IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 26

WCC No. 2005-1475

BRAD VALLANCE

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AND ORDER DENYING SUMMARY JUDGMENT

Summary: Petitioner filed an occupational disease claim after a 2004 MRI showed that he had herniated disks. However, a 1996 MRI showed those same disks to be bulging. Petitioner has memory difficulties and did not report an accurate history to the physicians who initially concluded that his back problems were from an occupational disease, as those physicians were not aware that Petitioner had suffered several specific traumas to his back both on the job and outside of work.

Held: Petitioner, who has a history of back traumas, including two industrial accidents which he did not report to his employer, has failed to prove that his current back problems stem from an occupational disease rather than an industrial accident or some other specific trauma.

Topics:

> **Witnesses: Credibility.** Where Petitioner has epilepsy for which he underwent brain surgery, and where he and his wife both testified that Petitioner has difficulty recalling information, particularly in stressful situations, and where Petitioner's testimony at times contradicted itself and his deposition testimony, Petitioner's memory problems make him an unreliable historian. Therefore, although the Court does not find Petitioner

to be an incredible witness, the Court does not find Petitioner's testimony to be reliable.

Employment: Job Duties. Whether Petitioner's job duties are specifically labeled heavy duty or moderate duty is less important than the Court's understanding of what Petitioner's job actually was.

Proof: Burden of Proof: Preponderance. Petitioner has not met his burden of proving by a preponderance of the evidence that he suffers from an occupational disease where his doctors were not provided with a sufficient history of his back problems, and where these doctors, upon learning of additional injuries and symptoms recorded in Petitioner's medical records, could no longer assert that Petitioner's back problems were more probably than not caused by an occupational disease.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-119. Distinct, identifiable incidents which satisfy the injury definition of § 39-71-119, MCA, fall under the Workers' Compensation Act. *Whitlock v. Fremont Indus. Indem. Co.*, 2002 MTWCC 12, ¶¶ 28, 31.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-408. Occupational diseases are considered to arise out of employment if there is a direct causal connection between the conditions under which the work is performed and the occupational disease, 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, the disease can be fairly traced to the employment as the proximate cause, and the disease comes from a hazard to which workers would not have been equally exposed outside of the employment. In Petitioner's case, he is simply unable to prove that his back condition was caused by an occupational disease rather than by a specific trauma or industrial accident.

¶ 1 The trial in this matter was held on Wednesday, February 15, 2006, in Helena, Montana. Petitioner Brad Vallance was present and represented by Norman H. Grosfield. Respondent was represented by Bradley J. Luck.

¶ 2 Exhibits: Exhibits 1 through 18 were admitted without objection. Exhibit 11 is a composite exhibit of the exhibits previously filed in support of Respondent's motion for summary judgment, attached to the foundational affidavit of Respondent's counsel. The

Court also took judicial notice of the proceedings in WCC No. 2005-1323, which involves the same parties and is also before this Court.[1]

¶ 3 Witnesses and Depositions: The depositions of Dr. Gary Rapaport and Dr. John Michelotti were taken and submitted to the Court. Petitioner, Michelle Vallance, James D. Silvan, and Robert Kruckenberg were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issue of law:

> ¶ 4a Whether Petitioner has suffered an occupational disease compensable under the Montana Occupational Disease Act.[2]

¶ 5 Respondent filed a motion for summary judgment on the grounds that Petitioner's claim is barred by the statute of limitations. The Court took the matter under advisement pending trial, and also rules on this issue below.

FINDINGS OF FACT

¶ 6 The parties stipulated that the Court could take judicial notice of the record in WCC No. 2005-1323, a claim involving Petitioner and Respondent which was heard by this Court on November 30 and December 7, 2005, and had a decision pending at the time of this trial. The Court has done so. The Findings set forth below take into account the record of that case.

¶ 7 At the outset, this Court finds that Petitioner has memory deficits.[3] Petitioner has epilepsy for which he underwent brain surgery in 1987.[4] Both Petitioner and his wife testified that Petitioner has difficulty recalling information, particularly when he is in a stressful situation.[5] Ms. Vallance explained that Petitioner has difficulty recalling mundane details in everyday life.[6]

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[1] Decision at 2006 MTWCC 15.

[2] (Pretrial Order at 2.)

[3] Trial Test.

[4] Exhibit 17 at 1.

[5] Trial Test.

