IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 5

WCC No. 2014-3378

DANENE McNAMARA

Petitioner

vs.

MHA WORKERS' COMPENSATION RECIPROCAL

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner claims that a 2013 injury aggravated her preexisting knee condition, resulting in her need for a total knee replacement. In the alternative, she claims her need for a total knee replacement was caused by an occupational disease resulting from years working as a CNA.

Held: Respondent is not liable for Petitioner's total knee replacement. Petitioner's treating physician testified that she did not require any treatment for her 2013 injury and that her work was not the leading cause of her knee condition and need for a total knee replacement. Instead, the treating physician opined the surgery was the inevitable consequence of an earlier injury.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. The medical condition for which compensation is sought must be caused by the industrial accident. Where claimant's treating physician testified that her need for a total knee replacement was a foregone conclusion prior to her industrial injury, and that she would have required the surgery regardless of her injury, claimant failed to prove her surgery was compensable.

Causation: Injury. The medical condition for which compensation is sought must be caused by the industrial accident. Where claimant's treating physician testified that her need for a total knee replacement was a foregone conclusion prior to her industrial injury, and that she would have

required the surgery regardless of her injury, claimant failed to prove her surgery was compensable.

Benefits: Medical Benefits: Surgery. Where claimant's treating physician testified that her need for a total knee replacement was a foregone conclusion prior to her industrial injury, and that she would have required the surgery regardless of her injury, claimant failed to prove her surgery was compensable.

Causation: Medical Condition. Although an aggravation of a preexisting condition is an injury, claimant's industrial injury was a minor aggravation of her underlying condition and did not cause her need for surgery, since her treating surgeon testified that her injury only made her condition "a little worse," and no treatment was "directly necessary" for it.

Injury and Accident: Subsequent Injury. Although an aggravation of a preexisting condition is an injury, claimant's industrial injury was a minor aggravation of her underlying condition and did not cause her need for surgery, since her treating surgeon testified that her injury only made her condition "a little worse," and no treatment was "directly necessary" for it.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Claimant's treating physician testified that her work may have accelerated her degenerative knee condition "a little bit," but she would have required a knee replacement regardless, and an old injury was the leading cause of her need for surgery when compared to all other contributing causes, including her occupation.

Occupational Disease: Causation. Claimant's treating physician testified that her work may have accelerated her degenerative knee condition "a little bit," but she would have required a knee replacement regardless, and an old injury was the leading cause of her need for surgery when compared to all other contributing causes, including her occupation.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Reliance on cases decided under the pre-2005 standard for determining the compensability of an occupational disease is misplaced, since they did not require a claimant to satisfy the "leading cause" test.

Benefits: Occupational Diseases. Reliance on cases decided under the

pre-2005 standard for determining the compensability of an occupational disease is misplaced, since they did not require a claimant to satisfy the "leading cause" test.

¶ 1 The trial in this matter began on January 28, 2015, at the Montana Workers' Compensation Court. Howard Toole represented Petitioner Danene McNamara, who appeared in person. G. Andrew Adamek represented Respondent/Insurer MHA Workers' Compensation Reciprocal (MHA). Jim Putman, claims adjuster for Brentwood Services Administrators, Inc., was also present. On July 13, 2015, following the conclusion of the deposition of Lawrence J. Iwersen, MD, the parties gave closing statements via teleconference and this Court deemed this matter submitted.

¶ 2 Exhibits: This Court admitted Exhibits 1, 2, 3, and 7 without objection. This Court overruled MHA's relevancy objections to Exhibits 4 through 6 and admitted the exhibits.

¶ 3 Witnesses and Depositions: This Court admitted the deposition of McNamara and the post-trial deposition of Dr. Iwersen and considers the depositions part of the record. McNamara and Putman were sworn and testified.

¶ 4 Issues Presented: This Court restates the following two issues from the Pretrial Order:

> Issue One: Is MHA liable for a total knee replacement as a result of McNamara's February 10, 2013, industrial injury?
>
> Issue Two: Does McNamara have a compensable occupational disease?

McNamara withdrew her constitutional challenge to § 39-71-407(12)(b), MCA. Consequently, the Court will not address that contention.

FINDINGS OF FACT

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

¶ 6 In 1997, McNamara injured her right knee. Dr. Iwersen diagnosed a lateral meniscus tear, a partially torn anterior cruciate ligament (ACL), and chondromalacia, which Dr. Iwersen explained meant the cartilage was worn. Dr. Iwersen testified that chondromalacia and degenerative arthritis are "more or less the same thing." McNamara had chondromalacia of the cartilage on the end of her femur, on the top of her tibia, and on the underside of her patella. McNamara's knee had Grade III chondromalacia, meaning the cartilage was thin and actively deteriorating.

