IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 22

WCC No. 2005-1256

BUDD CARDWELL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

TERRY RACKLEY

Respondent/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner worked as a sheetrocker with Terry Rackley for approximately four years and contends that he was an employee. Rackley contends that Petitioner was an independent contractor. On or about July 20, 2004, Petitioner felt pain in his neck and right shoulder. Petitioner placed a First Report of Injury and Occupational Disease in Rackley's mailbox on October 8, 2004. Petitioner filed an Amended Petition for Trial with this Court claiming he suffered an injury on July 20, 2004, or in the alternative, that he suffers from an occupational disease arising out of his employment. Respondents argue that Petitioner's claim for benefits is untimely.

Held: Petitioner was an employee of Rackley and suffers from an occupational disease. Petitioner timely presented his claim in writing pursuant to § 39-72-403(1), MCA.

Topics:

> **Independent Contractor: Elements.** Where the only evidence that Petitioner had an independently established occupation, profession, or business was that Petitioner bid and completed a drywall job for a friend of

his sister, no independently established business exists. The employer testified that he supplied most of the equipment and all of the materials for the drywall jobs, including scaffolding, stilts, and sheetrock. The employer also terminated Petitioner's employment, and decided what schedule Petitioner would work. All of this is overwhelming evidence that Petitioner was an employee, not an independent contractor.

Proof: Conflicting Evidence: Medical. In light of the testimony regarding the physical demands of the work Petitioner performed (hanging sheetrock), the fact that Petitioner can recall no specific incident preceding his neck pain, and the uncontroverted medical evidence that Petitioner's condition is work related, the Court concludes that Petitioner's condition is more likely than not an occupational disease.

Occupational Disease: Occupational Disease Versus Injury. In light of the testimony regarding the physical demands of the work Petitioner performed (hanging sheetrock), the fact that Petitioner can recall no specific incident preceding his neck pain, and the uncontroverted medical evidence that Petitioner's condition is work related, the Court concludes that Petitioner's condition is more likely than not an occupational disease.

Limitations Periods: Claim Filing: Occupational Disease. Where Petitioner filed his claim for benefits as a specific injury using the Department of Labor's form entitled "First Report of Injury and Occupational Disease," and Respondent argues that Petitioner's occupational disease claim is untimely, the Court need look no further than the caption of the form to determine whether Petitioner has presented a written claim for benefits pursuant to § 39-72-403(1), MCA. Nowhere on the form does it require Petitioner to elect whether his condition resulted from an injury or an occupational disease.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-403. Where Petitioner filed his claim for benefits as a specific injury using the Department of Labor's form entitled "First Report of Injury and Occupational Disease," and Respondent argues that Petitioner's occupational disease claim is untimely, the Court need look no further than the caption of the form to determine whether Petitioner has presented written claim for benefits pursuant to § 39-72-403(1), MCA. Nowhere on the form does it require Petitioner to elect whether his condition resulted from an injury or an occupational disease.

Costs: Uninsured Employers. Where Petitioner is entitled to his costs, an award of costs may be assessed against the uninsured employer under Rule 54(d) of the Montana Rules of Civil Procedure.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure: Rule 54(d). Where Petitioner is entitled to his costs, an award of costs may be assessed against the uninsured employer under Rule 54(d) of the Montana Rules of Civil Procedure.

¶ 1 The trial in this matter was held on June 5, 2006, in Kalispell, Montana. Petitioner Budd Cardwell was present and represented by Garry D. Seaman. Respondent Uninsured Employers' Fund (UEF) was represented by Brian J. Hopkins. Respondent Terry Rackley (Rackley) was represented by Bryce R. Floch.

¶ 2 Exhibits: Exhibits 1 through 16 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Alice Elrod, D.C., Ned Wilson, M.D., Scott Colgrove (Colgrove), and Charles A. Newman were taken and submitted to the Court. Petitioner, Rackley, Cory James Cardwell (Cory), and Steve LaVoie (LaVoie)[1] were sworn and testified at trial.

