IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 9

WCC No. 2015-3519

MONTANA STATE FUND

Petitioner

vs.

LIBERTY NORTHWEST INS. CORP.

Respondent

and

KIM L. WIARD

Claimant.

APPEALED TO MONTANA SUPREME COURT – 08/30/17
REVERSED – 07/31/18 [DA 17-0522]

ORDER DENYING MONTANA STATE FUND'S MOTION FOR SUMMARY JUDGMENT AND GRANTING LIBERTY NORTHWEST INS. CORP.'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent accepted liability for Claimant's 2011 bilateral carpal tunnel syndrome. Claimant changed positions and her symptoms essentially went away. In 2014, Claimant experienced an acute exacerbation of her chronic left carpal tunnel syndrome while working for the same employer, which by then, was insured by Petitioner. Petitioner paid Claimant benefits under a reservation of rights and filed a Petition for Hearing seeking indemnification from Respondent. The parties have cross-moved for summary judgment on the issue of liability for Claimant's 2014 condition.

Held: In 2014, after reaching MMI for her 2011 condition, Claimant was required to work longer hours and extra shifts while Petitioner was the at-risk insurer. This exposure

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materially or substantially contributed to, and significantly aggravated, Claimant's preexisting carpal tunnel syndrome. Therefore, Petitioner is liable for Claimant's 2014 condition and is not entitled to indemnification from Respondent.

¶ 1 Petitioner Montana State Fund (State Fund) filed a Petition for Hearing against Respondent Liberty Northwest Ins. Corp. (Liberty) regarding the claim of Claimant Kim L. Wiard, seeking a determination that Liberty is liable: 1) for past, current and future payment of medical and indemnity benefits related to Wiard's ongoing bilateral carpal tunnel condition; and 2) to reimburse State Fund for the costs of benefits it has paid and will pay for Wiard. Stephanie A. Hollar represents State Fund. Michael P. Heringer represents Liberty. Garry D. Seaman represents Wiard.

¶ 2 This case is before this Court on State Fund's and Liberty's Cross-Motions for Summary Judgment. A hearing on the motions was neither requested nor held.

FACTS

¶ 3 Wiard began working for Tricon Timber, LLC (Tricon) in 2002. She worked at Tricon until February 2014, with the exception of several breaks, including approximately six months in 2007 during which time she assisted her husband, who was a carpenter, and a few short lay-offs when Tricon ran out of supplies.

¶ 4 Wiard's first job at Tricon was to stack one-by-four boards. She soon moved to the faster-paced planer department, where her job was to quickly flip over and stack boards of varied size. Although the work was hard on her body, especially her wrists and hands, she continued in this position into 2011.

¶ 5 Wiard began treating with Patrick W. Tufts, MD, around 2010; among other things, he diagnosed her with bilateral carpal tunnel syndrome caused by her employment. During Wiard's treatment, which lasted through mid-June 2011, Dr. Tufts administered several steroid injections, prescribed pain medications, and recommended the use of wrist braces. He also encouraged Wiard to get a different job and raised the possibility of surgery if her carpal tunnel condition did not improve.

¶ 6 Wiard complained to her superiors at Tricon and was able to secure a different position aimed at alleviating her carpal tunnel syndrome. By the time she saw orthopedic surgeon Alan D. Alyea, MD, on August 1, 2011, she was training to be a trimmer, which involved placing boards into position to be cut by saw to a custom length. Dr. Alyea developed a treatment plan and indicated that he would determine whether surgical intervention was appropriate after Wiard underwent nerve conduction studies.

¶ 7 Later in August, Wiard filed a claim with Liberty for an occupational disease (OD) involving both wrists. Liberty accepted the claim.

¶ 8 As a trimmer, Wiard moved her hands in a different way. She found the work much easier and saw her carpal tunnel symptoms largely, if not completely, dissipate. Although she occasionally took over-the-counter pain medication during this time, Wiard did not need to wear her wrist braces. Indeed, she cancelled her appointment for the nerve conduction studies and had no further treatment for her carpal tunnel syndrome for several years.

