IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 8

WCC No. 2017-3955

WILLIAM MORRISH

Petitioner

vs.

AMTRUST INS. CO. OF KANSAS

Respondent/Insurer.

APPEALED TO SUPREME COURT – 07/10/2018
SETTLED (DISMISSED WITH PREJUDICE) – 08/27/18

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner has had a long history of low-back pain and sciatica, which, as it worsened, caused him to miss work. Starting in 2012, Petitioner and his chiropractor discussed that his work was causing his low-back pain and sciatica. In April 2015, after sending him for x-rays, Petitioner's chiropractor diagnosed him with degenerative disc disease at L5-S1 and L4-5, for which Petitioner continued to treat. In July 2016, Petitioner suffered acute low-back pain when he reached down to pick something up at his home; he has been unable to go back to work since. In August 2016, Petitioner's medical doctor told him the major cause of his low-back and radiating pain was likely his work as a mechanic. Petitioner filed an OD claim several days later, which Respondent denied. Respondent argues Petitioner does not have a compensable OD. Alternatively, Respondent argues Petitioner's claim is untimely because he did not file his claim for more than a year after his chiropractor diagnosed him with degenerative disc disease at L5-S1 and L4-5. Petitioner contends he has a compensable OD because his job duties were the major contributing cause of his degenerative disc disease. He further contends his claim is timely because he could only have known his degenerative disc disease was caused by his work when his medical doctor told him, and he filed his claim several days later.

Held: The issue of whether Petitioner has a compensable OD is moot, because even assuming that he does, Petitioner failed to timely file his claim pursuant to § 39-71-601(3), MCA. Petitioner knew his degenerative disc disease was caused by his work in April 2015 because: Petitioner's chiropractor told him as early as 2012 that Petitioner's work was causing his low-back problems; he treated continuously, and missed or was taken off work, for those problems through 2015 and beyond; and in April 2015, x-rays revealed degenerative disc disease in his lumbar spine. Notwithstanding, Petitioner filed his OD claim in August 2016, outside the one-year statute of limitations.

¶ 1 The trial in this matter was held on November 7, 2017, in Helena, Montana, and concluded on November 21, 2017, by telephone. Petitioner William Morrish was present and represented by Patrick T. Fox. Kelly M. Wills and Shea A.B. Sammons represented Respondent Amtrust Ins. Co. of Kansas (Amtrust).

¶ 2 Exhibits: The Court admitted Exhibits 1 through 6, and 8 through 19 without objection. Exhibit 7 was reserved, but never offered.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Morrish, Gary J. Litle, DC, and Kathleen R. Trapp, MD, into evidence. Morrish, Linda Morrish, and David J. Hewitt, MD, MPH, DABT, were sworn and testified at trial.

¶ 4 Issues Presented: This Court rephrases the issues set forth in the Pretrial Order as follows:

> Issue One: Did Morrish suffer a compensable occupational disease?
>
> Issue Two: Did Morrish timely file his occupational disease claim pursuant to § 39-71-601(3), MCA?

This Court's disposition of Issue Two renders Issue One moot because, even assuming that he suffers from a compensable occupational disease (OD), Morrish failed to timely file his claim, pursuant to § 39-71-601(3), MCA.

FINDINGS OF FACT

¶ 5 This Court finds the following facts by a preponderance of the evidence.[1]

Medical History

[1] Ordinarily, the claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted). However, "[a]s with other affirmative defenses, the party — here the insurer — asserting that a claim is time barred bears the burden of proof." *Preston v. Transp. Ins. Co.*, 2002 MTWCC 23, ¶ 30 (citations omitted), *aff'd in part, rev'd in part on other grounds, and remanded*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527.

¶ 6 Morrish was a credible witness, though not an entirely reliable historian regarding his medical history as he could not remember the dates on which he and his providers discussed his diagnosis or the terminology his providers used.

¶ 7 Morrish has worked in a heavy-labor position, as a mechanic, since the mid-1990s. He has long experienced back pain and gone to a chiropractor for adjustments.

¶ 8 Morrish was not physically active outside of work and spent most of his free time watching television.

¶ 9 He began treating with Dr. Litle in August 2005, shortly after moving to Montana, for headaches, neck pain, mid-back pain, lower-back pain, and sciatica.

