IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 11

WCC No. 2011-2793R1

DIANNE DVORAK

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: In 2006, Petitioner sought medical treatment for neck and shoulder pain which she attributed to her job duties. Her symptoms were managed with the use of a prescription pain reliever until they worsened in late 2010. In 2011, her treating physician referred her to a specialist and she subsequently filed an occupational disease claim. Respondent contends that the claim was untimely filed under § 39-71-601(3), MCA, and that Petitioner should have known in 2006 that she suffered from an occupational disease. Petitioner contends that she did not know she had an occupational disease until her treating physician told her.

Held: The facts of this case indicate that neither Petitioner nor her treating physician gave any consideration to her symptoms beyond refilling her prescription for several years after she first complained of these symptoms. The Court concluded that she knew or should have known that she suffered from an occupational disease on the day that her treating physician first took her off work and referred her to a specialist for further evaluation.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-601.** Since the Montana Supreme Court has held that the use of pain mediation "cuts both ways" in considering whether a claimant should have known she had an occupational disease, the Court found little, if any, probative value in the fact that Petitioner used Tylenol 3 to reduce her work-related pain for years prior to her formal diagnosis.

Limitations Periods: Claim Filing: Occupational Disease. Since the Montana Supreme Court has held that the use of pain mediation "cuts both ways" in considering whether a claimant should have known she had an occupational disease, the Court found little, if any, probative value in the fact that Petitioner used Tylenol 3 to reduce her work-related pain for years prior to her formal diagnosis.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-601. Where neither Petitioner nor her treating physician put any thought into the cause of her symptoms, and Petitioner's treating physician did not question whether a more aggressive approach to diagnosis and treatment was warranted, the Court held that Petitioner first knew or should have known that she suffered from an occupational disease on the day that her treating physician referred her to a specialist and took her off work.

Limitations Periods: Claim Filing: Occupational Disease. Where neither Petitioner nor her treating physician put any thought into the cause of her symptoms, and Petitioner's treating physician did not question whether a more aggressive approach to diagnosis and treatment was warranted, the Court held that Petitioner first knew or should have known that she suffered from an occupational disease on the day that her treating physician referred her to a specialist and took her off work.

Physicians: Diagnosis [Impression]. Although Petitioner's treating physician prescribed her a pain reliever, her treating physician paid almost no attention to her pain complaints until her symptoms significantly worsened nearly four years later. At that time, the physician took Petitioner off work and referred her to a specialist, and the Court held that this was the point at which Petitioner should have known she suffered from an occupational disease. The Court noted that the physician's testimony was that he did not consider making a formal diagnosis until Petitioner's symptoms worsened, and that the evidence was not clear as to whether Petitioner's condition actually worsened or whether she suffered from an entirely new occupational disease at that time.

¶ 1 This matter previously came before the Workers' Compensation Court on a motion for summary judgment filed by Respondent Montana State Fund (State Fund).[1]

[1] Motion for Summary Judgment, 2011-2793, Docket Item No. 11.

On October 23, 2012, I granted State Fund's Motion, concluding that Petitioner Dianne Dvorak had untimely filed her occupational disease claim under § 39-71-601(3), MCA.[2] Dvorak appealed that decision to the Montana Supreme Court.[3]

¶ 2 The Montana Supreme Court reversed my decision and remanded the case for trial to determine when Dvorak knew or should have known she was suffering from an occupational disease.[4]

¶ 3 The trial in this matter occurred on December 19, 2013, at the Workers' Compensation Court. Dvorak was present and represented by William P. Joyce. William Dean Blackaby represented State Fund. State Fund's claims examiner Robin Miller also attended.

¶ 4 Exhibits: I admitted Exhibits 1 through 3 without objection.

¶ 5 Witnesses and Depositions: I admitted the depositions of Dvorak and Terry Reiff, D.O., and they are part of the record. Dvorak and Dr. Reiff were sworn and testified.

¶ 6 Issues Presented: The Montana Supreme Court remanded this matter for the determination of the following issue:

> When Dvorak knew or should have known she was suffering from an occupational disease.[5]

FINDINGS OF FACT

¶ 7 Dvorak testified at trial. I found her to be a credible witness but a poor historian.

¶ 8 Dvorak testified that she went to school through the twelfth grade and completed one year of college. She does not have any medical training.[6] Dvorak began working at Wheat Montana in 2002.[7] She first worked in the deli, and after approximately six

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[2] *Dvorak v. Montana State Fund*, 2012 MTWCC 36.

[3] Notice of Appeal, 2011-2793, Docket Item No. 28.

[4] *Dvorak v. Montana State Fund*, 2013 MT 210, ¶ 31, 371 Mont. 175, 305 P.3d 873.

[5] *Id.*

[6] Trial Test.