¶ 4 Issues Presented: The following contested issues of law have been set forth for the Court's determination:

¶ 4a Whether Petitioner was an independent contractor or an employee of Rackley.

¶ 4b Whether Petitioner suffered an occupational disease arising out of his employment with Rackley pursuant to § 39-72-408, MCA.

¶ 4c Whether Petitioner suffered an injury arising out of his employment with Rackley pursuant to § 39-71-119, MCA.

¶ 4d Whether Petitioner provided notice within thirty days of his alleged injury, pursuant to § 39-71-603, MCA.

¶ 4e Whether Petitioner failed to present a written claim for benefits pursuant to § 39-72-403(1), MCA, within one year of when he knew or should have known that he suffered from an occupational disease.

[1] LaVoie testified by telephone.

¶ 4f Whether Petitioner is entitled to benefits related to his injury or occupational disease.

¶ 4g Whether Petitioner is entitled to costs and attorney fees.[2]

FINDINGS OF FACT

¶ 5 At the time of trial, Petitioner was 30 years old and lived in Fortine, Montana.[3]

¶ 6 Petitioner testified at trial and the Court finds his testimony credible.

¶ 7 Cory testified at trial and the Court finds his testimony credible.

¶ 8 Rackley testified at trial and the Court finds his testimony to be generally credible. However, where Rackley's testimony conflicts with Petitioner's testimony and Cory's testimony, the Court does not find Rackley's testimony credible.

¶ 9 Petitioner felt pains in his neck on approximately July 20, 2004, while hanging sheetrock at the personal residence of Colgrove.[4]

¶ 10 Petitioner was introduced to Rackley through a friend sometime in April 2000.[5]

¶ 11 Rackley was a dry wall contractor. Petitioner testified that he was initially paid $7 per hour but after approximately a year, Rackley offered to pay him a percentage of the profits.[6] Rackley countered that he never paid an hourly wage to Petitioner, but rather paid him a percentage of the profits from the very beginning.[7]

¶ 12 At the time he was hired as a sheetrocker, Petitioner led Rackley to believe that he had some previous experience performing dry wall work. Later, Petitioner informed

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[2] Final Pretrial Order at 2-3; Respondent's Motion for Reconsideration.

[3] Ex. 1; Trial Test.

[4] Ex. 1; Trial Test.

[5] Trial Test.

[6] *Id*.

[7] *Id*.

Rackley that he did not have much experience at the time he was hired.[8] Rackley testified that he spent time training Petitioner to perform his work in a more efficient and effective manner.

¶ 13 Rackley bid all of the jobs that he and Petitioner worked on except for one job that involved hanging sheetrock in a bowling alley as a favor for the boyfriend of Petitioner's sister.[9] Petitioner testified that his sister's boyfriend supplied the sheetrock and he and Rackley supplied the labor. Petitioner and Rackley split the check from that job.[10]

¶ 14 At the time of Petitioner's injury, Rackley possessed an independent contractor exemption. Rackley testified that he believed Petitioner also had an independent contractor exemption because Petitioner had stated as much, but Rackley did not ask to see the exemption, nor did he check with the Department of Labor and Industry to see if an exemption was on file.[11]

¶ 15 Petitioner testified that he did not own any of the tools used on the job sites.[12] On the Worker Relationship Questionnaire that Petitioner filled out and filed with the UEF, Petitioner wrote that Rackley supplied "ALL TOOLS."[13] He testified that Rackley ordered the tools and let him use them as needed.[14] Rackley responded that, although many of the tools were his, Petitioner had his own tool belt and various hand tools. Rackley conceded that the scaffolding and stilts they used were his and that he supplied the materials used at the job site.[15]

¶ 16 Petitioner's brother, Cory, also worked with Petitioner and Rackley at the Colgrove worksite. Cory testified that he was sometimes paid cash directly from Rackley's pocket, and at other times his money was added to Petitioner's paycheck who, in turn, gave the

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[8] *Id.*

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] Ex. 4 at 3.

[14] Trial Test.

