IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 7

WCC No. 2012-3054

KAREN MONROE, Individually and as Personal Representative of the Estate of Dwane Monroe

Petitioner

vs.

MACO WORKERS COMP TRUST

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner alleges her late husband, a W.R. Grace & Co. employee for over twenty years, was exposed to asbestos while later working with the Lincoln County Road Department in the Libby area for over ten years. Petitioner's husband was diagnosed with asbestos-related lung disease in 2001 and died in 2010. The decedent's claim for compensation with W.R. Grace was settled on a disputed liability basis. Petitioner alleges Lincoln County is liable for her husband's death under the last injurious exposure rule. Respondent denies liability on the grounds that Petitioner's claim is untimely pursuant to § 39-71-601, MCA, and that Petitioner's husband developed asbestos-related disease as a result of his work with W.R. Grace and not Lincoln County.

Held: Respondent is liable for Petitioner's claim under the "potentially causal" standard enunciated in *In re Claim of Mitchell*. Because no one at the Lincoln County Road Department had filed for asbestos-related disease at the time Petitioner submitted her claim, the Court concluded that Petitioner neither knew nor should have known that her husband's work for the county was directly related to his asbestos-related disease until informed by her attorney. Petitioner's claim is not time-barred, and she is entitled to widow's benefits and burial expenses. Petitioner is not entitled to PPD benefits based on a 100% impairment.

Topics:

Physicians: Treating Physician: Weight of Opinions. Where neither of two expert witnesses were the decedent's treating physician, the Court considered their respective qualifications relative to the issue at hand in determining which opinion to give the greater weight in determining the causation of the decedent's asbestos-related disease. The Court found that one expert had immersed himself in the field of asbestos-related medicine, and the other's involvement in the field was "peripheral." Therefore, the Court assigned greater weight to the former in determining whether the decedent suffered an injurious exposure at the employment in question.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Petitioner's husband was injuriously exposed to the hazard of his OD, asbestos-related disease, while working for two different employers: W.R. Grace and then Lincoln County. Petitioner's husband was first diagnosed with his OD years before he was last injuriously exposed, however, there was no prior OD claim for which liability had either been accepted or otherwise determined. Therefore, in accordance with *In re Claim of Mitchell*, the potentially causal standard applies in this case. Pursuant to § 39-71-407(10), MCA, since Petitioner's husband was last injuriously exposed to asbestos while employed with the Lincoln County Road Dept., that employer is liable for his OD.

Occupational Disease: Last Injurious Exposure. Petitioner's husband was injuriously exposed to the hazard of his OD, asbestos-related disease, while working for two different employers: W.R. Grace and then Lincoln County. Petitioner's husband was first diagnosed with his OD years before he was last injuriously exposed, however, there was no prior OD claim for which liability had either been accepted or otherwise determined. Therefore, in accordance with *In re Claim of Mitchell*, the potentially causal standard applies in this case. Pursuant to § 39-71-407(10), MCA, since Petitioner's husband was last injuriously exposed to asbestos while employed with the Lincoln County Road Dept., that employer is liable for his OD.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-601. Both Petitioner and her deceased husband believed the husband's asbestos-related disease (ARD) arose from the many years he worked for W.R. Grace. After Petitioner's husband died, her attorney found an industrial hygienist who explained how her husband was exposed to asbestos while on the county road crew, and a physician established that the husband's ARD was more probably than not significantly impacted by his work for the county. The Court concluded that Petitioner could not have known that the county was the last employer to injuriously expose her husband to asbestos-causing disease until informed by her attorney, and her claim was not time-barred pursuant to § 39-71-601(1), MCA.

Limitation Period: Occupational Disease.
Both Petitioner and her deceased husband believed the husband's asbestos-related disease (ARD) arose from the many years he worked for W.R. Grace. After Petitioner's husband died, her attorney found an industrial hygienist who explained how her husband was exposed to asbestos while on the county road crew, and a physician established that the husband's ARD was more probably than not significantly impacted by his work for the county. The Court concluded that Petitioner could not have known that the county was the last employer to injuriously expose her husband to asbestos-causing disease until informed by her attorney, and her claim was not time-barred pursuant to § 39-71-601(1), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-711. In order to be entitled to permanent partial disability benefits, a claimant must have an impairment rating established by an impairment evaluator under § 39-71-711, MCA. Petitioner's argument rests entirely upon the premise that at death, an individual is 100% impaired, which fails to satisfy the requirements of the WCA.