[7] Dvorak Dep. 5:24-25.

months, began working in the kitchen. She remained in that position until she left that employment.[8]

¶ 9 Each week, Dvorak worked four ten-hour shifts.[9] Dvorak spent nine hours of each shift making sandwiches at the sandwich bar.[10] On a typical day, Dvorak started work at 11:00 a.m. She made sandwiches at a counter which had overhead storage for bread, and an array of sandwich ingredients on a waist-high surface.[11] Dvorak testified that the bread was stored on overhead shelving.[12] Each time she made a sandwich, she would have to reach overhead to select the correct type of bread.[13] Dvorak estimated that during the lunch rush each day, she made approximately 50 sandwiches per hour, and approximately 25 sandwiches per hour for the rest of her shift.[14] During her shift, she also made chili and restocked the sandwich bar ingredients.[15]

¶ 10 Dvorak testified that she has problems with her neck, upper back, and shoulders which she believes are caused by the overhead reaching she did as part of her job duties at Wheat Montana.[16] Dvorak testified that her hobbies include gardening and cooking, but none of her hobbies or non-work activities involve overhead reaching.[17] Dvorak testified that the only overhead reaching she performed was at work.[18]

¶ 11 Dvorak testified that the only time she experienced pain was while she performed the overhead-reaching duties at work.[19] Dvorak further testified that she did not have pain during her three days off each week.[20] She further testified that at some point, she began having some pain on her days off, but it was not as painful as what she experienced during her work shifts.[21]

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[8] Dvorak Dep. 6:13-21.

[9] Dvorak Dep. 10:4-11.

[10] Dvorak Dep. 10:12-14.

[11] Dvorak Dep. 7:2 – 8:3.

[12] Dvorak Dep. 8:7-15.

[13] Dvorak Dep. 8:16-24.

[14] Dvorak Dep. 11:10-17.

[15] Dvorak Dep. 11:18 – 12:2.

[16] Dvorak Dep. 14:12-21.

[17] Dvorak Dep. 14:22 – 15:16.

[18] Dvorak Dep. 17:15-21.

[19] Dvorak Dep. 18:17-20.

[20] Dvorak Dep. 19:2-4.

[21] Dvorak Dep. 19:5-9.

¶ 12 Terry Reiff, D.O., is board-certified in family practice.[22] Dr. Reiff testified at trial and I found him to be a credible witness. He first saw Dvorak in 1995, when he treated her for a headache.[23] He testified that Dvorak may have occasionally seen other providers, but he believes he has been her primary medical provider since 1995.[24] Dr. Reiff treated Dvorak for various medical complaints on a regular basis over the next several years.[25]

¶ 13 On February 28, 2006, Dr. Reiff saw Dvorak and noted:

> DVORAK, Dianne is seen today with upper thoracic and cervical restrictions. She has had HA. Manipulation does reduce the restrictions. She says at work she has to lift up over her head on a regular basis and [t]his causes quite a bit of back pain. Manipulation reduces the restrictions. She is improved following treatment. She is to continue on her present medication . . . . [W]e will reevaluate her in 1 month.[26]

¶ 14 Dvorak testified that she only vaguely remembers her February 28, 2006, appointment with Dr. Reiff, but she knows she had some neck pain.[27] Dvorak testified that Dr. Reiff asked her about her activities and she told him that her job at Wheat Montana involved a significant amount of overhead, repetitive reaching, and she thought that it could be causing some of her neck and shoulder pain.[28]

¶ 15 Dvorak testified that Dr. Reiff did not tell her she had a work-related condition in 2006. Dvorak testified that when she later filed a First Report of Injury and Occupational Disease, she does not know why she wrote February 2006 on her claim form, although she thinks it may have been because she saw Dr. Reiff write that date on the insurance form.[29]

¶ 16 On March 3, 2006, Dr. Reiff noted that Dvorak had cancelled her appointment for that day: "said she was better – encouraged her to come in if needed."[30]

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[22] Reiff Dep. 7:8-11.

[23] Reiff Dep. 7:16-23.

[24] Reiff Dep. 7:24 – 8:4.

[25] Ex. 1 at 1-12.

[26] Ex. 1 at 13.

[27] Trial Test.

[28] Trial Test.

[29] Trial Test.

[30] Ex. 1 at 13.