[15] *Id*.

money to him. Cory stated that he perceived Rackley to be his boss and Rackley provided him with all of the tools he used at the job site.[16]

¶ 17 Petitioner did not publicly advertise his services as a dry waller separate from Rackley, and Rackley was aware that Petitioner did not perform dry wall services for other contractors.[17]

¶ 18 Rackley testified that he did not control Petitioner's schedule and Petitioner was free to come and go as he wished. Petitioner responded that Rackley would say what time they would meet at the job site, and he would agree to be there at the stated time.[18]

¶ 19 Petitioner testified that whenever a homeowner had a question or issue, the homeowner would approach Rackley.[19] Rackley testified that sometimes a homeowner would approach Petitioner with questions.[20] Regarding the job Petitioner was working on at the time of the onset of his symptoms, the homeowner, Colgrove, testified in his deposition that he hired Rackley and any issues regarding the job were directed only to Rackley.[21]

¶ 20 UEF investigator LaVoie investigated Petitioner's employment status and determined that Petitioner was an employee of Rackley. LaVoie based his determination on the fact that Petitioner did not have an independent business name or business checking account. Further, LaVoie concluded that Petitioner did not supply any materials or tools to the jobs. As part of his investigation LaVoie interviewed Rackley and found the only evidence supporting Rackley's belief that Petitioner was an independent contractor was Rackley's assertion that Petitioner told him he possessed an independent contractor exemption.[22]

¶ 21 Petitioner's last day of employment was August 25, 2004.[23] On that date, Petitioner walked off the job of the Colgrove house. Rackley testified that he arrived in the morning and found Petitioner and Cory already on the job site. It appeared to Rackley that

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[16] *Id*.

[17] Ex. 4; Trial Test.

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] Colgrove Dep. 17:4-17.

[22] Trial Test.

[23] *Id*.

Petitioner was angry but Rackley did not know why. Rackley testified that Petitioner threw a pair of stilts against some scaffolding before a verbal exchange in which Rackley claims he told Petitioner he could leave if he wanted to.[24]

¶ 22 Both Petitioner and Cory testified that Rackley terminated Petitioner's employment and that Petitioner and Cory left the job site a short time later.[25]

¶ 23 On October 13, 2004, the Employment Relations Division (ERD) received Petitioner's First Report of Injury and Occupational Disease. Under the heading "Description of Accident" Petitioner wrote, "Sudden pains in my neck, shoulders and right arm." Petitioner wrote "7/20/04" as the date of his injury.[26]

¶ 24 Rackley testified that he informed the homeowner, Colgrove, that he could not complete the job that he and Petitioner had been working on because everyone else had quit.[27] On this point Colgrove testified in his deposition:

> I'm trying to think of dates. I mean, at least a month - - at least a month after - - let's see, I'm trying to think. Terry walked into my office one day, Terry Rackley, and told me that he quit, he couldn't work there anymore, his crew had quit, and that somebody had claimed that they were injured. And that's - - that's all I was ever really told. And the one thing I mentioned to Terry was that "Well, he's been working for the last month, I think. I mean he's been working." So I was sort of surprised that that was even a consideration as far as an injury goes, so . . . . You know, no, I guess - - other than the one time that he came to my office and quit my job, no, I wasn't told anything else.[28]

¶ 25 Rackley testified that he did not recall making the statement to Colgrove about a person being injured on the job when he informed Colgrove that he would not be able to finish his dry wall job.[29] Colgrove testified in his deposition that he had a few different

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[24] *Id*.

[25] *Id*.

[26] Ex. 1.

[27] Trial Test.

[28] Colgrove Dep. 9:16 - 10:7.

