IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 20

WCC No. 2005-1256

BUDD CARDWELL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

TERRY RACKLEY

Respondent/Employer.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Summary: Respondent Uninsured Employers' Fund filed a motion to dismiss based on Petitioner's failure to file a claim alleging an occupational disease within one year, as required by § 39-72-403, MCA (2003). In Petitioner's original Petition for Trial he stated that he suffered an injury arising out of and in the course of his employment. Petitioner did not allege that he suffered an occupational disease. After the deposition of Petitioner's chiropractor, who opined that Petitioner's injury could be considered a repetitive-use injury which happened over time, Petitioner filed an Amended Petition for Trial and alleged that he suffered an injury or occupational disease.

Held: Respondent's motion to dismiss is denied. Petitioner initially believed his condition was caused by a single incident that occurred while hanging Sheetrock on or about July 20, 2004. All documentary evidence including his first report of injury and his original petition to the Court reflected this belief. After the deposition of Petitioner's chiropractor, however, he became aware that his injury could have been caused by repetitive use over time, after which he filed the Amended Petition for Trial alleging an occupational disease. Since Petitioner neither knew nor reasonably should have known that his condition may have been the result of an occupational disease before he was alerted to this possibility by

the testimony of his chiropractor, the statute of limitations did not begin to run until that time. Accordingly, Petitioner's Amended Petition for Trial was filed within the time prescribed by § 39-72-403, MCA (2003).

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-403, MCA. Where Petitioner filed a Petition alleging an injury and later filed an Amended Petition alleging, in the alternative, an occupational disease, the Amended Petition was filed timely within the one year statute of limitation where all of the documentary evidence indicates that Petitioner neither knew nor should have known that he may be suffering from an occupational disease until Petitioner's chiropractor stated in a deposition that Petitioner's medical condition may be a "repetitive use injury, which happens over a period of time."

Claims: Limitations Period. Where Petitioner filed a Petition alleging an injury and later filed an Amended Petition alleging, in the alternative, an occupational disease, the Amended Petition was filed timely within the one year statute of limitation where all of the documentary evidence indicates that Petitioner neither knew nor should have known that he may be suffering from an occupational disease until Petitioner's chiropractor stated in a deposition that Petitioner's medical condition may be a "repetitive use injury, which happens over a period of time."

Claims: Occupational Disease. Where Petitioner filed a Petition alleging an injury and later filed an Amended Petition alleging, in the alternative, an occupational disease, the Amended Petition was filed timely within the one year statute of limitation where all of the documentary evidence indicates that Petitioner neither knew nor should have known that he may be suffering from an occupational disease until Petitioner's chiropractor stated in a deposition that Petitioner's medical condition may be a "repetitive use injury, which happens over a period of time."

Limitations Periods: Claim Filing: Occupational Disease. Where Petitioner filed a Petition alleging an injury and later filed an Amended Petition alleging, in the alternative, an occupational disease, the Amended Petition was filed timely within the one year statute of limitation where all of the documentary evidence indicates that Petitioner neither knew nor should have known that he may be suffering from an occupational disease until Petitioner's chiropractor stated in a deposition that Petitioner's medical

condition may be a "repetitive use injury, which happens over a period of time."

¶ 1 Petitioner Budd Cardwell alleges that he suffered an injury or occupational disease that manifested on or about July 20, 2004. Petitioner completed a First Report of Injury and Occupational Disease form on October 8, 2004. On this form, Petitioner reported "sudden pains in my neck, shoulders and right arm."[1] Under the section for cause of injury, Petitioner wrote "hanging sheet rock."[2]

¶ 2 Petitioner initially consulted with Dr. Alice Elrod, a chiropractor, in late July and early August 2004. Petitioner also treated at Kalispell Regional Medical Center (KRMC) on September 13, 2004. Eventually, Petitioner underwent a cervical fusion on January 20, 2005.

¶ 3 Petitioner filed a Petition for Trial on February 25, 2005. In the petition, Petitioner alleged that he suffered an injury on or about July 20, 2004, arising out of and in the course of his employment with Terry Rackley. Petitioner did not allege an occupational disease in his original petition.

¶ 4 On October 19, 2005, Dr. Elrod was deposed in this case. In response to a specific question regarding whether Petitioner's condition was caused by a specific injury or occurred over a period of time, Dr. Elrod testified:

> In my opinion, this sort of -- these sort of findings occur over a repetitive -- They're a repetitive use injury, which happens over a period of time.[3]

¶ 5 Following the deposition of Dr. Elrod, Petitioner filed an Amended Petition for Trial on February 1, 2006, alleging that he suffered an injury, or in the alternative that he suffered an occupational disease, on or about July 20, 2004.

¶ 6 Respondent argues that Petitioner filed his petition claiming an occupational disease after the one-year limitation period expired as mandated under § 39-72-403(1), MCA (2003),[4] which reads in relevant part:

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[1] Petitioner's Response in Opposition to Respondent UEF's Motion to Dismiss, Ex. A.