[6] *Id.*

¶ 8 Petitioner explained that at the time of his deposition,[7] he was stressed and this caused him to become confused and perhaps answer some questions inaccurately. He acknowledged that he made no corrections to his deposition when later provided with the opportunity to do so.[8]

¶ 9 The Court finds Petitioner's explanation regarding his memory deficits in his testimony both in deposition and at trial to be credible.

¶ 10 Petitioner was an employee of Dick Anderson Construction (DAC) from June 1996 through February 2005.[9]

¶ 11 Petitioner filed an occupational disease claim for a back condition on April 27, 2005.[10]

¶ 12 DAC is enrolled under Compensation Plan No. 1 of the Montana Workers' Compensation Act, the insurer being the Montana Contractor Compensation Fund (Respondent or MCCF).[11]

¶ 13 Pursuant to an Order of the Montana Department of Labor and Industry, Petitioner was examined by Dr. Gary Rapaport, who issued his opinion on June 16, 2005.[12]

¶ 14 Respondent denied liability for the occupational disease claim on July 20, 2005.[13]

¶ 15 The mediation procedures set forth in the Occupational Disease Act have been complied with.[14]

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[7] Petitioner's deposition was entered into the record as part of his other pending claim, of which this Court takes judicial notice.

[8] Trial Test.

[9] Pretrial Order at 2, Uncontested Fact, ¶ 1.

[10] Pretrial Order at 2, Uncontested Fact, ¶ 2.

[11] Pretrial Order at 2, Uncontested Fact, ¶ 3.

[12] Pretrial Order at 2, Uncontested Fact, ¶ 4.

[13] Pretrial Order at 2, Uncontested Fact, ¶ 5.

[14] Pretrial Order at 2, Uncontested Fact, ¶ 6.

¶ 16 In 1993, Petitioner filed a workers' compensation claim for a back injury while working for the City of Helena.[15] Petitioner was off work for approximately two weeks, during which time he received payments for temporary total disability.[16] Petitioner testified that he does not recall filing a workers' compensation claim with the City of Helena in 1993, nor does he recall having two weeks off of work or receiving temporary total disability for a back injury.[17]

¶ 17 While working for DAC, Petitioner received an employee manual which included information about workers' compensation and instructed employees to report all accidents, including minor injuries and "near misses," to a supervisor. Petitioner signed an acknowledgment that he had received and read the manual, and that he was responsible for knowing the manual's contents.[18]

¶ 18 On September 4, 1996, Petitioner visited Dr. Charles B. Anderson for an annual checkup. Dr. Anderson reported that Petitioner complained of intermittent numbness in his feet. Petitioner told Dr. Anderson that the problem had been going on for two or three years. Petitioner further told Dr. Anderson that he had been experiencing low back pain for four or five years, ever since he strained his back while attempting to push a snowmobile out of some snow.[19]

¶ 19 Petitioner testified that although he recalls having an appointment with Dr. Anderson in 1996, he has no memory of back pain nor any memory of injuring his back attempting to move a snowmobile. He does not recall telling Dr. Anderson that he experienced numbness in his feet.[20]

¶ 20 On September 9, 1996, an MRI was performed on Petitioner's lumbar spine. Petitioner was diagnosed with a central and left-sided disk bulge at both the L4-5 and L5-S1 levels.[21]

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[15] Ex. 13.

[16] Ex. 14.

[17] Trial Test.

[18] Ex. 11 (11).

[19] Ex. 10 at 1.

[20] Trial Test.

[21] Ex. 7.

¶ 21 Petitioner testified that in 1996, he had an incident while lifting concrete forms at DAC which had a "severe effect" on his back. He agreed that he had recovered "some" from that incident, but that his symptoms since then have been sometimes better, sometimes worse. Petitioner did not file a workers' compensation claim for the lifting incident. He testified that it was because he did not know about workers' compensation at the time.[22]

¶ 22 It is unclear from the record before this Court whether this lifting incident occurred before or after Petitioner's September 1996 MRI. Although Petitioner testified in his deposition that the MRI occurred after he injured his back during a lifting incident,[23] Dr. Anderson's September 4, 1996, progress note does not mention this occurrence although it details back injuries from several years before.[24]