[29] Trial Test.

interactions with Rackley after Rackley finished working for him and he was unsure from which conversation he learned of Petitioner's claimed injury.[30]

¶ 26 Rackley initially testified that he did not replace Petitioner with another worker after August 25, 2004. Rackley then testified, however, that a friend of his named Jeff, whose last name he could not remember, was hired to help him for one day. Rackley testified that he considered Jeff to be an employee partly because he paid him between eight and nine dollars an hour. Rackley acknowledged that he did not carry workers' compensation insurance during the time Jeff was employed.[31]

¶ 27 Petitioner testified that he placed the First Report of Injury and Occupational Disease in Rackley's mailbox and Respondent received the report on approximately October 8, 2004.[32] Rackley testified that this was the first time he was notified that Petitioner was claiming he was injured on the job.[33]

¶ 28 Petitioner testified that he informed Rackley of his injury on the morning of July 20, 2004, after Rackley inquired about why he was holding his neck a certain way, and then informed him a few more times between July 20 and August 25, 2004, that his neck was hurting. Petitioner testified that he informed Rackley he had an appointment with Dr. Alice Elrod for later in the day on July 20, but that Rackley chuckled and told him he wouldn't make the appointment because there was too much work to do.[34]

¶ 29 Petitioner cancelled the initial appointment with Dr. Elrod and rescheduled an appointment for July 27, 2004. Petitioner testified that Rackley knew about the July 27, 2004, appointment with Dr. Elrod because Petitioner arrived back at the Colgrove house 15 minutes late.[35] Rackley testified that Petitioner might have informed him he was going to see a doctor about his neck or shoulder, but he did not remember that happening.[36]

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[30] Colgrove Dep. 31:16 - 32:14.

[31] Trial Test.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

¶ 30 Petitioner testified that he was rubbing tiger balm on his neck throughout the end of July to help relieve the pain.[37] Cory testified that he smelled the tiger balm at the job site. Rackley testified that he never smelled any tiger balm on Petitioner.[38] Petitioner testified that he was using the tiger balm because, at that time, he believed he had pulled a muscle.[39]

¶ 31 Rackley testified that he and Petitioner would sometimes complain to each other about being sore if they had worked hard for a few days in a row. Rackley further testified that Petitioner did not appear to be in any pain between July 20, 2004, and August 25, 2004, and was able to adequately perform his duties.[40]

¶ 32 Petitioner's testimony regarding the actual date of injury is conflicting. He claimed that his neck hurt approximately a full week before July 20, 2004, but that it really started to hurt on July 20, 2004.[41]

¶ 33 Cory testified that he did not witness Petitioner getting hurt on July 20, 2004, but that on that particular day he heard Petitioner tell Rackley of his injured neck. Cory also testified that he heard Petitioner tell Rackley of his appointment with Dr. Elrod, but that Rackley told Petitioner he would not make the appointment because there was too much work to complete.[42]

¶ 34 The sheetrock Petitioner and Rackley installed was 4' x 12' x ½" and each piece weighed approximately 90 pounds. Petitioner and Rackley carried the sheets up onto ladders and then used the tops of their heads to hold the sheetrock into place so it could be nailed off. They did not use any jacks to hold the weight of the sheetrock.[43]

¶ 35 Alice Elrod, D.C., possesses a bachelor's degree in botany and a master's degree in forest management. She received her doctorate in chiropractics in 2001 and, at the time of her deposition, she had been a chiropractor for approximately three years.[44]

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[37] *Id*.

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] Elrod Dep. 6:15-23.

¶ 36 Dr. Elrod's notes indicate that Petitioner tried to make an appointment for the week of July 20, 2004, but that the scheduling of the appointment did not work out.[45]

¶ 37 Dr. Elrod first examined Petitioner on July 27, 2004.[46]

¶ 38 Dr. Elrod testified that her interpretation of the notes she made during Petitioner's July 27, 2004, examination indicate that Petitioner had a recent exacerbation from the day before the examination, where he picked up something wrong and had nagging pain at the base of his neck.[47]

¶ 39 Dr. Elrod stated that Petitioner informed her at the July 27, 2004, visit that he believed his condition was related to his work as a dry waller.

> Q Could you tell us what he told you?
> A You know, I can remember him saying that he - - well, that he - - he thought he hurt himself at work, but I can't give you verbatim, you know, him saying.
> Q You thought that he told you that he got hurt at work?
> A No, I wrote down that he - - he related it to picking up something wrong at work.
> Q Did he relate to you when he did that?
> A In the notes here he was saying that it had happened the day before, on the 26th.[48]

¶ 40 Dr. Elrod opined that Petitioner's medical findings are caused by a repetitive use injury.[49]

¶ 41 Dr. Ned Wilson is a board certified orthopedic surgeon.[50]

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[45] Elrod Dep. 7:23 - 8:5.