Benefits: Permanent Partial Benefits: Generally. In order to be entitled to permanent partial disability benefits, a claimant must have an impairment rating established by an impairment evaluator under § 39-71-711, MCA. Petitioner's argument rests entirely upon the premise that at death, an individual is 100% impaired, which fails to satisfy the requirements of the WCA.

> **Impairment: Impairment Ratings.** In order to be entitled to permanent partial disability benefits, a claimant must have an impairment rating established by an impairment evaluator under § 39-71-711, MCA. Petitioner's argument rests entirely upon the premise that at death, an individual is 100% impaired, which fails to satisfy the requirements of the WCA.

¶ 1 Trial in this matter was held March 20, 2013, in the Flathead County Justice Center, 920 South Main, Kalispell, Montana. Petitioner Karen Monroe was present and represented by Laurie Wallace, Jon Heberling, and Ethan Welder. Respondent MACo Workers' Compensation Trust (MACo) was represented by Norman H. Grosfield.

¶ 2 Exhibits: I admitted Exhibits 1 through 20 without objection.

¶ 3 Witnesses and Depositions: The deposition of David J. Hewitt, M.D., and the videoconference depositions of Karen Monroe and Arthur Frank, M.D., Ph.D., were admitted without objection and are considered part of the record. Petitioner Karen Monroe, Terry Spear, Ph.D., and Dale Lee Byrer were sworn and testified.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:[1]

> Issue One: Whether Dwane Monroe suffered and died from an occupational disease arising out of and in the course and scope of his employment with Lincoln County.
>
> Issue Two: Whether the claim for the Estate of Dwane Monroe is precluded for consideration based on the claim filing time as set forth in Section 39-71-601, MCA.
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> Issue Three: Whether the Estate of Dwane Monroe is entitled to permanent partial disability benefits in the form of 100% impairment.
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> Issue Four: Whether the Petitioner is entitled to widow's benefits and reasonable burial expenses related to the death of Dwane Monroe.

[1] Pretrial Order at 3, Docket Item No. 27.

Issue Five: Whether the Petitioners are entitled to reasonable costs.

FINDINGS OF FACT

¶ 6 Dwane Monroe (Dwane) worked for W.R. Grace & Co. (W.R. Grace) from June 1967 to June 1990, and with the Lincoln County Road Department from June 1997 to March 2008. Dwane died on September 29, 2010, as a result of asbestos-related lung disease (ARD).[2] On June 20, 2012, Karen Monroe (Karen) filed two claims for compensation with MACo; one on her own behalf for widow's benefits and one on behalf of Dwane's estate. Both claims were denied by MACo.[3]

¶ 5 Dwane had also filed a claim dated July 28, 2001, for lung disease with W.R. Grace "caused by years of exposure to tremolite asbestos dust."[4] This claim was settled on a disputed liability basis.[5] Claims were pursued against some 12 entities on behalf of the Estate of Dwane Monroe, not including the current claim against Lincoln County.[6]

¶ 6 Terry Spear, Ph.D. (Spear), testified at trial. I found Spear to be a credible witness. Spear holds a doctorate in industrial hygiene and is a Professor Emeritus of industrial hygiene at Montana Tech of the University of Montana. Spear formerly taught courses at Montana Tech in industrial hygiene and has served as the department chair of the Safety, Health, and Industrial Hygiene Department.[7] Spear has authored or co-authored seven peer-reviewed publications on the Libby amphibole since 1996, conducted extensive research on Libby asbestos, interviewed hundreds of W.R. Grace employees, and reviewed thousands of pages of documents pertaining to Libby asbestos.[8]

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[2] Pretrial Order at 2.

[3] *Id.*

[4] Ex. 19 at 18.

[5] *Monroe v. MACO Workers Comp Trust*, *Order Denying Respondent's Motion to Allow Additional Evidence*, 2013 MTWCC 23, ¶ 4, *citing* Petitioner's Response to Respondent's Motion to Allow Additional Evidence at 2.

[6] Ex 19 at 2.

[7] Ex. 9 at 1.

[8] Trial Test.