¶ 23 At trial, Petitioner provided detailed descriptions of the various tasks he completed for DAC when he first began working as a mechanic/laborer in June 1996. He explained that his mechanical work included repairing and replacing hydraulic systems and servicing heavy equipment, and he described how he would perform this work. He listed the labor tasks he performed in the DAC "yard," the frequency with which he performed each task, and described how one would undertake these tasks, including the weight of items lifted and what types of mechanical aids were available to assist with each task. These tasks included stacking, loading, and delivering concrete forms, stacking rebar, sorting plywood, loading and unloading hardware from job site trailers, sandblasting, and loading and unloading concrete blankets, fencing, water pumps, power tools, and a variety of equipment which DAC used on work sites. Petitioner testified that although he utilized forklifts and other labor-assisting devices, his daily job activities entailed a great deal of lifting, bending, squatting, and carrying.[25]

¶ 24 James D. Silvan, Shop Manager, has worked for DAC for seventeen years and was Petitioner's supervisor for the entire time Petitioner worked for DAC. Mr. Silvan testified that Petitioner was a good worker and that Mr. Silvan considered them to be friends. He acknowledged that he was uncomfortable testifying against Petitioner.[26]

¶ 25 The Court finds Mr. Silvan to be a credible witness.

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[22] Vallance Dep. at 42; Trial Test.

[23] Vallance Dep. at 40-41.

[24] Ex. 10 at 1.

[25] Trial Test.

[26] *Id.*

¶ 26 Mr. Silvan testified that there was always help available for heavy or awkward tasks, and Mr. Silvan often worked alongside Petitioner. Mr. Silvan explained that equipment such as forklifts, a pallet jack, and various carts were available for lifting and moving heavy items. Although he characterized how frequently Petitioner performed certain tasks as less frequently than Petitioner asserted, Mr. Silvan generally agreed with Petitioner's enumeration of the tasks which he performed as part of his job duties. However, many tasks which Petitioner characterized as heavy labor – such as operating a forklift, servicing heavy machinery, and unloading equipment returned from job sites – Mr. Silvan classified as moderate to light labor. Mr. Silvan testified that there were many heavy items which needed to be lifted or carried a short distance, but Petitioner would ask for assistance in lifting heavy items. He testified that many of the tasks Petitioner described would only occur one to three times per year. Mr. Silvan stated that he considered Petitioner's job to be moderate to light labor because there was always assistance, either mechanical or human or both, for lifting heavy objects or completing awkward tasks.[27]

¶ 27 Whether Petitioner's job duties are specifically labeled heavy duty or moderate duty is less important than the Court's understanding of what Petitioner's job actually was. Based on the testimony presented to it, the Court finds that Petitioner's job was largely moderate duty with some regularly-assigned tasks being either light duty or heavy duty.

¶ 28 In January 1997, Petitioner slipped and fell on ice while at work.[28] He did not report the fall and he did not file a workers' compensation claim. Petitioner explained that he did not file a claim because he was unaware of workers' compensation.[29]

¶ 29 Ms. Vallance recalls Petitioner telling her that he fell on the ice at DAC in approximately 1996. She stated that he was "sore" afterwards, but that the fall did not seem significant.[30]

¶ 30 Mr. Silvan testified that he remembered that in 1998 or 1999, Petitioner told him that he fell on some ice at work.[31]

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[27] *Id.*

[28] Vallance Dep. 8:16 - 9:2; Trial Test.

[29] Vallance Dep. 20:18 - 21:11; Trial Test.

[30] Trial Test. Although Ms. Vallance recalls the fall as occurring in 1996, since Petitioner did not begin working for DAC until June 1996, the fall could not have occurred prior to Petitioner's September 1996 MRI.

[31] Trial Test.

¶ 31 In his deposition, Petitioner asserted that the fall on the ice was the start of his back problems. Specifically, Petitioner testified as follows:

> Q. Tell me about the onset of those back problems you believe were caused by your work at Dick Anderson Construction.
>
> A. When I started having that problem with my back and having to continually do the type of work that I was doing, it gradually just got worse.
>
> Q. But it started in 1997?
>
> A. Uh-huh.
>
> . . . .
>
> Q. Any specific event cause it?
>
> A. I slipped on the ice once.
>
> Q. Tell me about that.
>
> A. Out there in back of the shop, it puddles, and there was nothing but a bunch of ice out there. I slipped on the ice and fell on my back, and that was pretty sore.
>
> Q. Do you know when that was?
>
> A. The exact date, I don't. It was in the winter, probably in January or February.
>
> Q. Of what year?
>
> A. '97.
>
> . . . .
>
> Q. You had no back problems before that fall on the ice in about January '97 at Dick Anderson Construction?
>
> A. Never.
>
> Q. Never?

