IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 30

WCC No. 2000-0024

BARBARA CORCORAN

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent/Insurer for

BILLINGS SCHOOLS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 60-year-old custodian for school district sought occupational disease benefits relating to right foot problems, including neuroma. Insurer argued OD claim was barred because claimant had known about her foot problems for many years. While claimant had filed an earlier claim which insurer had accepted, that claim related to the left foot, whereas claimant now sought benefits for the right foot.

Held: Under section 39-72-403, MCA (1995), which requires a written claim within one year from the date the claimant knew or should have known that the condition resulted from an occupational disease, awareness of pain, and awareness that pain results from work, does not constitute knowledge of an occupational disease. Here, the limitations period begins running when claimant learned she had a diagnosable condition relating to her right foot requiring treatment, making the claim timely.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: 39-72-102(10), MCA (1995-1999).** Under 39-72-403, MCA (1995), which requires a written claim within one year from the date "the claimant knew or should have known that the claimant's condition resulted from an occupational disease," awareness of pain, and awareness that the pain is a result of work, does not constitute knowledge that one suffers from an "occupational disease," as defined in 39-72-102(10), MCA (1995-1999). The key words in section 39-72-102(10) are "harm" and "damage,"

meaning something more significant than suffering pain after a hard days' work. The limitations period commences when the worker has some specific knowledge of a specific pathological condition stemming from employment and requiring diagnosis or treatment.

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-72-403, MCA (1995). Under 39-72-403, MCA (1995), which requires a written claim within one year from the date "the claimant knew or should have known that the claimant's condition resulted from an occupational disease," awareness of pain, and awareness that the pain is a result of work, does not constitute knowledge that one suffers from an "occupational disease," as defined in 39-72-102(10), MCA (1995-1999). The key words in the section are "harm" and "damage," meaning something more significant than suffering pain after a hard days' work. The limitations period commences when the worker has some specific knowledge of a specific pathological condition stemming from employment and requiring diagnosis or treatment.

Claims: Filing. Under 39-72-403, MCA (1995), which requires a written claim within one year from the date "the claimant knew or should have known that the claimant's condition resulted from an occupational disease," awareness of pain, and awareness that the pain is a result of work, does not constitute knowledge that one suffers from an "occupational disease," as defined in 39-72-102(10), MCA (1995-1999). The key words in the section are "harm" and "damage," meaning something more significant than suffering pain after a hard days' work. The limitations period commences when the worker has some specific knowledge of a specific pathological condition stemming from employment and requiring diagnosis or treatment.

Occupational Disease: Disease. Under 39-72-403, MCA (1995), which requires a written claim within one year from the date "the claimant knew or should have known that the claimant's condition resulted from an occupational disease," awareness of pain, and awareness that the pain is a result of work, does not constitute knowledge that one suffers from an "occupational disease," as defined in 39-72-102(10), MCA (1995-1999). The key words in the section are "harm" and "damage," meaning something more significant than suffering pain after a hard days' work. The limitations period commences when the worker has some specific knowledge of a specific pathological condition stemming from employment and requiring diagnosis or treatment.

¶1 The trial in this matter was held on April 27, 2000, in Billings, Montana. Petitioner, Barbara Corcoran (claimant), was present and represented by Mr. Victor R. Halverson.

Respondent, Montana Schools Group Insurance Authority (MSGIA) was represented by Mr. Leo S. Ward.

¶2 Exhibits: Exhibits 1 through 12 were admitted without objection.[(1)]

¶3 The parties agreed to submit the matter upon the exhibits and the statement of uncontested facts set out in the Pretrial Order. Claimant's Hearing Memorandum was filed and both parties presented argument. No testimony was presented.

¶4 Issues: The issues, as stated in the Pretrial Order, are as follows:

> 1. Whether Petitioner's filing of the February 1997 claim and/or April 6, 1999 claim complied with the time filing requirements of §39-72-403, MCA; thereby obligating the Respondent to make payment of her medical and compensation benefits relating to the occupational disease condition in her right foot.
>
> 2. Whether Petitioner is entitled to an award of reasonable attorneys' fees and costs from the Respondent.
>
> 3. Whether Petitioner is entitled to the 20% penalty from the Respondent.

¶5 Having considered the Pretrial Order, the stipulated facts, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 This is an occupational disease case arising out of a right foot condition developing as a result of claimant's employment. The insurer has denied the claim and interposed a statute of limitations defense. The critical question presented to the Court concerns the time the claimant should have had enough information to have filed an occupational disease claim. Because she has had problems with both of her feet, and because the nature or her foot problems has varied, the findings that follow quote extensively from claimant's medical records. Aspects of the medical records have been bolded for emphasis to draw attention to which foot was involved and the nature of the complaints or condition involved.