¶ 7 Dr. Iwersen performed arthroscopic surgery in which he fixed McNamara's meniscus tear and smoothed out the cartilage so there was less irritation in her knee. However, Dr. Iwersen did not repair McNamara's ACL because Dr. Iwersen did not think it was necessary given her activity level and she did not want to go through such a complex procedure. Dr. Iwersen expected McNamara's knee to degenerate over time.

¶ 8 In 2003, McNamara became a Certified Nursing Assistant (CNA). After moving to Plains in 2004, McNamara started working at the Clark Fork Valley Nursing Home (Clark Fork). McNamara's job duties included bathing, dressing, toileting, and feeding the residents. To assist in lifting residents who could not stand on their own, McNamara used mechanical lifts.

¶ 9 McNamara returned to Dr. Iwersen on November 19, 2005, because she was having problems with her knee catching, giving out, and swelling. Dr. Iwersen saw a progression of her chondromalacia. On December 30, 2005, Dr. Iwersen performed a diagnostic arthroscopic surgery with debridement. McNamara had a few fibers of her ACL left. However, Dr. Iwersen did not repair it because an ACL repair could have made her arthritis worse and she did not report any instability. Dr. Iwersen did not think her compromised ACL posed a problem for her work as a CNA because the job does not typically require sudden movements or jumping.

¶ 10 On March 26, 2006, McNamara reinjured her right knee while using a lift to help a resident stand. Clark Fork's insurer accepted liability. Dr. Iwersen performed a third surgery on July 18, 2007, during which he removed part of McNamara's lateral meniscus and again addressed her chondromalacia.

¶ 11 By this time, McNamara's knee had progressed to Grade IV chondromalacia, meaning her cartilage had completely worn away and she had bone-on-bone contact. When asked what caused McNamara's knee to deteriorate so quickly, Dr. Iwersen replied there were multiple potential causes, including injuries, overuse, or simply because "she's prone to developing arthritis."

¶ 12 McNamara returned to Dr. Iwersen on August 15, 2007. When discussing McNamara's return to work, Dr. Iwersen recommended an unloading brace, which he thought "might help a significant amount and delay the need for any [total knee replacement]." Dr. Iwersen agreed that, at this time, performing a total knee replacement on McNamara's right knee was a "foregone conclusion."

¶ 13 On September 19, 2007, Dr. Iwersen released McNamara to light-duty work. On October 29, 2007, Dr. Iwersen found McNamara was doing better and that she was "doing as well as we can expect for her."

¶ 14 In his Independent Medical Evaluation report of April 17, 2008, Bruce R. Belleville, MD, found McNamara at maximum medical improvement for her March 26, 2006, injury and assigned a 1% whole person impairment rating.

¶ 15 On April 28, 2008, McNamara returned to Dr. Iwersen. Dr. Iwersen thought McNamara should continue wearing her brace and "just continue with what she is already doing at work." Dr. Iwersen concluded his record by stating, "I know something will need to be done in the future."

¶ 16 McNamara did not seek treatment for her right knee for nearly five years.

¶ 17 On February 10, 2013, McNamara twisted her knee while raising a resident with the assistance of a lift. She felt a "pop" and pain.

¶ 18 McNamara saw Randy Mack, PA, who diagnosed a right-knee sprain and restricted her to light duty. Because of her restrictions, Clark Fork assigned McNamara to work with independent residents who did not require assistance in standing. McNamara has been on light duty ever since, but has continued working full-time.

¶ 19 On March 5, 2013, McNamara underwent an MRI of her knee, which showed marked progression of her arthritis and swelling.

¶ 20 MHA accepted liability for McNamara's February 10, 2013, injury.

¶ 21 McNamara returned to Dr. Iwersen on April 24, 2013. Dr. Iwersen diagnosed "end-stage degenerative arthritis with total loss of lateral articular cartilage space." Dr. Iwersen concluded: "I am afraid there is not much left for [Danene]. Her x-rays are poor and show end-stage degenerative arthritis and her function is decreasing markedly. The only option I believe is a total knee replacement."

¶ 22 On July 1, 2013, Putman, who was adjusting McNamara's 2013 injury claim, wrote to Dr. Iwersen, asking him what diagnoses were directly attributable to her injury and what treatments were reasonably necessary as a direct result of her injury.

