

employment at MDC. She also worked part time as a cosmetologist in a beauty shop. The State Fund did not cover her employment at the beauty shop.

2. LaFournaise's physical complaints at issue in this matter began in July 1998. She filed her First Report of Injury/Occupational Disease on September 1, 1998.

3. In July 1998, LaFournaise began noticing numbness in her right trunk and pain in her back and arms. She sought treatment from Ron Hecht, a chiropractor in Bozeman, Montana. The pain in her arm, shoulder blade, and neck grew worse and LaFournaise saw a physician's assistant, Lori Lagerquist, in Boulder, Montana, on August 18, 1998. Lagerquist prescribed pain killers, anti-inflammatories, and muscle relaxants. LaFournaise had an MRI in Helena, Montana, on August 21, 1998, which revealed possible cervical disk abnormalities.

4. Lagerquist referred LaFournaise to Lashman W. Soriya, a neurosurgeon in Billings, Montana. Dr. Soriya examined LaFournaise on September 3, 1998 and diagnosed disc protrusion at C4-5 and C5-6 and perhaps at C6-7. He prescribed pain medication and recommended physical therapy and a home cervical traction unit. Dr. Soriya also suggested that LaFournaise avoid activities that aggravated her symptoms. LaFournaise did not realize any significant relief from the treatment.

5. LaFournaise then sought medical attention with Steven R. Speth, an orthopedic surgeon in Bozeman, Montana, who treated her from September 1998 through February 1999. Dr. Speth initially diagnosed cervical stenosis without myelopathy and right cervical radiculopathy. He recommended a Medrol Dosepak and a selective nerve root block at C5-6 and referred her to Dr. Ronald Hull, in Helena, Montana, for this procedure.

6. The State Fund referred LaFournaise to B. Max Iverson, an orthopedic surgeon in Helena, Montana, for an independent medical evaluation. Dr. Iverson examined LaFournaise on October 22, 1998 and reviewed her medical history. He diagnosed radiculitis in her right upper extremity, cervical disc bulges/protrusions at C4-7 and possible mild carpal tunnel syndrome, right greater than left. He noted LaFournaise's job duties at MDC as passing medication to patients (involving locking and unlocking doors into four different cottages in which the patients are housed). Dr. Iverson concluded that he could identify neither specific traumatic events nor activities that would cause cervical disk pathology, radiculitis into the upper extremity or carpal tunnel syndrome. Dr. Iverson also decided that LaFournaise's hair styling activities did not involve a sufficient history of repetitive activity to produce her symptoms. Dr. Iverson concluded that LaFournaise's symptoms did not appear to have an occupational disease basis.

7. On November 12, 1998, Dr. Speth diagnosed LaFournaise with carpal tunnel syndrome. On December 17, 1998, Dr. Speth diagnosed her to suffer from three level degenerative disk disease with possible ossification of the posterior longitudinal ligament and bilateral carpal tunnel syndrome. Dr. Speth concluded that both of her jobs caused her disk disease and bilateral carpal tunnel syndrome to be symptomatic. He apportioned the causation of her problems as resulting two-thirds from work at MDC and one-third from work as a hair stylist. He based the apportionment on his understanding that she worked 40 hours a week at MDC and 20 hours a week as a hair stylist. Dr. Speth recommended further selective nerve root blocks.

8. LaFournaise requested a second evaluation. On February 1, 1999, Patrick E. Galvas, an osteopath in Great Falls, Montana, examined LaFournaise as a result of that request. LaFournaise told Dr. Galvas that during the time her symptoms occurred she was working approximately 60 hours per week at MDC and about four hours per week as a hair dresser. In addition, she told Dr. Galvas that she had difficulty gripping, vacuuming, wallpapering, and working overhead. Dr. Galvas diagnosed bilateral carpal tunnel syndrome and right C7 radiculopathy. He concluded that both of her jobs caused her disk disease and bilateral carpal tunnel syndrome to be symptomatic. He apportioned 93% of her occupational diseases to employment at MDC and 7% to her hair stylist activities.

9. The Department then designated Dr. Thomas L. Schumann, an occupational disease physician in Billings, Montana, as the third panel member with Dr. Galvas and Dr. Iverson. Dr. Schumann did not discuss the case with the other two panel members (Drs. Iverson and Galvas.) (Ex. H.) He reviewed LaFournaise's medical records without examining her and concluded that her work did not cause her conditions. He decided that since the conditions (degenerative cervical disk disease, possible right cervical radiculopathy or radiculitis and bilateral carpal tunnel syndrome) occurred frequently among people who did not work as LPNs in facilities like MDC and who did not work as hair stylists, there was insufficient evidence of a causal connection between LaFournaise's work and her problems.

10. At hearing, LaFournaise testified that she worked full-time at MDC, with substantial overtime, while working perhaps four to five hours per week as a hairstylist. She also detailed the repetitive motions involved in dispensing medications.