¶ 9 At some point in 2012 or early 2013, Wiard moved into a grader position. The grader position involved turning boards over and putting them in one of three positions. For Wiard, that job was "a little bit" more difficult than being a trimmer, but for a time, "mostly more mental than it was physical."

¶ 10 Liberty stopped providing coverage for Tricon on November 1, 2013. State Fund became Tricon's insurer.

¶ 11 Sometime after she became a grader, Wiard got a new supervisor. He seemed, to Wiard, to be concerned with proving himself. He put a lot of pressure on his workers to increase the number of board feet they were doing, and expected them to work 10- and 12-hour days, and extra shifts. In around early 2014, Wiard's carpal tunnel symptoms, including pain and swelling, began to come back on and off depending on how many hours she worked. At one point, Wiard told her supervisor her left hand was bothering her and took a day off. He made her come in and use her right hand to work.

¶ 12 On February 17, 2014, Wiard was seen at Mineral Community Hospital for left and right wrist pain. She was scheduled for a clinic appointment the following day and taken off work until then.

¶ 13 Later the same night, however, Wiard went to the emergency room at Kalispell Regional Medical Center, complaining of severe pain in her right wrist, radiating to her right shoulder. John V. Van Arendonk, MD, assessed her as having an acute exacerbation of carpal tunnel syndrome. Wiard was given a shot of Toradol for pain, discharged with several prescriptions and a work release, and referred for follow-up with an orthopedic surgeon in two to three days.

¶ 14 On February 19, 2014, Wiard presented to the St. Joseph's Emergency Room in Polson in severe distress and complaining of pain in her left hand for three or four days. Michael Righetti, MD, took a history from Wiard and her daughter, examined Wiard, and assessed her as having an "acute exacerbation" of chronic left carpal tunnel syndrome, meaning "a[n] increase in symptoms over a period of three to five days." He performed an emergent open carpal tunnel release on her left wrist the same day.

¶ 15 Thereafter, Dr. Righetti advised Wiard to schedule a carpal tunnel release for her right wrist at her earliest convenience, which he performed endoscopically on March 25, 2014.

¶ 16 Wiard filed an OD claim for left carpal tunnel syndrome with State Fund in March 2014. State Fund first denied the claim on April 1, 2014, due to a lack of information, and reaffirmed its denial on May 6, 2014, because Wiard's medical documentation indicated she had originally been diagnosed with work-related carpal tunnel syndrome when State Fund did not insure Tricon.

¶ 17 Wiard requested that Liberty accept liability for her surgery and time loss relative to the August 2011 claim. Liberty denied the request, noting Wiard's filing of a new claim with State Fund.

¶ 18 On February 13, 2015, State Fund advised Wiard that it would pay temporary total disability and medical benefits under § 39-71-608, MCA, as there was a dispute between it and Liberty as to which insurer was liable for the benefits.

¶ 19 On July 16, 2015, Dr. Righetti examined Wiard and answered several questions in writing at State Fund's request. Dr. Righetti opined that, with respect to her bilateral carpal tunnel syndrome, Wiard had reached maximum medical improvement (MMI), had no permanent impairment, had no lifting restrictions, and required no further treatment.

¶ 20 On September 17, 2015, David J. Hewitt, MD, MPH, DABT, performed an independent medical evaluation (IME) of Wiard, which included obtaining a history and physical examination, and reviewing her available records from November 2, 2010, through July 16, 2015. Dr. Hewitt's assessment of Wiard was that her bilateral carpal tunnel syndrome, open left carpal tunnel release, and endoscopic right carpal tunnel release were related to her 2014 claim with State Fund. In response to questions posed by State Fund, he agreed that "the condition/diagnosis that required surgery in 2014 [was] the same condition or diagnosis identified in 2010, and on the first report of injury dated August 2011," and that "the condition that Dr. Righetti treated Ms. Wiard for in 2014 [was] a continuation of the disease process she was previously evaluated and treated for." He further opined that Wiard's "symptoms and exam findings were consistent with bilateral carpal tunnel syndrome since at least 2010" and "repetitively flipping boards while working at Tri[c]on [was] a reasonable explanation for the development of carpal tunnel syndrome in this case."

