

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 10

WCC No. 2013-3183

JUDY BAETH

Petitioner

vs.

LIBERTY NW INS. CORP.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner alleges that her work at a plywood plant in Libby from 1989 to March 1994 caused her asbestos-related lung disease. The plant was owned and operated initially by Champion International Co., then was taken over by Stimson Lumber Company in November 1993. Respondent denies that Petitioner suffers from an OD and claims that her respiratory problems are instead related either to COPD or emphysema caused by a long history of smoking. It also argues that even if Petitioner has asbestos-related disease, her non-employment exposure was greater than her exposure during her employment, and that she is judicially estopped from claiming an OD. Petitioner alleges she is entitled to attorney fees and a penalty.

Held: Petitioner's two treating physicians both opined that she has asbestos-related disease and that her employment at the plywood plant substantially contributed to it. Petitioner's work for Stimson was of the type and kind that could have caused her asbestos-related disease, and although she had worked relatively briefly for Stimson as compared to Champion, applying the "potentially causal" standard set forth in *In re Claim of Mitchell*, Petitioner was last injuriously exposed to the hazard of the disease while working for Stimson. Petitioner is not judicially estopped from claiming an OD. As Respondent did not act unreasonably in denying Petitioner's claim, Petitioner is not entitled to attorney fees or a penalty.

Topics:

Physicians: Treating Physician: Weight of Opinions. Where the opinions of the IME physicians and a radiologist experienced in reading ARD x-rays were diametrically opposed to the opinions of the treating physicians, the Court gave greater weight to the treating physicians' opinions that Petitioner was suffering from ARD, particularly where the record demonstrates that the treating physicians had more experience in identifying and treating Libby amphibole ARD than any other medical providers.

Medical Condition (By specific Condition): Asbestos-Related Disease. Where the opinions of the IME physicians and a radiologist experienced in reading ARD x-rays were diametrically opposed to the opinions of the treating physicians, the Court gave greater weight to the treating physicians' opinions that Petitioner was suffering from ARD, particularly where the record demonstrates that the treating physicians had more experience in identifying and treating Libby amphibole ARD than any other medical providers.

Occupational Disease: Causation. Where both treating physicians testified that they had treated a number of patients who were exposed to significant levels of asbestos and developed ARD after working in the same plywood plant as Petitioner, the Court concluded that Petitioner's ARD met the definition of an OD and that claimant's employment was the direct and proximate cause of her OD under *Kratovil v. Liberty Northwest Ins. Corp.* after both physicians testified that her employment was a significant factor in her development of ARD.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-408. Where both treating physicians testified that they had treated a number of patients who were exposed to significant levels of asbestos and developed ARD after working in the same plywood plant as Petitioner, the Court concluded that Petitioner's ARD met the definition of an OD and that claimant's employment was the direct and proximate cause of her OD under *Kratovil v. Liberty Northwest Ins. Corp.* after both

physicians testified that her employment was a significant factor in her development of ARD.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-303. Under the last injurious exposure rule, there is no question that Petitioner's exposure to asbestos during the approximately five months she worked under the last owner of the plywood mill was of the same type and kind of exposure under the previous mill owner since there was no discernible difference in her working conditions during the ownership transition. Because her treating physician testified that six months working in the mill constituted a **very** significant exposure to asbestos, the Court concluded that Petitioner's time working for the last mill owner was significant enough to have contributed to her OD.

Occupational Disease: Last Injurious Exposure. Under the last injurious exposure rule, there is no question that Petitioner's exposure to asbestos during the approximately five months she worked under the last owner of the plywood mill was of the same type and kind of exposure under the previous mill owner since there was no discernible difference in her working conditions during the ownership transition. Because her treating physician testified that six months working in the mill constituted a **very** significant exposure to asbestos, the Court concluded that Petitioner's time working for the last mill owner was significant enough to have contributed to her OD.

Equity: Judicial Estoppel. Despite Respondent's contention that it was prejudiced by Petitioner's inconsistent arguments that she was exposed to asbestos from numerous causes, Petitioner is entitled to sue all entities potentially responsible for the harm caused by her exposure and ask the courts to determine which entities, if any, are responsible. While the purpose of judicial estoppel is to suppress fraud and prevent abuse of the judicial process, it is not intended to suppress joinder of multiple parties or prevent alternative pleading.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-711. Petitioner's treating physician found her to be suffering from a "classic asbestos related obstructive

defect” and assigned her a 45% impairment rating under the 5th Edition of the AMA Guides. The Court concluded that under *Drake* and *Hilbert*, the “current edition of the Guides” in § 39-71-711(1)(b), MCA, are those in effect on the date claimant reaches MMI, and since under *Fellenberg*, an asbestosis victim was at MMI on the date of diagnosis, the physician used the correct edition of the guides that were in effect in May 2005, when Petitioner was first diagnosed with ARD.

Impairment: Impairment Ratings. Petitioner’s treating physician found her to be suffering from a “classic asbestos related obstructive defect” and assigned her a 45% impairment rating under the 5th Edition of the AMA Guides. The Court concluded that under *Drake* and *Hilbert*, the “current edition of the Guides” in § 39-71-711(1)(b), MCA, are those in effect on the date claimant reaches MMI, and since under *Fellenberg*, an asbestosis victim was at MMI on the date of diagnosis, the physician used the correct edition of the guides that were in effect in May 2005, when Petitioner was first diagnosed with ARD.

Benefits: Permanent Partial Disability Benefits: Wage Loss. Where Petitioner left her last regular employment not because of her ARD but to help care for her great-grandchildren and subsequently retired at age 62, she has not demonstrated a wage loss. Petitioner is therefore entitled only to medical benefits and an impairment award.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2907. Where Respondent relied on the opinions of three physicians who did not see evidence of Petitioner’s exposure to asbestos and who opined that her pulmonary condition was either emphysema or COPD brought on by years of smoking, Respondent was not without a reasonable basis to deny liability.

Unreasonable Conduct by Insurer. Where Respondent relied on the opinions of three physicians who did not see evidence of Petitioner’s exposure to asbestos and who opined that her pulmonary condition was either emphysema or COPD brought on by years of smoking, Respondent was not without a reasonable basis to deny liability.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. Where Respondent relied on the opinions of three physicians who did not see evidence of Petitioner's exposure to asbestos and who opined that her pulmonary condition was either emphysema or COPD brought on by years of smoking, Respondent was not without a reasonable basis to deny liability.

¶ 1 Trial in this matter was held on October 29, 30, and 31, 2013. The parties participated via videoconference. The Court participated all three days from the offices of Fisher Court Reporting in Helena. Judy Baeth was present and represented by Laurie Wallace, Ethan Welder, and Dustin Leftridge, who participated from the offices of Fisher Court Reporting in Kalispell. Liberty Northwest Insurance Corporation (Liberty) was represented by Michael P. Heringer who participated from the offices of Fisher Court Reporting in Billings.

¶ 2 **Exhibits:** I admitted Exhibits 2, 5, 7, 12 through 16, 18, 44 through 47, and 50 through 52 without objection. I overruled all relevancy objections and admitted Exhibit 11. I sustained Respondent's objections to Exhibits 1 and 17, except for those portions the parties stipulated to as admissible in their post-trial correspondence, which portions I admitted. I overruled the foundation and hearsay objections to Exhibits 3, 4, 6, 8, and 10, and admitted them on the basis that they are considered medical records and are therefore covered by ARM 24.5.317. I sustained both parties' various objections and did not admit Exhibits 9, 19 through 43, 48, and 49. I sustained the foundation objection to the remaining Exhibits and they were never moved for admission during trial.

¶ 3 **Witnesses and Depositions:** The depositions of Judy Baeth, Dana Headapohl, M.D., Brad Black, M.D., Stephen Becker, M.D., and Timothy Bruya, M.D., were admitted without objection and are considered part of the record. Petitioner Judy Baeth, Terry M. Spear, Ph.D., and Alan C. Whitehouse, M.D., were sworn and testified.

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

Issue One: Did Petitioner suffer an occupational disease as a result of her work at Stimson Lumber Company?

Issue Two: Is Petitioner barred from claiming her respiratory problems are related to her employment at Stimson Lumber Company based on estoppel, judicial estoppel, or res judicata?