¶7 Claimant is presently 60 years old. (Ex. 1.) She has worked for the Billings Public Schools as a custodian since October 24, 1983. (Ex.1; Statement of Uncontested Facts, hereinafter "Facts", ¶ 1.)

1986-1989 Treatment

¶8 Claimant has experienced pain in both feet since as early as 1986. On August 12, 1986, she first visited Dr. W. Charles O'Reilly, a podiatrist, complaining of "painful heels, **left greater than right**." (Ex. 10 at 11, emphasis added.) Dr. O'Reilly recorded:

> The pain particularly appears the first thing in the morning and lasts for approximately 3 minutes before it feels better. The pain also occurs when getting up after a period of rest and after the patient is on her feet for long periods of time.
>
> The patient works for the school district and is on a concrete surface most of the day. **The left foot hurts more than the right (right hurts about 60% as much as the left).**

(*Id*., emphasis added.)

¶9 Dr. O'Reilly described his examination, assessment, and treatment plan as follows:

> Podiatric vascular examination is within normal limits as is the neurological examination. The patient does experience some burning along the medial **left** instep with Tinnel's testing over the **left** posterior tibial nerve. Otherwise, the testing is normal. The patient experiences pain to palpation at the medial plantar, **left heel**. **No pain is experienced with palpation of the right heel.** X-rays were taken and **left** lateral view reveals plantar heel spur (moderate). The outline/contour of the heel is normal with no periostitis excepting the area of the heel spur. **The right lateral shows no evidence of heel spur.** Joint spaces are generally normal and bone quality is good.
>
> ASSESSMENT: Plantar fasciitis exacerbated by working on a concrete surface.
>
> PLAN: Treatment options were reviewed with the patient. The mechanism of heel spur and plantar fascitis [sic] was reviewed in detail. The patient was instructed to return to the office in one week for repeat of treatment options and x-ray consult.

(*Id*., emphasis added.)

¶10 Plantar fasciitis is an "inflammation involving the plantar fascia especially in the area of its attachment to the calcaneus [the heel bone] and causing pain under the heel in walking and running." The plantar fascia is "a very strong dense fibrous membrane of the sole of the foot that lies beneath the skin and superficial layer of fat and binds together the deeper structures." *See* Merriam-Webster Dictionary available through www.medscape.com.

¶11 Claimant returned to Dr. O'Reilly on August 20, 1986, "for treatment of plantar fasciitis; **pain sub 1st metatarsal left** and skin fissure at the plantar aspect of the 1st **left** metatarsal." (Ex. 10 at 12.) The medical record states:

> Treatment options were reviewed for the plantar fasciitis. The patient is observed to be pronated in stance. Treatment options include NSAID; injection; arch or orthoses and surgery. The orthoses were recommended.
>
> I believe the orthoses will help relieve the plantar fasciitis and the **sub 1st left pain**. The patient is observed to be pronated bilaterally, left greater than right. **I believe**

> **the sub 1st pain is due to medial overload at the metatarsal level, due to sub talar joint pronation.** The patient will return to the office at her convenience for B/C.

(Ex. 10 at 12, emphasis added.)

¶12 During September 1986, claimant was fitted for orthotics for **both** feet. (*Id.* at 12, 14.) On November 11, 1986, Dr. O'Reilly noted that claimant's "**heels** have been doing very well and are generally without pain when the patient uses the orthoses." (*Id.* at 12, emphasis added.) The doctor noted, however, that claimant had increased inflammation and swelling "at the dorsal aspect of the **left forefoot.**" (*Id.*, emphasis added.) Claimant reported having similar swelling previously and stated she had recently been sitting on her left foot while cleaning. X-rays revealed no arthritis or stress fracture. Dr. O'Reilly advised claimant to purchase knee pads for cleaning. (*Id.*)

¶13 Dr. O'Reilly's records evidence no further contact from claimant relating to this 1986 period of treatment.

¶14 Claimant had brief contact with Dr. O'Reilly's office in September 1989, when she called with a question, then visited the office for treatment relating to a nail on apparently the left foot. (Ex. 10 at 13.)

¶15 Another six years passed before the next significant medical care relating to claimant's feet.