[46] Elrod Dep. 8:10-16.

[47] Elrod Dep. 8:21 - 9:2.

[48] Elrod Dep. 11:23 - 12:9.

[49] Elrod Dep. 15:2-5, 31:7-10.

[50] Wilson Dep. 5:10-13; Trial Test.

¶ 42 Dr. Wilson diagnosed Petitioner with right-sided disk protrusions at C5-C6, C6-C7.[51] On January 20, 2005, Dr. Wilson performed a disk surgery with fusion on Petitioner.[52]

¶ 43 Dr. Wilson opined that Petitioner's symptoms came on acutely. Without an MRI scan of what Petitioner's neck looked like the day before the onset of his symptoms, Dr. Wilson testified that it would be difficult to place the time of the actual herniation.[53]

¶ 44 Dr. Wilson opined that he would not have any way to establish what constitutes an occupational disease of the spine.[54]

¶ 45 Dr. Wilson testified that Petitioner's injury was not a chronic event, but rather, on a more-probable-than-not basis, as something that happened on July 20, 2004, that precipitated Petitioner's symptoms of pain that did not improve.[55]

¶ 46 The medical documentation of Petitioner's injury is somewhat contradictory. A note from Kalispell Regional Medical Center (KRMC) on September 7, 2004, states, "Pain, no injury."[56] In another KRMC note: "History of shoulder discomfort suggests the possibility of a musculoskeletal component. . . . There is no history of a recent injury to this area. Nothing in history to suggest over use or a repetitive stress type of injury. This represents the acute onset of a new problem."[57] In still a different KRMC note: "Budd is a . . . sheet rock hanger. In July, he noted the onset of pain in his neck, right shoulder blade, and right arm. This pain has had a burning, sharp, shooting quality to it."[58] Finally, a Flathead Valley Orthopedic Center evaluation form from September 13, 2004, states: "He had no specific sudden onset of pain, but over the course of several days starting increasing his pain and had shooting pain he describes as burning down his arm into his thumb, index, and dorsal forearm. . . . The patient relates to me that he has had no specific trauma that he can relay, but the chronology of this is directly related to the industrial related injury

[51] Wilson Dep. 29:2-4; Ex. 9 at 15.

[52] Ex. 11 at 1 (*see* February 2, 2005, note).

[53] Wilson Dep. 29:5 - 30:20.

[54] Wilson Dep. 14:2 - 15:14.

[55] Wilson Dep. 36:14-17.

[56] Ex. 8 at 1.

[57] Ex. 8 at 12.

[58] Ex. 8 at 22.

where he was working with heavy sheet rock and had an increase in pain over the next 2-3 days following this injury."[59]

¶ 47 On May 4, 2006, Dr. Bruce R. Belleville performed an independent medical examination on Petitioner. He opined that Petitioner's condition is suggestive of an occupational disease rather than an occupational injury.[60]

¶ 48 The medical evidence that Petitioner suffered either an occupational injury or occupational disease is uncontroverted. Petitioner's testimony suggests, and the medical records verify, that while Petitioner's neck and shoulder were injured on the job, no specific time or event precipitated his pain. In fact, Petitioner stated that his neck began to hurt a few days before July 20, 2004, and that it also hurt on July 20, 2004. Dr. Elrod stated that Petitioner told her he aggravated his neck on July 26, 2004. Indeed, the medical documentation found above in paragraph 43 suggests that Petitioner was unsure whether his injury occurred at a specific time and place, or developed over time. Looking at the evidence in its entirety, this Court finds that Petitioner's condition occurred over the course of more than one day.

CONCLUSIONS OF LAW

¶ 49 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's last day of work.[61]

¶ 50 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[62]

¶ 51 One issue in the present case is whether Petitioner was an employee of Rackley. To determine whether a worker is an independent contractor, a two-step process is utilized. First, it must be determined whether certain "control factors" are met. This is achieved by following a four-part test: "(1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire."[63]

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[59] Ex. 9 at 2.

