

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 16

WCC No. 2005-1253

JOHN D. CLEMONS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

**ORDER DENYING RESPONDENT'S MOTIONS TO DISMISS, FOR SUMMARY
JUDGMENT, AND FOR A PROTECTIVE ORDER**

Summary: Petitioner alleges he suffers from asbestos-related lung disease as a result of his employment at a Libby, Montana, lumber mill from 1969 to 1995. The mill was owned by St. Regis Paper Company and then Champion International Company until November 1, 1993. It was thereafter owned by Stimson Lumber Company, which is insured by Respondent Liberty Northwest Insurance Corporation. Respondent moves for a protective order until the Court rules on the pending motions to dismiss and for summary judgment. Respondent moves for dismissal and summary judgment based on the following assertions: (1) Petitioner failed to file a petition within two years from the date Respondent denied Petitioner's claim as required under § 39-71-2905(2), MCA; (2) Petitioner is judicially estopped from claiming his work at Stimson is the cause of his asbestos-related disease because of Petitioner's complaint in a separate district court case; and (3) Petitioner's treating physician agreed with an article which put the latency period at fifteen years or more between exposure to asbestos and signs of exposure appearing on x-ray.

Held: Respondent's motions to dismiss and for summary judgment are denied. Likewise, Respondent's motion for a protective order is denied. (1) Section 39-71-2905(2), MCA, is a statute of limitations that reads "[a] petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." However, § 39-71-2905(2), MCA, does not apply to this case because this statute became effective July 1, 1997, and

applies “to claims for injuries occurring on or after [the effective date].”¹ Petitioner alleges the exposure to asbestos that caused his asbestos-related disease occurred between 1969 and March 31, 1995, the date on which he ceased working at the mill. (2) Petitioner’s district court complaint against other parties who allegedly were responsible for Petitioner’s exposure to asbestos is not inconsistent with his claim that asbestos from his employment at Stimson contributed to or caused his asbestos-related lung disease. (3) Respondent’s evidence concerning the latency period for asbestos-related lung disease does not establish as an uncontroverted matter that Petitioner was not injuriously exposed to asbestos during his employment with Stimson. Accordingly, this is an issue that should be decided at trial.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2905, MCA. Section 39-71-2905(2), MCA, applies to claims for injuries occurring on or after July 1, 1997 [the statute’s effective date].

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2905, MCA. The appropriate date to determine whether § 39-71-2905, MCA, applies to a petitioner’s claim is the date he alleges his injury occurred.

Estoppel and Waiver: Judicial Estoppel. A party claiming judicial estoppel must show: (1) the estopped party had knowledge of the facts at the time he or she took the original position; (2) the estopped party succeeded in maintaining the original position; (3) the position presently taken is inconsistent with the original position; and (4) the original position misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party. The Court previously addressed arguments similar to Respondent’s in *Fleming, Young, and Schull* and found that the elements of judicial estoppel were not met. The Court sees no appreciable distinction in the present case.

¶1 Petitioner was employed at a Libby, Montana, lumber mill from 1969 to 1995. From 1960 to November 1, 1993, the mill was owned by Champion International Corporation (Champion). It was then owned by Stimson Lumber Company (Stimson), which is insured by Liberty Northwest Insurance Corporation (Liberty). In his petition to the Workers’

¹ Laws of Montana, Ch. 276, Sec. 34(2) (1997).

Compensation Court, Petitioner alleges his exposure to asbestos while working at the mill caused his asbestos-related lung disease.

UNCONTESTED FACTS

¶2 For purposes of deciding the motions to dismiss and for summary judgment, the relevant uncontested facts are as follows:

¶2a Petitioner was employed at a lumber mill in Libby, Montana, from 1969 to March 31, 1995.²

¶2b Stimson purchased the lumber mill from Champion on November 1, 1993.³

¶2c Petitioner was employed by Stimson between November 8, 1993, and March 31, 1995.⁴

¶2d Petitioner filed a workers' compensation claim for occupational disease benefits which was filed with Respondent on June 19, 2001.⁵

¶2e Respondent denied Petitioner's claim for occupational disease benefits on January 4, 2002.⁶

¶2f Petitioner filed a Petition for Trial with the Workers' Compensation Court on February 22, 2005.⁷

¶2g Petitioner filed a complaint on June 5, 2001, in the Eighth Judicial District Court of Montana against International Paper Company, Champion, St. Regis Corporation, J. Neils Lumber Company, Robinson Insulation

² Ex. A to Affidavit of Ed Roberts; Ex. A to Affidavit of Gary Schild.