Issue Three: If Petitioner's claim is compensable, what is her impairment rating related to her occupational disease?

Issue Four: If Petitioner's claim is compensable, whether Petitioner is entitled to benefits and medical benefits related to the treatment of the occupational disease.

Issue Five: Whether Respondent has unreasonably refused to accept liability for Petitioner's occupational disease and pay impairment and medical benefits in accordance with § 39-71-407, MCA (1993).

Issue Six: Whether Petitioner is entitled to an increased award of 20% of all compensation benefits awarded pursuant to § 39-71-2907, MCA.

Issue Seven: Whether Petitioner is entitled to reasonable costs and attorney fees.

FINDINGS OF FACT

Industrial Hygiene Testimony

¶ 5 Terry M. Spear, Ph.D., testified at trial. I found Spear to be a credible witness. Spear holds a doctorate in industrial hygiene and is currently the coordinator for the distance learning industrial hygiene master's program at Montana Tech in Butte. Spear has authored or co-authored seven peer-reviewed publications on the Libby amphibole form of asbestos since 1996, conducted extensive research on the Libby amphibole, interviewed hundreds of W.R. Grace (Grace) employees, testified four times before this Court in Libby

¹ Pretrial Order at 3, Docket Item No. 40.

asbestos cases,² and reviewed thousands of pages of documents pertaining to the Libby amphibole.³

¶ 6 Spear has read numerous articles and documents related to the Libby lumber mill, interviewed mill workers, visited the mill, and reviewed depositions of mill workers who testified about asbestos contamination at the mill.⁴

¶ 7 Some of Spear's research on this case included interviewing Judy Baeth to determine her work history and the extent of her asbestos exposure. He learned that Baeth moved to Troy around 1967 and that her husband began working for the Grace mine a year later for four or five months. Baeth and her husband left the state for a short period before returning to Troy. Baeth worked for a company for a short period that did weatherization of homes, installing insulation and replacing doors and windows. In 1989, Baeth started work at the lumber mill in the plywood plant where she worked for the next 5½ years.⁵

¶ 8 Spear testified in two other workers' compensation cases involving plywood plant employees who had developed asbestos-related disease (ARD): Ray Johnson⁶ and Steve Peterson.⁷ Spear testified that Johnson, Peterson, and Baeth all worked in the area around the dryers in the plywood plant.⁸

¶ 9 Spear explained that the Libby amphibole is a mixture of three kinds of asbestos fibers: winchite, tremolite, and richterite. According to Spear, this type of asbestos is significantly more toxic than chrysotile asbestos fibers that were commonly used in building insulation. Spear stated that the source of Libby amphibole asbestos is the Grace vermiculite mine outside of Libby, and that it is well-documented that asbestos fibers can travel long distances and stay suspended in the air for long periods, which extends the risk of exposure.⁹

² *Johnson v. Liberty Northwest Ins. Corp. (Johnson II)*, 2009 MTWCC 20; *Peterson v. Liberty NW Ins. Corp.*, 2013 MTWCC 26; *Keller v. Montana State Fund*, WCC No. 2012-2879 (May 8, 2012); *Monroe v. MACO Workers Comp Trust*, 2014 MTWCC 7.

³ Trial Test.

⁴ Trial Test.

⁵ Trial Test.

⁶ *Johnson II*, 2009 MTWCC 20.

⁷ *Peterson*, 2013 MTWCC 7.

⁸ Trial Test.

⁹ Trial Test.

¶ 10 Spear testified that the information he reviewed reflected the existence of copious amounts of asbestos-containing material (ACM) in the plywood plant, and high levels of asbestos-contaminated soils throughout the area. There were piles of vermiculite scattered about, there was a train spur on the mill property where railroad cars carrying vermiculite were cleaned out, and the Grace processing facilities were located on the mill property. Vermiculite was mixed with concrete and spread around the top of the big dryer in the plywood plant, and Spear opined that a significant amount of asbestos-containing bark was processed at the lumber mill.¹⁰

¶ 11 Spear explained that Grace performed airborne asbestos testing in the mid-1970s, when higher concentrations of asbestos were detected in the air at the lumber mill than in downtown Libby. Spear stated that until approximately 2003, there were problems testing for the presence of Libby amphibole asbestos since it was not until that time that the Libby amphibole was identified as containing winchite and richterite as well as tremolite. As a result, many tests prior to that time underreported the presence of asbestos.¹¹

¶ 12 Spear explained that another problem with the testing was that it only reported asbestos fibers that were five micrometers or greater. Spear testified that by using this testing criteria, more than 50% of the asbestos fibers present were not reported. Spear explained that the smaller fibers were even more dangerous since they could lodge deeper into the respiratory system.¹²

¶ 13 Spear stated that the Environmental Protection Agency (EPA) began testing tree bark for asbestos in 2004, and found evidence of asbestos contamination in trees as far as eight miles from the Grace mine site. Spear explained that the EPA considers the disturbance of soil contaminated with the Libby amphibole to be the greatest source of danger to Libby residents and workers. Based on his interviews with mill workers, Spear testified that the mill was a dusty place to work, and there was significant soil disturbance due to the presence of heavy equipment, logging trucks, and worker activity.¹³

¶ 14 Spear testified that there was negative pressure created inside the plywood plant by fans on the roof that drew air up, which in turn would draw air in through openings in the building to replace the dispelled air, causing the constant

¹⁰ Trial Test.

¹¹ Trial Test.

¹² Trial Test.

¹³ Trial Test.

suspension of dust and asbestos fibers in the air. Spear opined that Baeth's exposure to asbestos at the plywood plant was far in excess of any exposure she received as a resident of Libby, and that her exposure over the 5½ years she worked at the plant more probably than not contributed to her ARD and was sufficient to cause her lung disease.¹⁴

¶ 15 According to Spear, Baeth had other pathways of exposure. Her first husband worked at the Grace mine for nearly half a year, and there was a potential for "take home" exposure, in which a worker brings home work clothes contaminated with asbestos. Baeth gardened in soil that may have been contaminated with vermiculite. She lived in a house insulated with vermiculite that was remediated by the EPA. Baeth gathered pine cones in contaminated areas, worked briefly adding insulation in homes, and fished in the Rainy Creek area of the Kootenai River near the road that went to the Grace mine. Baeth's children played on piles of vermiculite and attended ball games where vermiculite was spread around the fields. However, Spear opined that Baeth's work at the plywood plant for Champion International Corporation (Champion) and then for Stimson Lumber Company (Stimson) was a significant exposure compared to all other exposures and far outweighed her community exposure.¹⁵

¶ 16 Baeth also worked for a time at Bear's Truck Stop in Libby from 1995 to 1996. However, Spear did not believe that Baeth's exposure to asbestos as a clerk behind the counter was any different than her community exposure.¹⁶

Medical Testimony

Alan C. Whitehouse, M.D.

¶ 17 Alan C. Whitehouse, M.D., testified at trial. I found Dr. Whitehouse to be a credible witness. Dr. Whitehouse is licensed to practice medicine in Montana and is board-certified in internal medicine and pulmonary disease. Dr. Whitehouse practiced in Spokane from 1969 to 2004, when he transferred his practice to Libby. In 2009, Dr. Whitehouse retired from the active practice of medicine.¹⁷

¶ 18 Dr. Whitehouse published an article on asbestos exposure to Libby miners and residents that was part of the reason the EPA declared a public emergency

¹⁴ Trial Test.

¹⁵ Trial Test.

¹⁶ Trial Test.

¹⁷ Trial Test.

in Libby in 2009. Dr. Whitehouse also wrote a paper on the high incidence of mesothelioma deaths in Libby, and he is currently working on another paper regarding mortality rates and pleural disease.