[60] Ex. 16 at 12.

[61] *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

[62] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

[63] *Wild v. Montana State Compensation Ins. Fund,* 2003 MT 115, ¶ 33, 315 Mont. 425, 435, 68 P.3d 855, 861-62.

¶ 52 Second, the Court must determine whether the worker is engaged in an independently established trade, occupation, profession, or business. Both parts of the test must be satisfied "by a convincing accumulation of undisputed evidence" or the worker is an employee.[64]

¶ 53 Besides the one job for a friend of Petitioner's sister, there is no evidence that Petitioner had an independently established trade, occupation, profession, or business. The one-time job for a friend is hardly enough evidence to establish that Petitioner was operating his own independently established business. Petitioner was initially paid on an hourly basis and then chose to be paid a percentage of the profits. The overwhelming evidence points to Petitioner's status as an employee. Rackley admitted that he supplied most of the equipment and all of the materials for the jobs, including the scaffolding, stilts, and sheetrock. Rackley terminated Petitioner's employment on August 25, 2004. Finally, Rackley decided what schedule Petitioner would work.

¶ 54 Having determined that Petitioner was Rackley's employee, the Court must next address whether Petitioner suffered an occupational disease or a specific injury. On this point, the Court finds some useful guidance in the case of *Mosca v. American Home Assurance Co.*[65] In *Mosca*, this Court found that the uncontroverted medical evidence demonstrated that the claimant's (Mosca) herniated disk was work related.[66] The medical opinions in *Mosca* were that the claimant suffered either an injury or an occupational disease.[67] The Court ultimately found, "No specific incident stands out, therefore it is reasonable to infer and find that the herniated disk resulted from the claimant's work over more than a single day."[68] Like the claimant in *Mosca*, Petitioner can recall no specific incident preceding his neck pain. In light of the testimony regarding the physical demands of the work Petitioner performed, the fact that Petitioner can recall no specific incident, and the uncontroverted medical evidence that Petitioner's condition is work related, the Court concludes that Petitioner's condition is more likely than not an occupational disease.

¶ 55 Since the Court concludes Petitioner has suffered an occupational disease, it must next address Respondents' argument that Petitioner failed to present a written claim for benefits pursuant to § 39-72-403(1), MCA, within one year of when he knew or should have known that he suffered from an occupational disease. Respondents contend that Petitioner

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[64] *Id*., ¶ 34 (*citing Northwest Publishing v. Montana Dep't of Labor & Indus.,* 256 Mont. 360, 363, 846 P.2d 1030, 1032 (1993); *Sharp v. Hoerner Waldorf Corp.*, 178 Mont. 419, 424 584 P.2d 1298, 1301 (1978).

[65] *Mosca v. American Home Assurance Co.,* 2004 MTWCC 6.

[66] *Id*., ¶ 31.

[67] *Id.*, ¶ 41.

[68] *Id.,* ¶ 32.

initially filed his claim as a specific injury and the first written claim for benefits for an occupational disease was made only when Petitioner filed his Amended Petition for Trial. Respondents argue this was beyond the one-year time limitation. Respondents' argument is without merit.

¶ 56 Petitioner filed his first report on or about October 8, 2004. Although there is some debate as to when the one-year period commenced, Respondents do not dispute that October 8, 2004, was within the one-year time limitation. The Court, therefore, need look no further than the caption of Petitioner's first report to determine that Respondents' argument fails. The standard Montana Department of Labor and Industry form Petitioner used is captioned, in the conjunctive, "First Report of Injury ***and Occupational Disease***."[69] Nowhere on this form does it require Petitioner to elect whether his condition resulted from an injury ***or*** an occupational disease. Nor have Respondents pointed to any authority that, upon learning or suspecting that his condition may be an occupational disease as opposed to a specific injury, Petitioner was required to file a "second first report" (an oxymoron unto itself).