1995-1997 Treatment

¶16 On December 13, 1995, claimant visited Dr. Stephen R. Shaub of the Heights Family Practice in Billings "for blood pressure follow-up." (Ex. 10 at 43.) Dr. Shaub took a health history in which he noted "[s]he also has **right** foot pain and has had a lot of history of this." (*Id.*) His examination of "her foot reveal[ed] tenderness of the heel, indicating plantar fascitis [sic]." (*Id.*) Dr. Shaub diagnosed "foot pain" and referred claimant to "Dr. O'Reilly for her foot." (*Id.*)

¶17 Although the record contains no evidence directly challenging Dr. Shaub's reference to claimant's **right** foot in his December 13, 1995 note, Dr. O'Reilly's records of claimant's care a few days later suggest that Dr. Shaub's reference to the right foot was in error. Claimant visited Dr. O'Reilly on December 18, 1995. Dr. O'Reilly's records state:

> BARBARA CORCORAN: The patient is a 56 y/o woman who pto with several complaints. She complains of pain at the plantar and plantar medial aspect of the **left heel**. This pain has been present for one and a half months. She also complains of pain at the inferior aspect of the second metatarsal head which has been present for a year. She relates that all of these areas seem to be getting worse. The areas all improve after she is away from work for a weekend. She works in a custodial position which seems to exacerbate her pain. Barbara was seen about nine years

ago for plantar fasciitis and heel spur. Orthoses were made for her at that time which she is still wearing.

(Ex. 10 at 15, emphasis added.) Dr. O'Reilly's record of his examination, assessment, and treatment plan on that date also refer to the left foot:

> Examination reveals pain with palpation at the plantar medial aspect at the **heel, left**. She does not have heel pain with plantar fascial stretching. She has tenderness with rom at the subtalar joint and with rom at the ankle joint. She has pain with palpation over the lateral aspect of the sinus tarsi at the subtalar joint. X-ray shows good bone quality and normal joint spaces. She does have a larger heel spur than she had previously at the left heel.
>
> ASSESSMENT: 1. Painful plantar fasciitis and increasing heel spur, **left**.
>
> 2. Pain at the plantar aspect of the second metatarsal head, **left.**
>
> PLAN: Treatment options were reviewed. The orthoses were taken and covered with Spenco. Area of accommodation was made for the second metatarsal to decrease the pressure at this level. Injection was offered for the subtalar joint sinus tarsi. She wants to defer this for now. She will rto if the pain continues.

(*Id.*, emphasis added.)

¶18 Claimant returned to Dr. O'Reilly's clinic on February 19, 1996, where she was treated by Dr. Andrew Wolfe for the same ongoing condition. (*Id.* at 16.) Examination by Dr. O'Reilly later that month indicated claimant "has seen good relief of her **heel** symptoms since the injection from Dr. Wolfe...," but "[e]xam reveals mild pain with palpation at the inferior aspect of the 2nd MTP joint **of the left foot**." (*Id.,*emphasis added.) Claimant's orthotic was adjusted and she was directed to return for follow-up. (*Id.*)

¶19 On March 19, 1996, claimant returned to Dr. O'Reilly "for treatment of **heel spur, left, with additional complaint of plantar flexed 2nd metatarsal bilaterally, left worse than right.**" (*Id.* at 17, emphasis added.) The remainder of the record from that visit states:

> She relates she continues to have significant pain at the **left heel**. **This is the chief complaint.** She has found she has resolution of her forefoot problems with the accommodation in the athletic shoe. She brought another three pair of shoes to have accommodation performed here. Exam reveals pain with palpation at the plantar medial aspect of the **left heel**. She also has significant pain with palpation at the 2nd MTP joint **bilaterally, left worse than right.** The pain is a little unique in that it is more distal than normal.
>
> **ASSESSMENT: 1. Painful plantar heel spur, left. 2. Painful plantar flexed 2nd MTP joint but not as painful as the heel spur.**

> PLAN: Treatment options were reviewed. Injection was recommended and, after some discussion, accepted. PT block was given. Injection was then performed from medial to the heel using 1cc Dalalone DP and an equal amount of .5% Marcaine plain. The **left shoes** were accommodated for the inferior aspect of the 2nd metatarsal head. The patient was given additional material and instructions **on how to do this in the right shoes.** She will rto in one month for f/u.

(*Id.,* emphasis added.)

¶20 Claimant returned to Dr. O'Reilly on May 15, 1996, "for treatment of **painful heel spur, left.**" (*Id.*, emphasis added.) The record from that visit focuses upon the left foot, with the doctor diagnosing "painful plantar fasciitis and heel spur." (*Id*.) Dr. O'Reilly injected her heel and asked claimant to return for "unilateral" work on a new orthotic, which the doctor hoped would "help both the plantar fasciitis pain and the heel spur pain." (*Id.* at 17.)