¶ 23 Dr. Iwersen responded, in relevant part, as follows:

> In answer to your direct questions, all diagnoses directly attributed to the February 10th work-related injury would have to be exacerbation of a preexisting condition. You could call it a knee sprain, but in reality it was a twisting injury to a previous degenerative knee that exacerbated her condition. ***As a result of the injury on February 10, 2013, I believe that no treatment is directly necessary for that*.** We have injected her on a

> couple of occasions with fair results and do not feel that another injection would be helpful. Rest, anti-inflammatories, avoiding significant trauma to the knee are all helpful but not necessarily curative treatments.
>
> ***On a more-probable-than-not basis, Danene would have required a total knee replacement even if the injury in February of 2013 had not occurred*.** I believe that she has developed end-stage degenerative arthritis and it did begin 15 years ago. I do believe she had an exacerbation of the underlying condition, but the statement that best describes her current condition is the natural progression of end-stage degenerative arthritis that began 15 years ago.[1]

¶ 24 Following Putman's receipt of Dr. Iwersen's response, MHA denied liability for McNamara's total knee replacement.

¶ 25 Dr. Iwersen testified that McNamara's knee injury caused both a temporary and a permanent aggravation of her underlying condition. He explained that the injury caused a temporary aggravation because it increased McNamara's symptoms for a short period of time. He explained that the injury caused a permanent aggravation because it made her knee condition "a little worse" and it would not return to the condition it was in before the injury.

¶ 26 On October 21, 2013, McNamara filed an occupational disease claim for her right knee.

¶ 27 Putman then wrote to Dr. Iwersen, asking whether McNamara's job duties as a CNA for Clark Fork were the leading cause of her degenerative arthritis and her resulting need for her total knee replacement when compared to all other causes. Putman set forth check boxes for "yes" and "no," and a section for Dr. Iwersen to explain his answer.

¶ 28 In his response, Dr. Iwersen checked the "no" box. In the explanation section, Dr. Iwersen wrote, "The injury 15 years ago started the problem."

¶ 29 MHA denied liability for McNamara's occupational disease claim.

¶ 30 It is Dr. Iwersen's opinion that McNamara's 1997 injury was the leading cause of her degenerative arthritis and resulting need for a total knee replacement. Dr. Iwersen explained that contributing factors included her 1997 injury, her other knee injuries, her surgeries, normal daily activities, her CNA job, and her weight. Dr. Iwersen stated it was difficult to rank each cause, but testified that McNamara's 1997 injury was the leading

[1] Emphasis added.

cause. Dr. Iwersen agreed that her need for a total knee replacement was the inevitable result of her 1997 injury "on a medically more-probable-than-not basis." Dr. Iwersen also explained that without the 1997 injury, "she may not have required a total knee . . . ." In response to questions about whether McNamara's work as a CNA contributed to her knee condition, Dr. Iwersen testified that McNamara's work duties may have accelerated her arthritis "a little bit." However, Dr. Iwersen stated that McNamara's job as a CNA "was not an extremely difficult job and that much of her knee condition would have progressed on a daily basis due to normal activities." Dr. Iwersen also explained that he thought "her knee would have progressed to require a total knee, regardless of her occupation."

CONCLUSIONS OF LAW

¶ 31 This case is governed by two different versions of the Montana Workers' Compensation Act. Issue One is governed by the 2011 version because that was the law in effect at the time of McNamara's February 10, 2013, industrial accident.[2] Issue Two is governed by the 2013 version because McNamara's right to occupational disease benefits, if any, accrued at the time she filed her claim.[3]

¶ 32 McNamara bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[4]

Issue One: Is MHA liable for a total knee replacement as a result of McNamara's February 10, 2013, industrial injury?

¶ 33 McNamara argues that MHA is liable for her total knee replacement under her accepted 2013 injury claim because her injury aggravated her underlying condition. MHA cites to *Watkins v. State Compensation Ins. Fund*,[5] and argues that it is not liable for McNamara's total knee replacement because her 2013 injury was a minor strain and did not materially aggravate her knee condition. Rather, MHA argues that McNamara's knee condition and resulting need for a total knee replacement is the inevitable result of her 1997 injury.

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

[3] *Bouldin v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 8. *See also Langston v. MACO Workers' Comp. Trust*, 2013 MTWCC 15, ¶ 25 (citation omitted); *Wommack v. Nat'l Farmers Union Prop. & Cas. Co.*, 2015 MTWCC 7, ¶ 8 (citations omitted).