¶ 7 According to Spear, asbestos has been a known causative agent for ARD since the 1920s, and by the 1950s, asbestosis, lung cancer, and mesothelioma were all attributed to exposure to asbestos.[9]

¶ 8 Some of Spear's research on this case included interviewing Dwane's co-workers with the Lincoln County Road Department, interviewing Dwane's widow, Karen, and reviewing maps, Environmental Protection Agency (EPA) documents, and Dwane's equipment use logs.[10]

¶ 9 Spear testified that the equipment logs[11] reflected that Dwane's work for the county mostly consisted of working on road construction, mowing, and brush cutting in the Libby area. He loaded, hauled, and dumped gravel; ran sweeper, mower, and roller machines; and operated a chainsaw to clear ditches. Spear opined that the majority of Dwane's work for the county, according to the equipment logs and what Karen told him, involved soil and vegetation disruption and disturbance, which Spear stated accounts for most of the exposure to asbestos in the Libby area today.[12]

¶ 10 Spear estimated from the equipment logs that Dwane worked approximately 946 hours mowing and brush cutting for the county.[13] Spear testified that the mowing and brush cutting was dusty work, that it was reported as dusty work, and that there are EPA studies showing mowing and brush cutting in the Libby area entrained asbestos particles into the air.[14]

¶ 11 According to Spear, Dwane did quite a bit of street sweeping while on the road crew. Spear testified that in at least one log entry, Dwane reported that he had to stop sweeping because it got too dusty. Karen told Spear that Dwane had become concerned about the dusty conditions, particularly when emptying the sweeper machine, which Dwane did several times a day. Based on the equipment logs, Spear estimated that Dwane spent about 400 work hours sweeping streets.[15]

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[9] Trial Test.

[10] Trial Test.

[11] Ex. 20 at 4-659.

[12] Trial Test.

[13] Trial Test.

[14] Trial Test.

[15] Trial Test.

¶ 12 Dwane also used a front-end loader to scoop up gravel and haul it to various sites and return with a haul of debris to the gravel pits. Some of Dwane's activities involved working on culvert systems, which put him around heavy equipment and soil disturbance. There was evidence of asbestos contamination at the two pits used by the county to haul sand and gravel to construction sites. Dwane's duties on the county road crew included hauling and dumping sand and gravel. Based on his investigation, interviews, and review of the equipment logs, Spear estimated that Dwane spent approximately 100 hours in work involving heavy equipment and heavy soil disturbance.[16]

¶ 13 Spear opined that Dwane was engaged in work for the county from 1997 to 2007 that involved heavy soil disturbance that, in turn, exposed him to airborne asbestos fibers far above the background levels for the Libby area. Spear noted two occasions when Dwane encountered vermiculite on or near the roads and reported it to the authorities.[17]

¶ 14 During the time Dwane worked for Lincoln County, the EPA came into Libby and began cleaning up asbestos contamination. Dwane's work on the road crew exposed him to greater amounts of asbestos due to its transportation by the EPA out of the Libby area. Spear opined that Dwane was exposed to harmful levels of asbestos while working for Lincoln County sufficient to cause ARD, including mesothelioma.[18]

¶ 15 Spear's conclusions following his investigation into Dwane's work for the county road crew are contained in a 48-page report, including exhibits and attachments.[19] In this report, Spear concluded: "[W]hen we view all of Mr. Monroe's activities while working for the Lincoln County Road Department as a whole, it is more probable than not that Mr. Monroe's asbestos exposure far exceeded acceptable levels."[20]

¶ 16 Spear's report also noted:

> There were multiple sources [of] asbestos[-]contaminated materials present in and around the County Roads where Mr. Monroe worked. This work placed him in close proximity to these asbestos-

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[16] Trial Test.

[17] Trial Test.

[18] Trial Test.

[19] Ex. 9.

[20] Ex. 9 at 24, ¶ 52.

> contaminated materials, where friable asbestos was present, and where his work activities and the work activity of others disturbed asbestos-containing materials and created the transport mechanisms to release fibers into his breathing zone.[21]

¶ 17 Spear concluded:

> Through his work for the County Road Department, Mr. Monroe was often disturbing contaminated soil. . . . Based on eleven years working for Lincoln County's Road Department Mr. Monroe experienced [a] very significant level of exposure to asbestos, and based on industrial hygiene information, it is more probable than not that his exposure was sufficient to constitute an injurious exposure to asbestos and was likely sufficient to cause asbestos-related disease.[22]