¶ 21 Shortly after Wiard's IME, Dr. Righetti reviewed Dr. Hewitt's report and indicated in writing that he agreed with his opinions.

¶ 22 On October 29, 2015, Dr. Righetti gave a deposition. When asked again if he agreed with Dr. Hewitt's opinion that the condition/diagnosis that required surgery in 2014 was the same condition/diagnosis identified in 2010 and 2011, Dr. Righetti answered, "That's correct." However, as to Dr. Hewitt's opinion that the condition for which Dr. Righetti treated Wiard in 2014 was a continuation of the disease process for which he previously evaluated and treated her, Dr. Righetti disagreed, opining that, "Occasionally the natural progression of this condition can peak at severe symptoms, but it is highly

unusual." As to Wiard, Dr. Righetti stated that he thought he saved her hand, that he had never seen carpal tunnel syndrome as bad as hers in his career, and that it would be extremely unusual for her left wrist condition to be a natural progression of her carpal tunnel syndrome.

¶ 23 Dr. Righetti explained that with chronic carpal tunnel syndrome, a person's symptoms can wax and wane depending on her activities. Not having symptoms for a period of time would indicate that the person's activities were not aggravating her condition. Dr. Righetti opined that Wiard likely reached MMI after the 2011 carpal tunnel episodes before he saw her in February 2014, "[b]ecause she went from [20]11 to [20]14, which is three years. And during that period of time she didn't elect to have any surgery. The likelihood is that she would have reached maximum medical improvement with mild residual symptoms that she was electing to live with." Dr. Righetti specifically opined that after she reached MMI, and consistent with medical base evidence, Wiard's work activities aggravated her condition, changing it so materially and substantially that it warranted surgery.

LAW AND ANALYSIS

¶ 24 This case is governed by the 2011 and 2013 Montana Workers' Compensation Acts since those were the versions in effect at the time of Wiard's OD claims.[1] The applicable provisions are the same in both versions.

¶ 25 This Court grants summary judgment when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[2]

I. Do the medical opinions offered by Dr. Hewitt and Dr. Righetti create an issue of material fact?

¶ 26 Here, both parties agree that there are no genuine disputes of material fact. Yet, as set forth above, Dr. Hewitt opined that Wiard's 2014 condition was a continuation of the disease process for which she was previously evaluated and treated, while Dr. Righetti, when asked in person about each of Dr. Hewitt's opinions, opined that it would be extremely unusual for Wiard's left wrist condition to be a natural progression of her carpal tunnel syndrome. At first glance, the difference in opinions appears to create an issue of material fact.

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[1] *See Bouldin v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 8; *Fuss v. Ins. Co. of North Am.*, 2004 MTWCC 34, ¶ 88 (citation omitted) (applying the versions of the Workers' Compensation Act in effect at the time of claimant's OD claims).

[2] ARM 24.5.329(2).

¶ 27 However, under Montana workers' compensation law, a treating physician's opinion is entitled to greater weight than an IME physician's.[3] This Court has explained, "unless there are cogent reasons for preferring the opinions of non-treating physicians, the treating physician's opinions will prevail."[4] In deciding the weight to accord conflicting medical opinions, this Court has considered such factors as the relative credentials of the physicians and the quality of evidence upon which the physicians based their respective opinions.[5]