¶ 17 On April 10, 2006, a practice partner of Dr. Reiff called in a prescription for Tylenol 3 for Dvorak.[31] Dr. Reiff testified that he does not know why it was prescribed.[32] He concluded that Dvorak's pain had resolved after her February 28, 2006, appointment because she cancelled the follow-up appointment.[33] Dvorak agreed that she cancelled a March 2006 appointment with Dr. Reiff because she felt better.[34] She further agreed that she called him in late March 2006 and complained of pain, and Dr. Reiff prescribed Tylenol 3.[35] Dvorak testified that when she first began using Tylenol 3, she would occasionally take it first thing in the morning if she "slept wrong."[36] She testified that she did not take more than one Tylenol 3 per day, and on some days she did not take any.[37] Dvorak was having pain at work, but she testified that using the medication "would calm the pain down" and allow her to continue working.[38]

¶ 18 Dvorak was not seen again by Dr. Reiff's office until November 7, 2006, for an unrelated issue.[39] Over the next year, Dvorak was not seen by Dr. Reiff, but his office continued to refill her Tylenol 3 prescription as well as other prescriptions.[40]

¶ 19 On November 21, 2007, Dr. Reiff saw Dvorak for a physical. He noted that she occasionally used Tylenol 3 for back and shoulder pain.[41] Dr. Reiff testified that when he saw Dvorak on that day, he discussed the Tylenol 3 prescription with her and learned that she was using it for back and shoulder pain. He understood that she used it occasionally.[42]

¶ 20 Dvorak testified that in November 2007, when Dr. Reiff noted that she used Tylenol 3 "occasionally" for back and shoulder pain, she was typically taking Tylenol 3 during her work shift after the lunch rush ended.[43] Dvorak testified that the Tylenol 3 would "ease everything up so I could get through the day," and that this was successful

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[31] *Id*.

[32] Reiff Dep. 29:12-19.

[33] Reiff Dep. 30:25 – 31:7.

[34] Dvorak Dep. 20:21 – 21:2.

[35] Dvorak Dep. 21:3-6.

[36] Trial Test.

[37] Trial Test.

[38] Dvorak Dep. 21:7-16.

[39] Ex. 1 at 13.

[40] Ex. 1 at 14.

[41] Ex. 1 at 15.

[42] Reiff Dep. 31:9-16.

[43] Dvorak Dep. 21:19 – 22:6.

for her until her condition worsened.[44] Dvorak testified that using the Tylenol 3 also allowed her to stand up straight at work, because she would otherwise get sharp pains in her ribs that made it difficult to do so.[45]

¶ 21 On December 10, 2007, Dr. Reiff noted:

> Dvorak, Dianne is seen today. She is in with back pain. She was putting up Christmas lights and stepped on an unbalanced table and she fell. She landed on her back. She has had back pain with bruising since the episode. She did this last week. She has some abrasions on her back but no significant echymosis [sic]. She has pain in the iliosacral region bilaterally. Sacral shear technique does reduce some restrictions. Manipulation to the lumbosacral and thoracic areas reduces the restrictions. She is going to be on anti inflammatories and we will follow her in 3 or 4 days if she is not completely resolved.[46]

¶ 22 In December 2007, Dvorak fell off a table while she was hanging Christmas lights. Dvorak testified that Dr. Reiff gave her an adjustment and two days later gave her an injection which relieved her symptoms, and she has had no further problems with pain in that area.[47]

¶ 23 On December 18, 2007, Dr. Reiff noted:

> Dvorak, Dianne is seen today. She is in with right sciatic pain. She says she felt a little better after her last tx but by the time she had gone to work and worked 10 hours [sic] shifts she said she just felt like her hip developed severe pain again and like it just went right back out. Her right superior aspect of the illeosacral [sic] joint is tender to palpataion [sic]. This is the most intense trigger point. Manipulation reduces some restrictions. She still has trigger point tenderness and the trigger point is injected . . . . She is to use exercise, rest, positions and heat and we'll follow her prn.[48]

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[44] Dvorak Dep. 22:9-13.

[45] Trial Test.

[46] Ex. 1 at 15.

[47] Dvorak Dep. 25:1-15.

[48] Ex. 1 at 16.

¶ 24 Dvorak did not treat with Dr. Reiff for over a year after that, although Dr. Reiff continued to authorize refills of her prescription medications.[49] On January 20, 2009, she was seen for a review of her medications.[50]

¶ 25 Dr. Reiff agreed that by January 2009, Dvorak's use of Tylenol 3 had increased to the point that she was using it on an almost daily basis.[51] Dr. Reiff testified that Dvorak was mostly using the Tylenol 3 to combat muscle-spasm pain and that she tended to use more of it on days that she worked a ten-hour shift.[52]

¶ 26 On August 4, 2009, Dr. Reiff noted:

> Dvorak, Diane [sic] is seen today. She is in needing a refill on her Tylenol 3. She says about midafternoon she gets severe pain, just from repetitive motion mostly in her back and shoulders. She says she takes one Tylenol 3 and that helps her get through the day.[53]

¶ 27 On October 19, 2010, Dr. Reiff saw Dvorak for a physical examination. He noted, "She uses Tylenol #3 for her low back pain that she gets after she is working. She uses less than 15 of these per month."[54]

¶ 28 On December 13, 2010, Dr. Reiff reported:

> Dvorak, Dianne is seen today. She is in with severe pain in the upper thoracic area, T5 and 6 on the right side. Manipulation reduces some restrictions. She still has some trigger point on a subluxed rib. That trigger point is injected . . . . She is about 85 to 90% relieved after the treatment . . . .[55]

¶ 29 Dr. Reiff testified that the first injection he gave Dvorak was both for diagnostic and treatment purposes.[56] Since Dvorak experienced significant relief with the injection, it isolated the area he was considering in trying to pinpoint the cause of her problems.[57]

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[49] Ex. 1 at 16-17.