¶ 18 Karen Monroe testified at trial. I found Karen to be a credible witness. Karen was married to Dwane, who passed away on September 29, 2010. Karen testified that the EPA had run tests on their home and found positive levels of asbestos in their garden and flower bed. Karen and Dwane moved out of the house for a couple of weeks about seven years ago so the EPA could remediate the contamination in their yard.[23]

¶ 19 Dwane was diagnosed with mesothelioma the April prior to his death, which Karen and Dwane attributed to his work at the W.R. Grace mine. Neither she nor Dwane suspected his work with Lincoln County could have contributed to his mesothelioma until Karen was contacted by her attorney after Dwane's death, one year before she filed her claim.[24]

¶ 20 Dale Lee Byrer testified at trial. I found Byrer to be a credible witness. According to Byrer, he started work for the Lincoln County Road Department in 1970 and became the Libby district foreman for the road department in 1974 or 1975. The principle duty of the road department was to maintain the county road system, which was primarily asphalt but also included gravel roads. The Libby district employed between 7 and 9 employees; the Troy and Eureka districts had their own road crews. Road sweeping was done mostly in the winter under EPA

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[21] Ex. 9 at 24, ¶ 53.

[22] Ex. 9 at 24, ¶ 54.

[23] Trial Test.

[24] Trial Test.

guidelines that included watering the road ahead of the sweeper to minimize dust. According to Byrer, mowing was generally done once a year and it was not dusty work since the mower blades were kept out of the dirt and the operator was in an enclosed cab. Brush cutting was done either by hand with a chainsaw that cut the brush and was then hand-fed into a wood chipper, or by a tractor with a brush-cutter blade.[25]

¶ 21 According to Byrer, none of these duties amounted to much soil disturbance or dust generation. Byrer testified that the county had a special use permit with the U.S. Forest Service to take sand and gravel out of various pits owned by the Forest Service around the county, and he was unaware of any asbestos contamination concerns regarding any of the pits.[26]

¶ 22 Byrer testified that Dwane was a good employee, that Dwane helped a lot with his department and filled in at different jobs, and that Dwane worked both full-time and part-time for the department. Byrer recalled that on one occasion, Dwane brought to his attention some zonolite that Dwane spotted outside of a school where they had stopped for lunch. They informed the EPA about the zonolite and as far as Byrer knew, the EPA cleaned it up.[27]

¶ 23 Byrer reviewed the notation Dwane had made regarding having to shut down the street sweeper because of the dusty conditions. Byrer testified that it was normal to work the sweeper behind the water truck. In Byrer's opinion it was not normal to have to stop the sweeping operation because of dust. Since the road department was operating under EPA guidelines, Byrer testified that they were not allowed to stir up the dust and they would have been in violation of air quality standards if they did.[28]

¶ 24 Asbestos contamination in the material the road crew worked with had never been an issue to Byrer's knowledge. However, sometime within the last three months, another member of the road crew mentioned to Byrer that he had been placed on a watch list due to concern about his lungs. That was the first time Byrer was made aware that the road crew might have been exposed to asbestos while working.[29]

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[25] Trial Test.

[26] Trial Test.

[27] Trial Test.

[28] Trial Test.

[29] Trial Test.

¶ 25 Byrer testified that Dwane had a lot of jobs he covered for the road crew: he did some mechanic work and maintenance on the equipment and vehicles in the shop, he operated a snow plow in the winter, and he also operated a smaller machine to clear snow from the walking path in the Libby area. The sand and gravel runs that Dwane performed were for road base or for fill for a ball field. Dwane would haul the load after having either loaded it himself with heavy equipment or there might have been an operator in the gravel pit loading trucks. Dwane would then haul the load to the work site and dump the load, and return to the pit for another load. He would also haul a crush load that was mixed with gravel and asphalt to surface roads.[30]

¶ 26 Byrer testified that even before asbestos became an issue, EPA guidelines were put in place due to the dusty conditions in the Libby area. Because the county and city road crews were believed to be the major contributors to the dust, the EPA put into place standards to measure the dust and help the county and city road crews reduce the levels of dust.[31]

¶ 27 Arthur L. Frank, M.D., Ph.D., is licensed to practice medicine in Pennsylvania and Texas and is board-certified in internal and occupational medicine.[32] He is currently a professor of medicine and public health and Chairman of the Environmental and Occupational Health Department at Drexel University School of Public Health in Philadelphia, PA.[33] He holds a doctorate in Biomedical Sciences, and has worked in and researched asbestos-related medical issues for 45 years.[34]

¶ 28 Dr. Frank has authored between 170 and 180 publications of various types, about half of which are related to medical issues pertaining to asbestos.[35] Dr. Frank has been a guest speaker on asbestos medicine all over the world, and has given the key-note address at the American College of Occupational and Environmental Medicine, and at the equivalent Canadian college the following year, on his work in the area of asbestos-related medicine.[36] Dr. Frank has been an expert witness on mesothelioma matters for 35 years and testified in over

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[30] Trial Test.

