IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 8

WCC No. 2015-3518

ROBERT WOMMACK

Petitioner

vs.

NATIONAL FARMERS UNION PROPERTY & CASUALTY CO., NATIONWIDE MUTUAL FIRE INS. CO., MONTANA STATE FUND, CHS INC., LIBERTY MUTUAL FIRE INS. CO., and DOES 1-5, inclusive

Respondents/Insurers.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner developed an OD from exposure to asbestos at the refinery where he worked. For most of his career, Petitioner worked within the refinery, but in the years before his retirement, he worked as an asphalt salesman based in an office across the street. The insurers at risk during Petitioner's time in the refinery maintain that he continued to be exposed to asbestos after changing jobs and his last injurious exposure occurred when he worked as a salesman. The insurer at risk during Petitioner's time as a salesman argues that Petitioner's last injurious exposure occurred when he worked full-time in the refinery.

Held: Although Petitioner's most significant exposure to asbestos occurred prior to accepting the sales position, he continued to experience exposure to asbestos until he retired. Since Petitioner continued to be exposed to the same type and kind of conditions which caused his OD, under *In re Mitchell's* "potentially causal" standard, Petitioner's last injurious exposure occurred when he worked as an asphalt salesman, and the insurer at risk at that time is therefore liable.

¶ 1 The trial in this matter occurred on May 19, 2015, at the Workers' Compensation Court in Helena. Petitioner Robert Wommack appeared and was represented by Ben A. Snipes. Charles G. Adams represented Respondent Nationwide Mutual Fire Ins. Co. (Nationwide). Thomas E. Martello and Melissa Quale represented Respondent Montana State Fund (State Fund). Michael P. Heringer represented Respondent Liberty Mutual Fire Ins. Co. (Liberty).

¶ 2 Exhibits: This Court admitted Exhibits 1 through 42, 44, 45, 48, 70 through 73, and 75 through 78 without objection. This Court also admitted pages 1 through 3, 10, and 12 through 49 of Exhibit 43 without objection. This Court admitted pages 4 through 9 and page 11 of Exhibit 43 over Liberty's relevancy objections. The parties did not offer Exhibits 46, 47, 49 through 69, and 74. Exhibits 79 through 82 were duplicative of other exhibits admitted herein. This Court admitted Exhibit 83 as a demonstrative exhibit over Wommack's objection. This Court also admitted certain discovery answers upon unopposed motions.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Terry Spear, PhD, Robert Wommack, William (Bill) Strauch, Robert Wetch, Dick Lohof, Robert Robinson, Louis Day, and James McMeekin, MD. Wommack and Bob Sheriff, CIH, CSP, were sworn and testified at trial.

¶ 4 Issues Presented: This Court considers the following issues:

Issue One: Which insurer is liable for Wommack's occupational disease?

Issue Two: If Liberty is not liable for Wommack's occupational disease, is it entitled to contribution and/or indemnification for the expense of the occupational disease panel?

Issue Three: Is Wommack entitled to his attorney fees, costs, and/or a penalty?

FINDINGS OF FACT

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

Wommack's Work History at Cenex

¶ 6 On June 2, 1968, Wommack began working for Cenex in its Laurel refinery.[1] At the time, Reliance Insurance Company insured Cenex.

¶ 7 Wommack was initially a laborer. His duties included picking up discarded pieces of asbestos insulation and sweeping up asbestos-contaminated dust. Asbestos-containing materials were common throughout the refinery and included the insulation and gaskets used on the pipes. At that time, workers were often unaware of asbestos'

[1] Although the refinery changed names many times over the years, the parties all referred to the facility as "Cenex" and agreed that "Cenex" was Wommack's employer.

dangers.[2] None of the workers wore protective gear or employed procedures to minimize their exposure to asbestos.

¶ 8 After spending a year as a laborer, Wommack worked as a helper in the crude unit. Approximately six months later, he became a painter and his job duties entailed painting tanks and gas lines. This job did not usually involve contact with insulation. However, the working conditions throughout the refinery were dusty and the painters used compressed air to blow the dust off of pipes before painting them, putting more dust in the air. Wommack only used a respirator while actually painting.

¶ 9 In approximately 1970, Wommack began working throughout the refinery as a welder. Insulators typically removed the insulation from the pipes he welded, although Wommack occasionally did so himself. After the insulators removed the insulation, Wommack scraped insulation residue from the pipe by cleaning the pipe with a wire brush, brushing the loosened residue off with his hands, and then wiping his hands on his pants. On occasion, he broke off pieces of insulation with a hammer and the pieces would fracture and fall onto the refinery floor, creating a white "fiberish" dust. Wommack did not wear a respirator while doing this work. Furthermore, the refinery buildings' roofs and many of its walls were made of an asbestos-containing material called Transite. If Wommack had to run pipe through Transite panels, a carpenter would cut a hole in the panel with a circular saw. Wommack was in close proximity to the carpenter when this occurred, he did not wear respiratory protection during the cutting, and "Dust was flying everywhere."

¶ 10 National Farmers Union Property & Casualty Co. (National Farmers) began insuring Cenex on December 21, 1973.

¶ 11 By the mid-1970s, Cenex stopped using asbestos-containing materials. When insulators reinstalled insulation around pipes in the refinery, they discarded the old asbestos insulation and installed asbestos-free materials.

¶ 12 Wommack was a welder until approximately 1984. He then returned to the crude unit as an assistant operator. As an assistant operator, Wommack was present when workers disturbed insulation and he was in close proximity to pumps with asbestos-containing gaskets and insulation while insulators and pipefitters worked on the pumps.

¶ 13 After a year in the crude unit, Wommack became an assistant pumper. His duties included controlling the products flowing into the refinery's tanks and loading trucks and

[2] For much of his career, Wommack did not know that asbestos was harmful. He recalled that he learned of asbestos' harmfulness "[w]hen the government and everything started after [W.R.] Grace," although he could not remember an approximate time period.

train cars. Wommack spent part of each shift on the refinery floor. Wommack was often in close proximity to insulators and pipefitters while those workers disturbed insulation.

¶ 14 During part of the time Wommack worked as an assistant operator and assistant pumper, Nationwide insured Cenex, providing workers' compensation insurance from September 30, 1985, until October 16, 1986. After Nationwide's coverage period ended, State Fund began insuring Cenex on October 16, 1986.

¶ 15 In 1988, Wommack went into management, first as a pumper maintenance foreman. As a pumper maintenance foreman, his job duties included coordinating repairs in the pumping department. He directly supervised the pipefitters, welders, and insulators who performed repairs on a daily basis. However, the area in which he worked as a pumper maintenance foreman, called "Zone D," was a newly constructed area which did not contain asbestos insulation.

¶ 16 After approximately 18 months as a pumper maintenance foreman, Wommack became a maintenance foreman. Wommack's job duties remained largely the same, but he covered a larger area of the refinery, including areas which contained asbestos, and had more crews under his supervision. Wommack continued to supervise insulators while they handled insulation on a near-daily basis and wore no respiratory protection while doing so.

¶ 17 While a maintenance foreman, Wommack attended a one-week training program regarding asbestos removal and abatement. Wommack is unaware of Cenex having an asbestos removal program in place prior to his attending this program. There, he learned how to remove asbestos by covering it with a plastic bag and spraying it with water prior to beginning removal, a procedure called the "glove bag" method. Afterwards, Wommack supervised insulator crews to ensure they followed proper asbestos-removal procedures. Wommack wore a white paper dust mask during asbestos removal, but he never wore a respirator.

¶ 18 On May 15, 1990, Cenex issued work procedures for small scale/short duration asbestos removals in which it specified that workers were to use glove bags and wet methods for asbestos removal at all times, and that its state-certified asbestos insulators would perform these removals under the direction of a state-certified asbestos supervisor. The procedure included cordoning off an area around the work area, placing warning signs, installing the glove bag, encapsulating remaining insulation, and using a HEPA vacuum in the glove bag. The procedure specified the types of protective gear insulators were to wear, and how to properly dispose of the gear afterwards.