¶21 On May 22, 1996, claimant returned "for treatment of painful **left heel**." (*Id.* at 18.) The doctor's examination revealed "pain with palpation at the plantar medial and plantar central aspects of the **left heel**." (*Id.,* emphasis added.) Dr. O'Reilly began treating her with ultrasound, which continued on May 24th. (*Id.*)

¶22 On June 5, 1996, claimant returned "for treatment of **left heel** pain." (*Id.*, emphasis added.) She indicated the ultrasound treatment had not helped. Measurements were taken "bilaterally" to allow construction of new orthotic devices. (*Id.*)

¶23 On July 1, 1996, claimant returned to Dr. O'Reilly "for treatment of painful plantar fasciitis and heel spur, **left**." (*Id.* at 21, emphasis added.) Claimant was using the new orthotic devices but "relates she still has pain." (*Id.*) The doctor again diagnosed: "Plantar heel spur, **left**, and plantar fasciitis." He did a nerve block and an "[i]njection was then performed from medial and from plantar medial to the left heel." (*Id.*, emphasis added.)

¶24 The next entry in Dr. O'Reilly's records for claimant, dated November 14, 1996, indicates claimant returned "for treatment of **left heel** pain." (*Id.*, emphasis added.) He administered another nerve block and injection and noted that surgery "sometime after the 1st of the year for the heel spur" was discussed. (*Id*.)

¶25 Claimant again visited Dr. O'Reilly on December 16,1996, "for treatment of **left heel** pain." (Ex. 10 at 21.) She reported wearing her orthotics regularly "for both the pain at the plantar medial **left heel** and at the inferior aspect of the 2nd MTP joint, **left**." (*Id.*) Dr. O'Reilly reiterated his assessment as: "1. Painful heel spur, **left**. 2. Painful plantar flexed 2nd MTP joint, **left.**" (*Id.*) He noted claimant would return in January for follow-up and indicated that if present treatment still proved inadequate, "we may proceed with surgery." (*Id*.)

¶26 On April 21, 1997, Dr. O'Reilly operated on claimant's left foot. (*Id.* at 26-28, 31.) Specifically he performed

1. Heel spur resection, **left**.

2. Dorsiflexor osteotomy[(2)] of the second and third **left** metatarsals.

(*Id*. at 27, emphasis added.)

¶27 Following surgery, claimant returned to full-time work as a custodian in August 1997. (Pretrial Statement of Uncontested Fact 2.)

Claim for Compensation Involving Left Foot

¶28 On February 4, 1997, claimant and a representative of her employer signed and submitted A"first Report of Occupational Injury or Occupational Disease." (Ex. 1 at 1.) In the information section, claimant described her condition as "TWO BONE SPURS ON LEFT FOOT." (*Id.*, capitals in original.) In the section asking "What specific object or substance cause the injury?", claimant responded, "OCCUPATIONAL." (*Id.*, capitals in original.) In the box for "date and time of injury," she responded: ON GOING." (*Id.,* capitals in original.)

¶29 At the time of the claim, the Billings School District was insured by MSGIA. (Fact 2.) MSGIA accepted liability for the left foot condition. (Fact 2.)

¶30 By letter, dated February 12, 1997, MSGIA's adjuster asked Dr. O'Reilly to answer several questions regarding claimant's alleged occupational disease. (Ex. 10 at 23-24.)

Of note, the letter asked, "Is Ms. Corcoran suffering from a disease that is a result of the employment (an occupational disease)?" (*Id.* at 24.) The question was not limited to the left foot.

¶31 Dr. O'Reilly responded on March 5, 1997, saying in part:

> I believe Ms [sic] Corcoran is suffering from a disease (plantar fasciitis, **left**) that is a result of the employment. The hours of standing and walking, the majority of which is done on concrete, has definitely contributed to the plantar fasciitis. I believe the employment can be traced as the proximate cause.

(*Id*. at 25, emphasis added.) The letter makes no mention of any condition or disease relating to the right foot.

1999 Treatment

¶32 The next mention of foot problems was on October 10, 1998, when claimant visited Dr. Shaub for "GYN care." (*Id.* at 41.) Dr. Shaub's "review of symptoms" includes a notation that claimant "has pain in her **right** great toe and **right** mid-metatarsal area." (*Id.*, emphasis added.) As one of his "impressions," the doctor listed "FOOT PAIN." (*Id.* at 42, capitalization in original.) He recommended "she possibly see Dr. O'Reilly again or Dr. Elliott for chronic foot pain." (*Id.*)

¶33 On January 8, 1999, claimant visited Dr. Wolfe, who reported her chief complaint as follows:

> Patient is a 59 year old white female complaining of pain underneath the front of her **right** foot. **She states she's had this pain for approximately 4-5 years. It gets worse at the end of the day.** She states that she tried orthotics built by Dr. O'Reilly x 2. However, the pain did not go away.