¶ 19 Dr. Whitehouse testified that he has made many public presentations on the subject of Libby asbestos disease, and before retiring he estimates he treated approximately one thousand patients who suffered from ARD caused by exposure to the Libby amphibole. Of those, Dr. Whitehouse estimated that more than 30 had been employed at the Libby lumber mill.¹⁸

¶ 20 Prior to retiring in 2009, Dr. Whitehouse treated Baeth's ARD at the Center for Asbestos Related Disease (CARD) clinic in Libby, as did Brad Black, M.D. According to Dr. Whitehouse, nobody has as much experience as he and Dr. Black in identifying and treating Libby amphibole ARD.¹⁹

¶ 21 Dr. Whitehouse testified that Baeth's X-rays showed a progression of her lung disease over the years. His reading of Baeth's last CT scan of September 25, 2013, showed "diffuse interstitial fibrosis throughout both lungs . . . diffuse pleural changes . . . pleural thickening . . . and calcifications along the pericardial silhouette, on the right side. These findings have markedly progressed since the prior film." Dr. Whitehouse also noted that the interstitial disease had progressed "significantly" since 2007, and that "[t]he film remains consistent with severe asbestosis."²⁰

¶ 22 Dr. Whitehouse explained that Libby amphibole asbestos fibers are needle-like, and that once inhaled, they cannot be expelled. The fibers work their way into the alveoli and start an inflammatory process that causes fibrosis and scarring.²¹ The other form of asbestos, chrysotile, is serpentine in character. Dr. Whitehouse testified that both chrysotile and amphibole asbestos were present in the plywood plant, in and around the dryers where Baeth worked. The chrysotile came from the asbestos wrapping used to insulate pipes, while Libby amphibole-containing vermiculite was used in and on top of the dryers. Like Spear, Dr. Whitehouse opined that exposure to the amphibole asbestos fibers was much more dangerous than exposure to chrysotile asbestos.²²

¹⁸ Trial Test.

¹⁹ Trial Test.

²⁰ Trial Test.; Ex. 6 at 3.

²¹ Trial Test.

²² Trial Test.

¶ 23 Dr. Whitehouse performed an independent medical examination (IME) of Baeth on August 7, 2013.²³ He determined that Baeth's principle asbestos exposure came from working at the plywood plant from 1988 to 1994. Baeth explained during the IME that she worked on the plywood dryers and that on cleaning days at least once a week, she had to climb to the top of the dryers and clean off the top and the floor around the dryers.²⁴ Dr. Whitehouse found that Baeth had crackling rales in her right lower lobe that are a characteristic of asbestosis.²⁵

¶ 24 Dr. Whitehouse estimated that he has performed approximately 10 impairment ratings a year for the last three to four years.²⁶ Based on the 5th Edition of the American Medical Association's Guides to Evaluation of Permanent Impairment (AMA Guides),²⁷ which includes a chapter on impairments due to pulmonary dysfunction, Dr. Whitehouse placed Baeth's whole person impairment at 45% based on the severity of her symptoms. He also opined that her "severe interstitial disease as seen on x-ray is likely to make her totally unemployable at the present time."²⁸

¶ 25 Dr. Whitehouse testified that Baeth's pulmonary function test (PFT) given during her IME in Missoula on March 27, 2013,²⁹ showed an isolated low diffusion capacity for carbon monoxide (DLCO) reading that is consistent with asbestosis.³⁰ The PFT given at the CARD clinic on August 12, 2013,³¹ also showed a low DLCO reading of 57%, consistent with asbestosis. Dr. Whitehouse explained that anything below 60% shows a severe defect and that those with asbestosis show rapidly decreasing DLCO readings, consistent with Baeth's PFT tests.³²

¶ 26 Dr. Whitehouse believed that Baeth's asbestos exposure while working at Bear's Truck Stop was insignificant. On the other hand, he testified that her

²³ Ex. 3.

²⁴ Trial Test.; Ex 3 at 1.

²⁵ Trial Test.; Ex. 3 at 2.

²⁶ Trial Test.

²⁷ L. Cocchiarella, M.D., MSc, *et al.* (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed., AMA Press, 2005.

²⁸ Trial Test.; Ex. 3 at 2.

²⁹ Ex. 7 at 17.

³⁰ Trial Test.

³¹ Ex. 2 at 82.

³² Trial Test.

exposure to asbestos at the lumber mill was quite significant and wrote that her asbestos exposure at the plywood plant was more probable than not “sufficient to cause and to significantly aggravate her asbestos related disease, and did so.”³³

¶ 27 Dr. Whitehouse reviewed readings by Gordon S. Teel, M.D., of Baeth’s CT scans taken in May 2005 and July 2007. Dr. Teel is a radiologist with whom Dr. Whitehouse has worked in the past. According to Dr. Whitehouse, the findings listed in Dr. Teel’s report describe asbestosis in the same manner as the disease is described by the American Thoracic Society and by at least one authoritative study.³⁴

Brad Black, M.D.

¶ 28 Brad Black, M.D., testified by deposition. He works at the CARD clinic, which has been in existence since 2003 in Libby. Since its inception, Dr. Black has been the clinic’s medical director and CEO.³⁵ Dr. Black earned a medical degree from the University of Kansas, completed a three-year residency in pediatrics, and is a board-certified pediatrician. After Dr. Black moved to Libby, he practiced pediatric medicine and cross-trained in internal medicine. In 1991, Dr. Black became the county health officer. He also worked in the emergency room at St. John’s Hospital and at a walk-in clinic.³⁶

¶ 29 At the end of 1999, public health concerns arose in Libby about the community’s exposure to the asbestos amphibole, and Dr. Black took a leading role in trying to address those concerns.³⁷ Dr. Black explained that the ore deposit on Vermiculite Mountain was contaminated with asbestos fibers, and when the vermiculite was distributed throughout the community, the asbestos was spread with it. Dr. Black estimated that over the course of the mine’s operation, from the 1920s until it shut down in 1990, over 80,000 people lived in the Libby area and were probably significantly exposed to the Libby amphibole.³⁸

¶ 30 Dr. Black estimated that over 2,000 people in the Libby area currently suffer from various stages of ARD.³⁹ He explained that the established protocols

³³ Trial Test.; Ex. 4 at 2.

³⁴ Ex. 10 at 1; Trial Test.

³⁵ Black Dep. 5:19 - 6:2.

³⁶ Black Dep. 6:3 - 7:8, 14:25 - 15:2.

³⁷ Black Dep. 7:9-14.

³⁸ Black Dep. 7:17 - 8:10.

³⁹ Black Dep. 9:4-11.

for diagnosing ARD are: (1) adequate exposure history; (2) an adequate latency period, usually ten years, from the time of exposure to the time of evaluation; and (3) evidence of structural changes caused by a reaction to the asbestos fibers.⁴⁰

¶ 31 Dr. Black further explained that getting an accurate reading of ARD on a chest CT scan is very difficult, since no reference standards exist and most thoracic radiologists do not agree on what they see. Dr. Black trained under Dr. Whitehouse and acquired his skill in reading chest films through training and experience.⁴¹

¶ 32 Dr. Black first saw Baeth on May 25, 2005, for an evaluation of her asbestos exposure. He noted Baeth's screening in 2000, during which a radiologist apparently noted some interstitial changes on her chest X-ray.⁴² Questionnaires completed during her initial visit noted that Baeth worked at the plywood plant for five years; hunted, fished, and gathered firewood and pine cones near vermiculite sites; gardened with vermiculite; and worked in attics with vermiculite, among other exposures. Dr. Black termed Baeth's exposure history "significant."⁴³

¶ 33 Dr. Black explained that his experience has taught him that patients who worked in the plywood plant around the dryers were exposed to significant levels of asbestos due to their activity that disturbed the material. Dr. Black testified: "There were a very significant number that developed very bad disease . . . from being involved in that type of activity."⁴⁴ Dr. Black believed that being around the dryers for six months or more was "a very significant exposure."⁴⁵

¶ 34 Dr. Black ordered a CT scan of Baeth's chest and reviewed it with her, explaining that it showed "well-identified interstitial lung disease with some pleural thickening . . . consistent with excessive asbestos exposure in Libby."⁴⁶ Based on these findings, her exposure history, and latency time, Dr. Black concluded that Baeth had ARD.⁴⁷

⁴⁰ Black Dep. 9:12 - 11:3.

⁴¹ Black Dep.16:12 - 17:9.

⁴² Black Dep. 21:3-23.

⁴³ Black Dep. 21:24 - 22:7; Ex. 2 at 15-16, 20; Trial Test.

⁴⁴ Black Dep. 25:1-21.

⁴⁵ Black Dep. 25:22 - 26:7.