¶ 19 On December 16, 1992, Cenex filed an annual asbestos facility permit with the Montana Department of Environmental Quality (DEQ). Cenex informed DEQ that it

projected that in 1993, it would remove or strip approximately 950 linear feet of pipe and valve insulation, including approximately 150 to 160 small jobs at a rate of 3 to 4 jobs per week, and 1 or 2 larger jobs each month which might involve Transite or vessel insulation.

¶ 20 In March 1993, Brand Services, Inc., published a Work Plan for the Cenex refinery regarding asbestos abatement. In the plan, the company acknowledged that asbestos fibers can be too small to be seen with an optical microscope, and that these smaller fibers are capable of readily penetrating lung tissue. The Work Plan stated, "There is no known safe level of exposure [to asbestos]."

¶ 21 On December 2, 1993, Cenex filed an annual asbestos facility permit with DEQ. Cenex projected that in 1994, it would remove or strip approximately 1025 linear feet of pipe and valve insulation, including approximately 150 small jobs at a rate of 3 to 4 jobs per week, and 1 or 2 larger jobs each month which might involve Transite or vessel insulation.

¶ 22 Also in 1993, Wommack accepted a promotion to Eastern Regional Manager of Residual Fuels for Cenex. In this position, Wommack's job duties included selling asphalt and pitch to state transportation departments and large highway contractors. Once he became Eastern Regional Manager, Wommack maintained an office in a building across the street from the refinery. He also supervised asphalt plants located in Mandan and Grand Forks, North Dakota. Wommack estimated that he spent 40% of his time in the office building and 60% of his time traveling — either calling on customers or visiting the asphalt plants.

¶ 23 However, on the weeks when he worked in the Cenex office in Laurel, Wommack spent an hour or two inside the Cenex refinery, checking on orders and making contact with the employees who filled those orders. Although he could not recall any specific incidents, Wommack recalled that the refinery continued to be dusty, and pieces of insulation came loose and blew around the refinery on windy days. He did not wear respiratory protection when he visited the refinery.

¶ 24 On July 1, 1994, State Fund ceased insuring Cenex, and Liberty became Cenex's workers' compensation insurer.

¶ 25 In 1995, 1996, and 1997, Cenex filed annual asbestos facility permits with DEQ, in which Cenex projected that it would remove or strip approximately 2050 linear feet of pipe and valve insulation during the following year, including approximately 300 small jobs at a rate of 5 or 6 per week, and 1 or 2 larger jobs each month.

¶ 26 Wommack remained in the Eastern Regional Manager position until retiring from Cenex on April 1, 1998.

¶ 27 On June 2, 1998, Cenex, now part of CHS, Inc. (CHS), became a self-insured employer and remained so through the time of this trial.

¶ 28 Air quality analyses performed at Cenex in January and December of 2001 detected the presence of airborne asbestos, albeit in quantities below the Occupational Safety and Health Administration (OSHA) exposure limits. Under current OSHA standards, the permissible asbestos exposure limit for workers is an 8-hour time-weighted average of 0.1 fiber per cubic centimeter of air, as measured by PCM. However, OSHA acknowledges that at that current standard, the risk of death is 3.4 workers per 1,000, meaning that even though OSHA allows exposure at that level, that level of exposure is not harmless.

¶ 29 In the summer of 2014, Wommack attended a picnic for Cenex retirees. There, a Cenex safety engineer gave a presentation in which he reported that: Cenex continued to remove asbestos from the refinery; Cenex had removed 400 tons of asbestos insulation and pipe during each of the last two years; and Cenex projected the removal of 800 tons of asbestos in the next year.

¶ 30 Asbestos insulation and other asbestos-containing materials remain in use in the Cenex refinery, and the refinery has removed a significant amount of asbestos every year at least since the mid to late 1970s. Typically, Cenex employees remove small amounts of asbestos using a standardized abatement protocol, and contractors specializing in asbestos removal perform larger abatements.

¶ 31 Wommack opined that although his most significant exposure to asbestos occurred while he worked as a laborer and welder in the refinery because of his routine direct contact with asbestos-containing materials, he continued to be exposed to asbestos as a bystander throughout the remainder of his career.

Testimony of Wommack's Co-Workers

¶ 32 Louis Day, the Cenex refinery manager from 1975 until 1992, acknowledged that until the late 1980s, most Cenex workers could handle asbestos-containing materials as part of their job duties, and many refinery workers were exposed to asbestos on a daily basis. Day testified that for both practical and cost-effective reasons, Cenex removed asbestos gradually, replacing asbestos-containing materials with asbestos-free materials only if the materials needed to be disturbed for other reasons, such as repair work, and that by the mid-1980s, Cenex regularly employed safety procedures regarding asbestos.

However, Cenex never undertook a large-scale abatement for the purpose of removing asbestos from the refinery during Day's tenure.

¶ 33 Robert (Bob) Robinson worked at Cenex from February 1960 until he retired on April 1, 1999. During his career, Robinson held various jobs within the refinery, including pipefitter helper and welder, ultimately holding the position of maintenance foreman of new construction. Robinson recalled that many of the jobs he performed, such as removing insulation from pipes, created dusty conditions in the refinery. Robinson opined that refinery workers were exposed to asbestos throughout Robinson's entire career at Cenex up until his retirement in 1999 because "there was asbestos still throughout the refinery on all the pipes. And you've got vibrations and you've got winds and storms and there's always dust in the pipe racks."

¶ 34 Robert J. Wetch began working at the Cenex refinery in August 1966 and retired in 2001. The jobs Wetch held included insulator helper, pipefitter, and crane operator. As an insulator helper, Wetch was in daily contact with asbestos. He removed asbestos insulation from pipes and dropped it onto the floor, where laborers swept it up. He also ground up pieces of insulation in a hammer mill to turn it into a powder, to which he then added water to form a cement-like substance which he used to coat fittings which were difficult to cover with insulation — a process he described as creating a "terrible" amount of dust. Later, as a pipefitter, Wetch used a Skilsaw to cut Transite panels, which also produced dust. At the time, Wetch was unaware of the dangers of asbestos. He recalled that in approximately 1985, the refinery implemented safety protocols for working with materials suspected of containing asbestos, which included wearing protective gear and using glove bags. However, Wetch also believed that he was exposed to asbestos until he retired in 2001. Wetch explained that near the end of his career:

> I don't think that it was haphazard [asbestos] removal anymore. But the refinery has so much asbestos in it still, that I was -- anytime the wind blew, something broke or anything like that, and there was still asbestos insulation around the pipes and stuff, then it goes all through the refinery if -- and so up until I retired it was always there, and it's still there.

Wetch believed the refinery continues to have a hazardous level of asbestos, noting, "[T]he wind tears the tin [covering] off [the insulation], the insulation becomes bare, and it's in the wind. . . . [W]hen the wind's blowing it's all over . . . in the air."

¶ 35 William Strauch worked at the Cenex refinery from October 1971 until June 2007 in various jobs, including as a welder at roughly the same time as Wommack. Strauch and Wommack worked together on many occasions. Strauch recalled that as welders, he and Wommack routinely worked with gaskets which contained asbestos. Like Wommack, Strauch attended a training program at Cenex's request to become certified

for asbestos removal. Strauch recalled that in the mid-1980s, workers began following safety protocols and wearing protective gear when working with asbestos-containing materials, although he further noted that workers did not always follow the recommended protocols. Strauch testified that when Wommack worked as a maintenance foreman from 1988 until 1993, "Anytime there was a work order for removal of insulation, he could have been exposed [to asbestos], and that could have been nearly every day."

Expert Testimony

¶ 36 Wommack and Liberty both retained expert witnesses. Wommack retained Terry Spear, who has a PhD in industrial hygiene and is a professor emeritus at Montana Tech. Since 1985, Dr. Spear has performed litigation consulting in cases involving ARD, including numerous cases involving occupational asbestos exposure. Dr. Spear had co-authored at least seven peer-reviewed publications pertaining to asbestos.