A. Nothing, no back problems.[32]

¶ 32 The medical records contradict Petitioner's recollection. He had a workers' compensation claim for a back injury in 1993.[33] In September 1996, he reported a back strain and back pain going back four or five years from a snowmobile incident.[34] Petitioner also later reported that he strained his back while moving concrete forms prior to the fall on the ice.[35]

¶ 33 In August 1999, Petitioner filed a workers' compensation claim for a muscle strain in his lower back.[36] He received one acupuncture treatment and was released to work without restrictions.[37] Petitioner could not explain how, if he was unaware of workers' compensation when he fell on the ice in January 1997, he became aware of workers' compensation at the time of this injury.[38]

¶ 34 Petitioner's testimony at times contradicted itself and at times contradicted his deposition testimony. Much of this, in the Court's view, can be explained by Petitioner's memory difficulties about which both he and his wife testified. Irrespective of Petitioner's memory problems, however, much of Petitioner's history of back problems and treatment can be discerned from empirical evidence. As noted above, there is ample evidence to support a finding that Petitioner has memory problems, whether as a result of his epilepsy or his brain surgery. Unfortunately, these memory problems make Petitioner an unreliable historian. Therefore, although the Court does not find Petitioner to be an incredible witness, the Court does not find Petitioner's testimony to be reliable.

¶ 35 Petitioner occasionally complained to Mr. Silvan that his back was sore and at times he wore a velcro back support at work. Mr. Silvan recalled telling Petitioner on three or four occasions that he should file a workers' compensation claim to protect himself, but Petitioner did not want to file a claim.[39]

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[32] Vallance Dep. 8:4 - 9:14.

[33] Exs. 12-13.

[34] Ex. 10.

[35] Vallance Dep. at 40-43.

[36] Ex. 11 (12).

[37] Ex. 11 (13).

[38] Trial Test.

[39] *Id.*

¶ 36 Ms. Vallance recalled that it was during the last year and a half to two years of Petitioner's employment at DAC that his back problems noticeably worsened.[40]

¶ 37 The Court finds Ms. Vallance to be a credible witness.

¶ 38 Robert Kruckenberg is now the Safety Manager for Holsum, Inc. From August 1998 until October 2005, he was Safety Director for DAC.[41] The Court finds Mr. Kruckenberg to be a credible witness.

¶ 39 Mr. Kruckenberg testified that DAC has clear policies which outline workplace accident and injury reporting.[42] On November 22, 2004, Petitioner informed Mr. Kruckenberg that he had a herniated disk and that he needed to go on light duty at work. Mr. Kruckenberg asked Petitioner if he wanted to file a workers' compensation claim, and Petitioner replied that he did not believe his back problems were work-related.[43] Mr. Kruckenberg encouraged Petitioner to file a workers' compensation claim if Petitioner believed his back problems might be work-related, and Petitioner declined to do so.[44]

<u>Medical Testimony</u>

¶ 40 At trial, Petitioner was unable to recall his history of back problems as related to the various doctors he has seen since 1996. He could not recall why he told Dr. Michelotti that his back and leg problems started in late 2004. He could not recall whether he told Dr. Mulgrew that he experienced severe back pain for two or three years prior to October 2004. He could not recall whether he told Dr. Rapaport that his job aggravated his back problems. He could not recall discussing his previous MRI with Dr. Michelotti. He also could not recall why he did not tell Dr. Michelotti about the snowmobile incident, the 1996 lifting incident, or the 1997 fall on the ice.[45]

¶ 41 Dr. Rapaport conducted a panel examination of Petitioner. He is board certified in occupational medicine and as a medical review officer.[46]

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Ex. 12 at 1; Trial Test.

[44] Trial Test.

[45] *Id.*

[46] Rapaport Dep. 6:4-13.

¶ 42 In his deposition, Dr. Rapaport explained that the diagnosis of cumulative trauma is on the basis of history.[47] Dr. Rapaport testified that he did not know that Petitioner had complained of back pain prior to his fall on the ice, and that the history Dr. Rapaport had did not include the snowmobile incident, the 1996 lifting incident, or any other incident which predated the fall on the ice.[48] Dr. Rapaport was unaware that Petitioner had filed a workers' compensation claim for a back injury in 1993.[49] He also had not seen Dr. Anderson's 1996 progress report which noted that Petitioner had low back problems for four or five years. Dr. Rapaport was unaware that Petitioner had ever reported numbness in his feet.[50]