⁴⁶ Ex. 2 at 24; Baeth Dep. 64:20 - 65:6.

⁴⁷ Black Dep. 30:7-15, 31:15-19.

¶ 35 Dr. Black testified that, within a reasonable degree of medical probability, Baeth's exposure to asbestos during her five years at the plywood plant was significant, noting that it "probably was her highest exposure of all the exposures she had Most likely, it had the highest - - greatest contribution to the findings that we saw on her chest - - on her CT study."⁴⁸ Dr. Black did not believe that Baeth cleaning her husband's dirty clothes for six months after he came home from the Grace mine was a significant exposure, when compared to Baeth working for five years in and near the dryers at the plywood plant.⁴⁹

¶ 36 Dr. Black assigned no significance to the slightly improved PFT Baeth gave in 2008 over the 2007 results. He explained that the test results could vary by as much as 15% for no discernible reason, and he was very cautious about placing any significance on a single test.⁵⁰ Dr. Black testified that another reason for the different test results could be due to different technicians administering the tests.⁵¹

¶ 37 Prior to his deposition, the last time Dr. Black saw Baeth was in 2007. Baeth had been back to the CARD clinic since then, but was seen by different providers.⁵²

¶ 38 Five days after his deposition, Dr. Black saw Baeth at the CARD clinic. His office notes state that Baeth was having difficulty "carrying on her activities of daily living and her housework wears her out fairly readably" [sic]. Dr. Black also noted that Baeth's PFT results, including DLCO at 57%, were consistent with "moderately severe restrictive changes . . . with significant parenchymal injury." Dr. Black discussed doing a CT scan and diagnosed Baeth with asbestosis, with a high risk for developing lung cancer.⁵³

¶ 39 The CT scan ordered by Dr. Black was read by Michael T. Henson, M.D., on September 25, 2013, as showing bilateral lower lobe opacities "consistent with pulmonary fibrosis. In the setting of asbestos exposure, asbestosis should be considered."⁵⁴ Dr. Whitehouse found Dr. Henson's reading of the CT scan to

⁴⁸ Black Dep. 33:3-21.

⁴⁹ Black Dep. 34:19 - 35:16.

⁵⁰ Black Dep. 48:1 - 51:3; Ex. 2 at 37-40, 50-52.

⁵¹ Black Dep. 51:12 - 21.

⁵² Black Dep. 52:10-23.

⁵³ Ex. 2 at 78.

⁵⁴ Ex. 2 at 83.

be consistent with his own reading, noting that the scan showed evidence of “severe asbestosis.”⁵⁵

Dana Headapohl, M.D.

¶ 40 Dana Headapohl, M.D., testified by deposition. Dr. Headapohl practices with the Providence Medical Group in Missoula. She holds masters’ degrees in environmental engineering, civil engineering, and public health with emphasis on occupational and environmental medicine. Dr. Headapohl is board-certified in occupational medicine and preventive medicine.⁵⁶

¶ 41 Dr. Headapohl explained that occupational medicine involves the evaluation of work environments and natural environments to assess risks to employee safety, and to assess those that have been exposed to environmental risk factors. A small portion of her practice involves performing IMEs at the request of the Montana Department of Labor & Industry (DLI).⁵⁷

¶ 42 Dr. Headapohl testified that, at the request of the Montana Department of Health & Human Services, she worked for several years at the initial screening clinic for patients exposed to asbestos, reviewing CT scans and PFTs. She has also seen a number of patients exposed to asbestos to determine if they were suffering from ARD, including evaluations at the request of DLI.⁵⁸

¶ 43 At DLI’s request, Dr. Headapohl performed her IME of Baeth on March 27, 2013, in order to evaluate Baeth’s condition as it related to her occupational disease (OD) claim.⁵⁹ At the time, Baeth was caring for her “grandchildren” [sic] and was not working. Baeth was suffering from shortness of breath which she attributed to the five years she worked at the Libby lumber mill.⁶⁰

¶ 44 Dr. Headapohl’s IME consisted of reviewing Baeth’s medical records, performing a functional status, and completing a physical examination.⁶¹ In reviewing the records from the CARD clinic, Dr. Headapohl found it significant

⁵⁵ Trial Test.; Ex. 6 at 3.

⁵⁶ Headapohl Dep. 5:11 - 6:8.

⁵⁷ Headapohl Dep. 6:15 - 7:17.

⁵⁸ Headapohl Dep. 7:18 - 8:12.

⁵⁹ Ex. 7.

⁶⁰ Headapohl Dep. 19:8 - 20:5.

⁶¹ Headapohl Dep. 20:6-15.

that Baeth's pulmonary function testing in 2008 showed improvement after she quit smoking in 2007.⁶²

¶ 45 Dr. Headapohl does not read X-rays or CT scans but instead relies on the reports of radiologists. Dr. Headapohl reviewed the reports of radiologist Stephen Becker, M.D., who found no evidence of asbestos exposure on Baeth's CT scans.⁶³ As part of her IME, Dr. Headapohl also had Baeth seen by William B. Bekemeyer, M.D., a pulmonologist at St. Patrick Hospital in Missoula, who interpreted a cardiopulmonary study on Baeth as showing mild obstructive disease with moderately reduced oxygen diffusion.⁶⁴

¶ 46 Dr. Headapohl diagnosed Baeth with mild obstructive lung disease and small airway disease consistent with her long history of smoking. In addition, Dr. Headapohl diagnosed borderline restrictive lung disease, nocturnal desaturation, and nonspecific interstitial markings consistent with long-term smoking.⁶⁵

¶ 47 Dr. Headapohl concluded that Baeth was not suffering from an OD, based on her history, her medical records, imaging studies, interview, and examination.⁶⁶ Dr. Headapohl also concluded that even if Baeth was suffering from ARD, she had multiple documented exposures to asbestos outside of work that could explain it.⁶⁷

Stephen Becker, M.D.

¶ 48 Stephen Becker, M.D., testified by deposition. He is an independent contractor with Kalispell Radiology which has a contract with St. John's Lutheran Hospital in Libby. Dr. Becker completed his residency in radiology in 1981 and has been located in Libby since 2002.⁶⁸ He has read all of the CARD clinic films since its inception, and read all of the chest X-rays taken in Libby during the asbestos screening process in 2000.⁶⁹ Dr. Becker is not board-certified and has

⁶² Headapohl Dep. 28:5 - 29:10.

⁶³ Headapohl Dep. 29:19 - 30:25.

⁶⁴ Headapohl Dep. 35:6-20.

⁶⁵ Headapohl Dep. 36:14 - 38:8; Ex. 7 at 12-13.

⁶⁶ Headapohl Dep. 42:7-19; Ex. 7 at 13.

⁶⁷ Headapohl Dep. 43:5-12; Ex. 7 at 13.

⁶⁸ Becker Dep. 6:7 - 7:16.

⁶⁹ Becker Dep. 7:23 - 8:18.

no special training in reading chest films related to ARD.⁷⁰ To his knowledge, all of the other radiologists at Kalispell Radiology are board-certified.⁷¹

¶ 49 Dr. Becker explained his reading of Baeth's May 26, 2005, CT scan as not revealing any evidence of asbestos exposure. He would have expected to find pleural-based plaquing or calcification, but found only nonspecific interstitial markings.⁷² He also found no fibrosis or pleural fluid, which are also indicators of asbestos exposure.⁷³ Based on that CT scan, Dr. Becker concluded that Baeth was not suffering from ARD.⁷⁴

¶ 50 Dr. Becker next read Baeth's chest CT scan of July 17, 2007. He found mildly prominent interstitial markings that were nonspecific, no pleural thickening, no pleural fluid, essentially similar to and unchanged from the 2005 CT scan.⁷⁵ The last chest X-ray Dr. Becker had of Baeth was dated August 12, 2013, with an indication from the CARD clinic that it showed asbestosis. However, Dr. Becker found nothing on the film to indicate asbestos exposure.⁷⁶

Timothy Bruya, M.D.