¶ 37 Liberty retained Robert E. Sheriff, MS, CIH, CSP, who is the CEO of Atlantic Environmental, Inc., an industrial hygiene, safety, and environmental consulting firm based in Dover, New Jersey. Sheriff has an MA in preventive medicine and environmental health, is certified by the American Board of Industrial Hygiene as an industrial hygienist, and has approximately 40 years' experience in the field of industrial hygiene, among other qualifications. Although this was Sheriff's first appearance as an expert witness in Montana, he has testified in other asbestos cases throughout the country "almost exclusively [for] defendants."

¶ 38 Dr. Spear and Sheriff both opined that Wommack suffered exposure to asbestos at the Cenex refinery. However, they disagreed as to when Wommack may have experienced his last exposure to a significant amount of asbestos, and as to whether exposure to a minute amount of asbestos could be harmful or significant.

¶ 39 In investigating this case, Dr. Spear reviewed depositions, including the depositions of Wommack, Wetch, Strauch, Robinson, and Day. He also reviewed asbestos safety and removal records from Cenex, and the pleadings in this case. He then provided a report to Wommack's counsel which set forth his findings and opinions.

¶ 40 Dr. Spear opined that Wommack's most significant exposures occurred from 1968 through 1984 when his job duties entailed direct contact with asbestos-containing materials. However, he opined that Wommack continued to be exposed to asbestos in the refinery when he was a bystander while other workers handled asbestos-containing materials. Dr. Spear acknowledged that in approximately 1985, a "culture change" regarding asbestos occurred at the Cenex refinery. Prior to that time, the refinery had no significant safety protocols in place to protect workers from asbestos exposure. From approximately 1985 onward, workers would identify asbestos insulation and, for small

removals, utilized glove bags and wet methods. For larger asbestos-removal projects, Cenex employed specialized contractors.

¶ 41 However, Dr. Spear testified that the fibers Wommack was exposed to after 1985 "contributed to his asbestos fibers in his lungs," and that while ARD has a latency period, the length of time from asbestos exposure to development of ARD varies. Dr. Spear added that once Wommack became the Eastern Regional Manager, he spent less time in the refinery and his exposure to asbestos would have lessened, but it remained "very likely" that he was exposed to asbestos whenever he spent time in the refinery after 1993. In spite of the change in Wommack's job duties and the refinery's implementation of asbestos safety protocols, Dr. Spear opined that Wommack was exposed to a significant volume of asbestos throughout his 30-year career at Cenex. Dr. Spear stated, "I could not say that his exposure was nonexistent [after 1993]; . . . I still think there was a higher background of asbestos fibers in that refinery than you would find outside the refinery."[3]

¶ 42 Dr. Spear explained that asbestos from the 1960s, 1970s, and 1980s remains in the surface dust within the refinery and that he is unaware of Cenex attempting to remove dirt and dust which could contain residual asbestos. Dr. Spear explained that residual asbestos is hazardous because wind, air disturbances, vibrations, and worker activity may cause it to become airborne, and once airborne, asbestos fibers can remain aloft for long periods of time. Dr. Spear explained that the reintroduction of residual asbestos is a recognized avenue of exposure. Thus, Dr. Spear explained:

> Because of the large volume of asbestos present in the source materials at the Cenex Refinery with which Mr. Wommack worked with and around over a 30 year period, together with constant work activities that disturbed and re-suspended asbestos fibers into his breathing zone, it is my opinion to a reasonable degree of scientific certainty that Mr. Wommack's exposure to asbestos was significant enough to result in his asbestosis.

Dr. Spear further explained, "My opinion regarding his work as Regional Sales Manager is that he was exposed to asbestos fibers based on having to be in that refinery at least for a short period of time that would be above background levels of exposure if he was outside that refinery, and that the fibers that he was exposed to in that capacity contributed to his asbestos fibers in his lungs."[4] Dr. Spear opined that Wommack's last exposure to asbestos occurred in 1998, when he retired from Cenex.

¶ 43 Dr. Spear acknowledged that many of the air-sampling test results he reviewed for the Cenex refinery did not detect asbestos. However, insulation generally contains

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[3] FOR PROOFING: Spear Depo at 21-22.

[4] FOR PROOFING: Spear Depo at 68-69.

chrysotile asbestos, which is a very thin fiber, and Dr. Spear explained that the testing method utilized by Cenex — phase contrast microscopy (PCM) at 400 magnification — cannot detect the vast majority of chrysotile fibers. Dr. Spear stated that studies have indicated that approximately 80% of chrysotile fibers are too thin to be detected by PCM at 400 magnification. Dr. Spears also noted that only fibers longer than 5 micrometers are counted, although shorter fibers may also be hazardous.

¶ 44 Although Sheriff agreed with Dr. Spear that Wommack had significant potential for asbestos exposure through the time he worked as a welder until 1984, he disagreed with Dr. Spear's opinion that this exposure continued until 1998. Sheriff testified that Wommack's risk of contracting ARD as a result of his employment at Cenex from 1985 forward was "nonexistent" because of asbestos safety protocols. Sheriff further opined that after Wommack became Eastern Regional Manager, he was "definitely not" exposed to asbestos at the refinery.

¶ 45 Sheriff based these opinions on Cenex's adherence to OSHA requirements, the Asbestos Hazard Emergency Response Act (AHERA) criteria, and the results of air sampling tests Cenex performed. Sheriff noted that asbestos is only hazardous when fibers become airborne. Sheriff explained that in 1988, OSHA required all U.S. facilities to affix warning labels to asbestos-containing materials, and therefore he maintained that by the end of the year, all asbestos-containing materials in the refinery were identified and clearly labeled, reducing the possibility that these materials would be accidentally disturbed and thereby making the potential for exposure in the refinery "extremely small and likely nonexistent." Sheriff opined that the "glove bag" technique for small asbestos removal jobs, when done properly, results in no identifiable asbestos exposure to workers.

¶ 46 Although he did not inspect the Cenex refinery, Sheriff concluded that refinery workers who did not directly work with asbestos had no exposure to asbestos from 1988 onward. Sheriff agreed that his conclusion rests upon three assumptions: that all asbestos-containing insulation in the Cenex refinery is covered with an undisturbed and undamaged metal jacket; that workers correctly followed all required safety procedures when disturbing or removing asbestos-containing materials; and that no loose asbestos fibers remained in the refinery from earlier times.

¶ 47 However, this Court finds that the three assumptions underpinning Sheriff's opinion are unsupportable. First, Wommack's and Wetch's eyewitness testimony contradicts Sheriff's assumption that all asbestos insulation within the refinery was covered with an undisturbed, undamaged metal jacket. Sheriff conceded that he could not refute Wommack's and Wetch's testimony that they witnessed loose asbestos insulation

blowing around inside the refinery, including the time when Wommack was Eastern Regional Manager, because Sheriff, in his own words, "was not there at the time."[5]

¶ 48 Second, Strauch's eyewitness testimony undercuts Sheriff's assumption that Cenex workers always correctly followed safety protocols. Sheriff discounted Strauch's testimony because "I have a very intense understanding of the requirements and the practices of asbestos removal," and asserted that he was more knowledgeable than lay witnesses as to whether workers employed adequate safety precautions. However, Strauch was certified for asbestos removal, understood Cenex's safety protocol, and could recognize situations in which workers did not properly follow the safety protocol. Furthermore, Sheriff's belief that as of 1988, all asbestos-containing materials in the refinery had been identified and properly labeled was also incorrect: as recently as July 2000, workers at Cenex continued to discover unlabeled, uncontained, asbestos-containing materials within the refinery. Therefore, Sheriff's assumption regarding safety procedures cannot stand in light of the eyewitness testimony and the refinery's safety records. Sheriff admitted on cross-examination that if workers did not follow safety protocols, they would increase the risk of asbestos exposure to themselves and bystanders, including Wommack.

