

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 35

WCC No. 2011-2754

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RUSSELL ROMINE

Petitioner

vs.

NORTHWESTERN ENERGY

Respondent/Employer/Insurer.

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ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION  
FOR SUMMARY JUDGMENT

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

**Held:** The undisputed facts demonstrate that Petitioner received a diagnosis and treated for shoulder and back complaints in August 2009 and therefore he should have known he was suffering from an occupational disease at that time. His December 2010 claim was untimely filed for these conditions. However, Petitioner did not receive a diagnosis or treatment for his cervical condition until July 2010; therefore, his occupational disease claim for his cervical condition was timely filed. The Court granted Respondent's motion for summary judgment regarding Petitioner's occupational disease claim for his shoulder and low back, and denied the motion regarding Petitioner's cervical condition.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules:** **Montana Code Annotated: 39-71-601.** Where Petitioner received both diagnoses and treatment for his shoulder and low-back complaints, the Court concluded that he should have known by that time that these conditions resulted from an occupational disease, thereby triggering the statute of limitations under § 39-71-601(3), MCA. Conversely, since Petitioner did not receive a

diagnosis or treatment for his cervical condition until nearly a year later, the statute of limitations for that condition did not start to run until diagnosis or treatment triggered it.

**Limitations Periods: Occupational Disease.** Where Petitioner received both diagnoses and treatment for his shoulder and low-back complaints, the Court concluded that he should have known by that time that these conditions resulted from an occupational disease, thereby triggering the statute of limitations under § 39-71-601(3), MCA. Conversely, since Petitioner did not receive a diagnosis or treatment for his cervical condition until nearly a year later, the statute of limitations for that condition did not start to run until diagnosis or treatment triggered it.

**Limitations Periods: Claim Filing: Occupational Disease.** Where Petitioner received both diagnoses and treatment for his shoulder and low-back complaints, the Court concluded that he should have known by that time that these conditions resulted from an occupational disease, thereby triggering the statute of limitations under § 39-71-601(3), MCA. Conversely, since Petitioner did not receive a diagnosis or treatment for his cervical condition until nearly a year later, the statute of limitations for that condition did not start to run until diagnosis or treatment triggered it.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-601.** The statute of limitations begins to run when a worker knows or should know that he suffers from an occupational disease, as set forth in § 39-71-601(3), MCA. The Court rejected Petitioner's argument that the statute of limitations should not begin to run until the worker knows or should know that his employment is the leading cause contributing to the result. 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 he suffers from an occupational disease.

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occupational disease – not whether a worker knew or should have known that he suffers from an occupational disease.

¶ 1 Respondent Northwestern Energy moves this Court for summary judgment in its favor. Northwestern Energy contends that Petitioner Russell Romine’s claim was untimely filed under § 39-71-601(3), MCA, because he knew or should have known that he was suffering from an occupational disease more than one year prior to the filing of his claim.<sup>1</sup> Romine objects to Northwestern Energy’s motion, arguing that his claim is timely under the applicable statute.<sup>2</sup>

¶ 2 On April 16, 2012, the parties presented oral argument on this motion in conjunction with a similar motion filed in *Dvorak v. Montana State Fund*, 2011-2793.<sup>3</sup>

#### Undisputed Facts<sup>4</sup>

¶ 3 On August 17, 2009, Romine went to Express Care because he was working a shift and could not pick up his arm and it hurt. Romine stated that he had been working a ten-day shift and that his arm got progressively worse.<sup>5</sup>

¶ 4 On August 21, 2009, Romine saw Nicholas Blavatsky, M.D., and reported a chief complaint of tenderness of the right shoulder and lumbar spine. Romine told Dr. Blavatsky that he got stiffer over the course of each day as he performed his job duties. Romine reported a long history of right shoulder and lumbar spine discomfort and to some degree the cervical spine, with hypesthesia and tingling in the right arm. Dr. Blavatsky found Romine to have limited range of motion in his cervical and lumbar spine, limited range of motion in his shoulder, and mild impingement and prominence of the AC articulation. Three views of the right shoulder revealed fairly pronounced adaptive changes of the AC joint. Images of the lumbar spine revealed mid-lumbar spondylosis with discal narrowing, anterior osteophyte formation, and facet hypertrophy at most levels. Dr. Blavatsky diagnosed Romine with right AC joint arthrosis, right

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<sup>1</sup> Northwestern Energy’s Brief in Support of Motion for Summary Judgment (Opening Brief), Docket Item No. 12.