¶ 43 In his IME, Dr. Rapaport reported that Petitioner informed him that he fell on the ice in 1996, and that he subsequently had an MRI performed. At the time of the IME, Dr. Rapaport believed that the fall on the ice *preceded* the MRI. He also believed, based upon the history as related to him by Petitioner, that Petitioner suffered no previous or subsequent injuries to his back. Dr. Rapaport noted that the 2004 MRI revealed a disk herniation which was not present at the time of the 1996 MRI. Since Dr. Rapaport was under the mistaken impression that the 1996 MRI was subsequent to Petitioner's fall on the ice, and since he was unaware at the time of the IME of Petitioner's 1996 lifting injury and his August 16, 1999, back injury, Dr. Rapaport concluded that the disk herniation could only be attributed to an occupational disease caused by Petitioner's strenuous job activities. In other words, Dr. Rapaport's information was that Petitioner's only potentially back injuring accident was the fall on the ice, and Dr. Rapaport believed the 1996 MRI occurred after the fall on the ice, thus eliminating the fall as the possible cause of Petitioner's herniated disk.

¶ 44 Dr. Rapaport acknowledged that Petitioner's "credibility is an issue,"[51] and further stated, "I think the existence of back pain previously and additional potential injury may suggest that the condition may have developed prior to 1996 . . . ."[52]

¶ 45 Dr. Rapaport testified that, based upon his new knowledge about Petitioner's medical history, he could not say whether it was more probable that Petitioner's back problems stemmed from one of Petitioner's accidents or from his occupation. He testified

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[47] Rapaport Dep. 10:21-22.

[48] Rapaport Dep. 13:25 - 14:1; 18:9-12; 18:18 - 20:4.

[49] Rapaport Dep. 24:2-7.

[50] Rapaport Dep. 28:10 - 31:24.

[51] Rapaport Dep. 33:8.

[52] Rapaport Dep. 43:15-18.

that, based upon the history he had just learned, "I don't know if I could say that [Petitioner's back condition was the result of an occupational disease] on a more probable than not basis."[53]

¶ 46 Dr. Michelotti is a board certified orthopedic surgeon.[54] Petitioner first visited Dr. Michelotti on January 18, 2005, to get a second opinion about the knee injury which was the subject of Petitioner's other workers' compensation proceeding.[55] Petitioner continued to see Dr. Michelotti on a regular basis, with most of Dr. Michelotti's treatment focusing on Petitioner's knees.[56] Dr. Michelotti admitted he did not overtly consider causation in relation to Petitioner's back condition.[57]

¶ 47 Dr. Michelotti testified that Petitioner did not describe his work activities to him,[58] and that he did not know if heavy labor would necessarily aggravate a herniated disk.[59]

¶ 48 Dr. Michelotti's information about Petitioner's medical history included the report of Petitioner's 2004 MRI and the history Petitioner provided.[60] Petitioner did not inform Dr. Michelotti about his 1993 back injury,[61] the snowmobile incident,[62] the numbness he

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[53] Rapaport Dep. 47:1-2.

[54] Michelotti Dep. 4:23-25.

[55] Ex. 5 at 4.

[56] Michelotti Dep. 21:3.

[57] Michelotti Dep. 20:24 - 21:3.

[58] Michelotti Dep. 13:8-11.

[59] Michelotti Dep. 16:25 - 17.2.

[60] Michelotti Dep. 24:9-25.

[61] Michelotti Dep. 34:1-5.

[62] Michelotti Dep. 34:6-14.

experienced in his feet,[63] the concrete form lifting incident in 1996,[64] the fall on the ice in 1997,[65] nor the fact that Petitioner regularly saw a chiropractor in 2000 and 2003.[66]

¶ 49 Dr. Michelotti acknowledged that cumulative trauma injuries are often diagnosed primarily on the basis of history,[67] and that physicians are dependent upon patients providing complete and accurate histories.[68] He agreed that the history Petitioner did not provide would have been "important" in making a diagnosis.[69]

¶ 50 Dr. Michelotti admitted that Petitioner's 1997 fall on the ice could have caused his bulging disk to rupture.[70] He further admitted that the symptoms Petitioner has experienced since that fall are consistent with the fall and the other traumas.[71]

¶ 51 Based upon the new historical information provided, Dr. Michelotti admitted that he did not know whether Petitioner's present back condition was more probably caused by ongoing work activities or by a specific trauma or traumas.[72]

¶ 52 Both Dr. Rapaport and Dr. Michelotti testified that they reached their conclusions that Petitioner suffered from an occupational disease without the benefit of Petitioner's history regarding the various incidents in which he may have injured his back. Upon learning of some of Petitioner's history of back injuries, both doctors admitted that they were no longer convinced that Petitioner's present back condition was attributable to an occupational disease rather than to a specific injury.