¶ 28 While this Court cannot engage in the weighing of evidence on summary judgment, it was incumbent upon State Fund, at this stage of the proceedings, to introduce evidence from which this Court could find that Dr. Hewitt's opinions are entitled to more weight than Dr. Righetti's. However, State Fund failed to make any such showing. In terms of credentials, Dr. Hewitt is an occupational medicine physician, who offers opinions on a broad range of medical topics.[6] State Fund did not elicit any evidence that Dr. Hewitt has greater training or experience in evaluating patients with carpal tunnel syndrome than Dr. Righetti. The record shows that Dr. Righetti has the specific training and experience to render an opinion as to the cause of Wiard's recurrence of carpal tunnel syndrome. Dr. Righetti received four years of training in orthopedic surgery in addition to a one-year internship in general surgery, is a board-certified orthopedic surgeon, and has been in private practice in that field since 1985. As for evidence upon which to base their opinions, Dr. Hewitt personally examined Wiard, but only once for her IME, and a year and a half after her exacerbations and surgeries, at which time she no longer had any carpal tunnel symptoms. In contrast, Dr. Righetti treated Wiard on multiple occasions and contemporaneously with her exacerbations, and successfully performed both of her carpal tunnel release surgeries. Moreover, Dr. Hewitt's opinions neither impeach Dr. Righetti's nor answer the ultimate questions in this case: they do not acknowledge that, after a period of stability, Wiard's condition suddenly worsened or explain how or

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[3] *See EBI/Orion Grp v. Blythe*, 281 Mont. 50, 57, 931 P.2d 38, 42 (citation omitted) ("[A]s a general rule, we have held that the testimony of a treating physician is entitled to greater evidentiary weight."); *Doubek v. CNA Ins. Co.*, 2004 MTWCC 76, ¶ 61 (citation omitted) ("It is well established that a treating physician's opinions are entitled to greater weight than those of a non-treating physician.").

[4] *Doubek*, ¶ 52 (citation omitted).

[5] *See, e.g.*, *Barnhart v. Liberty Northwest Ins. Corp.*, 2016 MTWCC 12, ¶ 45 (citation omitted). *See also Warburton v. Liberty Northwest Ins. Corp*., 2016 MTWCC 1, ¶¶ 47, 52, 58, 59, 61 (accepting IME physician's opinions over treating physicians' in case where claimant provided inaccurate history to her treating physicians); *Rushford v. Montana Contractor Comp. Fund*, 2014 MTWCC 16, ¶ 205 (ruling that IME physician's opinion had more weight over treating physician's because IME physician had higher quality of evidence on which to base his opinions); *Wright v. ACE Am. Ins. Co.*, 2010 MTWCC 11, ¶ 75 (giving more weight to orthopedic surgeon's opinion over treating physician's because treating physician was chronic pain specialist and issue in case was whether orthopedic surgery was indicated); *Frisbie v. Champion Int'l Corp*., 1995 MTWCC 13, ¶ 31 (resolving conflict in medical opinions in favor of IME physicians who specialized in treatment of low-back conditions over opinion of claimant's treating physician, who was family practitioner).

[6] *See, e.g.*, *Haines v. Montana Univ. Sys. Self-Funded Workers' Comp. Program*, 2015 MTWCC 9, ¶ 33 (detailing Dr. Hewitt's opinion that "neither Haines' chlorine gas exposure nor his calcium hypochlorite exposure caused [his] peripheral neuropathy").

why it did so. Therefore, as a matter of law, Dr. Righetti's opinion must prevail as to the cause of Wiard's condition in 2014, and the material facts necessary for disposition of this case are not in dispute. Accordingly, this case is susceptible to summary disposition.

II. Is Liberty liable for the recurrence of Wiard's OD in 2014?

¶ 29 Section § 39-71-407(8), MCA, provides that in cases such as this, the last insurer potentially liable for the claim has the burden of proof:

> If there is no dispute that an insurer is liable for an injury but there is a liability dispute between two or more insurers, the insurer for the most recently filed claim shall pay benefits until the insurer proves that another insurer is responsible for paying benefits or until another insurer agrees to pay benefits. If it is later proven that the insurer for the most recently filed claim is not responsible for paying benefits, that insurer must receive reimbursement for benefits paid to the claimant from the insurer proven to be responsible.