[50] Ex. 1 at 18.

[51] Reiff Dep. 33:7-15.

[52] Reiff Dep. 33:21 – 34:3.

[53] Ex. 1 at 19.

[54] Ex. 1 at 21.

[55] Ex. 1 at 22.

[56] Reiff Dep. 11:2-9.

¶ 30 Dr. Reiff testified that he believed that the condition Dvorak presented with in December 2010 was a different condition than had existed in February 2006 because it presented differently and did not resolve itself.[58] Dr. Reiff testified that in December 2010, he identified a trigger point tenderness which was causing Dvorak significant discomfort. Prior to then, he treated her for muscle aches and pains and thoracic and cervical pain. Dr. Reiff testified that her pain complaints were not isolated to one area prior to December 2010.[59] Dr. Reiff testified that prior to December 2010, Dvorak's symptoms were not indicative of a thoracic disk problem, but after the various treatments he offered after December 2010 failed to relieve her symptoms, he began to consider this as a possible diagnosis.[60] Dr. Reiff testified that prior to December 2010, he did not feel the need to search for a specific diagnosis for Dvorak's pain complaints because the Tylenol 3 effectively relieved her symptoms.[61]

¶ 31 Dvorak testified that when she saw Dr. Reiff in December 2010, she had sharp pain which would radiate into her ribs.[62] Dvorak testified that she had neck pain prior to December 2010, but it was a dull pain. Prior to December 2010, she also had pain in her right shoulder and pain into her mid back on the right side.[63] Dvorak testified that after December 2010, her pain became extremely sharp and she felt like "something broke."[64] She stated that her pain had worsened and her prescription medication was no longer working.[65] She testified that she would not have filed a workers' compensation claim if her condition had remained the way it was prior to December 2010, because she was getting by with taking Tylenol 3 for aches and pains.[66]

¶ 32 On March 8, 2011, Dr. Reiff noted:

> Dvorak . . . is in with pain under her right scapula. This trigger point is injected . . . . Manipulation to the thoracic spine reduces some restrictions. She is improved after the manipulation and after the injection.

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[57] Reiff Dep. 11:11-15.

[58] Trial Test.

[59] Reiff Dep. 9:4-18.

[60] Trial Test.

[61] Trial Test.

[62] Trial Test.

[63] Trial Test.

[64] Trial Test.

[65] Trial Test.

[66] Trial Test.

> All of her pain is completely resolved. We are going to go back to 1 month scripts for her Tylenol with Codeine and Ativan.[67]

¶ 33 Dvorak testified that the first injection Dr. Reiff gave her relieved her pain for two months, but later shots were not as effective.[68]

¶ 34 Dr. Reiff testified that on March 8, 2011, he talked to Dvorak about her overusing her back by performing repetitive overhead lifting as part of her job duties, which he believed contributed to her back pain. He believed that he had spoken to her about this previously and noted that in December 2007, he had talked to her about a relationship between her low-back and hip pain and her ten-hour shifts.[69]

¶ 35 On April 12, 2011, Dr. Reiff treated Dvorak for back pain which was located under her right scapula. He compared a recent x-ray with one from 2010 and found no significant change nor evidence of any rib fractures or spinal abnormalities. He advised her to do as much of her work as possible with her left hand and to limit overhead lifting with her right hand.[70]

¶ 36 On April 21, 2011, Dr. Reiff saw Dvorak for a follow-up appointment. She continued to have pain at T6 on her right side with some relief through the use of pain patches and Tylenol 3. Dr. Reiff performed an injection at Dvorak's rib and she reported pain relief.[71]

¶ 37 Dvorak testified that Dr. Reiff told her she had a work-related problem when he gave her this injection.[72]

¶ 38 Dr. Reiff testified that by April 2011, the injections were no longer having a significant effect on Dvorak's pain and so he decided to refer her to Royce G. Pyette, M.D., for an evaluation.[73] Dr. Reiff testified that in reviewing his records, he believes that April 2011 was the first time that he made a determination that Dvorak suffered from an occupational disease.[74]

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[67] Ex. 1 at 22.

[68] Dvorak Dep. 22:21-24.

[69] Reiff Dep. 14:18 – 15:14.

[70] Ex. 1 at 23.

[71] *Id*.

[72] Trial Test.

[73] Reiff Dep. 12:25 – 13:9.