¶ 51 Timothy Bruya, M.D., testified by deposition. Dr. Bruya completed his internal medicine residency at Brown University and his CV lists a pulmonary fellowship at the University of Oregon in Portland. Like Dr. Whitehouse, Dr. Bruya is board-certified in pulmonary disease and internal medicine.⁷⁷ Over the course of his practice, Dr. Bruya has diagnosed and treated patients with ARD. He is a fellow in the American College of Chest Physicians, and received an American Top Physicians award and Physician of the Year award, both in 2003. He is now semi-retired.⁷⁸

¶ 52 Dr. Bruya has published no articles on asbestos disease, and he has never met or examined Baeth.⁷⁹ Liberty retained Dr. Bruya to review Baeth's

⁷⁰ Becker Dep. 7:21-22, 8:23 - 9:1.

⁷¹ Becker Dep. 54:4-7.

⁷² Becker Dep. 10:6 - 12:22; Ex. 2 at 23.

⁷³ Becker Dep. 14:18 - 15:11.

⁷⁴ Becker Dep. 15:19-22.

⁷⁵ Becker Dep. 15:23 - 17:12; Ex. 2 at 36.

⁷⁶ Becker Dep. 24:8 - 27:5; Ex. 2 at 79.

⁷⁷ Bruya Dep. 4:19 - 5:2; Ex. 1 to Bruya Dep.

⁷⁸ Bruya Dep. 5:12 - 6:23.

⁷⁹ Bruya Dep. 37:22-25.

medical records and determine whether Baeth was suffering from a respiratory condition.⁸⁰ Dr. Bruya opined that Baeth's primary respiratory problem was chronic obstructive pulmonary disease (COPD) and emphysema, based on her chest X-rays, CT scans, and PFTs.⁸¹ Dr. Bruya explained that he could see the progression of emphysematous changes in Baeth's upper lung fields. Although Dr. Bruya noted bilateral interstitial abnormalities in Baeth's CT scans, he felt that the abnormalities were fairly stable. According to Dr. Bruya, he could see no evidence on either her CT scans or chest X-rays that Baeth was suffering from pleural-related changes due to asbestos exposure.⁸²

¶ 53 Dr. Bruya reviewed Baeth's chest X-ray of July 21, 2008, read by C. Read Vaughan, M.D., as showing hyperinflation, or air trapping, consistent with COPD, possibly related to chronic smoking. Dr. Bruya agreed with Dr. Vaughan's findings.⁸³ Dr. Bruya requested that Gordon S. Teel, M.D., review Baeth's May 26, 2005, and July 17, 2007, CT scans.⁸⁴ Dr. Teel is a radiologist specializing in chest diseases and radiologic imaging of the chest, with whom Dr. Bruya often consults.⁸⁵ Dr. Bruya agreed with Dr. Teel's findings that the etiology for the mild interstitial markings on Baeth's lungs could not be determined with any certainty, and that the pattern of emphysema shown on the scans was typical of smokers.⁸⁶ Dr. Bruya also believed that the PFT results over the years were consistent with progressive COPD.⁸⁷

¶ 54 Dr. Bruya reviewed the September 25, 2013, chest CT scan originally read by Michael T. Henson, M.D.⁸⁸ Although Dr. Henson's report states that, "[i]n the setting of asbestos exposure, asbestosis should be considered[,]"⁸⁹ Dr. Bruya felt that a diagnosis of asbestosis requires more evidence, and that what Dr. Henson was describing on the CT scan was nothing different than what was seen

⁸⁰ Bruya Dep. 7:3 - 9:7; Ex. 8.

⁸¹ Bruya Dep. 9:8-12.

⁸² Bruya Dep. 9:15-25.

⁸³ Bruya Dep. 17:11 - 18:5; Ex. 2 at 48.

⁸⁴ Bruya Dep. 19:19-21; Ex. 2 at 23, 36; Ex. 10 at 1-2.

⁸⁵ Bruya Dep. 20:10-20.

⁸⁶ Bruya Dep. 20:21 - 22:2.

⁸⁷ Bruya Dep. 22:10-12. While Dr. Teel wrote that asbestos-related lung fibrosis "could not be excluded with certainty" (Ex. 10 at 1), Dr. Whitehouse testified that Dr. Teel's findings of "symmetric bibasilar subpleural ground-glass opacities and reticular opacities" were "amazingly similar" to how asbestosis is described on CT scans by the American Thoracic Society and at least one authoritative study.

⁸⁸ Ex. 2 at 83-84.

⁸⁹ Ex. 2 at 83.

previously by Dr. Becker, Dr. Teel, or himself. While he agreed the abnormality was there, Dr. Bruya testified that without being able to study lung tissue under a microscope “and seeing asbestos fibers, you don’t have the ability to make that diagnosis.”⁹⁰

¶ 55 Dr. Bruya testified that the PFTs initially showed a restrictive pattern but, over the years, became more indicative of an obstructive pattern that he believed represented evidence of COPD and not ARD, particularly the improvement seen on Baeth’s tests when she quit smoking between 2007 and 2008. He agreed with Dr. Whitehouse that many asbestos sufferers also have some obstruction in their lungs, but Dr. Bruya believed that this was because many of those patients were also smokers.⁹¹

¶ 56 Although Dr. Bruya believed that Baeth’s history was consistent with having been exposed to asbestos fibers, he did not believe she had ARD or asbestosis.⁹² He felt that her primary disease was COPD related to smoking.⁹³ Dr. Bruya did not believe Baeth had an impairment related to her exposure to asbestos, but he did believe Baeth would be limited in her activities due to her COPD.⁹⁴

Judy Baeth

¶ 57 Baeth testified at trial. I found Baeth to be a credible witness. Baeth was born in Colorado and grew up in Utah where she attended school through the tenth grade.⁹⁵ She married Henry Patton at age 17 and moved to Troy, Montana, at age 18.⁹⁶ Shortly after coming to Montana, Patton got a job at the Grace mine where he worked for approximately six months in 1968, during which time Patton and Baeth moved from Troy to Libby.⁹⁷ Baeth would wash her husband’s dirty

⁹⁰ Bruya Dep. 22:18 - 24:9. During trial, Dr. Whitehouse testified that this particular deposition testimony by Dr. Bruya made no sense to him. Dr. Whitehouse explained that he had never heard of a physician requiring a sample of a patient’s lung tissue in order to diagnose ARD. He also testified that a radiologist cannot diagnose asbestosis but he can suspect it, which is what Dr. Henson did.

⁹¹ Bruya Dep. 24:12 - 28:15.

⁹² Bruya Dep. 32:10-13.

⁹³ Bruya Dep. 33:2-20.

⁹⁴ Bruya Dep. 33:9 - 34:3.

⁹⁵ Trial Test.; Baeth Dep. 15:3-5.

⁹⁶ Trial Test.; Baeth Dep. 7:13 - 8:9.

⁹⁷ Trial Test.; Baeth Dep. 11:22 - 12:4.

work clothes and visit the mine approximately once a month to bring him his lunch.⁹⁸ They then moved back to Utah, where her husband worked on a ranch.⁹⁹

¶ 58 After about a year, Baeth moved back to Troy where she raised her children. During that time, she held a position as a cook for the Troy school district for about eight years before moving to Libby around 1988, where she worked at a restaurant for about six months.¹⁰⁰ In 1989, Baeth was hired by Champion, where she worked in the plywood plant, mostly as a dryer feeder but also as a plugger and patch cutter.¹⁰¹

¶ 59 Baeth testified that approximately once a week, she would use brooms, scrapers, shovels, and air hoses to clean the inside and the top of the dryers and the area around them. It was dusty work, according to Baeth. Also, the air quality inside the plywood plant was dusty in the winter because they had to keep the doors closed.¹⁰²

¶ 60 During the time Baeth worked for both employers—Champion, then Stimson—she only worked one day outside the plywood plant, at the stud mill. She spent the remainder of her time with both employers around the dryers in the plywood plant, either as a dryer feeder, a plugger, or a patch cutter.¹⁰³ According to Baeth, the transition from Champion to Stimson in November of 1993 was fairly seamless and it did not affect her job nor alter her job duties in any way.¹⁰⁴

¶ 61 Baeth completed a First Report of Injury and Occupational Disease for both Champion and Stimson on October 5, 2005, for “[l]ung disease caused by years of asbestos exposure.”¹⁰⁵ Baeth filed her claims because she learned that there was asbestos on top of the dryers and in the walls of the dryers from people she used to work with and from articles she read.¹⁰⁶

⁹⁸ Trial Test.; Baeth Dep. 12:18 - 15:2.