¶ 10 Morrish was hired as a mechanic at what is now Broadwater Ford around August 2006.

¶ 11 In late December 2006, Morrish saw Dr. Trapp, his family-medicine physician, for "[p]ain all over." She documented a history of, *inter alia*, lower-back pain and chronic back problems, and that Morrish had noted "physically demanding lifelong work ha[d] left him with significant pain in many joints."

¶ 12 Between 2005 and 2016, Morrish treated with Dr. Litle between 5 and 12 times per year. Morrish attributed his back pain to the awkward positions he had to get into while working, and heavy lifting. He typically responded well with one or two chiropractic visits, and Dr. Litle released him from care to return on an as-needed basis.

¶ 13 In January 2007, Dr. Trapp referred Morrish for a rheumatologic evaluation with Carolyn Coyle, MD.

¶ 14 Morrish saw Dr. Coyle on August 1, 2007. Dr. Coyle ordered additional testing, including a pelvic x-ray, which showed moderate degenerative changes in L5-S1, which Dr. Coyle characterized as "[p]rimary generalized osteoarthritis with some premature degenerative dis[c] disease [in the] lower lumbosacral spine." Dr. Coyle reviewed the results with Morrish that September.

¶ 15 In October 2007, Morrish began treatment with Dr. Trapp for Type II Diabetes. Morrish continued seeing Dr. Trapp for diabetes and general medical issues, and Dr. Litle for his pain complaints.

¶ 16 Over time, Morrish's low-back problems and sciatica gradually worsened, and he had to miss several days of work because of back pain. Starting in 2012, Dr. Litle and Morrish began having discussions about Morrish's ability to continue working as a mechanic due to the problems he was having with his back. They discussed that working on cement and getting into awkward positions were contributing factors to his back

problems. Dr. Litle told Morrish that his work as a mechanic was causing him to suffer degenerative changes in his low back.

¶ 17 Observing that "Morrish's lower back and sciatic episodes [were becoming] more acute and problematic," prompting him to "miss several days of work as a result," Dr. Litle assessed him, on April 9, 2015, as possibly having degenerative joint disease or degenerative disc disease and ordered lumber spine x-rays to determine which.

¶ 18 Morrish had the x-rays taken on April 16, 2015. The radiologist noted, *inter alia*, "severe narrowing of the L5-S1 interspace," "moderate narrowing of the L4-5 interspace," and "facet arthropathy at L4-5 and L5-S1." The radiologist diagnosed "[l]ower lumbar spondylosis"; i.e., "degenerative disc disease resulting in compression of the nerve roots."[2] Dr. Litle explained that the x-rays "did reveal advanced degenerative disc disease at L5/sacral level and mild changes at L4/5 level, either of which may be responsible for his sciatic complaints."

¶ 19 Although Morrish could not remember the "terminology" that Dr. Litle used when they discussed his back condition and could not recall if Dr. Litle used the term "spondylosis," at Morrish's next visit on April 20, 2015, Dr. Litle discussed the x-ray results with him, indicating that he had degenerative disc disease of the lumbar spine and documenting that "DDD L5 is noted" on the x-ray report.

¶ 20 Morrish continued to treat with Dr. Litle. As was his custom, Dr. Litle told Morrish, after each of his next ten visits, to follow-up as needed.

¶ 21 On Sunday, July 31, 2016, Morrish was using a chop saw to cut pieces of old wood in his home workshop. When he bent over to pick up some kindling, he experienced immediate, acute, and debilitating pain in his right-low back. The pain was more severe than he had ever experienced before.

¶ 22 On Monday, August 1, 2016, Morrish went to see Dr. Litle, presenting with acute lower-back pain and spasm, pain into his buttocks, pain with sitting, and difficulty standing erect. Dr. Litle told him the incident with the kindling was probably just the proverbial "straw that broke the camel's back" — meaning that, in Dr. Litle's judgment, the main cause of Morrish's back condition, regardless of the immediate precursor to his disability, was his long history of work as a mechanic. Dr. Litle did some physiotherapy modalities, and some massage and ice packs, but he deemed Morrish's condition too acute for any manipulative treatment.

¶ 23 Morrish did not go to work that day, and indeed, never returned to his job at Broadwater Ford.