[31] Trial Test.

[32] Frank Dep. 6:15 - 7:5.

[33] Frank Dep. 7:6-14.

[34] Frank Dep. 7:20 - 9:15.

[35] Frank Dep. 9:16-22.

[36] Frank Dep. 9:23 - 10:15.

1500 depositions on the issue.[37] He has been a consultant to various state and federal agencies, and foreign governments, including the EPA, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health.[38]

¶ 29 Dr. Frank began work in Libby in 2006 with the Department of Justice. He has worked at the Clinic for Asbestos Related Disease (CARD) in Libby and been an advisor to research projects there.[39] Dr. Frank testified that he has reviewed Libby patient chest x-rays in the hundreds, examined many Libby residents suffering from ARD, participated in the CARD preliminary mortality study, and testified in the W.R. Grace bankruptcy proceedings in Pittsburgh in 2009.[40]

¶ 30 Dr. Frank testified that ten years is the generally-accepted minimum latency period for mesothelioma, though there are cases that have a shorter time frame.[41] Dr. Frank also stated that it is generally accepted that every exposure to asbestos contributes to the development of mesothelioma, and that most mesothelioma cases will result in death within three years.[42] In formulating his own medical opinions in this case, Dr. Frank relied on Spear's studies and conclusions regarding the extent of Dwane's exposure to asbestos while employed with the Lincoln County Road Department.[43] Dr. Frank opined within a reasonable degree of medical certainty that "without question" Dwane's exposure to asbestos while employed with the county road crew was sufficient to significantly contribute to his development of mesothelioma.[44]

¶ 31 David J. Hewitt, M.D., is an occupational medicine physician with a master's degree in epidemiology, which is the study of risk factors for diseases.[45] Dr. Hewitt has studied the effects of asbestos exposure and explained that mesothelioma is a malignant tumor normally found in the lining of the lung, but it

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[37] Frank Dep. 11:5 - 12:12.

[38] Frank Dep. 12:23 - 13:25.

[39] Frank Dep.14:6-17.

[40] Frank Dep. 15:3 - 16:1.

[41] Frank Dep. 22:6-15, 31:20 - 32:9; Frank Dep. Ex. 4 at 25, ¶ 59.

[42] Frank Dep. 39:5-11, 53:2-24.

[43] Frank Dep. 18:20 - 20:25.

[44] Frank Dep. 14:1-5, 40:18 - 41:21, 60:9-13.

[45] Hewitt Dep. 5:16 - 6:6.

can also grow in the lining of the abdominal wall.[46] Dr. Hewitt testified that one study he reviewed showed that, of 1100 people exposed to asbestos, 99% had latency periods of more than 15 years. Another study of 12 vermiculite miners had latency periods of from 22 to 47 years.[47] Dr. Hewitt opined that Dwane's mesothelioma caused his death and that in his case, the latency period from the first exposure while working at the W.R. Grace mine to the date of his death was 43 years.[48]

¶ 32 Dr. Hewitt testified that in his opinion, Dwane's work on the county road crew played no role in his development of mesothelioma, because his exposure was small compared to his exposure at the W.R. Grace mine, and it was not within the expected time frame for the latency period for mesothelioma.[49] Dr. Hewitt also stated that the evidence that Dwane showed of pleural plaques in 1999-2000 is an indication that Dwane was exposed to asbestos 10 to 20 years before that.[50] Dr. Hewitt opined that Dwane's work for the Lincoln County Road Department was not a contributing factor to Dwane's development of mesothelioma, based on his exposure levels and short latency period.[51]

¶ 33 Dr. Hewitt admitted he has never examined nor treated a patient with Libby asbestos disease, he has never viewed CT scans or chest x-rays of patients with Libby asbestos disease or mesothelioma, and he has not published any articles on asbestos disease or mesothelioma.[52]

¶ 34 Dwane's death certificate lists the cause of death as respiratory failure due to mesothelioma.[53] Dwane's burial expenses totaled $8,676.[54]

CONCLUSIONS OF LAW

¶ 35 The law in effect on the employee's last day of work governs the resolution of an occupational disease (OD) claim.[55] This case is governed by the

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[46] Hewitt Dep. 6:15 - 7:21.

