IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 10

WCC No. 2003-0820

DENISE DeWITT

Petitioner

vs.

CONTINENTAL INSURANCE COMPANY and

OLD REPUBLIC INSURANCE COMPANY

Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

APPEAL DISMISSED BY STIPULATION OF PARTIES
8/16/04

Summary: Claimant was diagnosed with occupationally related carpal tunnel syndrome in 1996 with a recommendation she have surgery. She declined surgery and continued working. Her symptoms worsened and in 2002 she decided to have surgery and filed an occupational disease claim at that time.

Held: Claimant's occupational disease claim is time-barred under section 39-71-403, MCA (1995-2001), since it was required to be filed within one year.

Topics:

Limitations Periods: Claim Filing: Occupational Disease. Section 39-71-403(1), MCA (1995-2001), requires a claimant to file an occupational disease claim "within 1 year from the date the claimant knew or should have known that the claimant's condition resulted from an occupational disease." The period may be waived for an additional two years but no more. § 39-71-403(2), MCA (1995-2001).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-403 (1995-2001). Section 39-71-403(1), MCA (1995-2001), requires a claimant to file an occupational disease claim "within 1 year from the date the claimant knew or should have known that the claimant's condition resulted from an occupational disease." The period may be waived for an additional two years but no more. § 39-71-403(2), MCA (1995-2001).

Limitations Periods: Claim Filing: Occupational Disease. *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290, which held the apportionment provision of section 39-72-706, MCA, unconstitutional did not affect the statute of limitations prescribed by section 39-72-403, MCA.

¶1 The trial in this matter was held in Helena, Montana on February 17, 2004. Petitioner, Denise DeWitt, (claimant) was present and represented by Mr. Bernard J. Everett. Respondent insurers were represented by Mr. William O. Bronson.

¶2 Exhibits: Exhibits 1 through 6 were admitted without objection.

¶3 Witness: Claimant testified. No depositions were submitted.

¶4 Issues Presented: As restated by the Court, the issues presented for decision are:

¶4a Is the claim in this case time-barred?

¶4b If the claim is not time-barred, is the claimant entitled to attorney fees and a penalty?

(Pre-Trial Order at 2.)

¶5 Having considered the Pre-Trial Order, the testimony presented at trial, the demeanor and credibility of the witness, exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant has worked for many years as a home mortgage consultant for Norwest Mortgage, which was acquired by Wells Fargo at least by April 2000, perhaps the year before.

¶7 Between 1996 and 2002 the respondents insured claimant's employer. The Court does not determine the periods of each respondent's coverage.

¶8 Claimant's job involves handwriting and extensive use of computers. Over the years, her handwritten entries have diminished and her entry of information utilizing a computer has increased. Most of the information she is required to enter has been by computer.

¶9 In 1996 the claimant was experiencing tingling sensations in both of her hands.

¶10 On November 7, 1996, the claimant was evaluated by Dr. P.A. Baggenstos, a neurosurgeon. (Ex. 1-4.) Dr. Baggenstos described her complaints at that time as "tingling sensation and numbness of her hands, right side more than left side." (Ex. 1-5.) He suspected bilateral carpel tunnel syndrome and referred her to Dr. Carlos P. Sullivan, Jr., a neurologist for nerve conduction studies. (Ex. 2-1.) On November 18, 1996, Dr. Sullivan did the studies and summarized the results as follows: "Nerve conduction studies reveal

marked abnormalities consistent with carpal tunnel syndrome bilaterally which correlates well with this patients [sic] history and clinical findings." (Ex. 2-2.) He recommended surgery. (*Id*.)

¶11 Claimant discussed her condition with her doctors in 1996 and understood that the repetitive use of her hands in her work contributed to her condition and that her continued work would likely worsen her condition.

¶12 Claimant chose not to undergo surgery and continued working. She did not file an occupational disease claim and she did not notify her employer of her occupational disease.

¶13 In 1998 the claimant was provided by her employer with a laptop computer and her computer use increased even more.

¶14 On December 1999 she obtained further nerve conduction studies from Dr. Sullivan. The studies were for her right hand, which is her dominant hand, and showed a worsening of her carpel tunnel syndrome in her right hand. (Ex. 2-6.) At that time, the claimant notified her supervisor of her condition and the fact that it had worsened. Her supervisor suggested she purchase an ergonomically appropriate desk. The supervisor did not suggest to the claimant that she file a claim and in fact she did not do so at that time.

¶15 Thereafter, claimant's carpal tunnel symptoms continued to worsen. By 2002 she was having difficulty typing on her computer keyboard and at times lost all feeling in her right hand.

¶16 As a result of the continued worsening of her hand symptoms, claimant sought yet another nerve conduction study, this time from Dr. John V. Stephens. Dr. Stephens did his studies on June 25, 2002. (Ex. 4-1.) The studies indicated a further worsening of the right wrist.

¶17 Dr. Peter M. Sorini, a neurosurgeon, recommended surgery and his office scheduled the surgery for July 18, 2002. The surgery was cancelled when his office learned that there was no workers' compensation claim with respect to her condition and no other insurance coverage for the surgery.