⁹⁹ Baeth Dep. 16:1-10.

¹⁰⁰ Baeth Dep. 16:11 - 17:22.

¹⁰¹ Trial Test.; Baeth Dep. 17:22 - 19:6.

¹⁰² Trial Test.

¹⁰³ Trial Test.; Baeth Dep. 18:3 - 19:13.

¹⁰⁴ Trial Test.; Baeth Dep. 27:13 - 28:6.

¹⁰⁵ Exs. 46 and 47.

¹⁰⁶ Baeth Dep. 20:15 - 24:3.

¶ 62 Baeth knew what vermiculite was; she described seeing it around town and in piles by the ball fields, and even gardened with it on occasion.¹⁰⁷ Stimson documents in Baeth's former name of Patton show that she was working for Stimson by November 1993, and had voluntarily left work by March 1994 to move with her future husband to Arizona.¹⁰⁸ Melvin Baeth, who would become Baeth's husband, worked for Champion for 32 years but was not hired by Stimson when Stimson took over the mill.¹⁰⁹ Melvin died of prostate cancer in 2001.¹¹⁰ Before Melvin died, however, a lung biopsy revealed that Melvin had asbestosis.¹¹¹ According to Baeth, Melvin was told by his doctor that he developed asbestosis from working at the lumber mill.¹¹²

¶ 63 Baeth and Melvin only lived in Arizona three months before they moved back to Libby.¹¹³ Baeth's employment after that was sporadic; she worked for about a year in Libby as a cashier at Bear's Truck Stop from 1995 to 1996. Baeth testified that she could not recall any dirty or dusty truckers entering the store, and since the truck pumps were out of view, she had no idea whether a customer drove a truck or an automobile.¹¹⁴ She was not required to sweep the floor, and dusted only occasionally. In addition to her employment at the truck stop, Baeth also worked as a cook at various places.¹¹⁵

¶ 64 Baeth's last regular position was at Addus HealthCare from 2007 to 2009, where she worked 20 hours a week as a home health care assistant.¹¹⁶ Baeth voluntarily left that position in order to babysit her great-grandchildren and not because of her health. No physician had placed restrictions on what she could and could not do when she quit regular employment.¹¹⁷ Baeth applied for Social

¹⁰⁷ Baeth Dep. 25:9 - 26:14.

¹⁰⁸ Baeth Dep. 28:22 - 31:8, 34:17 - 35:4; Ex. 44 at 1; Ex 45 at 1.

¹⁰⁹ Trial Test.; Baeth Dep. 31:9 - 32:15.

¹¹⁰ Trial Test.; Baeth Dep. 33:7-13.

¹¹¹ Baeth Dep. 33:14 - 34:9.

¹¹² Baeth Dep. 34:10-16.

¹¹³ Baeth Dep. 35:23 - 36:4.

¹¹⁴ Trial Test.

¹¹⁵ Trial Test.; Ex. 52 at 2.

¹¹⁶ *Id.*

¹¹⁷ Baeth Dep. 47:13 - 48:2.

Security retirement benefits in 2011 when she turned 62 and has been receiving them since.¹¹⁸

¶ 65 Baeth first attended the asbestos screenings in 2000. Most of her family members were also screened because it became known that anyone who lived in the Libby/Troy area should be screened for asbestos exposure. The results of her breathing tests and X-rays at the time showed that she may have been harmed by exposure to asbestos. She reported that her exposure consisted of living with her first husband who worked at the Grace mine.¹¹⁹

¶ 66 Baeth first went to the CARD clinic in May 2005 at the urging of her nephew, as she was experiencing shortness of breath.¹²⁰ Baeth testified that this was the first time she was told that she had ARD.¹²¹

¶ 67 During her visit to the CARD clinic in May 2005, Baeth completed an application for the Grace Health Plan. She eventually received a card which she presented to the clinic when she was seen there and the Plan apparently paid for all of her lung treatments until the fund ended.¹²² Baeth has been on oxygen at night now for over two years following a nocturnal oximetry test ordered by the CARD clinic on October 25, 2011.¹²³

¶ 68 Baeth now has a persistent cough with clear sputum and has difficulty climbing stairs. In the last four to five years, her activity has been significantly curtailed; she can only walk about a block before she needs to rest, and she had to give up mowing her yard.¹²⁴

¶ 69 Baeth was a plaintiff in two lawsuits seeking civil damages from the State of Montana and other parties for physical harm caused by asbestos exposure.¹²⁵ Baeth maintained she was exposed to asbestos while residing in the vicinity of Libby from 1967 to 1996, including 1995 to 1996 when Baeth worked for Bear's

¹¹⁸ Baeth Dep. 7:9-10, 48:12 - 49:3.

¹¹⁹ Trial Test.; Baeth Dep. 52:21 - 55:17; Ex. 2 at 6-12.

¹²⁰ Trial Test.; Baeth Dep. 57:11 - 58:6.

¹²¹ Trial Test; Ex. 2 at 24; Baeth Dep. 59:24 - 65:6.

¹²² Ex. 2 at 24; Baeth Dep. 65:12 - 66:23.

¹²³ Baeth Dep. 69:21 - 70:15; Ex. 2 at 67-75.

¹²⁴ Baeth Dep. 71:16 - 73:17.

¹²⁵ Trial Test.; Exs. 50 and 51.

Truck Stop, and from 2001 to 2002.¹²⁶ Baeth stipulated at trial that she received a settlement as a result of the lawsuits.¹²⁷

CONCLUSIONS OF LAW

¶ 70 The law in effect on the employee's last day of work governs the resolution of an OD claim.¹²⁸ This case is governed by the 1993 version of the Occupational Disease Act (ODA) and the Workers' Compensation Act (WCA) since Baeth's last day of work at Stimson was in March 1994.

Issue One: Did Petitioner suffer an occupational disease as a result of her work at Stimson Lumber Company?

¶ 71 The Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.¹²⁹

¶ 72 Section 39-72-102(10), MCA, states, in pertinent part, "Occupational disease' means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift."

¶ 73 For an employer to be liable for an OD, the condition must arise out of the claimant's employment. Section 39-72-408, MCA, states:

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;

¹²⁶ Trial Test.; Ex. 50 at 18; Ex. 51 at 4, 15.

¹²⁷ Trial Test.

¹²⁸ *Montana State Fund v. Grande*, 2012 MT 67, ¶ 23, 364 Mont. 333, 274 P.3d 728 (citing *Hardgrove v. Transportation Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999).

¹²⁹ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

(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.

¶ 74 Where there is more than one employer involved in the development of an OD, § 39-72-303(1), MCA, provides in relevant part, “the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.”

¶ 75 The medical testimony in this case runs the gamut from diametrically opposed opinions with some inconclusive opinions thrown in for good measure. At one end of the spectrum, Drs. Headapohl, Bruya, and Becker opined that Baeth was not suffering from an OD at all, but rather from an obstructive lung disease related to her long-term smoking. At the other end of the spectrum, Drs. Black and Whitehouse diagnosed Baeth with asbestosis which Dr. Whitehouse termed to be “severe.” Meanwhile, Dr. Henson, the radiologist who read Baeth’s last CT scan, advised that in light of the evidence of pulmonary fibrosis, a diagnosis of asbestosis should be considered;¹³⁰ and Dr. Teel, the radiologist to whom Liberty’s expert Dr. Bruya referred Baeth’s CT scans for a second opinion, wrote that asbestos-related lung fibrosis “could not be excluded with certainty.”¹³¹

¶ 76 “[A]s a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses.”¹³² In this case, Dr. Black treated Baeth off and on for some eight years and determined during her last office visit that she was suffering from asbestosis. His opinion was bolstered by the trial testimony of Dr. Whitehouse, also a treating physician, who in addition to treating Baeth has treated Libby residents with Libby amphibole ARD for decades. As noted above, Dr. Whitehouse termed Baeth’s asbestosis “severe.” Dr. Whitehouse testified that no one was more experienced in identifying and treating Libby amphibole ARD than he and Dr. Black, and the record certainly bears out that statement. Because of Dr. Whitehouse’s and Dr. Black’s status as treating physicians, as well as considering their combined experience in diagnosing and treating patients suffering from exposure to the Libby amphibole, I conclude that their opinions are entitled to greater weight.