¶ 49 Third, Sheriff has no basis for his assumption that asbestos fibers from earlier times no longer remain in the dust and dirt within the Cenex refinery. Sheriff explained that in uncontained areas, wind would disburse the asbestos fibers. Sheriff also agreed that in contained areas, asbestos fibers can accumulate and can be re-introduced into the air. By Sheriff's own acknowledgement, there are contained areas in refineries, such as boiler rooms and valve buildings, and he has never been to the Cenex refinery and does not know whether it has places where asbestos fibers might lodge and accumulate. Conversely, both Robinson and Wetch, who worked in the refinery for decades, testified that they and their coworkers created large amounts of dust when working with asbestos insulation on a daily basis and that dust accumulated within the refinery's pipe racks. There is no evidence that Cenex ever removed the dirt and dust in the refinery, which this Court finds contains residual asbestos.

¶ 50 Additionally, this Court is not persuaded by Sheriff's position that the lack of identifiable asbestos in much of the PCM testing performed at Cenex reliably indicates an absence of airborne asbestos fibers. Dr. Spear explained that PCM testing misses up to 80% of chrysotile fibers because they are too small to be seen by that testing method, and Sheriff acknowledged that PCM does not detect all chrysotile asbestos fibers because some are thinner than PCM can identify. Although Sheriff further argued that PCM can over-count asbestos by miscategorizing non-asbestos fibers as asbestos,

[5] FOR PROOFING: Trial transcript, 162:24.

Cenex did not conduct more precise testing to determine whether there actually was an absence of airborne chrysotile asbestos in the refinery. This Court finds that the PCM testing does not conclusively show an absence of airborne asbestos in the refinery.

¶ 51 Since the assumptions Sheriff made in reaching his opinion that Cenex refinery workers were not exposed to asbestos after 1985 or 1988 are incorrect, and since the quality of the evidence on which Dr. Spear based his opinions is of better quality than the evidence on which Sheriff based his opinions, this Court gives Dr. Spear's opinions greater weight.

Resolution of the Factual Issue as to whether Wommack was Exposed to Asbestos after he became Eastern Regional Manager

¶ 52 This Court finds that Wommack continued to be exposed to asbestos in the Cenex refinery even after he became Eastern Regional Manager, including the nearly four years that Liberty was the insurer at risk, and that the fibers that he was exposed to during that time contributed to his asbestos fibers in his lungs. As evidenced by the testimony of Wommack and his co-workers, the refinery continued to be dusty and asbestos insulation became dislodged and blew around the refinery on windy days. The air quality testing performed in 2001 confirmed the presence of airborne asbestos fibers. There is no evidence that the refinery experienced an increase in airborne asbestos between the time of Wommack's retirement in 1998 and the 2001 tests; it therefore stands to reason that there were airborne asbestos fibers in the refinery when Wommack was the Eastern Regional Manager. The testimony of Wommack and his co-workers, and the annual permits Cenex filed with DEQ, show the process of removing asbestos insulation in the refinery was ongoing the entire time Wommack worked for Cenex, and removals occurred on an almost-daily basis. This Court also finds that wind, air disturbances, vibrations, and worker activity disturbed and released residual asbestos fibers into the air, including during the time that Wommack was Eastern Regional Manager. This Court also finds Dr. Spear's opinions more persuasive than Sheriff's, including Dr. Spear's opinions that: residual asbestos remained in the surface dust, became airborne, and remained aloft for long periods of time; the background level of airborne asbestos fibers was higher inside the refinery than outside; PCM testing does not detect the majority of airborne chrysotile fibers; and Wommack was "very likely" exposed to asbestos when he spent time in the refinery after 1993.

¶ 53 What remains in support of Liberty's contention that Wommack suffered no exposure to asbestos after 1988 are the findings made in an earlier case, *Nelson v. Cenex, Inc*.[6] In that case, which also involved a Cenex refinery worker with ARD, the Montana Supreme Court found that Nelson was exposed to asbestos from 1952 until

[6] 2008 MT 108, 342 Mont. 371, 181 P.3d 619.

1967, when he left his job at Cenex, but that he was not exposed to asbestos after he returned to Cenex in the early 1980s.[7] Although Liberty contends that this Court should apply *Nelson's* facts and find that the refinery contained no asbestos by the 1980s, the evidence in this case demonstrates otherwise. Cenex admits that it continues to remove asbestos from the refinery on an ongoing basis, and Liberty's own expert testified that Cenex refinery workers suffered a risk of asbestos exposure at least through 1985. While Liberty also contends that Dr. Spear's opinion testimony is entitled to less weight here because it contradicts his opinions in *Nelson*, this Court finds that Dr. Spear had the benefit of additional information when forming his opinions in the present case, and therefore the fact that he changed his opinion subsequent to *Nelson* has no impact on the weight this Court gives to his current opinions.

Wommack's Post-Retirement Developments

¶ 54 Since retiring from Cenex in 1998, Wommack has held other jobs, including five years performing golf course maintenance and more than ten years driving a charter bus. Wommack was not exposed to asbestos at any of his post-Cenex employments.

¶ 55 In approximately November 2002, Wommack developed a cough. On December 2, 2002, Robert C. Ulrich, MD, diagnosed him with bronchitis and sinusitis. Although medication alleviated some of Wommack's symptoms, the cough was persistent. At the time, Wommack believed he had developed allergies.

¶ 56 On March 29, 2005, Wommack saw pulmonologist James O. McMeekin, MD, on Dr. Ulrich's referral, for a chronic cough and shortness of breath. Dr. McMeekin is board-certified in internal medicine, and pulmonary and critical care. Dr. McMeekin diagnosed Wommack with a right pleural effusion and a left lung mass. Wommack continued to treat with Dr. McMeekin through 2005 and 2006. Wommack continued to believe he had developed allergies.

¶ 57 Over the next few years, Wommack occasionally saw Dr. McMeekin for shortness of breath and other pulmonary complaints. On February 15, 2010, Dr. McMeekin deemed Wommack's condition stable since his pleural thickening had not worsened over the previous several years.

¶ 58 Dr. McMeekin next saw Wommack on February 27, 2013, for increased shortness of breath. Dr. McMeekin ordered a CT scan, which revealed pleural-based calcifications in both lungs.

[7] *Nelson*, ¶¶ 7-8, 29.

¶ 59 On March 26, 2013, Dr. McMeekin diagnosed Wommack with asbestos-related disease (ARD). On April 2, 2013, Dr. McMeekin called Wommack and informed him that he had calcified asbestos in his lungs. Dr. McMeekin followed up with a letter, dated April 29, 2013, in which he explained that Wommack's CT scan had revealed bilateral pleural based calcifications associated with pleural thickening in a pattern consistent with asbestos-related pleural disease, and mild scarring of the lung bases also associated with asbestos exposure. Dr. McMeekin opined that in retrospect, Wommack's 2005 pleural effusion was likely related to his asbestos exposure, although he did not suspect ARD at that time. Dr. McMeekin further opined that Wommack's work at Cenex caused his ARD.

¶ 60 On September 1, 2013, Wommack filed a First Report of Injury (FROI). Wommack alleged that he suffered from ARD caused by his employment at Cenex from 1968 through 1998. Wommack sent his FROI to National Farmers, Nationwide, State Fund, Liberty, and CHS.

¶ 61 All of these entities denied liability for Wommack's occupational disease (OD). In its denial letter, State Fund contended that it was not liable for Wommack's OD because Wommack's potential injurious exposure to asbestos at Cenex continued after State Fund's coverage ended. In its denial letter, Liberty contended that liability should lie with an earlier carrier since it did not begin insuring Cenex until 1994, and it believed that Wommack did not have an injurious exposure to asbestos after he moved into the Eastern Regional Manager position in 1993.

¶ 62 On December 12, 2013, Alan C. Whitehouse, MD, submitted a report after conducting a records review of Wommack's case. Dr. Whitehouse opined that Wommack's condition was consistent with a significant asbestos exposure and subsequent ARD. Dr. Whitehouse assigned Wommack a 40% impairment rating.

