IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 36

WCC No. 2011-2793

DIANNE DVORAK

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
APPEALED TO MONTANA SUPREME COURT - 10/31/12
REVERSED AND REMANDED 07/30/2013

Summary: Respondent moved for summary judgment, arguing that Petitioner's occupational disease claim is untimely under § 39-71-601(3), MCA, because she knew or should have known that she was suffering from an occupational disease more than one year prior to the filing of her workers' compensation claim.

Held: The undisputed facts demonstrate that although she may not have had a formal diagnosis, Petitioner understood that her condition was caused by "repetitive motion" in her job duties and she received medical treatment, including prescription medication, for approximately five years before she filed her first report of injury or occupational disease. By the time Petitioner began taking prescription medication to alleviate her symptoms, she knew or should have known that she was suffering from an occupational disease. Her claim is therefore untimely under § 39-71-601(3), MCA, and Respondent is entitled to summary judgment.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-102.** In the year prior to the repeal of the Occupational Disease Act, the language of § 39-72-102(10), MCA (2003), differed from the language subsequently codified in § 39-71-116(20), MCA (2005), only by breaking the sentences into subparts. The Court therefore held that cases which were decided under the ODA may remain applicable for

occupational disease cases which fall under the WCA since the ODA's repeal.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116. In the year prior to the repeal of the Occupational Disease Act, the language of § 39-72-102(10), MCA (2003), differed from the language subsequently codified in § 39-71-116(20), MCA (2005), only by breaking the sentences into subparts. The Court therefore held that cases which were decided under the ODA may remain applicable for occupational disease cases which fall under the WCA since the ODA's repeal.

¶ 1 Respondent Montana State Fund (State Fund) moves this Court for summary judgment in its favor. State Fund contends that Petitioner Dianne Dvorak's claim for workers' compensation benefits was untimely filed under § 39-71-601(3), MCA, because she knew or should have known that she was suffering from an occupational disease more than one year prior to the filing of her claim.[1] Dvorak objects to State Fund's motion, arguing that her claim is timely under the applicable statute.[2]

¶ 2 On April 16, 2012, the parties presented oral argument on this motion in conjunction with a similar motion filed in *Romine v. Northwestern Energy*, 2011-2754.[3]

Undisputed Facts[4]

¶ 3 Dvorak worked as a sandwich maker at Wheat Montana from sometime in 2002 until May 6, 2011.[5]

¶ 4 On February 28, 2006, Terry Reiff, D.O., saw Dvorak and noted upper thoracic and cervical restrictions. The note reflects that Dvorak reported "at work she has to lift up over her head on a regular basis and [t]his causes quite a bit of back pain." Dr. Reiff's notes reflect pain complaints and an inability to move.[6]

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[1] Motion for Summary Judgment (Opening Brief), Docket Item No. 11.

[2] Petitioner's Brief in Opposition to Respondent's Motion for Summary Judgment (Response Brief), Docket Item No. 16.

[3] Minute Book Hearing No. 4387, Docket Item No. 20.

[4] Neither party disputed the accuracy of the other's proffered facts.

[5] Response Brief at 1.

[6] Opening Brief at 2.

¶ 5 Dr. Reiff submitted paperwork to Blue Cross Blue Shield which indicated that Dvorak's condition was work-related and had begun in February 2006.[7]

¶ 6 In March 2006, Dvorak sought pain medication because of pain at work.[8]

¶ 7 In April 2006, Dr. Reiff's clinic began prescribing Tylenol 3 for Dvorak's pain and continued to renew the prescription on a monthly basis. Dr. Reiff acknowledged that in November 2007, the prescription was for back and shoulder pain. Dr. Reiff increased Dvorak's prescription by January 20, 2009. He attributed the increase to persistent pain induced by muscle spasm and noted that Dvorak took more medication when she worked ten-hour shifts.[9]

¶ 8 Prior to December 2010, Dvorak's back pain was relieved by treatment and she was able to work without restrictions. After December 2010, Dvorak's pain intensified and became incapacitating at work.[10]

¶ 9 Prior to March or April 2011, Dr. Reiff had not talked to Dvorak about filing an occupational disease claim.[11]

¶ 10 On May 6, 2011, Dr. Reiff took Dvorak off work because of severe pain in her thoracic spine.[12]

¶ 11 In May 2011, Dvorak initiated her workers' compensation claim by filing a First Report of Injury (FROI) specifically acknowledging that she began treatment of her repetitive motion condition on February 18, 2006, stating that she had seen her doctor on February 18, 2006, and "It was from repetitive motion."[13]

¶ 12 Dvorak is not seeking benefits for any conditions or treatment suffered or incurred before December 2010.[14]

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[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] Response Brief at 2.

[11] *Id*.

[12] *Id*.

[13] Opening Brief at 1.

[14] Response Brief at 3.