As the insurer for the most recently filed claim, State Fund will bear at trial the burden of proving that Liberty is liable for the recurrence of Wiard's OD in 2014.[7]

¶ 30 State Fund argues that since Wiard was employed by only one employer, § 39-71-407(14), MCA, determines which insurer is liable for her 2014 condition.[8] Liberty insured Tricon when Wiard was diagnosed with bilateral carpal tunnel syndrome in 2010 and accepted Wiard's OD claim for that condition in 2011. In February 2014, Wiard underwent treatment for the same OD. Thus, pursuant to the statute, State Fund contends that Liberty is responsible for the indemnity and medical benefits due as a result of the treatment Wiard received for left carpal tunnel syndrome in February 2014. State Fund further argues that even a material aggravation of Wiard's condition while it insured Tricon would not relieve Liberty of liability. According to State Fund, in order to shift liability to State Fund, Liberty would have to, but cannot, show that Wiard's February 2014 medical treatment was for a new and different OD. State Fund cites *In re Abfalder I* and *Fuss v. Ins. Co. of North America*, in support of its position.[9]

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[7] *See also In re Abfalder* (*In re Abfalder I*), 2003 MT 180, ¶¶ 15, 16, 316 Mont. 415, 75 P.3d 1246 (the burden of proof is on the insurer which is at risk at the time of the accident in which a compensable injury is claimed).

[8] Section 39-71-407(14), MCA, provides:

> When there is more than one insurer and only one employer at the time that the employee was injuriously exposed to the hazard of the disease, the liability rests with the insurer providing coverage at the earlier of:
>
> (a) the time that the occupational disease was first diagnosed by a health care provider; or
>
> (b) the time that the employee knew or should have known that the condition was the result of an occupational disease.

[9] Wiard essentially concurs with State Fund's motion and arguments.

¶ 31 Liberty contends that it is not liable for Wiard's 2014 condition because Wiard's need for surgery in 2014 was the result of a permanent and material aggravation, not a natural progression, of her carpal tunnel syndrome. As Liberty explains, until she worked longer hours and extra shifts, Wiard had not complained of carpal tunnel syndrome symptoms since filing the 2011 claim and was at MMI. According to Liberty, the increased workload, to which Wiard was subjected while State Fund was the at-risk insurer, was a superseding intervening cause that relieves Liberty of liability for Wiard's benefits. Liberty also contends that, under § 39-71-407(13), MCA, liability for Wiard's benefits is correctly attributed to the insurer that covered Tricon when Wiard was last exposed to the type of conditions that would ordinarily cause work-related carpal tunnel syndrome, which was State Fund.[10] Liberty relies on a variety of cases in support of its position, including *In re Mitchell*,[11] *In re Rusco*,[12] *Stacks v. Travelers Property Casualty*,[13] and *Newlon v. Teck American Inc. (formerly Cominco)*.[14]

¶ 32 As an initial matter, State Fund's reliance on § 39-71-407(14), MCA, is misplaced. The "last injurious exposure doctrine" refers to a method of assigning liability to an insurer for an OD. Historically, Montana courts have applied different versions of the doctrine in different circumstances. As the Supreme Court explained in *In re Mitchell*, which version applies depends on the type of liability at issue.[15] Where the issue to be decided is liability for a newly diagnosed OD, the applicable version of the doctrine is that which is codified at § 39-71-407(13) and (14), MCA.[16] However, where an OD has already been diagnosed, initial liability for the OD has been determined, and the question is whether a recurrence of the OD is attributable to the initial insurer or a second insurer based on an intervening exposure to the hazard of the OD, the approach laid down in *Caekaert v. State*

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[10] Section 39-71-407(13), MCA, provides: "When compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease."

[11] 2009 MT 386, ¶ 17, 353 Mont. 299, 219 P.3d 1267.