¶ 63 On August 26, 2014, Dana Headapohl, MD, conducted an independent medical examination (IME) of Wommack to investigate his OD claim. After interviewing and examining Wommack and reviewing Wommack's medical records, Dr. Headapohl opined that Wommack suffered from calcified pleural plaques and asbestosis from his work at Cenex. Dr. Headapohl opined that Wommack could only perform sedentary job duties due to his age and condition.

¶ 64 On February 2, 2015, Wommack filed a Petition for Trial in this Court, seeking workers' compensation benefits for his OD.[8] This Court subsequently granted summary

[8] Wommack had previously filed a Petition for Trial in this matter on April 15, 2014, which this Court dismissed on December 26, 2014, ruling that it did not have jurisdiction because Wommack had not first undergone an OD evaluation as required by § 39-72-602, MCA (1997). *Wommack v. Nat'l Farmers Union Prop. & Cas. Co.*, 2014 MTWCC 22.

judgment in favor of National Farmers and CHS, ruling that neither was liable for Wommack's OD claim,[9] and this case proceeded against Nationwide, State Fund, and Liberty.

¶ 65 At the time of trial, Wommack had not received any benefits for his OD except reimbursement of travel expenses he incurred while attending Dr. Headapohl's IME.

CONCLUSIONS OF LAW

¶ 66 Generally, the law in effect when a claimant files his claim, or on his last day of work, whichever is earlier, governs an OD claim.[10] This Court applies the 1997 Occupational Disease Act (ODA), since that was the law in effect on Wommack's last day of employment.

Issue One: **Which insurer is liable for Wommack's occupational disease?**

¶ 67 In the present case, Wommack unquestionably developed an OD due to asbestos exposure at the Cenex refinery. Thus, the issue is which insurer is liable: Nationwide, which insured Cenex from September 30, 1985, until October 16, 1986, while Wommack worked in the refinery as an assistant operator and an assistant pumper; State Fund, which insured Cenex from October 16, 1986, until July 1, 1994, while Wommack went from assistant pumper to pumper maintenance foreman, then maintenance foreman, and finally Eastern Regional Manager; or Liberty, which insured Cenex from July 1, 1994, until June 1, 1998, during which time Wommack was Eastern Regional Manager.

¶ 68 Section 39-72-303, MCA, provides, in relevant part:

> (1) Where 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.
>
> (2) When there is more than one insurer and only one employer at the time 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 the occupational disease was first diagnosed by a treating physician or medical panel; or

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[9] *See* 2015 MTWCC 7 and 2015 MTWCC 5, respectively.

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

(b) the time the employee knew or should have known that the condition was the result of an occupational disease.

¶ 69 Earlier in this case, this Court granted summary judgment to CHS on an issue of first impression.[11] Relying on the statement in *Nelson* that "liability for and administration of a claim should correspond with the period in which the injurious exposure occurred,"[12] this Court ruled that § 39-72-303(2), MCA, does not apply to this case because CHS became the insurer at risk after Wommack's last day of employment at Cenex.[13] This Court ruled that interpreting § 39-72-303(2), MCA, to impute liability to CHS would result in an absurdity because it would make CHS liable for Wommack's OD even though he was never an employee when it was the insurer at risk, and liability would not correspond with the period in which his injurious exposure occurred.[14]

¶ 70 Therefore, the determination of liability in this matter is controlled by § 39-72-303(1), MCA. This Court applies the statute's "last injurious exposure" rule as set forth by *Liberty Northwest Ins. Corp. v. Montana State Fund* (*In re Mitchell*).[15] Although *In re Mitchell* discussed the rule as it relates to multiple employers, the standard nonetheless applies here under the plain language of the statute,[16] as the parties agree.[17]

¶ 71 In *In re Mitchell*, the Montana Supreme Court established "the quantum of proof required under the 'last injurious exposure' rule to establish initial liability for an OD claim when a claimant has worked for successive employers, and was arguably exposed to the hazard of the OD during each employment."[18] It relied upon cases from other jurisdictions and grouped these cases into categories, explaining that while some courts require that the exposure be a "substantial contributing cause" of the OD, others require a "lower

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[11] *Wommack v. Nat'l Farmers Union Prop. & Cas. Co.*, 2015 MTWCC 5.

[12] *Nelson*, ¶ 29.

[13] *Wommack*, 2015 MTWCC 5, ¶¶ 13-16. *See also Travelers Prop. & Cas. Co. of Am. v. Royal Ins. Co. of Am.*, 2005 MTWCC 21.

[14] *Wommack*, ¶ 16.

[15] 2009 MT 386, 353 Mont. 299, 219 P.3d 1267.

[16] *Wommack*, 2015 MTWCC 5, ¶ 12 ("Although Wommack did not work for successive employers or have a break in his employment with Cenex, the last injurious exposure rule applies to the facts of this case.").

[17] Respondent Nationwide Mutual Fire Insurance Company's Trial Brief, Docket Item No. 65, at 2; Petitioner's Proposed Findings of Fact and Conclusions of Law, Docket Item No. 64, at 6; Liberty Mutual Fire Ins. Co.'s [Proposed] Findings of Fact, Conclusions of Law and Judgment, Docket Item No. 63, at 30-31; Trial Brief of Respondent Montana State Fund, Docket Item No. 62, at 4.

[18] *In re Mitchell*, ¶ 19, analyzed § 39-71-407(10), MCA (2005), which came into effect after the Legislature repealed the ODA, and which states, "When compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease."

degree" of causation.[19] The category of cases which the court found most consistent with Montana's applicable statutes is what the court deemed the "potentially causal" standard:

> [Some] jurisdictions do not require a claimant to prove an actual causal connection between the exposure and the OD, but rather require him or her to simply demonstrate that the exposure was of a kind which could have caused the OD. In *SAIF Corp. v. Hoffman*, 193 Or.App. 750, 91 P.3d 812 (2004), the Oregon Court of Appeals explained that the "last injurious exposure" rule is a [sic] both a rule of proof and rule of assignment of responsibility which "allows a claimant to prove the compensability of a condition by proving that the condition resulted from employment without having to prove the degree, if any, to which exposure to disability-causing conditions at a particular employment actually caused the claimant's condition." *SAIF Corp.*, 91 P.3d at 813. If a claimant chooses to rely upon this rule, "full responsibility falls presumptively to the last employer (before the onset of disability or treatment) that exposed the claimant to working conditions of the kind that could cause the disability." *SAIF Corp.*, 91 P.3d at 813-14; *see also Wood v. Harry Harmon Insulation*, 511 So.2d 690, 693 (Fla.App. 1 Dist. 1987); *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354, 365 (2007); *Reese v. CCI Const. Co.*, 514 S.E.2d 144, 146 (S.C.App. 1999). This approach is sometimes referred to as the "potentially causal" standard. *See New Portland Meadows v. Dieringer*, 157 Or.App. 619, 973 P.2d 352, 353 (1998).[20]

The court explained the "potentially causal" as follows:

> Under this approach, the claimant who has sustained an OD and was arguably exposed to the hazard of an OD among two or more employers is not required to prove the degree to which working conditions with each given employer have actually caused the OD in order to attribute initial liability. Instead, the claimant must present objective medical evidence demonstrating that he has an OD and that the working conditions during the employment at which the last injurious exposure was alleged to occur, were the type and kind of conditions which could have caused the OD.[21]

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[19] *In re Mitchell*, ¶ 22.

[20] *In re Mitchell*, ¶ 23.