[47] Hewitt Dep. 8:4 - 8:24, 10:21-25.

[48] Hewitt Dep. 11:5-22.

[49] Hewitt Dep. 13:2 - 14:1.

[50] Hewitt Dep. 14:2-25.

[51] Hewitt Dep. 15:14 - 16:4.

[52] Hewitt Dep. 47:3-22.

[53] Ex. 10.

[54] Ex. 11 at 1-3.

2007 version of the Workers' Compensation Act (WCA) since Dwane's last day of work for Lincoln County was in March 2008.

Issue One: Whether Dwane Monroe suffered and died from an occupational disease arising out of and in the course and scope of his employment with Lincoln County.

¶ 36 The Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[56]

¶ 37 An OD is "harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift."[57]

¶ 38 Section 39-71-407, MCA, states, in pertinent part:

> (9) Occupational diseases are considered to arise out of employment or be contracted in the course and scope of employment if:
>
> (a) the occupational disease is established by objective medical findings; and
>
> (b) the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease.

¶ 39 "Major contributing cause" is defined by § 39-71-407(13), MCA, as "a cause that is the leading cause contributing to the result when compared to all other contributing causes." Finally, where more than one employer is involved in the development of an OD, § 39-71-407(10), MCA, provides, "[w]hen 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."

¶ 40 Here, there is no dispute that the cause of Dwane's death was ARD; however, there is disagreement as to what caused Dwane's ARD. Dr. Hewitt believed Dwane's work for W.R. Grace for 23 years was the cause of his

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[55] *Montana State Fund v. Grande*, 2012 MT 67, ¶ 23, 364 Mont. 333, 274 P.3d 728 (*citing Hardgrove v. Transportation Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999).

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

[57] § 39-71-116(20)(a), MCA.

asbestos disease and that his work for the county played no part in its development. Dr. Frank held the opposite view and stated that Dwane's exposure to asbestos while working for the road crew was a significant factor in the development of his disease.

¶ 41 Since neither Dr. Hewitt nor Dr. Frank was Dwane's treating physician, I have considered their respective qualifications relative to the issue at hand in determining which opinion to give the greater weight. As detailed above, Dr. Frank has written and spoken extensively on ARD. Dr. Frank has worked at the CARD clinic in Libby, where he has examined numerous patients with ARD, and reviewed hundreds of chest x-rays of ARD cases. While Dr. Frank has immersed himself in the field of asbestos-related medicine, Dr. Hewitt's involvement in the field is much more peripheral. I therefore ascribe greater weight to Dr. Frank's opinion and conclude that Dwane's employment with the Lincoln County Road Department constituted an injurious exposure to his OD, ARD.

¶ 42 This, however, is not the end of the analysis. Because Dwane was exposed to asbestos while working for two different employers, I held a conference with counsel on March 29, 2013,[58] and ordered post-trial briefing on the limited issue of which standard to apply in this case regarding the last injurious exposure rule – the "potentially causal" standard that the Montana Supreme Court applied in *In re Claim of Mitchell*,[59] or the standard applied in the *Caekaert*[60] and *Lanes*[61] cases, which the Supreme Court in *In re Claim of Mitchell* held was still applicable in certain situations.[62] In *In re Claim of Mitchell*, the Montana Supreme Court held:

> We conclude that the "potentially causal" standard is consistent with § 39-71-407(10), MCA (2005), and will be applied in this and future cases in Montana. 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 the 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

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[58] Minute Book Hearing No. 4462, Docket Item No. 30.

[59] *Liberty Nw. Ins. Corp. v. Montana State Fund*, 2009 MT 386, 353 Mont. 299, 219 P.3d 1267 (*In re Claim of Mitchell*).

[60] *Caekaert v. State Comp. Mut. Ins. Fund*, 268 Mont. 105, 885 P.2d 495 (1994).

[61] *Lanes v. Montana State Fund*, 2008 MT 306, 346 Mont. 10, 192 P.3d 1145.

[62] *In re Claim of Mitchell*, ¶ 24.