[4] *Ricks v. Teslow Consol.*, 162 Mont. 469, 483-84, 512 P.2d 1304, 1312-13 (1973) (citations omitted); *Dumont v. Wickens Bros. Constr. Co*., 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

[5] 2002 MTWCC 11.

¶ 34 Section 39-71-704(1)(a), MCA, provides, in relevant part: "After the happening of a compensable injury . . ., the insurer shall furnish reasonable primary medical services, including prescription drugs for conditions that are a direct result of the compensable injury . . . ."

¶ 35 This Court addressed the causation requirement in § 39-71-704(1)(a), MCA, in *Watkins*. Watkins injured his left knee in 1975.[6] After multiple surgeries, his doctor predicted his knee would eventually "wear out."[7] Over the ensuing years, he suffered occasional knee strains and developed progressive, degenerative arthritis.[8] In October 1997, Watkins strained his knee while stepping off a rack on his truck.[9] His employer's insurer accepted liability for his injury claim.[10] Watkins eventually underwent a total knee replacement and attempted to have the surgery covered under his 1997 injury claim.[11] In the alternative, Watkins filed an occupational disease claim, alleging that his years of work as a truck driver materially aggravated his knee condition.[12]

¶ 36 This Court ruled that Watkins did not meet his burden of proving that his 1997 injury caused his need for a total knee replacement.[13] Watkins' surgeon, a joint-replacement specialist, testified that his need for surgery "was the product of a natural progression and deterioration of the preexisting knee condition."[14] Watkins' surgeon also opined that the 1997 injury was a temporary aggravation of Watkins' preexisting condition and he would have required knee replacement in any event.[15] Watkins' treating physician explained that since his initial injury, Watkins was "on a course that would lead him ultimately to need to have something done, like a knee replacement."[16] The treating physician testified that Watkins' injury may have hastened the need for his total knee replacement, but the physician could not speculate as to how much.[17] A physician from the occupational disease medical panel testified that Watkins' injury accelerated the need

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[6] *Watkins*, ¶ 7.

[7] *Watkins*, ¶ 8.

[8] *Watkins*, ¶¶ 9-10.

[9] *Watkins*, ¶ 12.

[10] *Watkins*, ¶ 13.

[11] *Watkins*, ¶¶ 26-27.

[12] *Watkins*, ¶ 27.

[13] *Watkins*, ¶ 42.

[14] *Watkins*, ¶¶ 24, 32.

[15] *Watkins*, ¶ 32.

[16] *Watkins*, ¶ 33.

[17] *Id.*

for his total knee replacement, and opined on a more-probable-than-not basis that it did so by one to five years, but that surgery was inevitable and caused by the 1975 injury.[18] Relying on the causation standard in § 39-71-704(1)(a), MCA, this Court explained, "[t]o be compensable, the medical condition for which compensation is sought must be caused by the industrial accident."[19] This Court found that Watkins' need for a total knee replacement was the inevitable result of his 1975 injury[20] and that his 1997 injury neither caused nor hastened his need for surgery "significantly or materially."[21] Thus, this Court ruled that the insurer was not liable for Watkins' total knee replacement under § 39-71-704, MCA.[22]

¶ 37 As in *Watkins*, McNamara has not met her burden of proving that her need for a total knee replacement was caused by her 2013 injury. Like the physicians in *Watkins*, Dr. Iwersen testified that McNamara's 2013 injury was not the cause of her need for a total knee replacement. Dr. Iwersen opined that he expected McNamara's knee to degenerate after her 1997 injury; that McNamara's need for a total knee replacement is the inevitable result of her 1997 injury; that by 2007, her eventual need for a total knee replacement was a "foregone conclusion"; and that McNamara would have required a total knee replacement regardless of her 2013 knee injury. Although an aggravation of a preexisting condition is an injury,[23] McNamara's 2013 accident was a minor aggravation of her underlying condition and did not cause her need for a total knee replacement. Dr. Iwersen testified that McNamara's February 2013 injury made her knee condition only "a little worse" and that there was no treatment "directly necessary" for it. McNamara did not present any medical evidence that her 2013 injury significantly hastened her need for a total knee replacement.[24]

¶ 38 McNamara's need for a total knee replacement is not a direct result of her 2013 injury. Consequently, MHA is not liable for this surgery under § 39-71-704(1)(a), MCA.

Issue Two: Does McNamara have a compensable occupational disease?

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[18] *Watkins*, ¶ 35.

[19] *Watkins*, ¶ 41 (*citing Hash v. Montana Silversmith*, 256 Mont. 252, 257, 846 P.2d 981, 983 (1993)).