---

[2] *Ford v. Sentry Cas. Co.,* 2012 MT 156, ¶ 16, 365 Mont. 405, 282 P.3d 687.

¶ 24 Morrish returned to see Dr. Litle on August 4, 2016. He continued to have lower-back pain, though not as much spasm. Dr. Litle referred Morrish to Dr. Trapp for medication to help manage his back symptoms, which Dr. Litle had never done with Morrish before.

¶ 25 Morrish saw Dr. Trapp on August 8, 2016. He told her about the incident with the kindling, which she agreed was just "the straw that broke the camel's back." She performed an exam, diagnosed Morrish with low-back pain and radiculopathy in the thoracolumbar region, and recommended he undergo a lumbar MRI. Because she believed Morrish's work as a mechanic was the major cause of the pain he was exhibiting, Dr. Trapp encouraged him to file a workers' compensation claim.

¶ 26 Two days later, on August 10, 2016, Morrish filed a First Report of Injury or Occupational Disease with his employer, alleging that his low-back pain and right-sided radicular symptoms constituted an OD.[3]

¶ 27 Amtrust denied the claim, asserting that it was both unrelated to Morrish's work and untimely.

¶ 28 Morrish had an MRI of his lumbar spine without contrast on January 25, 2017. The report shows: "Degenerated disc L5-S1 with 5 mm posterior disc/osteophyte complex and bilateral but more prominently right L5-S1 foraminal stenosis. Broad-based posterior disc protrusion L4-5 measuring just under 5 mm with mild L5 subarticular recess stenosis."

¶ 29 After learning of the results of his MRI, Morrish requested follow up with a spine specialist, and met with Benjamin T. Smith, DO, on February 6, 2017. Dr. Smith's assessment included: "53 year old male with lumbar spondylosis most notable at L4-5 and L5-S1 with bilateral L5 radiculopathy (right > left)."

¶ 30 On July 18, 2017, Morrish underwent an independent medical evaluation with Dr. Hewitt.

¶ 31 At Dr. Smith's request, Morrish underwent an epidural steroid injection (ESI) on the right at L5 in August 2017. The injection provided good relief of Morrish's low-back and leg symptoms, but those symptoms returned by his follow-up appointment in September 2017. Dr. Smith sent Morrish for bilateral ESIs at L5 in October 2017. Morrish had complete relief for approximately one week.

¶ 32 Dr. Smith plans to do surgery if Morrish continues physical therapy, and can get off nicotine and lose more weight.

¶ 33 Dr. Litle opined that Morrish is currently unable to work because of his low-back problems.

---

[3] At trial, counsel for Morrish characterized the OD Morrish is claiming as his degenerative disc disease.

Provider Opinions

¶ 34 The providers in this matter offered differing opinions as to the relationship between Morrish's work as a mechanic and his degenerative disc disease.

¶ 35 Dr. Litle opined that Morrish's work as a mechanic at Broadwater Ford is the major contributing cause of his degenerative disc disease. To form his opinion, Dr. Litle relied on his training and experience in the field of Chiropractic, as well as "objective medical evidence of physical examination (spasm, antalgia, hypertrophy, etc.) and diagnostic evaluation" over the course of his treatment of Morrish. In a letter to the claims examiner, Dr. Litle explained:

> Mr. Morrish has employment history of over 30 years as an auto mechanic. He has been seen in my office on essentially "as need basis" since [August 4, 2005,] for complaints involving his neck, headaches, midback and lower back with history of sciatic issues, primarily on right side but at times also left side as well. X-rays of his lower back were performed on 4/16/2015 at Broadwater Health Center which did reveal advanced degenerative disc disease at L5/sacral level and mild changes at L4/5 level, either of which may be responsible for his sciatic complaints. . . . The past few years, Mr. Morrish's lower back and sciatic episodes have been more acute and problematic and many times he will miss several days of work as a result.
>
> I see in reviewing his records that some episodes are a result of positions he must get into working on vehicles as a mechanic. Working on cement floors is also a factor for Mr. Morrish's lower back considering the degenerative changes that are present.
>
> . . . .
>
> He was diagnosed with diabetes in 2013.[4] Lost 35 pounds which he has been able to maintain though helpful for his lower back, continues to have lower back issues.