[74] Reiff Dep. 16:13-23.

¶ 39 Dvorak received a form from Blue Cross Blue Shield of Montana which asked about her condition. Handwritten on the form was, "This is a work aggravated injury of T6 T7 facet [indecipherable] rib articulation first began 2/28/06."[75] Dvorak testified that Dr. Reiff filled out the form and she signed it afterwards.[76]

¶ 40 Dr. Reiff testified that he filled out the form Dvorak obtained from Blue Cross Blue Shield of Montana.[77] He stated that the pain Dvorak experienced in December 2010 was "in the same area" as the pain she complained of on February 28, 2006, "but I don't know if it's the same condition" because Dr. Reiff believed the earlier condition had "resolved."[78] Dr. Reiff testified that when he indicated that Dvorak's pain had "resolved" after February 28, 2006, he did not mean that her pain had ever completely gone away, but rather that it had improved.[79]

¶ 41 On May 6, 2011, Dr. Reiff saw Dvorak, who reported severe back pain. Dvorak informed Dr. Reiff that she was unable to work more than two hours without having to take pain medication. Dr. Reiff took Dvorak off work and referred her to Dr. Pyette for evaluation.[80] Dr. Reiff testified that after he took Dvorak off work in May 2011, he never subsequently released her to return to work.[81] Dvorak testified that at that time, she was having a hard time completing her work shifts because of pain.[82]

¶ 42 Dvorak testified that the last day she worked at Wheat Montana was the day she filed her occupational disease claim.[83] Dvorak testified that she filled out the claim form because she received a letter from her insurance company which stated that it had been monitoring her medical appointments and that it had determined that her treatment was for a work-related condition. The insurer asked Dvorak to fill out a form.[84] Dvorak testified that she was not familiar with the term "occupational disease" until she filed her claim.[85]

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[75] Ex. 3 to Dvorak Dep.

[76] Trial Test.

[77] Reiff Dep. 34:7-20.

[78] Reiff Dep. 34:21 – 35:3.

[79] Trial Test.

[80] Ex. 1 at 24.

[81] Trial Test.

[82] Trial Test.

[83] Trial Test. On the First Report of Injury and Occupational Disease (attached to Dvorak's deposition as Exhibit 4), Dvorak's signature is dated May 6, 2011.

[84] Trial Test.

[85] Trial Test.

¶ 43 On May 17, 2011, Dr. Pyette saw Dvorak. Dr. Pyette took a history and noted:

> She states over the past 3-6 months she has developed escalating pain located at the right thoracic spine. She states her symptoms are worse with repetitive reaching above shoulder level. She works in the sandwich deli and work in this position requires repetitive cervical spine extension and reach above shoulder level. She states that she will develop escalating pain located from the T3-T8 level on the right. . . . The patient has been off work for approximately 3 weeks and does note improvement of her symptoms with time off.[86]

¶ 44 On examination, Dr. Pyette noted tenderness to palpation of the paraspinous musculature extending from T3 to T5, but no other point-specific tenderness to palpation of the spinous processes.[87] Dr. Pyette's impression was thoracic strain/overuse secondary to industrial injury and possible exacerbation of cervical spondylolytic myelopathy secondary to industrial injury.[88] Dr. Pyette recommended a cervical and thoracic MRI and a chest x-ray. He noted that Dvorak reported improvement in her symptoms since being taken off work and he restricted her from returning to work pending the MRI and x-ray.[89]

¶ 45 On June 7, 2011, Dr. Reiff reported:

> Dvorak, Diane [sic] is seen today. She is really anxious and upset about her Work Comp problems. Her shoulder and back continue to be a major issue. She has less pain now that she is not working which is understandable since it is a work aggravated injury.[90]

¶ 46 Dr. Reiff agreed that he had never used the expression "work-aggravated injury" in his notes prior to June 7, 2011, but he could not recall if he had talked to Dvorak about it prior to then.[91]

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[86] Ex. 2 at 1.

[87] *Id.*

[88] Ex. 2 at 2.

[89] *Id.*

[90] Ex. 1 at 24.

[91] Reiff Dep. 21:25 – 22:5.