[2] *Id.*

[3] *Id.*, Ex. B, 14:24-25, 15:1-5.

[4] The statutes in effect on the last day of a claimant's employment govern the resolution of an occupational disease claim. *Grenz v. Fire and Casualty of Connecticut,* 278 Mont. 268 924 P.2d 264 (1996).

> (1) When a claimant seeks benefits under this chapter, the claimant's claims for benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the claimant knew or should have known that the claimant's condition resulted from an occupational disease. . . .

¶ 7 Based on this, Respondent argues that Petitioner's petition is untimely and, accordingly, summary judgment should be entered in favor of Respondent.

Did Petitioner know or should have known that he was suffering from an occupational disease within the one-year period prior to February 1, 2006, the date the Amended Petition was filed?

¶ 8 Respondent argues that Petitioner knew or should have known that he suffered an occupational disease beginning on July 20, 2004, the date of Petitioner's alleged injury. Alternatively, Respondent alleges that Petitioner knew or should have known that he suffered an occupational disease after consulting with Dr. Elrod in August 2004, or after his visit to KRMC in September 2004.

¶ 9 Contrary to Respondent's allegations, there is absolutely no evidence prior to Dr. Elrod's deposition that Petitioner either knew or should have known that the injury he sustained while hanging Sheetrock on July 20, 2004, may actually have been the manifestation of an occupational disease, as opposed to an injury arising out of a specific event. Respondent admits that nothing in Dr. Elrod's notes from her consultation with Petitioner in August 2004 indicates Petitioner suffered from an occupational disease. Further, Respondent acknowledges that the physician's note from KRMC on September 13, 2004, specifically states, "[n]othing in history to suggest over use or a repetitive stress type of injury."[5] In the Court's view, this treatment note reinforces Petitioner's argument that he did not know, nor should he have known, that his injury was caused by an occupational disease. Finally, prior to Petitioner's cervical fusion of January 20, 2005, the attending surgeon wrote, "this is a 28-year-old gentleman who injured himself hanging dry wall July 20, 2004."[6] In short, all of the documentary evidence indicates not only that Petitioner neither knew nor should have known that he may be suffering from an occupational disease, it reinforced his belief that he was ***not*** suffering from an occupational disease.

¶ 10 From the record before the Court, it appears that Dr. Elrod's deposition on October 19, 2005, was the first mention that Petitioner's condition may, in fact, be the result of an

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[5] Respondent UEF's Motion to Dismiss, Ex. 8/12.

[6] *Id.,* Ex. 8/36.

occupational disease. Prior to this testimony, there is nothing from which the Court could conclude that Petitioner knew or should have known that his condition was the result of anything other than the specific incident of July 20, 2004. Certainly, Petitioner cannot be charged with having the medical training, knowledge, or experience to make such a determination, particularly when, until Dr. Elrod's deposition, the medical opinions he received all were directed towards a diagnosis of a specific incident being the cause of his injury.

¶ 11 Respondent argues that *Grenz v. Fire and Casualty of Conn.* [7] sheds light on when the one-year limitation period for filing a claim begins. However, in *Grenz*, the statute of limitation at issue was the one-year limitation for filing ***injury*** claims under § 39-71-601, MCA (1983). This statute provided in relevant part:

> (1) In case of personal injury or death, all claims shall be forever barred unless presented in writing to the employer, the insurer or the division, as the case may be, ***within 12 months from the date of the happening of the accident***. . . .[8]

¶ 12 The obvious distinction between § 39-72-403(1), MCA (2003), the statute at issue here, and § 39-71-601, MCA (1983), the statute at issue in *Grenz*, is the event which triggers the commencement of the limitations period. As addressed at length above, the one-year limitation period for occupational disease claims begins to run when the claimant knew or should have known that he suffers from an occupational disease. The statute of limitations at issue in *Grenz*, however, began to run at the happening of a specific incident resulting in the claimant's injury. *Grenz*, therefore, is inapposite to the present case.

¶ 13 Dr. Elrod's deposition started the running of the one-year limitation period prescribed by § 39-72-403(1), MCA (2003). Petitioner alleged that he suffered from an occupational disease within the one-year limitation period when he filed the Amended Petition for Trial on February 1, 2006, claiming an occupational disease. Accordingly, Petitioner's occupational disease claim was timely.

ORDER

¶ 14 Respondent's motion to dismiss is **DENIED**.

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[7] 260 Mont. 60, 63, 857 P.2d 730, 732 (1993).

[8] § 39-71-601, MCA (1983) (emphasis added).

DATED in Helena, Montana, this 28th day of April, 2006.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Garry D. Seaman
Brian J. Hopkins
Bryce R. Floch
Submitted: March 17, 2006