¶ 36 Likewise, Dr. Trapp opined that Morrish's work as a mechanic was the major contributing cause of his degenerative disc disease. To form her opinion, Dr. Trapp relied on her training and experience in the field of Family Medicine, as well as the January 25, 2017, MRI she ordered, which showed "objective medical evidence of [a] degenerative spine condition that correlated with [the] symptoms that [she] personally observed in [the] clinic and on physical examination."

---

[4] Dr. Litle's conclusion that Morrish was diagnosed with diabetes in 2013 appears to be in error, as lab work indicates that Morrish had an impaired fasting glucose in December 2006, and Dr. Trapp assessed him as having Type II diabetes in October 2007.

¶ 37 According to Dr. Hewitt, Dr. Litle's and Dr. Trapp's causation opinions are "anecdotal." He claimed that M.C. Batee's 2009 twin spine study, and a comprehensive review in 2014 in the *American Medical Association Guides to the Evaluation of Disease and Injury Causation*, conclusively show that heavy labor does not cause degenerative spine changes; thus, he testified that it was his opinion that Morrish's "work activities as a mechanic over the years [were] not the major contributing cause of the degenerative changes he has in his low back." He further claimed that M.C. Jensen's 1994 study and W. Brinkikji's 2015 analysis show that degenerative findings are often seen in asymptomatic individuals; thus, he opined that it is not Morrish's degenerative spine changes — or, incidentally, the incident with the kindling[5] — that is responsible for his ongoing low-back and radiating pain. Rather, based on exam findings and electrodiagnostic testing, Dr. Hewitt opined that Morrish's radiating pain is consistent with a diabetic or alcohol-related neuropathy.

CONCLUSIONS OF LAW

¶ 38 This case is governed by the 2015 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect on Morrish's last day of employment and consequently, his alleged last injurious exposure.[6]

¶ 39 Section 39-71-601(3), MCA, provides in pertinent part:

> 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.

¶ 40 Since Morrish did not file his First Report of Injury or Occupational Disease until August 10, 2016, his claim would be untimely under § 39-71-601(3), MCA, if he knew or should have known that his degenerative disc disease was caused by his work before August 10, 2015.

¶ 41 Amtrust argues that Morrish knew or at least should have known he suffered from an OD in April of 2015 because he had already been treating for years for lower-back pain, which he and Dr. Litle attributed to his work; Dr. Litle had told him that his work was causing degenerative changes in his spine in 2012; and in April 2015, he received a

---

[5] As Dr. Hewitt explained in his report, "It appears the individual likely experienced an acute low back strain and/or spasm on July 31, 2016. It is impossible to determine the extent, if any, of significant physical harm at that time. However, this appears to be an unlikely explanation for his continued symptoms months later in view of the other findings discussed above."

[6] *Hardgrove v. Transp. Ins. Co*., 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citation omitted); *Nelson v. Cenex, Inc.*, 2008 MT 108, ¶ 33, 342 Mont. 371, 181 P.3d 619.

diagnosis, based on x-rays, of lumbar spondylosis, or degenerative changes in the lumbar spine at L5-S1 and L4-5. Thus, Amtrust argues that Morrish's claim is time barred under § 39-71-601(3), MCA, as interpreted in *Corcoran v. Montana Schools Group Ins. Authority*,[7] *Dvorak v. Montana State Fund*,[8] and *Romine v. Northwestern Energy*.[9]

¶ 42 Morrish argues that he did not know, and could not have known, that he was suffering from an OD until August 8, 2016, when Dr. Trapp told him that the cause of his degenerative disc disease was his work as a mechanic. Morrish argues that under *Corcoran* and *Dvorak*, and this Court's decision in *Dvorak* on remand, the statute of limitations does not begin running when the claimant receives treatment for pain and is able to continue working. He asserts that if this Court rules that the statute of limitations begins running because he treated with Dr. Litle for pain, then claimants will be required to file a claim any time they suffer lumbago at the end of a workday for which they seek treatment, a result the Montana Supreme Court rejected in *Dvorak*.[10] Morrish also points out that in *Corcoran* and *Dvorak*, this Court and the Montana Supreme Court stated that the statute of limitations does not begin running until the claimant has "a condition requiring *medical* diagnosis and treatment."[11] Thus, he maintains that the statute of limitations did not start running when Dr. Litle, a chiropractor, treated him and did not begin running until Dr. Trapp, a medical doctor, diagnosed him with degenerative disc disease and informed him it was her opinion that it was caused by his work.