[21] *In re Mitchell*, ¶ 24. *See also Banco v. Liberty Northwest Ins. Co.*, 2012 MT 3, ¶ 14, 363 Mont. 290, 268 P.3d 13 (Under the "potentially causal" standard "the issue to be reviewed is not whether contribution to the OD is established, but whether [the claimant's] working ***conditions*** at [her last employer] were of the same type and kind after she left [her other employment].") (emphasis in original). *See also* Larson's Worker's Compensation Law,

¶ 72 The cases that the Montana Supreme Court relied on to illuminate the "potentially causal" standard set forth the traditional rule, in which courts explained what it means for an exposure to occur under the "type and kind of conditions which could have caused the OD." In *Olivotto*, the claimant developed mesothelioma more than 20 years after he retired from a long career installing flooring.[22] Given the passage of time, the claimant could not recall specific instances of asbestos exposure, making it difficult for the courts to pinpoint a last injurious exposure, although sufficient evidence existed to prove the claimant suffered from an OD.[23] The court explained that for an exposure to be "injurious," it must bear a causal relationship to the disease: "However . . . this means simply that the exposure must be *of the type which could* cause the disease, given prolonged exposure."[24] Just as the Montana Supreme Court rejected the position that the last injurious exposure rule requires that the exposure giving rise to the OD be a "substantial contributing cause," the *Olivotto* court had rejected the notion that this exposure needed to be a major contributing cause, and acknowledged the possibility that an insurer or employer could be on risk for "perhaps only a few weeks . . . [but] charged with full liability for a condition that had developed over a number of years."[25] The court further reasoned that for ODs which result from "the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time," the date that determines liability is the date the worker becomes disabled — "when the accumulated effects of the substance manifest themselves" — and therefore the employer responsible for the most recent exposure to the "deleterious substance" is liable.[26] Noting the lack of evidence regarding specific asbestos exposures, the court held that the claimant's last injurious exposure occurred on his final day of employment.[27]

¶ 73 Similarly, in *Reese*, the Court of Appeals of South Carolina reversed and remanded a lower court's affirmation of a commission decision which denied benefits to an injured worker who developed an OD of the wrist.[28] In that instance, the claimant had worked as a carpenter for over 20 years, but was only on his third day of work for the employer/respondent when an underlying condition became symptomatic after he twisted

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153.02[7][a] ("Traditionally, courts applying the last injurious exposure rule have not gone past the original finding of some exposure to weigh the relative amount or duration of exposure under various carriers and employers. As long as there was some exposure of a kind that could have caused the disease, the last insurer at risk is liable for all disability from that disease.").

[22] *Olivotto*, 273 Neb. 672, 674-75, 732 N.W.2d 354, 358-59.

[23] *Olivotto*, 273 Neb. at 675-76, 732 N.W.2d at 359.

[24] *Olivotto*, 273 Neb. at 684, 732 N.W.2d at 365 (emphasis in original) (quoting *Osteen v. A.C. and S., Inc.*, 209 Neb. 282, 290-91, 307 N.W.2d 514, 520 (1981)).

[25] *Olivotto*, 273 Neb. at 685, 732 N.W.2d at 365 (citations omitted).

[26] *Olivotto*, 273 Neb. at 685-86, 732 N.W.2d at 365-66 (citations omitted).

[27] *Olivotto*, 273 Neb. at 686, 732 N.W.2d at 366.

[28] *Reese*, 334 S.C. 600, 605, 514 S.E.2d 144, 146 (1999).

his wrist while operating a drill.[29] While a workers' compensation commission ruled that the claimant had an OD, but that the claimant did not establish that the condition was caused, aggravated, or contributed to by his work for the employer/respondent, the appellate court disagreed, explaining:

> [T]he record clearly shows [the claimant] was engaged in the same type of work with [the employer/respondent] as that which he had performed during his twenty years as a carpenter. Thus the evidence shows that [his] employment . . . was of a kind contributing to the disease.[30]

Therefore, even though the evidence indicated that the claimant did not aggravate the underlying condition while working for his final employer, the court determined that the last employer was liable because the employment was "of a kind" which could contribute to the OD.

¶ 74 In *Wood*, the claimant worked with insulation from 1949 to 1973, having approximately 43 different employers during his career.[31] He worked for the employer/respondent from 1971 until 1973, and in 1984, he was diagnosed with mesothelioma.[32] Although the employer/respondent conceded that it exposed the claimant to asbestos, it argued that the exposure was not "injurious" because mesothelioma has a 20- to 45-year latency period.[33] Two medical experts testified: one opined that the most likely cause of the OD was asbestos exposure prior to 1964, while the 1973 exposure "merely could have caused the disease," while the other opined that asbestos is injurious any time that it is inhaled, and "the 1973 exposure could have caused the disease '10 years down the road.' "[34] The court held:

> [A] claimant need only prove that the employer against whom benefits are claimed was the employer at the time of the last injurious exposure. That the employee may have actually contracted the disease while working for a prior employer is not determinative.[35]

The court noted that this "begs the question of what constitutes *injurious* exposure," and rejected the argument that to be injurious, the exposure must aggravate or cause the

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[29] *Reese*, 334 S.C. at 602, 514 S.E.2d at 144.

[30] *Reese*, 334 S.C. at 604, 514 S.E.2d at 146.

[31] *Wood*, 511 So. 2d 690, 691 (Fla. Dist. Ct. App. 1987).

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

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

[34] *Id*.

[35] *Wood*, 511 So. 2d at 693.

disease.[36] The court concluded that, "so long as the exposure in question, independent of other causes, could over extended time lead to development of the disease, then that exposure is 'injurious.' "[37]

¶ 75 Finally, underlying *SAIF Corp. v. Hoffman*, quoted by *In re Mitchell*, is *Roseburg Forest Products v. Long*[38] — a case which is factually on point with Wommack's case. In *Roseburg*, the claimant worked for a single employer from 1960 until 1993, during which time the employer had at least five different workers' compensation insurers and was self-insured at the time of the claimant's retirement.[39] The claimant's job environment was noisy, and in 1972, testing revealed that he had suffered significant bilateral hearing loss.[40] However, this hearing loss did not cause him to miss work, and he did not seek treatment until 1989.[41] The potentially liable insurers all conceded that the claimant had an OD.[42]

¶ 76 The *Roseburg* court explained that the last injurious exposure rule is both "a rule of proof and a rule of assignment of responsibility."[43] As a rule of proof, it allows a claimant to prove compensability "without having to prove the degree, if any, to which exposure to disease-causing conditions at a particular employment actually caused the disease. The claimant need prove only that the disease was caused by employment-related exposure."[44] As a rule of responsibility, the last injurious exposure rule assigns "responsibility," or liability, to the last employer which could have caused the injury.[45] The claimant need only show that the employment environment during the relevant period could have contributed to the OD.[46]

¶ 77 Thus, under *In re Mitchell's* potentially causal standard, this Court must determine which insurer was the last insurer when Wommack's working conditions at Cenex were the same type and kind which could have caused his ARD. To do so, this Court must take into account which party has the burden of proof. Generally, an injured worker bears

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[36] *Wood*, 511 So. 2d at 693 (emphasis in original).

[37] *Wood*, 511 So. 2d at 693.

[38] 325 Or. 305, 937 P.2d 517 (1997).

[39] *Roseburg*, 325 Or. at 308, 937 P.2d at 518.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Roseburg*, 325 Or. at 309, 937 P.2d at 518 (citation omitted).

[44] *Id*.

[45] *Roseburg*, 325 Or. at 309, 937 P.2d at 519 (citation omitted).

[46] *Roseburg*, 325 Or. at 310, 937 P.2d at 519 (citation omitted).

the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[47] However, Wommack argues that he met his burden of proof by proving proximate cause, and the burden now lies with the insurers to refute their respective liability under the last injurious exposure rule.

¶ 78 The Montana Supreme Court has considered the question of burden-shifting in the context of subsequent injury cases and has held that once the claimant meets his burden of proving that he incurred an OD or injury, the burden shifts to the last potentially liable insurer to prove that it is not liable for the claim.[48] Thus, as the last potentially liable insurer, Liberty bears the burden of proving that it is not the liable entity by proving that the conditions of Wommack's employment as Eastern Regional Manager were not the type and kind of conditions that could cause ARD.[49] Liberty argues that Wommack's work conditions as Eastern Regional Manager were not of the same type and kind as the earlier work conditions which caused his OD, and that Wommack's job duties were likewise dissimilar from his earlier job duties in the refinery. Liberty further argues that spending one or two hours per week inside the refinery as the Eastern Regional Manager was insufficient exposure to cause Wommack's ARD, especially in light of the continual reduction of asbestos within the refinery.