(*Id*. at 1, emphasis added.) His examination disclosed that claimant was suffering from "metatarsus primus varus and hallux adductus bilaterally, right greater than left. She also has a hyper-mobile first ray at the right foot." (*Id*. at 1.) His plan was to "[m]ake for the patient a functional orthotic starting as a conservative basis for treatment and consider surgical intervention only if this does not work well for her." (*Id*. at 2.)

¶34 Claimant returned to Dr. Wolfe on January 18, 1999, "stating that she would like to have surgery performed on her foot such as Dr. O'Reilly performed on the contra-lateral foot." (*Id*. at 3.) Dr. Wolfe explained the risks of surgery and indicated his preference to begin with conservative treatment. Claimant agreed to return for fitting of new orthotics. (*Id*.)

¶35 The next entry in Dr. Wolfe's records is dated November 2, 1999. (Ex. 10 at 4.) Claimant brought several things to the doctor's attention, all apparently involving the **right** foot. (*Id*.) Claimant reported "soreness and [a] lump on the lateral aspect of her left dorsum of the foot." (*Id*.) Dr. Wolfe surmised the presence of a ganglion cyst which had left scar tissue. Claimant also asked for repair of a "right bunion" but described additional symptoms which Dr. Wolfe believed might relate to a neuroma.[(3)] He opted to try injection and deep ice massage, noting "[w]e will defer all surgery at this time until we get a better idea of what we're going to do with the neuroma." (*Id*.)

¶36 Claimant returned to Dr. Wolfe on November 9, 1999, reporting "60% reduction in her neuroma pain" and requesting surgery. (*Id*.) On December 8, 1999, Dr. Wolfe operated on claimant, doing the following surgical procedures:

> 1. BUNIONECTOMY WITH FIRST METATARSAL OSTEOTOMY AND FIXATION.
>
> 2. OSTEOTOMY WITH FIXATION PROXIMAL HALLUX PHALANX.
>
> 3. TENDON LENGTHENING PROCEDURE, EXTENSOR LUSUS LONGUS.
>
> 4. MORTON'S NEUROMA EXCISION.
>
> 5. HAMMER TOE REPAIR FIFTH DIGIT.
>
> ALL PROCEDURES PERFORMED ON THE RIGHT FOOT**.**

(*Id*. at 6, capitalization in original.) The preoperative and postoperative diagnoses were the same, as follows:

- HALLUS ADDUCTUS.
- METATSUS PRIMUS VARUS.
- THIRD INTERMETATARSAL SPACE MORTON'S NEUROMA.
- VARUS ROTATED FIFTH DIGIT HAMMER TOE.

ALL SURGERIES PERFORMED ON THE RIGHT FOOT.

(*Id.,* capitalization in original.)

¶37 Claimant returned to Dr. Wolfe several times during December and January for post-operative examination and treatment. (*Id.* at 9.) The last entry in the records of Dr. Wolfe, dated January 10, 2000, indicates the healing process was still ongoing and that claimant would be allowed to return to work half-time in two weeks. (*Id.* at 10.)

1999 Claim

¶38 In January 1999, the Billings School District prepared a "First Report of Occupational Injury or Disease." The report is on a Montana Schools Group form and is date-stamped January 28, 1999, by "RSKCo. CLAIMS." (Ex. 2.) It notes "01/21/99" as the "date employer notified." The "accident" described was: "EMPLOYEE HAS CONTINUOUS FOOT PAIN DUE TO WORKING." (*Id.*, capitalization in original.) The part of the body affected was identified as: "FOOT/FEET." (*Id.*, capitalization in original.) The date and time of injury was noted to be: "01/01/1996," with the letter "R" handwritten into the margin and circled. (*Id.*) The report was not signed by claimant because she disputed some of the contents of the report. (*See* Ex. 8 at 1, which is quoted in ¶ 44.)

¶39 On February 1, 1999, MSGIA denied the claim as untimely. Its claims adjuster, Rhonda McClure, wrote to claimant as follows:

> Although the incident as described is not in dispute, section 39-72-403, MCA, requires that claims for benefits must be presented in writing to the employer, the employer's insurer, or the department within one year from the date the claimant knew or should have known that the claimant's condition resulted from an occupational disease. Because your claim indicates your injury date, January 1, 1996, was not reported until January 21, 1999, your claim must be denied.

(Ex. 9.)