¶ 43 In *Corcoran*, this Court addressed the issue of when a claimant knows or should know that her condition resulted from an OD, thereby starting the running of the statute of limitations. Relying on the definition of "occupational disease" — which, in relevant part states that an OD is "harm, damage, or death . . . 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" — this Court explained that the terms "harm" and "damage," as found within that definition, "must mean something more than suffering mere pain," and "indicate something more significant, such as a condition requiring medical diagnosis and treatment."[12] Thus, this Court ruled that "[a]wareness of pain, and awareness that the pain is a result of work does not constitute knowledge that one suffers from an 'occupational disease,' as that term is defined in the Occupational Disease Act."[13] This Court went on to construe the limitations period "as commencing when the worker has

---

[7] 2000 MTWCC 30.

[8] 2013 MT 210, 371 Mont. 175, 305 P.3d 873.

[9] 2012 MTWCC 35.

[10] *Dvorak*, 2013 MT 210, ¶ 28.

[11] *Dvorak*, 2013 MT 210, ¶ 21 (quoting *Corcoran*, ¶ 52) (emphasis added).

[12] *Corcoran*, ¶ 52.

[13] *Id*. For all intents and purposes, the term "occupational disease" is defined the same in the 2015 version of the Workers' Compensation Act.

some specific knowledge of a specific pathological condition stemming from employment and requiring diagnosis or treatment."[14]

¶ 44 In *Romine*, Romine worked a ten-day shift and suffered an increase in his longstanding neck, right-shoulder, and low-back pain, which Romine attributed solely to his work.[15] In August 2009, Nicholas Blavatsky, MD, obtained x-rays and diagnosed him with right-AC joint arthrosis, right-rotator cuff irritation, and symptomatic lumbar spondylosis.[16] Dr. Blavatsky prescribed an anti-inflammatory and recommended a shoulder injection.[17] In September 2009, Dr. Blavatsky referred Romine to physical therapy, continued Romine's prescription of anti-inflammatory medication, and took Romine off work to give him time to rest.[18] In July 2010, Steven M. Martini, MD, diagnosed Romine with cervical mechanical syndrome, and referred Romine to physical therapy.[19] Romine filed an OD claim in December 2010.[20]

¶ 45 Relying upon *Cocoran*, this Court ruled that Romine's claim for his cervical condition was timely because it was filed within one year of when Dr. Martini diagnosed his cervical mechanical syndrome, but that his claims for his shoulder and lumbar spine conditions were time barred.[21] This Court explained: "Romine received both diagnoses and treatment for his shoulder and low-back complaints in August and September 2009. Therefore, . . . Romine should have known by that point that these conditions resulted from an occupational disease, thereby triggering the statute of limitations under § 39-71-601(3), MCA."[22]

¶ 46 In *Dvorak*, the Montana Supreme Court addressed whether this Court erred in granting summary judgment for Montana State Fund, after concluding that Dvorak's claim for OD benefits was time-barred because the statute of limitations had begun to run in 2006. In 2006, Dvorak saw her primary care physician, Terry Reiff, DO, for pain in her right shoulder, neck, upper back and ribs, and headaches, which she attributed to her work. Dr. Reiff prescribed Tylenol 3 for her pain, which she regularly refilled through 2011. The court explained that "both Dvorak and [Dr.] Reiff believed that Dvorak's original complaint was the result of a work-related strain or injury" in February 2006, and that

---

[14] *Corcoran*, ¶ 53.

[15] *Romine*, ¶¶ 3, 4, 20.

[16] *Romine*, ¶ 4.

[17] *Id*.

[18] *Romine*, ¶¶ 5, 6.

[19] *Romine*, ¶ 8.

[20] *Romine*, ¶ 10.

[21] *Romine*, ¶¶ 19, 20.