¶ 13 In her deposition, Dvorak testified that the only time she experienced pain was while performing overhead activity at work, and that she did not experience pain with other non-work activities.[15]

Analysis and Decision

¶ 14 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[16] The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 15 This case is governed by the 2009 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time Dvorak alleged an exposure resulting in an occupational disease.[17]

¶ 16 Under § 39-71-601(3), MCA, when an injured worker seeks occupational disease benefits, the worker's claim for benefits must be in writing, signed by the worker or the worker's representative, and presented to the employer, insurer, or the Department of Labor and Industry within one year from the date when the worker knew or should have known that his or her condition resulted from an occupational disease.

¶ 17 In the present case, State Fund argues that Dvorak's claim, filed in May 2011, is untimely because more than a year had passed from the date when Dvorak knew or should have known that she was suffering from an occupational disease.[18] Dvorak disagrees and contends that the condition for which she seeks benefits did not occur until October 2010 and therefore her May 2011 FROI was timely filed.[19]

¶ 18 State Fund argues that from February 2006 forward, Dvorak had, or reasonably should have had, knowledge that she suffered from an occupational disease. In support of its position, State Fund relies on several previous cases: *Corcoran v. Montana Schools Group Ins. Auth.,*[20] *Mack v. Montana State Fund,*[21] *Evans v. Liberty Northwest*

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[15] Opening Brief at 3.

[16] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

[17] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[18] Opening Brief at 6-7.

[19] Response Brief at 7.

[20] *Corcoran*, 2000 MTWCC 30.

[21] *Mack*, 2005 MTWCC 48.

Ins. Corp.,[22] *and Grenz v. Fire and Cas. of Conn*.[23] Dvorak responds that none of these cases are applicable here because they apply to the Occupational Disease Act (ODA) which the legislature has since repealed and incorporated into the WCA.[24] Dvorak argues that the Court should instead rely upon the more recent cases of *Faulkner v. Hartford Underwriters Ins. Co*.[25] and *Grande v. Montana State Fund.*[26]

¶ 19 Dvorak notes in her response brief that the purpose in incorporating the ODA into the WCA was "to [e]nsure that occupational diseases were treated the same as workers' compensation injuries."[27] Dvorak notes that the statutes applicable to her case define occupational disease as "harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift."[28]

¶ 20 In the final year of the ODA prior to repeal, § 39-72-102(10), MCA (2003), defined occupational disease as:

> 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. The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity.

¶ 21 Aside from the present version of § 39-71-116(20), MCA, moving the latter sentence into subpart (b), the statute remains substantially the same. Therefore, I conclude that cases which were decided under the ODA may remain applicable to occupational disease cases which now fall under the WCA.

¶ 22 However, Dvorak argues that these cases are inapplicable to her particular case not only because of the change from the ODA to the WCA, but because § 39-71-407, MCA, further requires that for an occupational disease to be considered to have arisen out of employment, the occupational disease must be established by objective medical

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[22] *Evans*, 2007 MTWCC 23.

[23] *Grenz*, 278 Mont. 268, 924 P.2d 264 (1996). *See* Opening Brief at 4-5.

[24] Response Brief at 4.

[25] *Faulkner*, 2007 MTWCC 15.

[26] *Grande*, 2011 MTWCC 15.

[27] Response Brief at 4.

[28] Response Brief at 4; *See* § 39-71-116(20)(a), MCA.

findings and the events occurring on more than a single day or work shift must be the major contributing cause of the occupational disease.[29] Dvorak argues that while neither *Faulkner* nor *Grande* deal with the statute of limitations found in § 39-71-601(3), MCA, they both deal with determining a major contributing cause and therefore they are "instructive to the issue before the [C]ourt."[30] Dvorak contends that her work did not become the major contributing cause of her condition until October 2010, and therefore that is the time from which the statute of limitations for filing her claim would run.[31]

¶ 23 The difficulty with Dvorak's position is that the major contributing cause analysis goes to whether a condition is compensable as an occupational disease – not whether a worker knew or should have known that she is suffering from an occupational disease. As I noted in *Grande*, under the older statutory scheme, this Court and the Montana Supreme Court issued several decisions which clarified the way in which occupational diseases arising from the aggravation of underlying conditions may be ***compensable*** under the ODA.[32] After determining the meaning of the phrase "major contributing cause," I then turned to determining whether Grande's condition was indeed a compensable occupational disease under the statutes.[33] I recognized in *Grande* that it was possible for a worker to suffer, in the words of the statute, some harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift, and yet not have a compensable occupational disease if the "leading cause contributing to the result" was not the worker's employment.[34] Under Dvorak's argument, the statute of limitations found in § 39-71-601(3), MCA, would no longer begin to run when a worker knows or should know that she is suffering from an occupational disease, but rather it would not begin to run until the worker knows or should know that her employment is the leading cause contributing to the result and that her condition is a ***compensable*** occupational disease. I find no basis to raise the burden beyond the standard set forth in § 39-71-601(3), MCA.

¶ 24 In *Grenz*, the Montana Supreme Court affirmed this Court's decision which barred the claimant's occupational disease claim as untimely. The court noted that the hearing examiner who heard Grenz's case found that Grenz knew or should have

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[29] Response Brief at 4.