¶40 Prompted by MSGIA's denial of her claim, claimant visited Dr. O'Reilly on February 5, 1999. He recorded:

> I visited with Barb today. She relates that she had heel spur surgery and dorsiflexory osteotomy performed on the second and third metatarsals in April of 1997. She further relates that her right foot was not very symptomatic at that time. She did

have some pain although it was not sufficient enough at that time to consider surgery. She relates that we had discussed working on the right foot and together agreed not to do anything to the right foot due to the mild symptoms that were present at that time.

. . . .

Review of the records does show that her March visit in 1996 described pain in the forefoot of both feet. The left heel was the only heel that was tender at that time, however, and it was also the CC at that time. I don't see any further notation regarding right foot pain.

(Ex. 10 at 39.)

¶41 On February 8, 1999, Dr. O'Reilly wrote a letter "to whom it may concern" as follows:

I have been asked to review the records of Barbara Corcoran regarding her previous foot complaints. I originally saw Barbara in August of 1986.

At that time, she was complaining of bilateral heel pain, left worse than right. The pain was exacerbated at that time by working on a concrete floor doing custodial work. The right foot was 60% as painful as the left. Orthoses were made in September of 1986. The orthoses seemed to work well at that time in relieving her heel pain.

Barbara was then seen years later, December of 1995, complaining of pain at the left heel as well as pain at the forefoot, left. The pain in the left foot ultimately led to surgery in April of 1997 for heel spur resection, left and dorsiflexory osteotomy of the second and third metatarsals.

I received a call from Barbara relating that she is scheduled for surgery on the right foot. She relates that the right foot symptoms are similar to the left foot symptoms. The surgery will be performed by Dr. Wolfe.

Barbara has asked me to verify that her original symptoms in the heel were bilateral. This letter will verify that fact. When she was seen originally in August of 1986 she did have bilateral heel pain.

(*Id*. at 37.) It is not clear when the letter was provided to MSGIA.

¶42 On March 2, 1999, claimant again wrote to Rhonda McClure, saying in part:

In April of 1997 I had surgery on my left foot which was a job related injury and was covered by workman's compensation. At that time I discussed with my doctor problems with both feet, the most severe problem being with my left foot. Surgery was discussed with the doctor on both feet, but was decided against because it

> would have made it almost impossible for me to get around during the recovery process. At that time the claim for benefits under workman's compensation was approved and the surgery on my left foot was successful.
>
> Since that time the condition of my other foot had deteriorated to the point that I will not be able to continue my duties as a custodian for the school district. I filed a workman's compensation claim which you denied. After discussing the matter further with you, I provided reports from my doctor which mentioned the problem with both feet. After you received these reports and reviewed them you contacted me and told me you would approve the second claim under the original claim. Then, several days later you called me and told me that you had changed your mind and would deny the claim.

(Ex. 7 at 1.) The remainder of the letter referenced claimant's belief that coverage should be provided for the surgery and her intention to hire counsel, if the insurer continued to deny the claim. (*Id*.)

¶43 Dr. O'Reilly wrote another letter "to whom it may concern" on March 3, 1999, which stated in part as follows:

> Barb had surgery on the left forefoot and the left heel in April of 1997. She relates that she had pain in the right foot prior to the left foot surgery. **Because the left foot pain was significantly worse than the right foot pain, no treatment was instituted at that time.** She relates that her pain has become more severe to the point where she would like to have surgery on her right forefoot by Dr. Wolfe. The patient relates that she judged her pain on a scale of 1-10 (right foot pain) prior to the left forefoot surgery. There is not a note about this in the chart, however. The problem that she is presently having is that Workers Comp. and occupational disease institutions will not pay for the right foot surgery. They have told her that they would pay for the right foot surgery is [sic] she could establish a link to an earlier notation or finding that described the right foot pain in the forefoot.
>
> . . . I don't recall Barb having right forefoot symptoms. I believe that she probably did have the symptoms prior to the left foot surgery based on what she is telling me. Unfortunately, no notation regarding the right forefoot pain was made in the chart. **We both agree that at the time her right forefoot pain was not significant enough to require treatment or x-ray.** When I explained that her Work. Comp. and occupational disease claim should start from the point where her right forefoot pain became more significant, she related that she tried to do this. When she was truthful, however, relating an earlier episode of pain, the claim was apparently disallowed. She relates that it was disallowed because it had gone over a year.

(Ex. 10 at 38, emphasis added).