[22] *Romine*, ¶ 20; *see also Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996) (holding that claimant's OD claim was untimely because his physician diagnosed him with degenerative arthritis and told him it was caused by his work four years before he filed his OD claim).

strain or injury "resolved itself satisfactorily over time with minor treatment."[23] It was not until December 2010, when Dvorak reported severe pain in her upper thoracic area and Dr. Reiff was able to identify acute trigger points for the first time, that Dr. Reiff concluded that "Dvorak had a site-specific pathological condition that was not going to resolve with treatment and that her work was placing stress on her upper spine to the extent that it was incapacitating her."[24] And it was not until March or April 2011, after he had seen Dvorak several more times for severe thoracic and right-shoulder pain, that Dr. Reiff concluded, and communicated to Dvorak, that she had an OD.[25] In April 2011, in light of the intensity of Dvorak's localized complaints, Dr. Reiff took x-rays for the first time.[26] And when, in May 2011, Dvorak reported continued severe back pain and an inability to work more than two hours without pain medicine, Dr. Reiff took her off work and referred her to an orthopedic specialist.[27] Dvorak filed her OD claim in May 2011.

¶ 47 The Montana Supreme Court held that this Court erred in disposing of the case on summary judgment. Citing *Corcoran*, the court first held that merely suffering pain is not an OD, and affirmed that the statute of limitations starts running when the claimant "has some specific knowledge of a specific pathological condition stemming from employment and requiring diagnosis and treatment."[28] The court explained that obtaining a prescription for pain medicine was not, by itself, sufficient to prove that Dvorak knew she had an OD because, "Dvorak could well have assumed that because the medication alleviated her symptoms and allowed her to continue working 10-hour shifts for the ensuing four years, she did not have a disease."[29] The court also explained it was "concerned that the practical implication of the WCC ruling could be that any worker in Montana who suffers pain at the end of a workday for which she seeks a prescription will be required to file a benefits claim . . . ."[30] The court noted that Dr. Reiff testified that he did not conclude she had an OD until March or April 2011, at which time he told Dvorak he thought the cause of her condition was her work. Accordingly, the court determined, "If her doctor 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. This being so, summary judgment on this issue was not appropriate."[31]

---

[23] *Dvorak*, 2013 MT 210, ¶ 25. In making this observation, the court made clear that Dvorak's continued ingestion of pain medication does not necessarily prove that she had an OD. *Dvorak*, ¶ 27.

[24] *Dvorak*, 2013 MT 210, ¶ 7.

[25] *Dvorak*, 2013 MT 210, ¶ 26.

[26] *Dvorak*, 2013 MT 210, ¶ 8.

[27] *Dvorak*, 2013 MT 210, ¶ 9.

[28] *Dvorak*, 2013 MT 210, ¶ 21 (citing *Corcoran*, ¶¶ 52, 53).

[29] *Dvorak*, 2013 MT 210, ¶ 27.

[30] Dvorak, 2013 MT 210, ¶ 28.

[31] *Dvorak*, 2013 MT 210, ¶ 30.

¶ 48 Here, under *Corcoran*, *Romine*, and the Montana Supreme Court's decision in *Dvorak*, the statute of limitations in § 39-71-601(3), MCA, was triggered at Morrish's appointment with Dr. Litle on April 20, 2015, in which Dr. Litle informed him that the x-rays revealed degenerative disc disease at L5-S1 and L4-5. Dr. Coyle informed Morrish in 2007 that he had some premature degenerative disc disease in his lumbar spine. At the time, Morrish was treating with Dr. Litle for his back pain and sciatica, but it worsened over the years. Starting in 2012, Dr. Litle and Morrish discussed that Morrish's work was the cause of his worsening low-back problems. Thereafter, on a number of occasions, Morrish left work early or called in sick due to his back pain, or Dr. Litle recommended he be excused from work or not return following treatment. In April 2015, suspecting Morrish had either degenerative joint disease or degenerative disc disease, Dr. Litle referred him for lumbar spine x-rays to determine which. Morrish had the x-rays mid-month, and the radiologist noted that they showed degenerative disc disease at L5-S1 and L4-5. At Morrish's follow-up appointment on April 20, 2015, Dr. Litle told him the x-rays showed that he had degenerative disc disease at L5-S1 and L4-5. In short, on April 20, 2015, Morrish was diagnosed with, and therefore had knowledge of, a specific pathological condition stemming from his employment requiring treatment. Accordingly, consistent with *Cocoran*, *Romine*, and the Supreme Court's decision in *Dvorak*, the statute of limitations began running and Morrish had until April 21, 2016, to file his OD claim for degenerative disc disease.[32] Because Morrish did not file his claim until August 10, 2016, his claim is untimely.