[12] 2003 MTWCC 10, ¶ 35 (citation omitted).

[13] 2001 MTWCC 9, ¶ 108.

[14] 2014 MTWCC 12, ¶ 52, *aff'd* 2015 MT 317, 381 Mont. 378, 360 P.3d 1134.

[15] *See In re Mitchell*, ¶ 24.

[16] *See, e.g.*, *Montana State Fund v. Murray*, 2005 MT 97, ¶ 29, 326 Mont. 516, 111 P.3d 210 (affirming this Court's conclusion that, pursuant to what is now § 39-71-407(14), MCA, initial insurer was liable for claimant's condition where: it was the insurer at risk when doctor advised claimant that work was a cause of his condition; and it offered no evidence indicating that claimant should have been aware of the connection between his condition and his employment earlier). *See also In re Abfalder I*, ¶ 12 (indicating that what are now § 39-71-407(13) and (14), MCA, are encompassed in the codification of the last injurious exposure doctrine).

Compensation Mutual Ins. Fund[17] and *Lanes v. Montana State Fund*[18] applies.[19] Where Liberty accepted liability for Wiard's OD of carpal tunnel syndrome in 2011, and the issue is which insurer is liable for the recurrence of that OD in 2014, the *Caekaert* and *Lanes* approach applies.

¶ 33 Under that approach, the attribution of liability for recurrence of an OD condition is based on two factors: (1) MMI; and (2) causation. In *Caekaert*, the Supreme Court cited Professor Larson's statement that "recurrence of occupational disease cases should be treated the same as accidental injury cases" and his explanation of the considerations involved in determining causation:

> [W]hen disability has once resulted from occupational disease, a second disability occurring under a different carrier will be chargeable to the first carrier *if it is a recurrence of the first disability. The persistence of symptoms in the meantime, and the failure to demonstrate an incident that can independently explain the second onset*, are strong grounds for finding a mere recurrence....
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> ....
>
> However, if the later exposure should increase the degree of disability caused by the initial exposure, the second carrier might become responsible; but in such a case it would be necessary to distinguish carefully between the increased disability from natural progress of the disease and that resulting from the added exposure.[20]

Thus, under *Caekaert*, *Lanes*, and the other cases on which Liberty relies, the initial insurer is liable if the worker never reached MMI for the original condition ***or*** if the recurrence is a direct and natural result of the original condition; the second insurer is liable if the worker reached MMI for the original condition ***and*** the subsequent workplace exposure materially or substantially contributed to, or significantly aggravated, the

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[17] 268 Mont. 105, 885 P.2d 495 (1994).

[18] 2008 MT 306, 346 Mont. 10, 192 P.3d 1145.

[19] *In re Mitchell*, ¶ 24. *See Wommack v. Nat'l Farmers Union Prop. & Cas. Co.*, 2017 MTWCC 8, at n.*54; In re Abfalder*, 2002 MTWCC 29, ¶ 49 (applying the *Caekaert* framework, which originally applied to case involving two employers, to case involving only one employer), *aff'd* 2003 MT 180, 316 Mont. 415, 75 P.3d 1246.

[20] *Caekaert*, 268 Mont. at 111, 885 P.2d at 499 (alteration in original) (emphasis in original) (quoting Larson's Workmen's Compensation Law, § 95.27).

worker's condition.[21] "[I]f a second . . . exposure does not 'materially or substantially contribute' to [or significantly aggravate] the claimant's condition, then the condition can be said to be 'a direct and natural result' of the initial occupational disease."[22]

¶ 34 State Fund's entitlement to indemnification from Liberty therefore depends on State Fund's ability to prove that Wiard did not reach MMI for her 2011 condition before her 2014 exacerbation, or that her 2014 exacerbation was the direct and natural result of her 2011 condition. State Fund did not submit sufficient evidence to prove either. Therefore, Liberty is entitled to summary judgment.[23]

¶ 35 First, as Dr. Righetti explained and Dr. Hewitt did not dispute, Wiard reached MMI for her 2011 condition before February 2014.[24]