¶18 The claimant then sought legal advice and was advised to file a claim. On July 31, 2002, she filled out and faxed her claim. (Ex. 5-1.)

¶19 At trial I ascertained from counsel that the insurers in this case agree claimant is suffering from occupational bilateral carpal tunnel syndrome. However, they urge that her claim for compensation is time-barred.

CONCLUSIONS OF LAW

¶20 The critical question in this case is whether the claim in this case is time-barred by the statute of limitations. Since it is undisputed that this is an occupational disease claim involving repeated and cumulative micro-trauma occurring over a period of years, the limitations period under the Occupational Disease Act (ODA) applies. That provision is found in section 39-72-403, MCA.

¶21 In 1996, at the time claimant first learned of her carpal tunnel syndrome and its relationship to her work, section 39-72-403(1), MCA, provided:

> **39-72-403. Time when claims must be presented.** (1) When a claimant seeks benefits under this chapter, the claimant's claims for benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the claimant knew or should have known that the claimant's condition resulted from an occupational disease. When a beneficiary seeks benefits under this chapter, claims for death benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the beneficiaries knew or should have known that the decedent's death was related to an occupational disease.

The quoted subsection has not been amended.

¶22 Subsection (2) of 39-72-403, MCA (1995), allowed the Department of Labor and Industry (Department) to waive the one-year limitations period for up to an additional two years "upon a reasonable showing by the claimant or a decedent's beneficiaries that the claimant or the beneficiaries could not have known that the claimant's condition or the employee's death was related to an occupational disease." In 1999 subsection (2) was amended by substituting the insurer for the Department as authorized to waive the limitations period. In addition, subsection (3) was added to provide that any dispute concerning the limitations period was subject to mediation and then the original jurisdiction of the Workers' Compensation Court.

¶23 On its face section 39-72-403, MCA, bars the present claim since it was not submitted in writing within a year after the claimant knew she suffered from carpal tunnel syndrome and knew that her condition was work related. Since the statute commenced running in 1996, the two-year period for a potential waiver had long expired when she submitted her claim on July 31, 2002.

¶24 The claimant's attempts to avoid the statute of limitations by arguing that her condition was continually aggravated by her continued work. The aggravation provision of the ODA, section 39-72-706, MCA, was declared unconstitutional in *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290. The claimant believes that *Schmill* somehow voids the limitations period in section 39-72-403, MCA, but the logic of her argument completely escapes me.

¶25 *Schmill* had nothing to do with the statute of limitations. It simply held that the provision in section 39-72-706, MCA, which required apportionment between occupational and non-occupational factors was unconstitutional.

¶26 The claimant cites the rules that an employer takes a worker as it finds him or her and is liable for aggravations of preexisting conditions. *Miller v. Frasure,* 264 Mont. 354, 367, 871 P.3d 1302, 1310 (1994) and *Schieno v. City of Billings,* 210 Mont. 457, 460, 683 P.2d 953, 955 (1984). Those rules are not violated by the application of the limitations period set forth in section 39-72-403, MCA. Indeed, section 39-72-706, MCA, expressly recognizes that aggravations are compensable; it was only the apportionment provision that was invalid. And, in *Liberty Northwest Ins. Corp. v. Champion Intern. Corp.,* 285 Mont. 76, 945 P.2d 433 (1997), the Supreme Court upheld imposition of liability for an occupational disease which substantially aggravated the claimant's underlying preexisting injury.

¶27 The limitations period set out in section 39-72-403, MCA, makes sense. Under the ODA, a disability resulting from an occupational disease remains the responsibility of the carrier under whom the disability first arose so long as it is a recurrence of the first disability. *Caekaert v. State Compensation Mutual Ins. Fund,* 268 Mont. 105, 111, 885 P.2d 495, 499 (1994). Thus, the employee alleging an aggravation of a preexisting occupational disease must prove that the treatment and disability for which the claimant seeks compensation did not result from the initial occupational disease. *Id.* at 112, 885 P.2d at 495. In this case, surgery for the claimant's condition was recommended in 1996. While her condition symptoms have increased since then, she continues to work and the recommendation is the same. Moreover, under section 39-71-303(2), MCA (1995-2001):

> (2) When there is more than one insurer and only one employer at the time the employee was injuriously exposed to the hazard of the disease, the liability rests with the insurer providing coverage at the earlier of:
>
> (a) the time the occupational disease was first diagnosed by a treating physician or medical panel; or
>
> (b) the time the employee knew or should have known that the condition was the result of an occupational disease.

Under this provision, the liability rests with the 1996 insurer, and should have been filed at that time.

¶28 The claimant could and should have filed an occupational disease claim in 1996. Her claim in 2002 comes far too late.

JUDGMENT

¶29 The claimant's occupational disease claim for bilateral carpal tunnel syndrome is time-barred under section 39-72-403, MCA (1995-2001). Her petition must therefore be and is **dismissed with prejudice**.

¶30 This JUDGMENT is certified as final for purposes of appeal.

¶31 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 19th day of February, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Bernard J. Everett
Mr. William O. Bronson
Submitted: February 17, 2004