[30] *Id*.

[31] Response Brief at 7.

[32] *Grande*, ¶ 21.

[33] *Grande*, ¶ 31.

[34] *Grande*, ¶ 30.

known that his disability was caused by an occupational disease, and that this finding was supported by substantial evidence in the record, including Grenz' testimony that he knew a few years earlier that his doctor believed that Grenz' work was aggravating his arthritis.[35]

¶ 25 In *Corcoran*, this Court held that awareness of pain, and awareness that the pain is a result of work, does not constitute knowledge that one suffers from an occupational disease.[36] The Court noted that the terms "harm" and "damage," as found within the statute, must mean something more than suffering mere pain, but indicate something more significant, such as a condition requiring medical diagnosis and treatment.[37]

¶ 26 In *Mack*, the claimant suffered from symptoms including sneezing and shortness of breath while working with grains and hay at work.[38] He attributed his symptoms to hay fever and treated himself with over-the-counter allergy relief medication.[39] Several years after he left this employment, he sought medical care after he experienced breathing difficulty and swelling in his legs. He was diagnosed with pulmonary hypertension and Chronic Obstructive Pulmonary Disease which the Court concluded was an occupational disease.[40] Although the insurer argued that Mack's claim for occupational disease benefits was untimely, this Court disagreed and held that Mack did not have "the requisite knowledge to trigger" the statute of limitations, reasoning:

> In this case, the claimant certainly associated his symptoms with his work, however, he was not aware that he was suffering from a specific pathological condition which required medical treatment. Taking over-the-counter drugs for symptomatic relief of runny nose, chest tightness, and cough no more constitutes medical treatment than taking aspirin for pain arising after a hard day's work.[41]

¶ 27 In *Evans*, I found the claimant's case to have more in common with *Corcoran* and *Mack* than with *Grenz*, explaining that unlike Grenz, Evans did not have a medical diagnosis and a doctor's opinion that his condition was work-related. I noted that

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[35] *Grenz*, 278 Mont. at 272.

[36] *Corcoran*, ¶ 52.

[37] *Id*.

[38] *Mack*, ¶ 9.

[39] *Mack*, ¶ 10.

[40] *Mack*, ¶¶ 13, 15.

[41] *Mack*, ¶ 19.

although Evans may have had some idea that he might be suffering from a specific disease, it appeared that he had never sought a medical diagnosis or treatment, nor did the evidence indicate that he knew that his work aggravated his condition. I further noted that Evans "self-treated" by resting on his days off.[42] Although I determined that in Evans' case, his idea that he might be suffering from a specific disease was "idle speculation" and therefore did not support a conclusion that Evans knew or should have known that he was suffering from an occupational disease, I further noted that the determination as to whether a claimant knew or should have known he or she may be suffering from an occupational disease may not always require a formal diagnosis.[43]

¶ 28 In Dvorak's case, the submitted facts reflect that in 2006, Dvorak's doctor noted that her job duties caused her pain and he submitted paperwork to Dvorak's insurer which indicated that her condition was work-related. Also in 2006, Dvorak sought and received prescription pain medication to alleviate her symptoms, and Dvorak associated increased pain – and therefore increased use of her prescription medication – with her job duties. Like Grenz, Dvorak's doctor correlated Dvorak's job duties to her symptoms. Unlike Mack, who treated with over-the-counter allergy medications because he had another plausible explanation for his symptoms, Dvorak attributed her symptoms to "repetitive motion," sought medical care, and treated with prescription medication. Likewise, the facts of Dvorak's case are dissimilar from Evans because she sought a medical diagnosis and treatment, and she was aware that her work aggravated her condition. Although Dvorak may not have received a "formal diagnosis" from her doctor, she nonetheless received ongoing treatment and prescription medication for a condition which had only one apparent explanation: her job duties.

¶ 29 In *Corcoran*, the Court explained that pain alone is insufficient to conclude that a claimant should have known her condition was an occupational disease. The Court suggested that something "more significant," such as diagnosis and treatment, was necessary to impute such knowledge to a claimant. In the present case, the facts reflect that Dvorak received treatment and while Dr. Reiff may not have given her a formal diagnosis, Dvorak understood that her problems were "from repetitive motion" caused by her job duties. Therefore, I conclude that by April 2006, when Dvorak began to use a prescription medication to alleviate the symptoms of her "repetitive motion" condition, she knew or should have known that she was suffering from an occupational disease. Her May 2011 FROI is therefore untimely pursuant to § 39-71-601(3), MCA.

¶ 30 State Fund is entitled to summary judgment in its favor.

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[42] *Evans*, ¶ 27.

[43] *Evans*, ¶ 28.

ORDER

¶ 31 Respondent's motion for summary judgment is **GRANTED**.

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

DATED in Helena, Montana, this 23rd day of October, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: William P. Joyce
William Dean Blackaby
Submitted: April 16, 2012