> 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. . . . 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* approach will continue to apply.
>
> [Therefore], for purposes of the initial liability determination of an OD where two or more employers are potentially liable, the "last injurious exposure" to the hazard of the OD occurs during the last employment at which the claimant was exposed to working conditions of the same type and kind which gave rise to the OD.[63]

¶ 43 *In re Claim of Mitchell* involved an individual with a long history of heavy labor who filed claims in 2006 for back injuries incurred in 2002 and 2005. He only worked two months for his last employer but testified his back worsened during those two months to the point he was unable to return to work. Both claims were denied, and both Mitchell's treating physician and the doctor who performed an independent medical examination testified that his last job contributed to some degree to his low-back condition. I then concluded that Mitchell was last injuriously exposed to the hazard of his OD, his back condition, while employed for the two months with his last employer.[64]

¶ 44 Dwane was injuriously exposed to the hazard of his OD, ARD, while working for two different employers: W.R. Grace and Lincoln County. Dwane was first diagnosed with his OD years before he was last injuriously exposed. Significantly, however, although Dwane had made other ARD claims, there was no prior OD claim for which liability had either been accepted or otherwise determined. Therefore, in accordance with the Supreme Court's holding in *In re Claim of Mitchell*, the potentially causal standard applies in this case.

¶ 45 I conclude that Dwane was last injuriously exposed to the hazard of his OD, ARD, while employed with Lincoln County, and that the county is liable for his ARD, which ultimately lead to his death.

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[63] *In re Claim of Mitchell*, ¶¶ 24, 26. (Emphasis added.)

[64] 2008 MTWCC 54, ¶ 34.

Issue Two: Whether the claim for the Estate of Dwane Monroe is precluded for consideration based on the claim filing time as set forth in Section 39-71-601, MCA.

¶ 46 Section 39-71-601, MCA, states, in pertinent part:

> (3) When a claimant seeks benefits for an occupational disease, the claimant's claims for benefits must be presented in writing 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. When a beneficiary seeks benefits under this chapter, claims for death benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date that the beneficiary knew or should have known that the decedent's death was related to an occupational disease.

¶ 47 At the outset, it must be noted that neither the estate nor its personal representative has standing to pursue death benefits. In *Van Vleet v. Montana Ass'n of Cntys. Workers' Comp. Trust,*[65] this Court held:

> As an initial matter, the petitioner lacks standing to pursue the present claim in her capacity as the personal representative of the decedent's estate. Death benefits are not payable to the estate; by statute they are directly payable to the decedent's beneficiaries.

¶ 48 Although this issue, as worded, may be related only to the estate's pursuit of permanent partial disability benefits (PPD) under Issue Three, an analysis of the timely filing of both claims – Karen's claim individually, and as personal representative of the estate – is necessary in order to determine if Karen is entitled to widow and burial benefits under Issue Five. Both claims require scrutiny under the "knew or should have known" analysis of § 39-71-601(3), MCA.

¶ 49 Karen testified that neither she nor Dwane suspected that his work on the road crew contributed to his ARD. They both put the blame on Dwane's years working for W.R. Grace, and Karen did not think to file a claim against the county until notified by her attorney to do so after Dwane passed away. Dwane's boss, Byrer, also never suspected that working on the road crew could contribute to the

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[65] 2004 MTWCC 8, ¶ 28, *rev'd on other grounds by Van Vleet v. Montana Ass'n of Cntys. Workers' Comp. Trust,* 2004 MT 367, 324 Mont. 517, 103 P.3d 544.

development of asbestos disease until he was notified by one of his crew members recently that the crew member had been placed on a watch list due to a lung condition.

¶ 50 In *Dvorak v. Montana State Fund*,[66] the Montana Supreme Court noted the Legislature's recognition of the difference between work-related injuries and work-related diseases when it enacted § 39-71-105(6)(b), MCA:

> [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.

¶ 51 As this Court explained in *Corcoran v. Montana Schools Group Ins. Auth.*,[67] the statute of limitations for an OD commences to run "when the worker has some specific knowledge of a specific pathological condition stemming from employment and requiring diagnosis or treatment."

¶ 52 The facts here are similar to those in *Keller v. Montana State Fund*, WCC No. 2012-2879, wherein I issued a bench ruling following trial, finding that Keller had suffered an asbestos-related OD and that his claim was filed timely after tolling the statute of limitations.[68] Keller logged in the mountains outside Libby for nearly twenty years, and knew of no co-workers or other loggers who contracted asbestos disease. Applying the reasonable man standard, I found that Keller should not have known his condition resulted from his employment until advised by his attorney, and his claim was thereafter filed timely. To the best of my knowledge, Keller was the first logger who brought a claim for ARD before this Court.