¶ 57 The UEF claims process begins when an injured employee files a first report of injury.[70] Indeed, it is obvious from the correspondence exchanged in the present case that the UEF accepted Petitioner's First Report of Injury and Occupational Disease as the initiation of his claim.[71] To deny an employee benefits based upon a purported failure to specify whether his condition is either an injury or occupational disease in the "First Report of Injury and Occupational Disease" would be to effectively hold that an employee's claim may be barred if he fails to correctly self-diagnose the nature of his condition at the time of his first report. Aside from being absurdly impractical, such a finding flies in the face of the express public policy of this State that Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering.[72]

¶ 58 In the present case, it is not disputed that Petitioner would have submitted the same first report form irrespective of whether he was suffering from a specific injury or an occupational disease. Petitioner was not required to self-diagnose the nature of his condition as an occupational disease or injury to satisfy the requirements of § 39-72-403(1), MCA. Petitioner's submission to his employer of the "First Report of Injury and

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[69] Ex. 1 (emphasis added).

[70] *Flynn v. UEF*, 2005 MT 269, 329 Mont. 122, 124, 122 P.3d 1216, 1217.

[71] Ex. 7 at 4-5.

[72] § 39-71-105(3), MCA.

Occupational Disease" satisfied his obligation of presenting a written claim for benefits pursuant to § 39-72-403(1), MCA.[73]

¶ 59 As the prevailing party, Petitioner is entitled to his costs. In *Greene*, this Court held that under Rule 54(d) of the Montana Rules of Civil Procedure, an award of costs could be imposed on an uninsured employer.[74] Accordingly, this Court holds that Rackley is liable for Petitioner's costs in the present case.

¶ 60 The Final Pretrial Order states that one of the issues to be determined by this Court is whether Petitioner is entitled to attorney fees.[75] Since Rackley is not an insurer, and the UEF is not considered an insurer under § 39-71-611 or -612, MCA,[76] neither is subject to an award of attorney fees.

JUDGMENT

¶ 61 Petitioner was Rackley's employee.

¶ 62 Petitioner suffers from an occupational disease arising from his employment with Rackley.

¶ 63 Petitioner timely presented his claim in writing pursuant to § 39-72-403(1), MCA.

¶ 64 Petitioner is entitled to benefits related to his occupational disease.

¶ 65 Petitioner is entitled to his costs, payable by Rackley.

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[73] The Court initially addressed this issue in its Order Denying UEF's Motion to Dismiss. *See* 2006 MTWCC 20. In that Order, the Court held that Petitioner neither knew, nor should have known, that he was suffering from an occupational disease more than a year before written notice was filed. Rackley, joined by the UEF, then filed a motion for reconsideration of this Court's Order Denying Respondent's Motion to Dismiss and presented additional evidence which, Respondents contend, supports a finding that Petitioner knew or should have known that he was suffering from an occupational disease more than a year before he amended his petition. Although the Court is not entirely convinced the additional records make such a showing, the issue of when Petitioner knew or should have known he was suffering from an occupational disease is moot for the reasons set forth in ¶¶ 55 through 58.

[74] *Greene v. UEF*, 2003 MTWCC 64, ¶ 4.

[75] In Petitioner's "Written Particulars of Any Claim for Attorney Fees and Penalty" (Petitioner's Witness, Expert Witness, and Exhibit Lists at 4, Docket Item No. 46), Petitioner waived his demand for attorney fees and a penalty. However, the Final Pretrial Order, executed by all parties, sets forth Petitioner's entitlement to attorney fees as an issue to be decided by this Court. Though the inclusion of this issue was presumably an oversight by all counsel, "The pre-trial order supersedes the pleadings and becomes the governing pattern of the lawsuit." *Garcia v. State Compensation Mut. Ins. Fund*, 253 Mont. 196, 201, 832 P.2d 770, 773 (1992), *citing Case v. Abrams* (10th Cir. 1965), 352 F.2d 193, 195. Therefore, the Court must address the issue.

[76] *Pekus v. UEF*, 2003 MTWCC 33, ¶ 4.

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

¶ 67 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 15th day of June, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Garry D. Seaman
Brian J. Hopkins
Bryce R. Floch
Submitted: June 5, 2006