<sup>2</sup> Petitioner’s Brief in Opposition to Northwestern Energy’s Motion for Summary Judgment (Response Brief), Docket Item No. 15.

<sup>3</sup> Minute Book Hearing No. 4387, Docket Item No. 20.

<sup>4</sup> Neither party disputed the accuracy of the other’s proffered facts.

<sup>5</sup> Opening Brief at 2.

rotator cuff irritation, and symptomatic lumbar spondylosis. He recommended a subacromial injection for the shoulder and prescribed Mobic.<sup>6</sup>

¶ 5 On September 11, 2009, Romine saw Dr. Blavatsky and complained of right shoulder tenderness. Dr. Blavatsky noted that Romine had generalized aches and pains from work-related activities. Romine initiated physical therapy and continued taking his anti-inflammatory medication.<sup>7</sup> At his initial physical therapy evaluation, Romine reported that he had difficulty performing his job duties due to pain.<sup>8</sup>

¶ 6 On September 25, 2009, Dr. Blavatsky took Romine off work at Romine's request. Romine testified that his low back hurt and that he associated the pain with his job duties. He asked Dr. Blavatsky to take him off work so he could rest and get better.<sup>9</sup>

¶ 7 On October 14, 2009, Romine saw Dr. Blavatsky and reported tenderness in his right shoulder, neck, and back. He did not see Dr. Blavatsky again for several months.<sup>10</sup>

¶ 8 On July 15, 2010, Romine treated with Steven M. Martini, M.D. Romine reported headaches and back, shoulder, thoracic, lumbar, and right hip pain. Romine reported that he experienced several "aggravations" of his pain from work-related activities. Dr. Martini diagnosed Romine with cervical and lumbar mechanical syndromes, rotator cuff tendinitis, and acromioclavicular arthritis. Romine returned to physical therapy and reported that he had been having cervical pain for the past six to seven years.<sup>11</sup>

¶ 9 Romine testified that he has had shoulder pain for a number of years while at work, and that working ten-day shifts made his overall condition worse. Romine testified that the physical aspect of his life is all work-related.<sup>12</sup>

¶ 10 On December 8, 2010, Romine filed a claim for an occupational disease with a date of injury of December 7, 2010.<sup>13</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> Opening Brief at 2-3.

<sup>8</sup> Opening Brief at 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Opening Brief at 4.

<sup>13</sup> Opening Brief at 2.

## Analysis and Decision

¶ 11 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.<sup>14</sup> The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 12 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time Romine alleged an exposure resulting in an occupational disease.<sup>15</sup>

¶ 13 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.

¶ 14 In the present case, Northwestern Energy argues that Romine's claim is untimely because Romine had specific knowledge of a specific pathological condition stemming from his employment and requiring diagnosis and treatment on August 21, 2009 – more than a year prior to his filing a first report of injury.<sup>16</sup> Northwestern Energy relies on *Corcoran v. Montana Schools Group Ins. Authority*,<sup>17</sup> in which this Court stated:

In the context of the Occupational Disease Act, [the terms “harm” and “damage”] must mean something more than suffering mere pain, otherwise, every ache and pain a worker suffers after a hard day at work would constitute an occupational disease. . . . Rather, the terms indicate something more significant, such as a condition requiring medical diagnosis and treatment.<sup>18</sup>

Northwestern Energy asserts that Romine triggered the statute of limitations in August 2009 when he suspected that his shoulder, neck, and back pain resulted from work activities and he sought medical treatment for those conditions.<sup>19</sup> Northwestern Energy

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<sup>14</sup> ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

<sup>15</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>16</sup> Opening Brief at 1.

<sup>17</sup> *Corcoran*, 2000 MTWCC 30.