¶ 47 On July 21, 2011, Dr. Reiff reported:

> I spoke with [Dvorak's attorney] Mr. Joyce concerning Diane [sic] Dvorak this morning. She has hired him as her attorney in a dispute with the Workers' Compensation on an injury to her thoracic spine. She has had, as I had discussed with him, numerous issues over the past several years but not consistently a problem with her mid and upper thoracic spine. She has been treated and then the issues have resolved and then other problems in her low back and mid back and cervical areas have come up, but again they have resolved. But beginning in December of 2010 she began to develop a very consistent specific pain in her mid thoracic spine. She was evaluated and felt that this was secondary to her work situation where she was doing a lot of overhead and reaching type of activity at work, particularly with pans and different breads. She was referred to Dr. Payette and Dr. Speth for evaluations but Work Comp has decided that this is not a work aggravated injury or other technicalities have been cited. I feel this certainly is a work aggravated injury that became persistent in December of 2010 and has continued through June of 2011.[92]

¶ 48 On July 22, 2011, Dr. Reiff responded to questions posed by Dvorak's attorney. He noted that prior to December 2010, Dvorak's back pain was usually relieved by treatment and that Dvorak was able to work without restrictions, but that after that time, Dvorak's pain intensified and became incapacitating at work. Dr. Reiff also opined that Dvorak's job duties were putting increased stress on her thoracic vertebral bodies and shoulder muscles, requiring medical treatment.[93]

¶ 49 On October 11, 2011, Dr. Reiff noted that he saw Dvorak for medications and to discuss her medical conditions. He found her back to be "much improved probably because she is not working and lifting heavy pans up above shoulder level." Dr. Reiff noted that he would like to have Dvorak evaluated by an orthopedic surgeon, but that she had not been able to obtain an evaluation.[94]

CONCLUSIONS OF LAW

¶ 50 In an occupational disease claim, the statutes in effect on the claimant's last day of employment controls.[95] Dvorak's last day of work was May 6, 2011. Consequently,

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[92] Ex. 1 at 26.

[93] Ex. 3.

[94] Ex. 1 at 27.

[95] *Dvorak*, 2013 MT 210, ¶ 18 (citing *Gidley v. W.R. Grace & Co.*, 221 Mont. 36, 37-38, 717 P.2d 21, 22 (1986).

the 2009 Workers' Compensation Act (WCA) controls.[96] Dvorak bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[97]

¶ 51 The sole issue before the Court on remand is to determine when Dvorak knew or should have known she was suffering from an occupational disease.[98] The time period allowed for filing an occupational disease claim is set forth in § 39-71-601(3), MCA:

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

Since Dvorak did not file her First Report of Injury and Occupational Disease until May 6, 2011, her claim would be untimely under § 39-71-601(3), MCA, if she knew or should have known that her condition resulted from an occupational disease for more than a year before she filed her claim.

¶ 52 Dvorak argues that she did not know she was suffering from an occupational disease until December 2010 at the earliest. She contends that in February 2006, she visited Dr. Reiff for a single appointment in which she complained about pain from her job duties, and that her pain resolved after the treatment she received that day. Dvorak points out that she cancelled her follow-up appointment, and argues that while she subsequently obtained a prescription for Tylenol 3, there is no evidence that this pain medication was used for the specific pathological condition which Dr. Reiff diagnosed in December 2010. Dvorak argues that since Dr. Reiff did not make a diagnosis of a specific pathological condition, nor communicate such diagnosis to Dvorak, until December 2010 or early 2011, this Court cannot conclude that Dvorak should have known she was suffering from an occupational disease prior to that time.[99]

¶ 53 State Fund argues that the issue is not whether Dvorak actually knew she was suffering from an occupational disease, but when Dvorak *should have known* she was suffering from an occupational disease. State Fund argues that Dvorak should have known by February 28, 2006, when she saw Dr. Reiff complaining of pain from her job

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[96] *See id.*

[97] *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).

[98] *See Dvorak*, 2013 MT 210, ¶ 31.

[99] *See* Petitioner's Trial Brief, Docket Item No. 8, at 5 (citing *Dvorak*, 2013 MT 210, ¶ 30).

duties. State Fund argues that the trial testimony of Dvorak and Dr. Reiff contradicted their earlier statements and provided confusing testimony and that this Court should place little weight on Dr. Reiff's testimony because he acknowledged that he had no independent recollection of Dvorak's case but instead wholly relied on his medical records.[100]

¶ 54 In arguing that Dvorak should have known that she suffered from an occupational disease in February 2006, State Fund relies on: *Corcoran v. Montana Schools Group Ins. Authority,*[101] *Mack v. Montana State Fund,*[102] *Evans v. Liberty Northwest Ins. Corp.,*[103] *and Grenz v. Fire & Cas. of Conn.*[104]

¶ 55 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' case found that Grenz knew or should have 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.[105]

¶ 56 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.[106] 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.[107]

¶ 57 In *Mack*, the claimant suffered from symptoms including sneezing and shortness of breath while working with grains and hay at work.[108] He attributed his symptoms to hay fever and treated himself with over-the-counter allergy relief medication.[109] Several years after he left this employment, he sought medical care after he experienced breathing difficulty and swelling in his legs and he was diagnosed with pulmonary

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[100] Closing argument.

[101] *Corcoran*, 2000 MTWCC 30.

[102] *Mack*, 2005 MTWCC 48.

[103] *Evans*, 2007 MTWCC 23.