¶ 79 However, *In re Mitchell* does not require a showing that the last exposure actually resulted in injury.[50] It requires, as the court explained in *Banco v. Liberty Northwest Ins. Co.*, that the working conditions were of the same type and kind which gave rise to the injury.[51]

¶ 80 Here, while this Court agrees that Liberty has proven that Wommack likely experienced less exposure to asbestos after he became Eastern Regional Manager, this Court does not agree that Liberty has proven that it is more likely than not that the post-1993 exposure was not injurious under the potentially causal standard. This Court has found that Wommack continued to be exposed to asbestos at the refinery after he became Eastern Regional Manager and that the exposure during this time contributed to the asbestos fibers in his lungs, and exposure to airborne asbestos at the refinery is precisely the type of work conditions which caused Wommack's ARD. Although Wommack spent less time in the refinery after 1993, when he was there, the conditions were the same type and kind as they had been for years: dust accumulated in certain areas of the refinery;

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[47] *Dumont v. Wickens Bros. Constr. Co*., 183 Mont. 190, 201 598 P.2d 1099, 1105-06 (1979).

[48] *In re Abfalder v. Nationwide Mut. Fire Ins. Co.*, 2003 MT 180, ¶ 16, 316 Mont. 415, 75 P.3d 1246.

[49] *See, e.g.*, *Baeth v. Liberty NW Ins. Corp.*, 2014 MTWCC 10, ¶ 81, in which this Court ruled that the claimant's ARD could not have been caused by any potential exposure to an insignificant amount of asbestos that may have been "tracked into" the convenience store where the claimant last worked.

[50] *See In re Mitchell*, ¶ 29 (Rice, J., dissenting).

[51] *See Banco*, ¶ 14.

workers disturbed asbestos-containing materials on a daily basis, albeit using containment procedures which reduced contamination; some asbestos-containing materials remained unidentified and uncontained; protective jacketing on insulation occasionally became loose and the underlying insulation was disturbed; and windy conditions within the refinery caused loose insulation and dust particles to become airborne. The lay witnesses testified that workers occasionally disregarded containment procedures. Safety records from the refinery indicated that workers continued to find unlabeled and uncontained asbestos in the refinery even after Wommack retired. Testing conducted after Wommack retired detected airborne asbestos in the refinery. Dr. Spear testified that asbestos fibers remain in the refinery's dust and become airborne when the dust is disturbed, and that, once aloft, the fibers remain airborne for long periods of time. Moreover, Cenex has never conducted a comprehensive abatement of asbestos within the refinery, nor has it made efforts to remove the accumulated dust. Thus, any time Wommack entered the refinery without respiratory protection, he had ample opportunity for exposure to airborne asbestos fibers, and Dr. Spear opined that these fibers would have added to the fibers in Wommack's lungs. Under the "potentially causal" standard of *In re Mitchell*, and as illustrated by the cases it relied upon, Liberty is liable as the insurer at risk at the time of the last injurious exposure. As the last potentially liable insurer, Liberty has not met its burden of proving otherwise.

¶ 81 Although Liberty raises four arguments in support of its position that it is not liable for Wommack's ARD, none have merit.

¶ 82 First, Liberty argues that it cannot be liable for Wommack's OD because Wommack has not proven that his asbestos exposure while under Liberty's insurance was the major contributing cause of his ARD. However, Liberty is confusing which standard to apply. To prove an OD under the 2005 or later Workers' Compensation Act (WCA), a claimant must prove that his employment was the major contributing cause of his OD.[52] Here, under § 39-72-408, MCA (1997)[53] – the statute applicable to this case – Wommack has established a direct causal connection between the conditions under which his work was performed and his OD. Indeed, the parties do not dispute that he has an OD. Once the claimant has proven that he has an OD, the standard to apply to determine which insurer is liable is the potentially causal standard, as set forth in *In re*

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[52] *Montana State Fund v. Grande*, 2012 MT 67, ¶¶ 24, 25, 364 Mont. 333, 274 P.3d 728 (citing §§ 39-71-116(20), -407(8), (9), (13), MCA (2009)).

[53] "Occupational diseases shall be deemed to arise out of the employment only if: (1) there is a direct causal connection between the conditions under which the work is performed and the occupational disease; (2) 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; (3) the disease can be fairly traced to the employment as the proximate cause; (4) the disease does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) the disease is incidental to the character of the business and not independent of the relation of employer and employee."

Mitchell.[54] In *Olivotto*, the court rejected the very argument Liberty makes, explaining: "an exposure which will support imposition of liability under [the potentially causal standard] need not be proved to have been a 'material contributing cause' of the disease. Indeed, to so require would bring the employee back to Square One by requiring 'proof of the unprovable and litigation of the unlitigable.' "[55]

¶ 83 Second, Liberty argues that it cannot be liable for Wommack's ARD because ARD has a 20-year latency period and Wommack developed ARD less than 20 years from July 1, 1994, when Liberty became Cenex's insurer. Thus, it argues that Wommack's exposure to asbestos when it was the insurer at risk did not cause his ARD. However, the *Wood* court rejected this argument, explaining that the purpose of the potentially causal standard was to "render it unnecessary in cases of occupational diseases to make the nearly impossible determination as to which employment or employments contributed in what measure to the disease."[56] Even assuming *arguendo* that ARD has a hard and fast 20-year latency period — an assumption undermined by Dr. Spear's testimony — as one of the medical experts in *Wood* aptly explained it, the asbestos exposure Wommack suffered while Eastern Regional Manager could cause ARD "years down the road."[57] This is sufficient under the "potentially causal" standard, as Wommack continued to be exposed to the hazard of asbestos while Liberty was the insurer at risk.

¶ 84 Indeed, it is clear that the *In re Mitchell* court considered and rejected a standard which would impute liability to the insurer at risk when the exposure, at a minimum, "augmented" the claimant's condition.[58] In his dissenting opinion in *In re Mitchell*, Justice Rice opined that the court should not follow the potentially causal standard, which is the "traditional rule," and argued that Montana should follow other jurisdictions that require a higher level of proof.[59] He explained that, in his view, the potentially causal standard obviated the "injurious" part of the "last injurious exposure" rule:

> I believe the "potentially causal" standard fails to sufficiently account for and apply the word "injuriously" within the "last injuriously exposed" statutory

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[54] *In re Mitchell*, ¶¶ 17-18, 23-24 (The "potentially causal" standard applies in situations where an OD is being diagnosed for the first time and the issue is which insurer is liable, but in cases where an OD has already been diagnosed, and an insurer has accepted liability or been determined to be liable, and the question is whether another insurer is liable for a recurrence of the condition based on another exposure to the hazard of the disease, the "intervening cause" standard of *Caekaert v. State Comp. Mut. Ins. Fund*, 268 Mont. 105, 885 P.2d 495 (1994), and *Lanes v. Montana State Fund*, 2008 MT 306, 346 Mont. 10, 192 P.3d 1145, will apply.).

[55] *Olivotto*, 732 N.W.2d at 365 (citation omitted).

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

[57] *See* ¶ 77, above.

[58] *In re Mitchell*, ¶ 22 (citing *Rutledge v. Tultex Corp.*, 301 S.E.2d 359, 362-63 (1983)).

[59] *In re Mitchell*, ¶ 33.

> requirement. Under the "potentially causal" standard, there is no requirement to show that the last exposure actually resulted in injury. The standard effectively reads out the word "injuriously" from the statute by only requiring proof that the "type and kind of [working] conditions" of the last employment "could have caused" the worker's OD.[60]

Justice Rice recognized that none of the possible standards are "clearly superior," but argued that "the lower causal standard under the 'potentially causal' standard necessarily shifts disproportionate burden to the last insurer."[61] Thus, Justice Rice advocated for a rule "that liability under the 'last injuriously exposed' rule not pass to the subsequent insurer unless a permanent aggravation or contribution to the OD is established."[62] However, the majority decided that the better approach is to follow the traditional rule, under which courts need not weigh the relative exposures among subsequent employers, but need determine only the last insurer at risk when the claimant suffered some exposure of a kind which could cause the disease.[63] Therefore, Liberty's argument fails.