<sup>18</sup> *Corcoran*, ¶ 52.

<sup>19</sup> Opening Brief at 5.

points out that on August 21, 2009, Romine had diagnoses: right AC joint arthrosis, right rotator cuff irritation, and symptomatic lumbar spondylosis – and treatment: a subacromial injection for the shoulder and a prescription for Mobic. Northwestern Energy argues that Romine therefore knew or should have known that he was suffering from an occupational disease.<sup>20</sup>

¶ 15 Romine argues that although he sought treatment for his right shoulder and low back in 2009, he was unaware that he had a specific condition caused by his work and Dr. Blavatsky did not advise him that he had an occupational disease. Romine contends that it would not be appropriate to conclude he “should have known” that he had an occupational disease because this is a medical determination and his treating physician did not make this determination. Romine argues that in order to prove a compensable occupational disease, a claimant must demonstrate that his employment is the major contributing cause of his condition, and in his case, he could not make such a determination in 2009 based on the information presented to him by Dr. Blavatsky.<sup>21</sup>

¶ 16 Romine further responds that his “main problem” is with his neck and that he did not receive any treatment for his neck until 2010; moreover, Romine notes that he was not diagnosed as suffering from an occupational disease until December 2010.<sup>22</sup> Romine argues that he did not seek any treatment nor receive any diagnoses for his neck condition in 2009 and that he only became aware that he might have an occupational disease in his neck when Dr. Martini advised him of such in 2010. Therefore, Romine contends that his neck condition claim was timely filed in December 2010.<sup>23</sup>

¶ 17 Northwestern Energy argues that Romine inappropriately attempts to shift the burden to his treating physician to specifically inform him that he is suffering from an occupational disease before the statute of limitations may begin to run. Northwestern Energy argues that Romine’s position would negate the “should have known” language from § 39-71-601(3), MCA. Northwestern Energy argues that if the Legislature intended the statute of limitations to begin to run only when a physician informs a worker that he is suffering from an occupational disease, then the statute would include language to that effect. Northwestern Energy contends that under § 39-71-601(3), MCA, a claimant

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<sup>20</sup> *Id.*

<sup>21</sup> Response Brief at 5.

<sup>22</sup> Response Brief at 1-2.

<sup>23</sup> Response Brief at 4.

has the burden of filing a claim within one year of when the claimant should have known he was suffering from an occupational disease.<sup>24</sup>

¶ 18 Northwestern Energy further replies that Romine’s cervical condition cannot be treated separately from his other conditions because he suffered from “a constellation of symptoms.” Northwestern Energy argues that Romine therefore should have realized that his cervical complaints were part of the occupational disease with his shoulder and low-back symptoms.<sup>25</sup>

¶ 19 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

¶ 20 In the present case, the facts establish that Romine received a diagnosis and treatment related to his shoulder and low back in August 2009. Moreover, at one appointment in September 2009, his treating physician noted that he experienced aches and pains from work-related activities and his treating physician later took him off work to give Romine time to rest as Romine associated his pain with his work activities. I further note that Romine testified that all his physical activities were work-related and therefore this is not a case where the claimant could have attributed his diagnosis to non-work-related activities. Romine received both diagnoses and treatment for his shoulder and low-back complaints in August and September 2009. Therefore, I conclude that 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. However, because Romine did not receive a diagnosis or treatment for his cervical condition until July 2010, the statute of limitations did not begin to run until that time specifically for his cervical condition.

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<sup>24</sup> Respondent Northwestern Energy’s Reply to Petitioner’s Opposition to Respondent’s Motion for Summary Judgment (Reply Brief), Docket Item No. 19, at 1-2.

<sup>25</sup> Reply Brief at 3.