¶ 53 Similarly, in this case Spear explained how the dusty conditions in which Dwane worked while on the county road crew contained asbestos that he inhaled; and Dr. Frank established that Dwane's ARD was more probably than not significantly impacted by his work for the county; but these were facts established with the assistance of Karen's attorney only ***after*** Dwane died. I therefore conclude that Karen could not have known that the Lincoln County

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[66] 2013 MT 210, ¶ 19, 371 Mont. 175, 305 P.3d 873.

[67] 2000 MTWCC 30, ¶ 53.

[68] Minute Book Hearing No. 4393, Docket Item No. 21.

Road Department and not W.R. Grace was the last employer to injuriously expose Dwane to asbestos causing disease until informed by her attorney, and her claim was filed timely thereafter.

Issue Three: Whether the Estate of Dwane Monroe is entitled to permanent partial disability benefits in the form of 100% impairment.

¶ 54 Karen argues that because Dwane passed away from his OD, he was 100% impaired under § 39-71-703, MCA, and should be entitled to a 100% impairment award. I disagree. Section 39-71-703(1)(b), MCA requires that in order for a claimant to be eligible for PPD benefits, the claimant must have an impairment rating that is established by objective medical findings and not exclusively on pain complaints, and that it be "more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment."

¶ 55 Section 39-71-711, MCA, states:

> (1) An impairment rating:
>
> (a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;
>
> (b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association;
>
> (c) must be expressed as a percentage of the whole person; and
>
> (d) must be established by objective medical findings.
>
> (2) A claimant or insurer, or both, may obtain an impairment rating from an evaluator who is a medical doctor or from an evaluator who is a chiropractor if the injury falls within the scope of chiropractic practice. If the claimant and insurer cannot agree upon the rating, the mediation procedure in part 24 of this chapter must be followed.
>
> (3) An evaluator must be a physician licensed under Title 37, chapter 3, except if the claimant's treating physician is a chiropractor, the evaluator may be a chiropractor who is certified as an evaluator under chapter 12.

¶ 56 At the outset, I note that I am hard pressed to find a claimant 100% ***partially*** disabled since, by definition, a partial disability must be something less than 100%. More to the point, there is absolutely no evidence in the record of an impairment rating being assigned by a qualified physician within the requirements of § 39-71-711, MCA. Boiled down, Karen's argument rests entirely upon the

premise that at death, an individual is 100% impaired. Novel as this argument may be, it fails to satisfy the requirements of the WCA. Karen has therefore failed to carry her burden of proof on this issue.

Issue Four: Whether the Petitioner is entitled to widow's benefits and reasonable burial expenses related to the death of Dwane Monroe.

¶ 57 As Dwane's surviving spouse, Karen is entitled to widow's benefits pursuant to §§ 39-71-116(4)(a) & 39-71-721, MCA. In addition, as Dwane's burial expenses were $8,676, Karen is entitled to the maximum burial expenses of $4,000 as provided by § 39-71-725, MCA.

Issue Five: Whether the Petitioners are entitled to reasonable costs.

¶ 58 As the prevailing party, Karen is entitled to her costs.

JUDGMENT

¶ 59 Dwane Monroe suffered and died from an OD arising out of and in the course of his employment with the Lincoln County Road Department, the employer with whom he was last injuriously exposed to the hazard of his ARD.

¶ 60 Petitioner's claim for OD benefits is not time-barred pursuant to § 39-71-601, MCA, since she could not have known that her husband's death was related to his work with the Lincoln County Road Department until advised by her attorney, and the claim was timely filed thereafter.

¶ 61 Petitioner, as Personal Representative of the Estate of Dwane Monroe, is not entitled to PPD benefits in the form of a 100% impairment.

¶ 62 Petitioner, individually, is entitled to widow benefits and reasonable burial expenses as the surviving spouse of Dwane.

¶ 63 As the prevailing party, Petitioner is entitled to her reasonable costs.

¶ 64 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.

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DATED in Helena, Montana, this 17th day of March, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Laurie Wallace
Jon Heberling
Ethan Welder
Norman H. Grosfield

Submitted: August 26, 2013