.

[84] *Wommack*, ¶¶ 26, 27.

[85] 2008 MT 108, 342 Mont. 371, 181 P.3d 619.

[86] *Nelson*, ¶ 32.

[87] *Wommack*, ¶ 69.

that Liberty Mutual Fire Insurance was liable for Wommack's OD because it was the insurer at risk during the last period when Wommack was exposed to asbestos.[88]

¶ 120 ALE asserts that under *Wommack*, "ALE's liability should correspond to when it was at risk, August 1, 2008, through December 17, 2011." This Court agrees, which is why ALE is liable for McMillan's OD. In short, ALE's liability directly corresponds with the period in which McMillan's last injurious exposure to Libby asbestos occurred. Thus, like Liberty Mutual Fire Insurance in *Wommack*, ALE is liable because McMillan was last injuriously exposed to Libby asbestos while working for P&S while ALE was the insurer at risk.

¶ 121 Seventh, ALE asserts that because its agreement insuring P&S is contractual, it is only liable for ODs "that occur . . . during the period of the contract." However, the Montana Supreme Court has explained, "the workers' compensation statutes in effect when a worker is injured establish the contractual rights and debts of the parties."[89] Here, the statutes in effect provide that an OD is to be determined by the claimant's lifetime of employment and that the employer liable for an OD is the employer at which the claimant was last injuriously exposed to the hazard of the disease. Thus, under the contract, ALE is liable because it was the insurer at risk for P&S during McMillan's last injurious exposure to Libby asbestos.

¶ 122 Finally, ALE also asserts, as an affirmative defense, that there was a "superseding intervening cause."[90] However, ALE did not introduce any evidence indicating that any exposure McMillan had to Libby asbestos after he stopped working for P&S was sufficient to relieve ALE of liability.

¶ 123 In sum, because McMillan was last injuriously exposed to Libby asbestos during his employment with P&S, P&S is the employer that is liable under § 39-71-407(13), MCA. ALE, as P&S's insurer during the last year and a half of McMillan's employment with P&S, is liable for his OD.

Issue Four: If Associated Loggers Exchange is liable for McMillan's occupational disease, is McMillan entitled to medical benefits and an impairment award?

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[88] *Wommack*, ¶ 80.

[89] *Wiard v. Liberty Nw. Ins. Corp.*, 2003 MT 295, ¶ 21, 318 Mont. 132, 79 P.3d 281 (citation omitted); *see also* § 39-71-2202, MCA ("Every policy for insurance written under compensation plan No. 2 shall be considered to be made subject to the provisions of this chapter.").

[90] Pretrial Order, Docket Item No. 35, at 5.

¶ 124 Under § 39-71-704, MCA, an injured worker is entitled to reasonable primary medical services for conditions that are the result of an OD.

¶ 125 Pursuant to §§ 39-71-710, -737 MCA, "permanently totally disabled claimants are legally entitled to an impairment award for the loss of physical function of their bod[ies] occasioned by a work-related injury."[91]

¶ 126 While ALE denied liability for McMillan's claim in its entirety, it has not disputed any particular medical bills. Furthermore, the parties have stipulated that McMillan has a 40% impairment rating based on his ARD.

¶ 127 Therefore, since this Court has ruled that ALE is liable for McMillan's OD, McMillan is entitled to his medical benefits and an impairment award.

Issue Five: If Associated Loggers Exchange is liable for McMillan's occupational disease, is McMillan entitled to permanent total disability benefits pursuant to § 39-71-702, MCA?

¶ 128 Under § 39-71-702(1), MCA, a worker is eligible for permanent total disability (PTD) benefits when he meets the definition of PTD, as set forth in § 39-71-116(28), MCA. Section 39-71-116(28), MCA, provides:

> "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

¶ 129 As set forth above, McMillan left his employment at P&S in January 2012 due to his inability to perform his job duties because of his ARD. This Court has found that McMillan did not have a reasonable prospect of physically performing regular employment. Accordingly, McMillan was permanently totally disabled at that time, and ALE is liable for PTD benefits.

Issue Six: Is McMillan entitled to attorney fees, costs, and/or a penalty?

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[91] *Rausch v. State Comp. Ins. Fund*, 2002 MT 203, ¶ 30, 311 Mont. 210, 54 P.3d 25.

¶ 130 As the prevailing party, McMillan is entitled to costs.[92]

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

¶ 132 McMillan asserts that ALE's failure to apply the plain language of § 39-71-407(12) and (16), MCA, under which the determination of whether a claimant has an OD is based on his lifetime of employment, and not for a particular employer, was unreasonable, as that is an issue of law that has long been settled. McMillan also argues that ALE's reliance on latency to deny liability under the last injurious exposure rule was unreasonable because this Court has rejected that argument in several cases. McMillan also argues that after he obtained his experts' opinions in the fall of 2015, ALE did not have a factual basis to deny liability for McMillan's claim.

¶ 133 ALE asserts that its initial denial was reasonable b4ecause Dr. Black's records did not state that McMillan's employment was the major contributing cause of his ARD, nor that his employment with P&S contributed to his ARD. ALE asserts that its argument that the liability standard is cause-in-fact is correct. ALE acknowledges that this Court has previously rejected its latency argument in *Johnson v. Liberty Northwest Ins. Corp.* and *Fleming v. International Paper Co.* but asserts that this Court did not understand the medical science.

¶ 134 Here, this Court is troubled by ALE's failure to apply the framework under which OD claims are analyzed, established by the plain language of §§ 39-71-116(23)(a), -407(12), (13) and (16), MCA, and by this Court's and the Montana Supreme Court's decisions in *In re Mitchell*. This Court is also troubled by ALE's failure to apply the liability standard for OD claims, as set forth by the plain language of § 39-71-407(12) and (16), MCA, and the Supreme Court's decision in *Grande*. Moreover, this Court agrees with McMillan that ALE recycled arguments that this Court has previously rejected, including its latency argument, an argument based on its failure to understand the medical science. However, this Court does not find that ALE's initial denial of liability nor its ongoing denial of liability was unreasonable. Given Dale Riggles' testimony, ALE's statute of limitations defense was reasonable. Since that defense was potentially dispositive of McMillan's

[92] § 39-71-611, MCA.

claim, ALE's denial of liability was reasonable; thus, McMillan is not entitled to attorney fees nor a penalty under the applicable statutes.

JUDGMENT

¶ 135 McMillan timely filed his OD claim.

¶ 136 McMillan's ARD was an OD.

¶ 137 Associated Loggers Exchange is liable for McMillan's OD.

¶ 138 McMillan is entitled to medical benefits and an impairment award.

¶ 139 McMillan is entitled to permanent total disability benefits pursuant to § 39-71-702, MCA.

¶ 140 McMillan is entitled to costs pursuant to § 39-71-611, MCA.

¶ 141 McMillan is not entitled to attorney fees.

¶ 142 McMillan is not entitled to a penalty.

DATED this 21st day of March, 2019.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Laurie Wallace
Ethan Welder
Dustin Leftridge
Jon L. Heberling
Larry W. Jones

Submitted: August 2, 2017