11. LaFournaise suffers from three conditions, most recently diagnosed as degenerative cervical disk disease, possible right cervical radiculopathy or radiculitis and bilateral carpal tunnel syndrome, that result from her occupation as an LPN at MDC. Her testimony at hearing tracks the report of Dr. Galvas and contradicts the report of Dr. Iverson regarding her occupational activities. Dr. Soriya clearly recommended that she avoid activities that aggravate her symptoms, suggesting that he also saw a causal connection between her activities and the disabling impact of her conditions. Thus, Dr. Galvas and Dr. Speth, and perhaps Dr. Soriya, lend support to the connection between her activities and her conditions. Her reported activities that led to symptoms and increased symptoms were work activities. Dr. Iverson based his contrary conclusions on a report he attributed to LaFournaise of activities. His recounting of activities was inconsistent with those to which LaFournaise testified at hearing. Dr. Schumann did not examine the patient. The conclusions of Dr. Galvas and Dr. Speth carry greater weight regarding causation. Therefore, there is a direct casual connection between the conditions under which the work is performed and the occupational diseases. The diseases can be seen to follow as a natural incident of the work as a result of the exposure occasioned by the nature of the employment. The diseases can be fairly traced to the employment as the proximate cause. The diseases do not come from a hazard to which LaFournaise would have been equally exposed outside of the employment. The diseases are incidental to the character of the business and not independent of the relation of employer and employee.

DISCUSSION

Because the Workers' Compensation Court directed the department to consider the substance of the medical opinions, rather than their semantic conformity to the language of the causation statute, the decision on remand is solely about deciding which doctors' conclusions were more credible. A host of health care professionals, combining their own expertise with second hand information about LaFournaise's work activities, came to conflicting conclusions about whether her work as an LPN caused her problems. Of the four doctors who expressed opinions (reputable professionals), two concluded it did not and two concluded it did. One very well qualified doctor expressed no opinion, since he was treating her rather than evaluating her, but suggested she stop doing things that made her hurt more.

The Workers' Compensation Court suggested (as the judge has done in other cases) that live medical testimony might shed more light on the causation issue. The parties, accorded an opportunity to add that testimony, did not do so. Perhaps the reason was that live testimony would not serve to buttress or weaken any of the opinions proffered by the health care professionals. Two panel physicians pointed to the absence of any clearly defined mechanism of causation, and concluded that LaFournaise had not established that she suffered from occupational diseases. The third panel doctor and a treating physician both looked at the sequence of developing problems and the kinds of activities at work, and concluded that work activity triggered the manifestation of the problems and therefore she did have occupational diseases.

The doctors' opinions would no doubt have remained the same even if they testified live and faced hours of grilling by counsel. The doctors who concluded she suffered from occupational diseases relied, in one instance, upon actual treatment of LaFournaise, and in the other, upon reports of activity levels consistent with those to which LaFournaise testified at hearing. The doctors who decided she did not suffer from occupational diseases relied, in one instance, on file review without seeing the patient and in the other, upon reports of her activities inconsistent with those to which she testified at hearing.⁽²⁾ The preponderance of the credible evidence supports the finding that LaFournaise suffers from occupational diseases.

Both physicians who found occupational diseases apportioned causation. Apportionment, which the Act requires, is an unconstitutional reduction in disability benefits. *Schmill v. Liberty NW Ins. Co.*, 2001 MTWCC 36 (WCC No. 2001-0300, June 22, 2001). A related case is pending after oral argument before the Montana Supreme Court, but the present state of the law does not allow for apportionment. Thus, with the finding of occupational disease, the function of the hearing officer is complete.

CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction in this matter pursuant to §39-72-611, MCA.
2. Claimant's medical condition was caused out of or contracted in the course and scope of employment. §39-72-408, MCA.
3. Claimant is entitled to occupational disease benefits, without any apportionment for causation by exposures outside of her employment.

ORDER

Margery LaFournaise's medical condition was caused by occupational disease. She is entitled to retroactive and continuing benefits in accord with the law.

DATED this 15th day of May, 2002.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR

TERRY SPEAR
Hearing Officer

Notice: This Order is signed by the Hearing Officer of the Department of Labor and Industry under authority delegated by the Commissioner. Any party in interest may appeal this Order to the Workers' Compensation Court within thirty (30) days after the date of mailing of this Order as provided in § 39-72-612(2), MCA and ARM 24.5.350. The Court's address is: Workers Compensation Court
P.O. Box 537
Helena, MT 59624-0537
(406) 444-7794

1. ¹ The Compensation Court's order on remand notes the parties did not present any medical testimony but only medical records. The order goes on to note that the department decided the medical issues in the case on the medical records, without the benefit of any exploration of the doctors' opinions and conclusions through deposition or hearing testimony. The current hearing officer felt impelled to provide the parties with the opportunity to augment that record on remand if they so desired.

2. ² One of the two doctors concluding there were no occupational diseases also reported that LaFournaise had a medical history that included a broken femur, no minor fracture. She testified that she had never sustained a broken femur.