[104] *Grenz*, 278 Mont. 268, 924 P.2d 264 (1996). *See* Motion for Summary Judgment at 4-5.

[105] *Grenz*, 278 Mont. at 272, 924 P.2d at 267.

[106] *Corcoran*, ¶ 52.

[107] *Id*.

[108] *Mack*, ¶ 9.

[109] *Mack*, ¶ 10.

hypertension and Chronic Obstructive Pulmonary Disease which the Court concluded was an occupational disease.[110] Although the insurer argued that Mack's claim was untimely, this Court 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.[111]

¶ 58 In *Evans*, the Court found the claimant's case had 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. The Court noted that Evans had some idea that he might be suffering from a specific disease, but it appeared he had never sought diagnosis or treatment, nor did the evidence indicate that Evans had any awareness that his work aggravated his condition. The Court noted that Evans "self-treated" by resting on his days off.[112] Although the Court determined that Evans' 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, the Court 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.[113]

¶ 59 State Fund argues that Dvorak's case is distinguishable from *Corcoran*, *Mack*, and *Evans* because Dvorak had received medical treatment prior to the time when she filed her claim. State Fund further argues that, unlike the claimants in *Corcoran*, *Mack*, and *Evans*, Dvorak had more than a "general awareness" of work-related pain in that she had specifically sought treatment for pain in her neck and shoulders which she attributed to the overhead reaching she performed at work.[114] State Fund argues that Dvorak's medical records indicate that she experienced both muscle spasm and restricted range of motion which "warranted both physical manipulation and pharmaceutical treatment" to relieve her symptoms.[115] State Fund argues that the facts

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[110] *Mack*, ¶¶ 13, 15.

[111] *Mack*, ¶ 19.

[112] *Evans*, ¶ 27.

[113] *Evans*, ¶ 28.

[114] State Fund's Trial Brief, Docket Item No. 9, at 6.

[115] State Fund's Trial Brief at 6-7.

indicate that Dvorak attributed her symptoms to her job duties and Dr. Reiff did not offer any alternate explanation of her symptoms.[116]

¶ 60 State Fund further argues that the phrase "knew or should have known" is not a redundancy but rather is a disjunctive phrase requiring two separate factual analyses.[117] State Fund argues that "should have known" must mean something other than actual knowledge, and that Dvorak's position is that § 39-71-601(3), MCA, requires actual knowledge since nothing short of a physician making a specific diagnosis and informing the claimant that his or her condition is work-related will suffice for "should have known."[118]

¶ 61 In *Dvorak*, the Montana Supreme Court found that December 13, 2010, was the first occasion when Dr. Reiff concluded that Dvorak had "a site-specific pathological condition that was not going to resolve with treatment."[119] After considering the record presented to it, the Montana Supreme Court found that Dr. Reiff's medical records indicated that in February 2006, Reiff diagnosed Dvorak with a "work-related 'injury' with which there was no associated impairment and that promptly resolved with osteopathic manipulations and medication." The court further noted that Dr. Reiff's records indicated that while Dvorak saw Dr. Reiff on eight occasions between February 28, 2006, and October 19, 2010, six of the appointments addressed unrelated medical issues, while the only two other appointments to reference "work-related upper back and shoulder pain" were the February 28, 2006, and August 4, 2009, appointments.[120] The court further found that the record established that Dvorak and Dr. Reiff believed her February 28, 2006, symptoms were "the result of a work-related strain or injury which resolved itself satisfactorily over time with minor treatment" and further found:

> Neither [Dvorak nor Dr. Reiff] considered the prospect of an occupational disease until Reiff first undertook diagnostic testing in April 2011. Until that time, when x-rays were taken and she was referred to an orthopedic specialist, Dvorak clearly had no intention of seeking more complex treatment, altering her employment duties or hours, or making a claim for workers' compensation benefits.[121]

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[116] State Fund's Trial Brief at 7.

[117] State Fund's Trial Brief at 3.

[118] State Fund's Trial Brief at 7.

[119] *Dvorak*, 2013 MT 210, ¶ 7.

[120] *Dvorak*, 2013 MT 210, ¶ 24.

[121] *Dvorak*, 2013 MT 210, ¶ 25.

¶ 62 In its ruling, the Montana Supreme Court held:

> [T]he answer to the question of when Dvorak knew or should have known that she was suffering from an occupational disease is not amenable to a summary determination. . . . If [Dr. Reiff] did not conclude she had an occupational disease until March or April 2011, a material question of fact arises as to when Dvorak – who is not trained in medicine – should have known she was suffering from an occupational disease.[122]

¶ 63 State Fund responds that *Corcoran* remains good law, and that under Corcoran, if a claimant has a condition for which the claimant sought diagnosis and treatment, then the claimant should have known he or she suffered from an occupational disease. State Fund argues that in Dvorak's case, she sought diagnosis and treatment in February 2006, and therefore under *Corcoran*, she should have known that she suffered from an occupational disease at that time. State Fund argues that although Dr. Reiff did not make a specific diagnosis in 2006, he did make findings. State Fund argues that if this Court determines that Dvorak does not meet the *Corcoran* criteria, then the "should have known" standard is essentially eliminated, because a layperson will never be able to meet that standard without actual knowledge of a diagnosis and condition from a medical provider.