[20] *Watkins*, ¶ 37.

[21] *Watkins*, ¶¶ 37-38.

[22] *Watkins*, ¶ 43.

[23] § 39-71-407(3)(a)(ii), MCA (stating that an insurer is liable if "a claimed injury has occurred and aggravated a preexisting condition"). *See also Greene v. Uninsured Employers' Fund*, 2003 MTWCC 27, ¶ 88 ("[I]t has long been the rule that the employer or insurer are liable for material, permanent aggravations of preexisting conditions. The employer takes its workers as it finds them with all of their preexisting conditions.").

[24] *See Ford*, ¶¶ 48-49 (holding that medical causation must be proven by medical evidence).

¶ 39 In the alternative to her injury claim, McNamara argues that her work caused the worsening of her knee condition and that she therefore has a compensable occupational disease. MHA counters that McNamara has not met her burden of proving that her work was the "leading cause" of her degenerative arthritis and need for a total knee replacement under the definition of "major contributing cause" in § 39-71-407(12)(b), MCA.

¶ 40 The standard for the compensability of an occupational disease, which the Legislature enacted in 2005, states, in relevant part: "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."[25] The statute defines "major contributing cause" as "a cause that is the leading cause contributing to the result when compared to all other contributing causes."[26]

¶ 41 In *Montana State Fund v. Grande*,[27] the Montana Supreme Court explained that, under the "leading cause" test, "*all* contributing factors [must] be considered in determining whether a condition qualifies as an occupational disease," including preexisting conditions.[28] The court affirmed this Court's conclusion that "leading cause" means the cause that ranks first out of all causes and does not need to be a cause that is greater than 50%: "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."[29] Moreover, the court explained that the "leading cause" test in § 39-71-407, MCA, "does not require the job to be the leading cause of the *onset* of the disease, but the leading cause contributing to the *result* . . . ."[30]

¶ 42 McNamara has not satisfied the "leading cause" test. Dr. Iwersen initially wrote that McNamara's duties as a CNA were not the leading cause of the worsening of her degenerative arthritis and need for a total knee replacement and, "The injury 15 years ago started the problem." McNamara is correct that Dr. Iwersen may have thought that he was being asked to determine the leading cause of the onset of her knee condition.

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[25] § 39-71-407(12)(b), MCA.

[26] § 39-71-407(16), MCA.

[27] 2012 MT 67, 364 Mont. 333, 274 P.3d 728.

[28] *Grande*, ¶ 35 (emphasis in original) (citation omitted).

[29] *Grande*, ¶ 40.

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

However, when asked at his deposition whether McNamara's work as a CNA contributed to the worsening knee condition and resulting need for a total knee replacement, Dr. Iwersen responded that her work accelerated her degeneration "a little bit," and that she would have needed a total knee replacement regardless of her occupation. Dr. Iwersen also identified the contributing factors and testified that the 1997 injury was the leading cause of her knee condition and resulting need for a total knee replacement when compared to the other causes, which included her work as a CNA. Dr. Iwersen has been McNamara's treating physician for her right knee since 1997, and his opinion is therefore given significant weight.[31]

¶ 43 McNamara cites *Polk v. Planet Ins. Co.*[32] and *Oksendahl v. Liberty Northwest Ins. Corp.*[33] and argues that she has a compensable occupational disease because her work significantly aggravated her preexisting condition and hastened her need for surgery. However, McNamara's reliance on *Polk* and *Oksendahl* is misplaced because they were decided under the pre-2005 standard for determining the compensability of an occupational disease, which did not require claimants to satisfy the "leading cause" test.

¶ 44 McNamara has not met her burden of proving that her degenerative arthritis and resulting need for a total knee replacement is a compensable occupational disease under § 39-71-407(12)(b), MCA. Thus, MHA is not liable for her occupational disease claim.

JUDGMENT

¶ 45 MHA is not liable for a total knee replacement as a result of McNamara's February 10, 2013, industrial injury.

¶ 46 McNamara does not have a compensable occupational disease.

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

DATED this 25th day of May, 2016.

(SEAL) /s/ DAVID M. SANDLER
JUDGE

c: Howard Toole
G. Andrew Adamek
Submitted: July 22, 2015

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[31] *See EBI/Orion Group v. Blythe*, 1998 MT 90, ¶¶ 12-13, 288 Mont. 356, 957 P.2d 1134.

[32] 287 Mont. 79, 85, 951 P.2d 1015, 1018 (1997).

[33] 2007 MTWCC 24, ¶ 25.