¶ 49 Despite Morrish's claim, this Court's decision in *Dvorak* on remand does not support his position. On remand, this Court rejected the insurer's argument that Dvorak should have known she was suffering an OD in 2006, reasoning that "[t]he mere taking of Tylenol 3 while continuing to work and without a diagnosis of an occupational disease" was insufficient to give Dvorak reason to think she had an OD.[33] This Court found that Dr. Reiff — who had a family practice — first determined that Dvorak's thoracic spine pain was caused by an OD in April 2011, though he could not make a specific diagnosis supported by objective medical findings because Dvorak's x-rays did not show any abnormalities.[34] Because Dvorak's pain was worsening, on May 6, 2011, Dr. Reiff took her off work and referred her to a specialist for further evaluation.[35] This Court ruled that Dvorak first knew or should have known she was suffering from an OD on May 6, 2011, reasoning that although she did not have a specific diagnosis, that was when Dr. Reiff

---

[32] *See Corcoran*, ¶ 53; *Romine*, ¶¶ 20, 27; *Dvorak*, 2013 MT 210, ¶¶ 26, 30; *see also Evans v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 23, ¶¶ 19, 28 (ruling that the statute of limitations in § 39-71-601(3), MCA, began running when claimant's treating physician diagnosed him with carpal tunnel syndrome and opined it was caused by his work).

[33] *Dvorak v. Montana State Fund*, 2014 MTWCC 11, ¶¶ 63, 68.

[34] *Dvorak*, 2014 MTWCC 11, ¶¶ 30, 35, 38.

[35] *Dvorak*, 2014 MTWCC 11, ¶ 41.

informed her that her condition was an OD, took her off work, and referred her to a specialist.[36]

¶ 50 In this case, Morrish's treatment with Dr. Litle until April 20, 2015, was similar to Dvorak's treatment with Dr. Reiff until May 6, 2011; i.e., they were both just treating for pain. In *Dvorak* on remand, this Court ruled that the statute of limitations began running when *Dvorak* was no longer just treating for pain; the statute of limitations started running when Dr. Reiff informed her that she had an OD and needed a specialist to evaluate her.[37] Similarly, as of April 20, 2015, Morrish was no longer seeing Dr. Litle for treatment of low-back pain and sciatica and his situation was no longer akin to an employee taking medication for pain after a hard day's work so he could work the following day. While Morrish is correct that the statute of limitations does not begin running when an employee sees a chiropractor for treatment of pain so the employee can continue working, even if the chiropractor and the employee attribute the pain to the employee's work,[38] it was triggered under the *Corcoran* standard on April 20, 2015, when Dr. Litle, who meets the definition of a treating physician and can therefore make "medical determinations,"[39] informed Morrish of his specific diagnosis of degenerative disc disease, which he had long attributed to Morrish's work as a mechanic, and at which time Morrish had sufficient evidence to support a claim for an OD under § 39-71-407(12), MCA.[40]

JUDGMENT

¶ 51 Morrish did not timely file his OD claim pursuant to § 39-71-601(3), MCA; accordingly, judgment is entered in Amtrust's favor on his OD claim.

¶ 52 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 this 23rd day of May, 2018.

(SEAL)

/s/ DAVID M. SANDLER

---

[36] *Dvorak*, 2014 MTWCC 11, ¶ 69.

[37] *Id*.

[38] *Dvorak*, 2013 MT 210, ¶ 21; *Dvorak*, 2014 MTWCC 11, ¶¶ 63, 68; *see also Mack v. Montana State Fund*, 2005 MTWCC 48, ¶¶ 13, 15, 19 (ruling that while claimant attributed his symptoms to his work, he did not have the "requisite knowledge to trigger" the statute of limitations because, "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.").

[39] § 39-71-116(41)(b), MCA; *see Weis v. Div. of Workers' Comp.*, 232 Mont. 218, 220, 755 P.2d 1385, 1386 (1988) (holding that "medical determinations" can be made only by those who meet the definition of a "physician" under the WCA).

[40] *See* § 27-2-102(2), MCA (unless otherwise provided by statute, a period of limitations begins when the claim accrues).

JUDGE

c: Patrick T. Fox
Kelly M. Wills/Shea A.B. Sammons

Submitted: November 21, 2017