¶ 36 Second, State Fund has not provided sufficient evidence that Wiard's 2014 carpal tunnel syndrome was a direct and natural result of her 2011 bout of carpal tunnel syndrome. The medical records of Dr. Tufts, who treated Wiard for her 2011 condition, indicate that he previously raised the possibility of carpal tunnel surgery if her condition failed to improve. Far from persisting, however, Wiard's symptoms basically disappeared

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[21] *Caekaert*, 268 Mont. at 112, 114, 885 P.2d at 499, 501 (material or substantial contribution); *Lanes*, ¶ 36 (citations omitted) ("To determine whether an aggravation of a preexisting condition gives rise to a compensable occupational disease, 'the test for compensability . . . is whether occupational factors significantly aggravated a preexisting condition, not whether occupational factors played the major or most significant role in causing the claimant's resulting disease.' "). *See also In re Abfalder*, ¶ 42 ("[T]he principal issue in this case is whether claimant's disability commencing December 3, 1999, is the result [of] his 1994 occupational disease or a natural progression of that disease, or whether later injuries materially and permanently aggravated his underlying occupational disease."); *In re Rusco*, 2003 MTWCC 10, ¶ 35 (citing *Burglund v. Liberty Mut. Fire Ins. Co.*, 286 Mont. 134, 950 P.2d 1371 (1997)) ("If a claimant has reached MMI with respect to a first industrial injury and he thereafter suffers a work-related, permanent, and material aggravation of his medical condition, then the insurer at risk at the time of the aggravation is liable for compensation and medical benefits attributable to the condition. If, on the other hand, the subsequent aggravation is temporary or immaterial, and the disabling condition results from a natural progression set in motion by the first injury, then the insurer for the original injury is liable for compensation and medical benefits for the condition."); *Stacks*, ¶ 108 (emphasis in original) ("Where a worker suffers two sequential industrial injuries affecting the same part of the body, the insurer for the second injury is initially liable for benefits and bears the burden of proof when seeking to shift liability back to the prior insurer. When a subsequent injury has arguably **aggravated** a preexisting condition, the second insurer avoids liability for that condition **only** upon proving the claimant had not reached maximum medical healing with respect to his prior workers' compensation injury **or** that the second injury did not in fact permanently aggravate the underlying condition for which the prior insurer was liable."); *Liberty Northwest Ins. Corp. v. Champion Int'l Corp.*, 1996 MTWCC 45 ("[T]he crux of the inquiry in the present case is whether claimant's work at Stimson materially and significantly aggravated his underlying low-back condition."), *aff'd* 285 Mont. 76, 945 P.2d 433 (1997).

[22] *In re Abfalder*, ¶ 49 (alteration added).

[23] *See Blacktail Mountain Ranch, Co. v. Dep't of Natural Res. & Conservation*, 2009 MT 345, ¶ 7, 353 Mont. 149, 220 P.3d 388 (citation omitted) ("Summary judgment is proper when a non-moving party fails to make a showing sufficient to establish the existence of an essential element of its case on which it bears the burden of proof at trial.").

[24] *See Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 42, 365 Mont. 405, 282 P.3d 687 (citation omitted) ("[T]he probative force of the opinion 'is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis.' "). *See also Lockwood v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 21, ¶¶ 39, 46 (citations omitted) ("Where a claimant refuses further treatment, MMI has been reached.").

after she changed positions at Tricon; surgery only became necessary — even emergent — years later, after her added exposure of working longer hours and extra shifts.[25] Dr. Righetti, whose opinion is entitled to more weight, opined both that it would be extremely unusual for Wiard's left wrist condition to be a natural progression of her carpal tunnel syndrome, and that her post-MMI work activities aggravated her condition, changing it so materially and substantially that she required emergency surgery. Dr. Hewitt, whose opinion is entitled to less weight as a matter of law, offered no other explanation for Wiard's sudden worsening in 2014. Thus, the condition of Wiard's left wrist in 2014 was not the direct and natural result of her 2011 condition; rather, after she reached MMI, added exposure to the hazard of her OD materially or substantially contributed to, and significantly aggravated, her condition.[26]