<sup>26</sup> *Corcoran*, ¶ 52.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

¶ 21 Alternatively, Romine argues that, following his return to work in October 2009, his work activities caused an aggravation of his pre-existing condition and that those activities were the major contributing cause of the occupational disease he filed a claim for in December 2010.<sup>29</sup> Romine contends that his work in late 2009 and 2010 was a leading cause of his condition and therefore constitutes an occupational disease from which a new statute of limitation period began.<sup>30</sup> Romine argues that the Court should look to *Faulkner v. Hartford Underwriters Ins. Co.*<sup>31</sup> and *Grande v. Montana State Fund*.<sup>32</sup> Romine 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.”<sup>33</sup>

¶ 22 Northwestern Energy replies that under Romine’s argument, he suffers an aggravation of a pre-existing condition every day that he goes to work, thereby starting the statute of limitations anew. Northwestern Energy contends that under Romine’s argument, the statute of limitations would never begin to run so long as a claimant continued to work.<sup>34</sup>

¶ 23 The difficulty with Romine’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 he 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 Occupational Disease Act.<sup>35</sup> 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.<sup>36</sup> 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

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<sup>29</sup> Response Brief at 6.

<sup>30</sup> Response Brief at 10.

<sup>31</sup> *Faulkner*, 2007 MTWCC 15.

<sup>32</sup> *Grande*, 2011 MTWCC 15.

<sup>33</sup> Response Brief at 7.

<sup>34</sup> Reply Brief at 3.

<sup>35</sup> *Grande*, ¶ 21.

<sup>36</sup> *Grande*, ¶ 31.



yet not have a **compensable** occupational disease if the “leading cause contributing to the result” was not the worker’s employment.<sup>37</sup> Under Romine’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 he is suffering from an occupational disease, but rather it would not begin to run until the worker knows or should know that his employment is the leading cause contributing to the result and that his condition is a **compensable** occupational disease. This is not the standard set forth in § 39-71-601(3), MCA, and it is not the province of this Court to raise the standard established by statute.

¶ 24 Romine additionally argues that his case is analogous to the facts of *Burley v. Burlington N. & Santa Fe Ry. Co.*,<sup>38</sup> in which the Montana Supreme Court tolled a statute of limitation under the “continuing tort” doctrine.<sup>39</sup>

¶ 25 It is difficult to find the “continuous tort” doctrine as analyzed in *Burley* analogous to the present statute of limitations question. In *Burley*, the U.S. District Court asked the Montana Supreme Court to determine how the continuing tort doctrine would apply to a particular scenario with three elements. The Montana Supreme Court explained that the three elements include “the fact that the pollution has stabilized in terms of concentration levels, that the contamination continues to migrate, and that the parties dispute the ease of abatability of the contamination.”<sup>40</sup> Romine does not offer any insight into how he believes the analysis in *Burley* applies to the present issue.

¶ 26 However, even assuming *arguendo* that I found *Burley* analogous, the analysis does not support Romine’s argument. In *Burley*, the court ultimately explained the rule: A plaintiff would be required to bring an action within the limitations period when the plaintiff knows, or reasonably should know, of a permanent injury.<sup>41</sup> In Romine’s situation, as set forth above, I have determined that insofar as his shoulder and back conditions are concerned, he should have known that he was suffering from an occupational disease on August 21, 2009.

¶ 27 Northwestern Energy is entitled to summary judgment in its favor regarding Romine’s occupational disease claim for his right shoulder and low back as untimely pursuant to § 39-71-601(3), MCA. I am denying Northwestern Energy’s motion for summary judgment regarding Romine’s cervical condition as, based on the facts before

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<sup>37</sup> *Grande*, ¶ 30.

<sup>38</sup> *Burley*, 2012 MT 28, 364 Mont. 77, 273 P.3d 825.

<sup>39</sup> Response Brief at 10.

<sup>40</sup> *Burley*, ¶ 12.

<sup>41</sup> *Burley*, ¶ 99.

me, I cannot conclude that Romine should have known that his cervical condition constituted an occupational disease prior to his July 15, 2010, appointment with Dr. Martini.

ORDER

¶ 28 Respondent's motion for summary judgment is **GRANTED** regarding Petitioner's occupational disease claim for his right shoulder and low back.

¶ 29 Respondent's motion for summary judgment is **DENIED** regarding Petitioner's cervical condition.

DATED in Helena, Montana, this 17<sup>th</sup> day of October, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: William P. Joyce  
Oliver H. Goe  
Submitted: April 16, 2012