¶ 85 Third, Liberty argues that no evidence indicates that Cenex violated OSHA standards after 1993, and that with the exception of one test in 1974, air sampling indicated that airborne asbestos contamination inside the refinery was below OSHA's threshold. However, the evidence presented in this case indicates that the permissible OSHA exposure level would have reduced, but not eliminated, the risk to workers from asbestos exposure.[64] OSHA recognizes that instances of ARD will still arise with its current permissible exposure levels; an insurer cannot escape liability for valid OD claims by pointing to its insured's compliance with OSHA standards.

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[60] *In re Mitchell*, ¶ 29 (Rice, J., dissenting) (quoting *In re Mitchell*, ¶ 24).

[61] *In re Mitchell*, ¶ 31 (Rice, J., dissenting).

[62] *In re* Mitchell, ¶ 33 (Rice, J. dissenting). *See also* 14 Arthur Larson, Lex K. Larson, Thomas A. Robinson, Larson's Workers' Compensation Law § 153.02[7][a] ("In contrast to this traditional rule, however, are decisions such as that in *Busse v. Quality Insulation*, [322 N.W.2d 206 (Minn. 1982),] in which the Minnesota Supreme Court took notice of medical testimony to the effect that there is a 'lag time' of five to ten years between exposure to asbestos and the development of asbestosis. The court accepted this testimony in support of a conclusion that the claimant's exposure under the last insurer, who had been at risk for only two months, was not a 'substantial contributing cause' of death. Other courts have also held that in order to impose liability on the insurer who was last at risk, the exposure during its period of risk must have been of such length or degree that it could have actually caused the disease." (emphasis in original)).

[63] *See* 14 Arthur Larson, Lex K. Larson, Thomas A. Robinson, Larson's Worker's Compensation Law § 153.02[7][a].

[64] *See* Dr. Spear's testimony in ¶ 58 above, in which he indicated that OSHA recognizes that under its current permissible exposure limit of 0.1 fiber per cubic centimeter, as measured by PCM, the risk of death is 3.4 workers per 1,000.

¶ 86 Finally, this Court rejects Liberty's argument that Wommack's claim is time-barred pursuant to § 39-72-403, MCA (1997), and *Peterson v. Liberty NW Ins. Corp.*[65] Section 39-72-403(1), MCA, provides that a claimant has one year to make a claim for benefits from the date he knew or should have known that his condition resulted from an OD. In *Peterson*, this Court ruled that a claimant's OD claim was untimely under § 39-72-403, MCA, when that claimant knew that he had been exposed to asbestos in his workplace, had co-workers diagnosed with ARD who successfully pursued OD claims, and was diagnosed with ARD in 2005, but claimed that he did not know that the ARD might be work-related until 2010. Liberty's reliance on *Peterson* is misplaced. Unlike Peterson, who learned of his ARD diagnosis nearly five years before he filed a claim for benefits, Wommack learned of his ARD diagnosis in late March or early April of 2013, and filed a claim on September 1, 2013 — well less than one year later. Even though Wommack had treated for respiratory issues for several years prior to that time, no facts indicate that he should have known his condition was ARD. Even Dr. McMeekin, Wommack's treating physician, acknowledged that it was only in hindsight that he realized that Wommack's earlier complaints were likely asbestos-related. If a board-certified pulmonologist did not initially recognize Wommack's symptoms as ARD, this Court cannot expect Wommack to have identified the provenance of his respiratory complaints prior to Dr. McMeekin's diagnosis of ARD.

Issue Two: If Liberty is not liable for Wommack's occupational disease, is it entitled to contribution and/or indemnification for the expense of the occupational disease panel?

¶ 87 Since this Court has ruled that Liberty is liable for Wommack's OD, this issue is moot.

Issue Three: Is Wommack entitled to his attorney fees, costs, and/or a penalty?

¶ 88 Since Wommack is the prevailing party, he is entitled to his costs.[66] As to his entitlement to attorney fees, pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. Additionally, § 39-71-2907, MCA, provides that this Court may increase by 20% the full amount of benefits due a claimant when an insurer unreasonably delays or refuses to pay benefits prior or subsequent to an order granting benefits from this Court.

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[65] 2013 MTWCC 26.

[66] § 39-71-611, MCA.

¶ 89 An insurer's legal interpretation may be incorrect without being unreasonable, and the existence of a genuine doubt, from a legal standpoint, that liability exists constitutes a legitimate excuse for denial of a claim.[67] Here, Liberty was not unreasonable in denying Wommack's claim. Although Wommack argues that, pursuant to *Belton*,[68] Liberty should have paid his claim and then sought indemnification from another insurer, this case is distinguishable from *Belton* and its progeny. At the time Wommack filed his Petition for Hearing, Liberty was not the last potentially liable insurer; rather, CHS was.[69] When CHS moved for summary judgment, Wommack made a well-reasoned, albeit ultimately unpersuasive, argument that CHS was liable under § 39-72-303(2), MCA. This Court cannot find Liberty unreasonable in refusing to pay benefits when it also found Wommack's argument that another entity was liable to be a reasonable position in this case.

¶ 90 Although Wommack further argues that, once this Court granted summary judgment in favor of CHS, Liberty then became the last potentially liable insurer and should have begun to pay benefits, this Court's grant of summary judgment was interlocutory and is still subject to appeal,[70] an appeal that will present an issue of first impression to the Montana Supreme Court. Thus, at the time this Court granted summary judgment in favor of CHS, it remained the last potentially liable insurer. Moreover, Wommack's position as to liability remained ambivalent through the time of trial. In his Proposed Findings of Fact and Conclusions of Law, Wommack took no position as to which insurer was liable. In his closing argument, Wommack's counsel stated that he had a "gut feeling" that Liberty was liable, but ultimately stated that it was up to this Court to determine the liable entity. Wommack's arguments made it clear that he was not convinced that Liberty was liable for his OD claim. Although Wommack is correct that on the issue of liability, once he met his burden of proof by demonstrating proximate cause, Liberty had the burden of proving that it was not the insurer at risk at the time of Wommack's last injurious exposure, Wommack still must prove that the facts support a

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[67] *Marcott v. Louisiana Pac. Corp.*, 275 Mont. 197, 204-05, 911 P.2d 1129, 1134 (1996) (citing *Holton v. F.H. Stoltze Land & Lumber Co.*, 195 Mont. 263, 269, 637 P.2d 10, 14 (1981)).

[68] 202 Mont. 384, 658 P.2d 405 (1983). *See In re Abfalder*, ¶ 14, which held that *Belton* was superseded by § 39-72-303(2), MCA — a statute which this Court found inapplicable to Wommack's case.

[69] *See* 2015 MTWCC 5, in which this Court dismissed CHS from this case. In that Order, ¶ 4, this Court found that on June 1, 1998, Cenex merged with another entity and became CHS, which then became self-insured under Plan I of the WCA.

[70] *See Total Indus. Plant Services, Inc. v. Turner Industries Group, LLC*, 2013 MT 5, ¶ 43, 368 Mont. 189, 199-200, 294 P.3d 363, 371 (holding that a district court's grant of partial summary judgment was interlocutory and "did not finally decide the entire case").

finding of unreasonableness in order for this Court to award attorney fees and a penalty under the applicable statutes.

¶ 91 Since this Court has not found that Liberty was unreasonable in refusing to pay benefits, it concludes that Wommack is not entitled to his attorney fees nor a penalty under the applicable statutes.

JUDGMENT

¶ 92 Liberty Mutual Fire Ins. Co. is liable for Wommack's occupational disease.

¶ 93 Wommack is entitled to his costs pursuant to § 39-71-611, MCA.

¶ 94 Wommack is not entitled to his attorney fees.

¶ 95 Wommack is not entitled to a penalty.

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

DATED this 12th day of June, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Ben A. Snipes
Joe C. Maynard
Charles G. Adams
Melissa Quale and Thomas E. Martello
Kelly M. Wills
Michael P. Heringer

Submitted: May 19, 2015