¶ 37 It is not enough to contend, as State Fund does, that Liberty is liable for Wiard's recurrent condition because it is the same condition for which Liberty previously accepted liability. As the Supreme Court demonstrated in *Caekaert*, even when the OD remains the same, it is the cause of the recurrence that is key.[27] Indeed, this Court specifically pointed out, in *Fuss*, why focusing only on identity of ODs can be too "simplistic":[28]

> [What if a] claimant contracted a work-related bacterial infection causing a sore throat, [that] was successfully treated with antibiotics, and then suffered a subsequent sore throat due to a new bacterial or viral infection unrelated to his work[?] In this hypothetical, an insurer is clearly not liable for the subsequent sore throat and infection because it is unrelated to the original one, i.e., there is no causal connection between the claimant's original occupational disease and his subsequent condition.[29]

As this hypothetical demonstrates, identity of OD is not always dispositive of the issue of liability.

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[25] *Cf.* ¶ 33 & n.20 above.

[26] *See Liberty Northwest Ins. Corp. v. Champion Int'l Corp.*, 285 Mont. 76, 945 P.2d 433 (affirming this Court's conclusion that claimant's "heavier," post-MMI work for a different employer was a material and significant aggravation of claimant's underlying low-back condition, where medical testimony indicated that it: accelerated his low-back disease, caused it to symptomatically deteriorate, and ultimately caused disability). *Cf. Caekaert*, 268 Mont. at 114-15, 885 P.2d at 501 (holding that this Court should have concluded that initial insurer was liable for claimant's medical expenses following a second set of surgical procedures in light of medical testimony that surgery was necessary before any possible aggravation occurred, and the insurer's failure to offer substantial evidence that a second event or exposure caused claimant to undergo the procedures).

[27] *See Caekaert*, 268 Mont. at 115, 885 P.2d at 501 (where Caekaert's OD remained the same, court held, "Because the State Fund did not offer substantial evidence that a second event or exposure caused Caekaert to undergo surgical procedures in 1992 and 1993, the Workers' Compensation Court incorrectly concluded that the last injurious exposure rule barred Caekaert's claim.").

[28] *Fuss*, ¶ 89.

[29] *Fuss*, ¶ 91.

¶ 38 Moreover, State Fund's reliance on *Fuss* — for the general proposition that a material aggravation, while the subsequent insurer is at risk, does not relieve the initial insurer of liability — is misguided. After this Court decided *Fuss*, the Supreme Court issued *Lanes*, in which it clearly established that, after the claimant has reached MMI for the original condition, a significant aggravation of the condition, while the subsequent insurer is at risk, will shift liability.[30] The following year, the court reiterated that, where liability for recurrence of an OD is at issue, as it is in this case, the approach laid down in *Caekaert* and *Lanes* continues to guide the analysis: i.e., after MMI, a work-related material or substantial contribution, or significant aggravation will shift liability to the subsequent insurer.[31] Since that is what happened in this case, State Fund is liable for the recurrence of Wiard's carpal tunnel syndrome.

ORDER

¶ 39 Petitioner's Motion for Summary Judgment is **denied**.

¶ 40 Respondent's Motion for Summary Judgment is **granted**.

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

DATED this 3rd day of July, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Stephanie A. Hollar
Michael P. Heringer
Garry D. Seaman

Submitted: February 4, 2016

[30] *See Lanes*, ¶ 38 ("Because the evidence did not establish that the minister duties 'significantly aggravated' Lanes' pre-existing condition, the WCC did not err in concluding that this temporary aggravation did not constitute the last injurious exposure . . . ."). *See also* ¶ 33 & n.21 above.

[31] *See* ¶ 32 & n.19 above.