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[63] Michelotti Dep. 34:23 - 35:5.

[64] Michelotti Dep. 25:14-17.

[65] *Id.*

[66] Michelotti Dep. 42:16 - 43:10.

[67] Michelotti Dep. 26:5-8.

[68] Michelotti Dep. 26:25 - 27:11.

[69] Michelotti Dep. 32:4-12.

[70] Michelotti Dep. 49:7-13.

[71] Michelotti Dep. 50:2-9.

[72] Michelotti Dep. 55:23 - 56:3.

CONCLUSIONS OF LAW

¶ 53 The law in effect on an employee's last day of work governs the resolution of a claim under the Occupational Disease Act.[73] Since Petitioner's last day of employment with DAC was in February 2005, the 2003 statutes control.[74]

¶ 54 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[75]

¶ 55 Petitioner has not met his burden of proving by a preponderance of the evidence that he suffers from an occupational disease. Neither Dr. Michelotti nor Dr. Rapaport was provided a sufficient history of Petitioner's back problems, and both doctors, upon learning of additional injuries and symptoms recorded in Petitioner's medical records, could no longer assert that Petitioner's back problems were more probably than not caused by an occupational disease.

¶ 56 Petitioner's own testimony is that he had two specific incidents at work which caused injury to his back, but for which he filed no compensation claims. Distinct, identifiable incidents which satisfy the injury definition of § 39-71-119, MCA[76], fall under the Workers' Compensation Act.[77]

¶ 57 In *Whitlock*, this Court held that three distinct identifiable but unreported incidents which the claimant suffered at work did not transform into an occupational disease claim.[78] In *Whitlock*, the claimant ultimately prevailed under the latent injury doctrine because, although she experienced some aching in her shoulder after each incident, it was not of a magnitude which either inhibited her work or led her to believe she needed medical care.[79]

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[73] *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996); *Hardgrove v. Transportation Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999.

[74] All Montana statute citations in this document refer to the 2003 version unless otherwise noted.

[75] *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).

[76] Specifically, § 39-71-119(2), MCA, explains that an injury is caused by an accident, and an accident is an unexpected traumatic incident or unusual strain identifiable by time and place of occurrence and part of the body affected, and caused by a specific event on a single day or during a single work shift.

[77] *Whitlock v. Fremont Indus. Indem. Co.*, 2002 MTWCC 12, ¶ 28.

[78] *Id.*

[79] *Whitlock*, ¶ 31.

In the case before us, Petitioner does not assert a latent injury claim, nor do the facts lend themselves to such a claim.

¶ 58 While Petitioner asserted that his job should be classified as heavy labor, Respondent argued Petitioner's job was more properly classified as a moderate or light-duty construction job. Regardless of how Petitioner's job may be classified, however, Petitioner has failed to establish causation.

¶ 59 Occupational diseases are considered to arise out of employment if there is a direct causal connection between the conditions under which the work is performed and the occupational disease, 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, the disease can be fairly traced to the employment as the proximate cause, and the disease comes from a hazard to which workers would not have been equally exposed outside of the employment.[80] In Petitioner's case, he is simply unable to prove that his back condition was caused by an occupational disease rather than by a specific trauma or industrial accident.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

¶ 60 Prior to trial, Respondent moved for summary judgment in this matter on the grounds that Petitioner's claim was barred by the statute of limitations, pursuant to § 39-72-403(1), MCA, since Respondent alleges that Petitioner, in arguing that his job aggravated his back problems from 1996 through 2003, should have filed his claim sooner. The Court reserved its ruling on this motion until after trial. The Court, after hearing this case, has determined that Petitioner's failure to prove causation is dispositive. Since the Court's ruling is based on the merits of this case, it need not reach Respondent's legal argument.

JUDGMENT

¶ 61 Petitioner's back condition is not an occupational disease compensable under the Montana Occupational Disease Act. The request for relief prayed for in Petitioner's Petition for Hearing is therefore **DENIED**.

¶ 62 Respondent's Motion for Summary Judgment is **DENIED** as moot.

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

[80] § 39-72-408(1), MCA.

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

DATED in Helena, Montana, this 5th day of July, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Norman H. Grosfield
Bradley J. Luck
Submitted: February 24, 2006