³ Affidavit of Ed Roberts, ¶ 3.

⁴ *Id.*, ¶¶ 4, 5.

⁵ Affidavit of Gary Schild, ¶ 3.

⁶ *Id.*, ¶ 4.

⁷ Petition for Trial.

Company, and Does A-Z alleging his asbestos-related disease was caused by these entities.⁸

ISSUES

¶3 The Court must decide the following issues set forth in Liberty's motion to dismiss and for summary judgment:

¶3a Whether Petitioner's claim is barred under § 39-71-2905(2), MCA;

¶3b Whether Petitioner is judicially estopped from claiming his employment at Stimson is a cause of his asbestos-related disease because the position taken by Petitioner in district court is inconsistent with the position taken by Petitioner in the Workers' Compensation Court; and

¶3c Whether Petitioner's treating physician's opinion in a different case that the latency period is fifteen years or more between exposure to asbestos and signs of exposure appearing on x-ray bars Petitioner's claim that his exposure between 1993 and 1995 at Stimson caused his asbestos-related disease.

STANDARD OF REVIEW

¶4 In a motion for summary judgment the moving party must establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.⁹

ANALYSIS AND DECISION

I. Section 39-71-2905(2), MCA's Applicability to Petitioner's Claim

¶5 Section 39-71-2905(2), MCA, requires a petition to be filed within two years of a denial of a claim. Respondent denied Petitioner's claim on January 4, 2002, and Petitioner filed his petition with this Court on February 22, 2005, more than two years after Respondent's denial. Respondent argues that § 39-71-2905(2), MCA, enacted in 1997, applies to Petitioner's claim, and thus, bars Petitioner's petition. No similar statute of limitation existed at the time of Petitioner's injury.

⁸ Ex. 1 to Respondent's Motion to Dismiss and Motion for Summary Judgment and Supporting Brief.

⁹ ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

¶6 Generally, the statutes in effect on an employee's last day of work govern the resolution of an occupational disease claim.¹⁰ However, the Montana Supreme Court has ruled that if the subject of a statute is procedural rather than substantive, the statutes in effect at the time of trial control.¹¹ Respondent asks the Court to find § 39-71-2905(2), MCA, to be procedural.

¶7 In *Fleming v. International Paper Co.*, this Court concluded that “[a] statute affecting procedure may be applied to causes of action arising prior to its enactment and such application does not constitute a retroactive application subject to section 1-2-109, MCA, which provides that statutes are not retroactive unless the legislature expressly provides for retroactive application.”¹²

¶8 Petitioner argues that the Court need not decide whether § 39-71-2905(2), MCA, is procedural or substantive because the legislature specifically directed that § 39-71-2905, MCA, is “effective July 1, 1997, and appl[ies] to claims for injuries occurring on or after [the effective date].”¹³ Petitioner interprets this language to mean that this statute only applies to injuries which occurred on or after July 1, 1997. Petitioner reasons that this statute is inapplicable, since his injuries predate its effective date.

¶9 Respondent, on the other hand, emphasizes the word “claims” in the above-quoted language and argues that any “claims” filed after the July 1, 1997 effective date are governed by § 39-71-2905(2), MCA. Respondent’s emphasis is misplaced.

¶10 In *Fleming, supra*, this Court interpreted this language as Petitioner does in the present case. Specifically, this Court stated in *Fleming* that § 39-71-2905(2), MCA, “was applicable to injuries occurring on or after the effective date.”¹⁴ The Court reaffirms its analysis in *Fleming* and concludes the appropriate date to determine whether § 39-71-2905(2), MCA, applies to Petitioner is the date he alleges his injuries occurred. Because Petitioner only worked for Stimson until 1995 and § 39-71-2905(2), MCA, was effective July 1, 1997, the statute does not apply to Petitioner’s petition.

¹⁰ *Grenz v. Fire and Casualty of Conn.*, 278 Mont. 268, 924 P.2d 264 (1996).

¹¹ *State Compensation Ins. Fund v. Sky Country, Inc.*, 239 Mont. 376, 379, 780 P.2d 1135, 1137 (1989).