¹³⁰ See *supra* ¶ 39.

¹³¹ See *supra* ¶ 53, f.n.87.

¹³² *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶ 12, 288 Mont. 356, 957 P.2d 1134.

¶ 77 In *Johnson II*, I cited to *Kratovil v. Liberty Northwest Ins. Corp.*, where the Montana Supreme Court held that under § 39-72-408, MCA, “the correct standard for determining proximate causation for compensability of an ODA claim [under § 39-72-408, MCA is] whether [the] claimant’s employment significantly aggravated or contributed to the occupational disease.”¹³³

¶ 78 Drs. Black and Whitehouse both opined that Baeth’s work at the plywood plant was a significant factor in her development of ARD, and was a more significant exposure than anything else that she reported. Dr. Whitehouse testified that he knew of the asbestos present around the dryers in the plywood plant and had treated at least 30 patients with ARD who worked in that area. Dr. Black testified that he knew a significant number of patients who were exposed to high levels of asbestos in the plywood plant and who developed what he termed to be a “very bad disease” as a result.¹³⁴ Dr. Whitehouse wrote that Baeth’s work at the plywood plant was sufficient to cause ARD. Spear opined that Baeth’s exposure to asbestos at the plant was significant.

¶ 79 Based upon the foregoing evidence, I conclude that Baeth’s ARD meets the definition of an OD and that her employment at the plywood plant was the direct and proximate cause of her OD.

¶ 80 Having concluded that Baeth suffers from an OD, I must next determine where liability for that OD properly rests. The plywood plant was under the ownership of two different employers during Baeth’s tenure. In that regard, the Montana Supreme Court held in *Liberty Northwest Ins. Corp. v. Montana State Fund (In re Claim of Mitchell)*:

We conclude that the “potentially causal” standard is consistent with § 39-71-407(10), MCA (2005), and will be applied in this and future cases in Montana. Under this approach, the claimant who has sustained an OD and was arguably exposed to the hazard of an OD among two or more employers is not required to prove the degree to which 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

¹³³ *Johnson II*, ¶ 93 (quoting *Kratovil v. Liberty Northwest Ins. Corp.*, 2008 MT 443, ¶ 21, 347 Mont. 521, 200 P.3d 71).

¹³⁴ See *supra* ¶ 33.

have caused the OD. . . . In cases where an OD has already been diagnosed, liability for the OD has been determined, and the question is whether a recurrence of the OD condition is attributable to the original employer or is attributable to a second employer based on an intervening exposure to the hazard of the OD, the *Caekaert* and *Lanes* approach will continue to apply.

[Therefore], for purposes of the initial liability determination of an OD where two or more employers are potentially liable, the “last injurious exposure” to the hazard of the OD occurs during the last employment at which the claimant was exposed to working conditions of the same type and kind which gave rise to the OD.¹³⁵

¶ 81 Respondent argues that Baeth’s work at Bear’s Truck Stop from 1995 to 1996 was her last injurious exposure to asbestos. Respondent’s argument was initially premised on the idea that Baeth worked as a waitress at the truck stop, and that this work was of the type and kind that would have exposed her to asbestos similar to her exposure at Stimson from logging truck drivers, laborers, and others tracking dust into the restaurant. This erroneous assumption was fostered by Baeth’s response to Liberty’s discovery requests wherein Baeth categorized her work at Bear’s as “waitress.”¹³⁶ As Baeth explained at trial, however, Bear’s was not a restaurant but a convenience store, and she worked there as a cashier behind a counter. According to Spear, Baeth’s exposure to asbestos at Bear’s was insignificant. Although it may be fair to assume that **some** asbestos dust may have been tracked into Bear’s while Baeth was an employee, there is a dearth of evidence as to the level of that asbestos other than Spear’s testimony that the level was insignificant. Therefore, I must conclude that any exposure to asbestos that Baeth may have encountered while employed at Bear’s was not of the same type and kind which gave rise to her OD.

¶ 82 There is no question that Baeth’s working conditions with Stimson were of the same type and kind as those with Champion, since there was no discernible difference in her working conditions when the transition from Champion to Stimson occurred. According to Dr. Black, six months or more being around the dryers in the plywood plant constituted a “**very** significant exposure” to asbestos.¹³⁷ Similar to *In re Claim of Mitchell*, where the claimant only worked

¹³⁵ *In re Claim of Mitchell*, 2009 MT 386, ¶¶ 24, 26, 353 Mont. 299, 219 P.3d 1267.

¹³⁶ Ex. 52 at 2.

¹³⁷ See *supra* ¶ 33. (Emphasis added.)

two months for his last employer but the last employment contributed to Mitchell's bad back, I conclude that Baeth's employment with Stimson from November 1993 to March 1994 was of the same type and kind as her work with Champion and was a significant enough exposure to asbestos while working around the dryers in the plywood plant to have contributed to her OD.

¶ 83 I therefore conclude that Baeth was last injuriously exposed to the hazard of her OD, asbestos-related lung disease, while employed with Stimson and that Stimson is liable for her ARD.

Issue Two: Is Petitioner barred from claiming her respiratory problems are related to her employment at Stimson Lumber Company based on estoppel, judicial estoppel, or res judicata?

¶ 84 Of these three doctrines, Liberty addresses only judicial estoppel in its Proposed Findings of Fact, Conclusions of Law and Judgment, and in its closing argument.¹³⁸ Liberty maintains that because Baeth filed two civil actions against various entities for exposing her to asbestos in the town and locale of Libby after concluding her work at Stimson, she is pursuing inconsistent arguments. That is, Baeth maintains that her last injurious exposure to asbestos was at the Stimson plywood plant, yet argues in her civil complaints that her asbestos exposure continued years after she quit working for Stimson. Liberty contends that it is prejudiced by these inconsistent exposure theories and that Baeth should be estopped from maintaining she was not exposed to asbestos while working at Bear's Truck Stop and while living in the Libby area.¹³⁹

¶ 85 As pointed out by Baeth,¹⁴⁰ substantively similar judicial estoppel arguments were addressed and rejected by this Court in two prior asbestos cases: *Fleming v. International Paper Co. and Liberty Northwest Ins. Corp.*¹⁴¹ and *Johnson v. Liberty Northwest Ins. Corp. (Johnson I)*.¹⁴² In *Johnson I*, I noted the earlier ruling in *Fleming* where this Court held that a claimant has the right to "sue all of the entities possibly responsible for the exposure and ask the courts

¹³⁸ Respondent's Findings of Fact, Conclusions of Law and Judgment (Respondent's Findings) at 35-36, Docket Item No. 37.

¹³⁹ Respondent's Findings at 36.

¹⁴⁰ Petitioner's Proposed Findings of Fact, Conclusions of Law and Judgment (Petitioner's Proposed Findings) at 27, Docket No. 38.

¹⁴¹ 2005 MTWCC 34.

¹⁴² 2007 MTWCC 7.

to determine which entities, if any, are liable for the harm caused by the exposure.”¹⁴³

¶ 86 *Fleming* involved a claimant who filed suit against several nonoccupational defendants, alleging their actions caused his asbestos disease. The claimant also sought workers’ compensation benefits in an action against his employer. As the Court in *Fleming* rejected Liberty’s judicial estoppel argument, finding none of the elements present, so do I here. While the purpose of the doctrine is “to suppress fraud and prevent abuse of the judicial process,”¹⁴⁴ its purpose is not to suppress the joinder of multiple parties or prevent alternative pleading. Baeth is not judicially estopped from maintaining an OD claim against Stimson.

Issue Three: If Petitioner’s claim is compensable, what is her impairment rating related to her occupational disease?