¶44 On March 31, 1999, claimant again wrote to the adjuster, noting:

> First of all, I must inform you that I have not signed the First Report of Injury form which was mailed to me because I feel the date of injury which is handwritten on the claim form is incorrect. I had problems with both of my feet in January of 1996 and did, in fact, have surgery on my left foot. **But the condition in my right foot did improve over time.** The surgery and resulting recovery is well documented in the medical records.
>
> I was able to resume my normal activities for a period of time. I then again began having pain in my right foot to a point where I would be limping on the job while trying to work. I continued to work and tried to avoid seeking medical treatment for quite some time. I did report the problems I was having to my supervisor, Mr. Greg Uhren, who was well aware that I was having increased problems. Other co-workers were also aware that the pain in my foot was increasing and the more I worked, the worse it became.
>
> **It finally got to a point where I felt I needed to seek medical treatment. I again informed Mr. Uhren that the condition was getting worse and I felt I had no alternative but to seek additional medical treatment and I did. When I was told that I needed surgery and that the condition was due to my employment, I again notified my supervisor that a claim needed to be filed.**
>
> I do admit that I have had problems with my feet over the years, but I also feel, and the doctors seem to agree, that it is the work that I do that causes the problems with my feet. It is hard to pin point a specific date of injury as I do feel it has occurred over a period of time and has continually gotten worse to a point where surgery is now required.
>
> . . . .
>
> Please find enclosed a new WCRRP form with a more accurate date stating that I told my supervisor Greg Uhren that my right foot was bothering me enough so that I would soon be seeking a doctor's opinion. That was in September of 1998, which Greg Uhren can verify. On September 28, 1998, my family physician Dr. Shaub recommended that I see a specialist. I took his advice and in January of 1999 I contacted doctor Andrew Wolfe a podiatrist. He has recommended surgery on my foot.
>
> This letter is also my formal request that you reconsider your decision.

(Ex. 8 at 1, emphasis added.)

¶45 The insurer refused to change its position and claimant then filed a signed Claim for Compensation dated April 6, 1999. (Ex. 3; Statement of Uncontested Facts, ¶ 4.) The

problem described was "continuous foot pain due to working all day on concrete." The described "specific body part affected" was "right foot," with the "nature of [the] injury" described as "forefoot pain." This form identified the date of injury as "10/8/98." (*Id.*)

Factual Synthesis

¶46 The medical records show that claimant experienced right foot pain as early as 1986, when she reported right heel pain in both feet, the right heel hurting "about 60% as much as the left." (Ex. 10 at 11.) The diagnosis for both feet was planter fasciitis. That was not the condition diagnosed in 1999 for which claimant seeks compensation. Thus, even if the Court finds claimant had knowledge she was suffering from an occupational disease in 1986, that disease or condition was different from the conditions or diseases for which she now seeks compensation.

¶47 As to the 1999 conditions, even though she was suffering some degree of right foot pain in 1996, the condition was not serious enough to warrant further medical workup or treatment. No diagnosable medical condition was identified. As Dr. O'Reilly wrote on March 3, 1999, the claimant's right foot complaints of "right forefront pain was not significant enough to require treatment or x-ray." (Ex. 10 at 38.) In contrast, in early 1999, claimant had significant right foot problems, which led to a number of diagnosis, including a neuroma, none of which had been indicated previously. The conditions were surgically addressed. (Ex. 10 at 6.)

¶48 The most that can be said concerning claimant's knowledge is that in 1996 she was aware that she was experiencing foot pain and that her pain was related to her work. She was not aware that she was suffering from any particular condition or disease.

CONCLUSIONS OF LAW

I

Applicable Statute

¶49 A preliminary question before the Court is which version of section 39-72-403, MCA, applies in this case. The parties have suggested two possibilities: the statute in effect during 1986, when claimant first received medical treatment for foot problems, and the revised statute that took effect in 1995 and continues (as relevant here) to the present. Section 39-72-403, MCA (1985), provides in relevant part:

> (1) When a claimant seeks benefits under this chapter, his claims for benefits must be presented in writing to the employer, the employer's insurer, or the division **within 2 years** from the date the claimant knew or should have known that his **total disability condition** resulted from an occupational disease. [Emphasis added.]

In 1995, subsection (1) was amended to read:

> (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. [Emphasis added.]

This language continues in both the 1997 and the 1999 versions of the Act.

¶50 The 1986 version of section 39-72-403, MCA, is inapplicable. There is no proof that the right foot conditions identified in 1999, and for which claimant now seeks compensation, were present in 1986. The diagnosis in 1986 was plantar fasciitis. The diagnoses in 1999 were multiple, but none involved plantar fasciitis.

¶51 Therefore, I must determine whether claimant's awareness of right foot pain in 1996 constituted knowledge that the pain resulted from an occupational disease. The operative language of the 1995 version of section 39-72-403, MCA, is "the claimant knew or should have known that **the claimant's condition** resulted from an occupational disease."