¶ 64 In my summary judgment ruling, I concluded:

> Like Grenz, [in February 2006] 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.
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> ¶ 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

[122] *Dvorak*, 2013 MT 210, ¶ 30.

> 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.[123]

¶ 65 However, the Montana Supreme Court held: "We have never held that ingestion of pain medication by a full-time employee constitutes proof of the existence of an occupational disease." The Supreme Court further stated that Dvorak's use of medication "cuts both ways" and was of no persuasive value either for or against State Fund's argument that it indicated that Dvorak should have known she suffered from an occupational disease.[124]

¶ 66 In light of the Montana Supreme Court's holding that the use of medication "cuts both ways," I find little, if any, probative value in Dvorak's use of Tylenol 3 to reduce her work-related pain and other symptoms as evidence either for or against whether she should have known she suffered from an occupational disease in February 2006. Although State Fund argues that Dvorak's and Dr. Reiff's testimony was inconsistent and confusing, Dr. Reiff's testimony, in conjunction with his medical records, clearly demonstrates that Dr. Reiff did not even begin to consider making a formal diagnosis of Dvorak's condition until December 2010. In fact, the testimony of Dvorak and Dr. Reiff calls into question whether the condition Dvorak presented with in December 2010 was in fact a worsening of the same condition from which she had suffered since February 2006, or whether it was an entirely new occupational disease.

¶ 67 As to when, specifically, Dvorak should have known she was suffering from an occupational disease, the Montana Supreme Court reasoned, as set forth above, that Dvorak demonstrated no intention of filing a claim or seeking further treatment until Dr. Reiff referred her to Dr. Pyette for further evaluation. Although, as the Montana Supreme Court noted, Dr. Reiff formulated a plan to refer Dvorak to Dr. Pyette in April 2011, the records indicate that he informed Dvorak of this and acted upon these intentions on May 6, 2011 – the same day that Dr. Reiff took Dvorak off work and Dvorak signed the First Report of Injury and Occupational Disease claim form.

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[123] *Dvorak v. Montana State Fund*, 2012 MTWCC 36, ¶¶ 28-29.

[124] *Dvorak*, 2013 MT 210, ¶ 27.

¶ 68 State Fund argues that if this Court concludes that the day Dvorak actually knew she suffered from an occupational disease is concurrent with the day that Dvorak should have known she suffered from an occupational disease, then the language of § 39-71-601(3), MCA, is redundant and the *Corcoran* standard becomes meaningless. I disagree with State Fund's absolutist interpretation. It is true that the Montana Supreme Court's holding in *Dvorak* indicates that an insurer must put forth a more persuasive case as to when a claimant should have known he or she suffered from an occupational disease than the evidence presented in this case, and obviously more than the evidence which I found sufficient to initially grant summary judgment in State Fund's favor on this issue. However, there have been numerous cases before *Dvorak* in which this Court held that a claimant should have known he or she suffered from an occupational disease and I can envision a myriad of factual situations in a post-*Dvorak* world from which a Court may conclude that a claimant should have known he or she suffered from an occupational disease. The mere taking of Tylenol 3 while continuing to work and without a diagnosis of an occupational disease is just not among that myriad.

¶ 69 As the facts above indicate, prior to December 2010, neither Dvorak nor her treating physician put any thought into the cause of her symptoms. Dr. Reiff's medical records do not indicate that either of them ever questioned whether a more aggressive approach to diagnosis and treatment was warranted prior to December 2010. Moreover, aside from refilling Dvorak's Tylenol 3 prescription, almost no attention was paid to Dvorak's pain complaints after February 28, 2006, until her symptoms worsened in December 2010. Dvorak may have been under the care of a doctor in February 2006, but like Evans, she did not have a medical diagnosis for her "aches and pains." In *Evans*, I concluded that Evans knew or should have known that he was suffering from an occupational disease on the day that his treating physician diagnosed the condition and opined that it was caused by Evans' job duties.[125] Similarly, in the present case, I conclude that Dvorak knew of should have known that she was suffering from an occupational disease on May 6, 2011, the day Dr. Reiff took her off work and referred her to a specialist for further evaluation.

JUDGMENT

¶ 70 Petitioner knew or should have known she was suffering from an occupational disease on May 6, 2011.

¶ 71 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.

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[125] *Evans*, ¶ 28.

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

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: William P. Joyce
William Dean Blackaby
Submitted: December 31, 2013