¶ 87 Liberty’s position on Baeth’s impairment rating is premised upon the opinions of Drs. Headapohl and Bruya. Dr. Headapohl opined that there is no causal relationship between Baeth’s pulmonary difficulties and her employment; rather, her pulmonary difficulties are related to her 40-year history of smoking. Dr. Bruya agreed that there was no impairment rating related to ARD. Therefore, Liberty contends that Baeth has a 0% impairment rating.¹⁴⁵

¶ 88 Dr. Whitehouse performed an IME on Baeth on August 7, 2013.¹⁴⁶ He noted that she complained of being short of breath the last two years walking across her yard and needed to rest on stairs.¹⁴⁷ On examination he noted fine crackling rales, more on the right than the left, an indication of asbestosis. Pulmonary function testing showed a restrictive defect with some obstruction, what Dr. Whitehouse called a “classic asbestos related obstructive defect.”¹⁴⁸ He rated her impairment, in accordance with the 5th Edition of the AMA Guides, at 45%. He also noted that her “severe interstitial disease . . . is likely to make her totally unemployable at the present time.”¹⁴⁹

¹⁴³ *Id.*, ¶ 5 (quoting *Fleming*, ¶ 28).

¹⁴⁴ *Brown v. Small*, 251 Mont. 414, 418, 825 P.2d 1209, 1212 (1992) (quoting *Rowland v. Klies*, 223 Mont. 360, 726 P.2d 310 (1986)).

¹⁴⁵ Respondent’s Findings at 36.

¹⁴⁶ Ex. 3.

¹⁴⁷ Ex. 3 at 1.

¹⁴⁸ Trial Test.; Ex. 3 at 2.

¹⁴⁹ Ex. 3 at 2.

¶ 89 Section 39-71-711(1)(b), MCA, provides that an impairment rating must be based on the current edition of the AMA Guides. In *Drake v. Montana State Fund* and *Hilbert v. Montana State Fund*, I reasoned that since a claimant is assigned an impairment rating only after reaching maximum medical improvement (MMI), “[t]he most reasonable interpretation is that the ‘current edition’ of the Guides are those which are in effect at the time the injured worker reaches MMI.”¹⁵⁰

¶ 90 Although Dr. Whitehouse’s report makes no reference to MMI, in *Fellenberg v. Transportation Ins. Co.* this Court held that an asbestosis victim was at MMI on the day he was diagnosed with the condition, “since his disease is a degenerative one and he will never get better no matter what medical treatment is afforded him.”¹⁵¹ Dr. Black first diagnosed Baeth with ARD during her office visit of May 26, 2005, when he reviewed the results of her CT scan with her. Therefore this is the date Baeth was at MMI. The 5th Edition of the Guides was in effect when Baeth reached MMI, and Dr. Whitehouse was correct in utilizing that edition to assign Baeth her impairment rating.

¶ 91 Dr. Whitehouse testified to his experience in assigning impairment ratings and indeed he has testified in this Court previously in assigning impairment ratings regarding claimants diagnosed with ARD. Based on Dr. Whitehouse’s rating, I conclude that Baeth’s impairment rating related to her OD is 45%.

Issue Four: If Petitioner’s claim is compensable, whether Petitioner is entitled to benefits and medical benefits related to the treatment of the occupational disease.

¶ 92 Having found that Baeth suffers from an OD caused by her employment, and that she was last injuriously exposed to asbestos while employed with Stimson, Baeth is entitled to medical benefits related to the treatment of her OD.

¶ 93 Regarding the other benefits to which Baeth may be entitled, she has offered the Court little guidance in this regard. Baeth’s contentions in the Pretrial Order can be summarized as follows: Baeth contends that she suffers from an OD for which Liberty is liable, and which has resulted in a 45% impairment rating. Baeth further contends that Liberty “has unreasonably refused to accept liability and pay medical and impairment benefits” related to her OD, entitling Baeth to a

¹⁵⁰ 2011 MTWCC 2, ¶ 38.

¹⁵¹ 2004 MTWCC 29, ¶ 43.

penalty, reasonable costs, and attorney fees.¹⁵² Similarly, in Petitioner's Proposed Findings, Baeth requests only a judgment that Respondent is liable for her OD and that she "is entitled to 45% in impairment benefits [sic]," and a penalty, attorney fees, and costs.¹⁵³

¶ 94 Based on Baeth's contentions in the Pretrial Order and her representations in Petitioner's Proposed Findings, I can only surmise that the only benefit besides medical benefits which Baeth seeks is an impairment award. Baeth has not demonstrated a wage loss due to her OD since, as she testified, she did not leave her last regular employment in 2009 because of her ARD, but rather to help care for her great-grandchildren, and she subsequently retired upon turning 62 years old. Therefore, in addition to medical benefits, I can only conclude that Baeth is entitled to whichever other benefits she may be entitled under either the WCA or ODA¹⁵⁴ based on her 45% impairment rating. Presumably, the parties can make this calculation and agree on the amount of benefits due. In the event they cannot, the Court retains jurisdiction to determine the amount, until such time as a notice of appeal to the Montana Supreme Court is filed.

Issues Five: Whether Respondent has unreasonably refused to accept liability for Petitioner's occupational disease and pay impairment and medical benefits in accordance with § 39-71-407, MCA (1993).

¶ 95 Baeth maintains that it was unreasonable for Liberty to continue to deny liability for her OD claim when the weight of the evidence clearly demonstrated that Baeth was suffering from ARD and that the most significant exposure to asbestos came from her employment at the plywood plant.¹⁵⁵

¶ 96 Both the attorney fee statutes, §§ 39-71-611 & 612, MCA, and the penalty statute, § 39-71-2907, MCA, require a finding that Liberty was unreasonable in its handling of Baeth's claim. However, as explained in *Marcott v. Louisiana Pac. Corp.*, the penalty statute "was never intended to eliminate the assertion of a legitimate defense to liability[,] and "the existence of a genuine doubt, from a

¹⁵² Pretrial Order at 2.

¹⁵³ Petitioner's Proposed Findings at 29.

¹⁵⁴ See *Paul v. Transportation Ins. Co.*, 2004 MTWCC 69, ¶ 25 (citing *Stavenjord v. Montana State Fund*, 2003 MT 67, 314 Mont. 466, 67 P.3d 229) (A claimant suffering from an OD is entitled to the same benefits as an injured worker whose benefits are governed by the WCA if those benefits are greater than those provided under the ODA.)

¹⁵⁵ Petitioner's Proposed Findings at 28-29.

legal standpoint, that any liability exists constitutes a legitimate excuse for denial of a claim or delay in making payments.”¹⁵⁶

¶ 97 Liberty’s denial of Baeth’s claim was premised upon the opinions of three physicians who offered different diagnoses for Baeth’s pulmonary condition: Dr. Bruya, a pulmonologist; Dr. Headapohl, an occupational health specialist and OD evaluator; and Dr. Becker, a radiologist with years of experience reading X-rays on CARD clinic patients. All three physicians failed to see evidence of any asbestos exposure, and determined instead that Baeth was suffering from either COPD or emphysema brought on by her many years of smoking. Although I ultimately found the opinions of Drs. Whitehouse and Black more persuasive in light of their status as treating physicians and their combined years of experience, Liberty was not without a reasonable basis for denying Baeth’s claim. Therefore, I conclude that Liberty was not unreasonable in denying Baeth’s claim.

Issues Six and Seven: Whether Petitioner is entitled to an increased award of 20% of all compensation benefits awarded pursuant to § 39-71-2907, MCA, and whether Petitioner is entitled to reasonable costs and attorney fees.

¶ 98 Having concluded that Liberty was not unreasonable in denying Baeth’s claim, Baeth is not entitled to an increased award pursuant to § 39-71-2907, MCA, nor her attorney fees.

¶ 99 As the prevailing party, Baeth is entitled to her costs.

JUDGMENT

¶ 100 Petitioner suffered an OD, asbestos-related lung disease, as a result of her employment with Stimson.

¶ 101 Petitioner is not barred from maintaining a claim for OD benefits.

¶ 102 Petitioner has a 45% impairment rating.

¶ 103 Since Petitioner voluntarily retired, she is presently only entitled to her impairment award and to medical benefits as a result of her OD.

¹⁵⁶ 275 Mont. 197, 205, 911 P.2d 1129, 1134 (1996). (Citations omitted.)

¶ 104 Respondent has not acted unreasonably in its denial of Petitioner's claim. Therefore, Petitioner is not entitled to a penalty or her attorney fees.

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

¶ 106 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 in Helena, Montana, this 5th day of May, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Laurie Wallace
Jon Heberling
Ethan Welder
Dustin Leftridge
Michael P. Heringer
Submitted: November 4, 2013