¶52 Awareness 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. Section 39-72-102(10), MCA (1995-99), defines occupational disease as follows:

> (10) "Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift. The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity.

The key words in the section are "harm" and "damage". In the context of the Occupational Disease Act, both terms 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. That sort of construction of the terms would be absurd and contrary to common sense. Rather, the terms indicate something more significant, such as a condition requiring medical diagnosis and treatment. Construing the words in that manner is consistent with another of the commonly understood meanings of disease as "a particular destructive process in an organ or organism, with a specific cause and characteristic symptoms."[(4)] (Webster's New World Dictionary and Thesaurus, CD ROM Ver. 1.0 (1997).) Moreover, lacking a working diagnosis or medical workup, it may be impossible to say whether earlier pain of the same body was due to the disease which was later diagnosed.

¶53 I therefore construe the limitations period set out in section 39-72-403, MCA (1995-99), as commencing when the worker has some specific knowledge of a specific pathological

condition stemming from employment and requiring diagnosis or treatment. Applying that construction, claimant herein did not have such knowledge until 1999. Her claim was timely.

¶54 This ruling is consistent with the treatment of a somewhat analogous situation in another jurisdiction. In *M. M. Sundt Constr. Co. v. Indus. Comm'n of AZ*, 124 Ariz. 94, 602 P.2d 475 (1979), the employee operated heavy construction machinery for 35 years. Approximately fifteen years before filing a claim for compensation, the worker began to notice "a ringing in his ears which would disappear within an hour after leaving work." *Id*, 124 Ariz. at 95, 602 P.2d at 476. The Arizona court noted "[i]t is well established in this state that the right to workmen's compensation benefits accrues when the employee knows or should have known that he had a compensable injury." *Id*, 124 Ariz. at 96, 602 P.2d at 477. Although the Court was dealing with the compensability of an injury, much of its reasoning is similar to that adopted herein:

> Although respondent was aware of ringing in his ears, it would characteristically disappear approximately one hour after work. The disability neither required him to miss work nor caused him economic loss. Except for a temporary discomfort, respondent had no basis for suspecting a permanent disability. He required no medical attention and was thus never informed of the significance of the impairment until it became immutable. Where, as here, the disorder is merely slight or trivial, but subsequently develops unexpectedly into a permanent condition, it cannot be said that the compensability of the problem became manifest until diagnosis disclosed the severity of the injury.

¶55 The attorney's fees, costs, and penalty provisions contained within the Workers' Compensation Act (§§ 39-71-611, -2907, MCA) apply to this Court's adjudication of occupational disease disputes. § 39-72-402(1), MCA; *Ingbretson v. Louisiana-Pacific Corp.* 272 Mont. 294, 900 P.2d 912 (1995). The award of attorney's fees and penalty requires a finding of unreasonable conduct on the part of the insured. §§ 39-71-611(c), -2907, MCA.

¶56 The insurer's denial of the claim was not unreasonable. The insurer construed the section in the broadest possible sense. While the Court has construed the section as requiring more specific knowledge than contended by the insurer, what constitutes knowledge within the meaning of section 39-72-403, MCA (1995-99), is reasonably debatable. Claimant is not entitled to attorney fees or a penalty.

¶57 Claimant is, however, entitled to costs where she has prevailed in this action. § 39-71-611, MCA.

JUDGMENT

¶58 1. Claimant's claim for occupational disease benefits on account of the right foot conditions diagnosed in 1999 is timely.

¶59 2. Claimant is entitled to costs in an amount to be determined by the Court.

¶60 3. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

¶61 4. This Judgment is certified as final for purposes of appeal pursuant to ARM 24.5.348.

DATED in Helena, Montana, this 23rd day of May, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Victor R. Halverson
Mr. Leo S. Ward
Submitted: April 27, 2000

1. The parties stipulated that the year on the date of two letters within exhibit 10 (beginning at pages 37 and 38) should be 1999, not 1998. The parties also stipulated that page 40 of exhibit 10 is the second page of the letter beginning at page 38. Page 39 is a separate document.

2. Osteotomy is defined as "[a] surgical operation in which a bone is divided or a piece of bone is excised (as to correct a deformity)," *see* www.medscape.com.

3. "A tumor or mass growing from a nerve and usually consisting of nerve fibers," see definition at www.medscape.com.

4. While one dictionary definition of disease is "any departure from health; illness in general", that is using the word in its loosest and most general sense, and does not accord with the context of the ODA. (Webster's New World Dictionary and Thesaurus, CD ROM Ver. 1.0 (1997).)