¹² 2005 MTWCC 34, ¶ 18 (citation omitted).

¹³ *Laws of Montana*, Ch. 276, Sec. 34(2) (1997) (see “Effective dates – applicability”).

¹⁴ *Fleming*, ¶14 (internal quotations omitted).

II. Barring Petitioner's Claim Based on Judicial Estoppel

¶11 The doctrine of judicial estoppel precludes a party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding.¹⁵ A party claiming judicial estoppel must show: “(1) the estopped party had knowledge of the facts at the time he or she took the original position; (2) the estopped party succeeded in maintaining the original position; (3) the position presently taken is inconsistent with the original position; and (4) the original position misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party.”¹⁶

¶12 This Court previously addressed similar arguments in *Fleming*,¹⁷ *Young*,¹⁸ and *Schull*.¹⁹ Because the Court's language is clear in *Fleming*, it is quoted at length herein:

Contrary to Liberty's contention, the claimant's petition for occupational disease benefits is **not** inconsistent or incompatible with his district court complaint. Read together, the district court complaint and the petition in the present case simply allege that the claimant was exposed to multiple sources of asbestos in the Libby area, including asbestos at his workplace. Any or all of those sources could have caused or contributed to his asbestos-related lung disease. Under such circumstances, the Rules of Civil Procedure permit pleading in the alternative, as well as joinder of multiple defendants potentially liable to the claimant even though it may ultimately be determined that one or more of them is in fact not liable. . . .²⁰

. . . .

Further, since the claimant may have been exposed to multiple sources of asbestos while living and working in Libby, any or all of those sources may

¹⁵ *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶15, 307 Mont. 45, 36 P.3d 408.

¹⁶ *Id.*, ¶16.

¹⁷ *Fleming*, *supra*.

¹⁸ *Young v. Liberty Northwest Ins. Corp.*, WCC No. 2005-1262.

¹⁹ *Schull v. International Paper Co.*, WCC No. 2005-1260.

²⁰ *Fleming*, ¶27 (emphasis in original).

have contributed to his lung disease. He is entitled to sort out liability among those sources.²¹

¶13 Other than the Petitioner's name, the Court sees no real appreciable distinction between the operative facts and arguments laid out in *Fleming* and those in the present case. Therefore, for the same reasons as those set forth in *Fleming*, this Court rejects Respondent's judicial estoppel argument.

III. The Latency Period of Asbestos-Related Disease

¶14 Finally, Respondent notes that in *Johnson v. Liberty Northwest Ins. Corp.*,²² Petitioner's treating physician, Dr. Brad Black, estimated the latency period of asbestos-related disease at fifteen years between the time of exposure and the time of manifestation. Petitioner began working for Stimson on November 8, 1993. He was diagnosed with asbestosis in July 2001. Since this is less than eight years, Respondent asserts that Petitioner could not have been exposed to the cause of his disease for which he now seeks benefits during the time of his employment with Stimson. In support of this contention, Respondent directs the Court to Dr. Black's testimony in *Johnson*.²³

¶15 Petitioner responds that in *Johnson*, Dr. Alan C. Whitehouse opined that the latency period of tremolite asbestos is in the range of 5 to 50 years.²⁴ With respect to Dr. Whitehouse's credentials and experience, this Court noted in *Fleming*:

Dr. Whitehouse is a board certified pulmonologist who has been treating Libby asbestosis cases for approximately three decades. . . . Dr. Whitehouse has evaluated approximately 500 patients from Libby and maintains and tracks data concerning those patients. He has also treated asbestosis patients from the Hanford, Washington, nuclear facility.²⁵

¶16 Neither Dr. Black nor Dr. Whitehouse have yet testified in the present case. Liberty's argument is premised entirely on an opinion offered in *Johnson, supra*. Petitioner responds in kind with a contravening opinion from the same case. In any event, there are facts in dispute which preclude summary judgment on these grounds.

²¹ *Id.*, ¶35.

²² *Johnson v. Liberty Northwest Ins. Corp.*, WCC No. 2004-1092.

²³ *Id.*

²⁴ See *Fleming*, ¶ 44 (quoting from Dr. Whitehouse's affidavit in *Johnson*).

²⁵ See *Fleming*, ¶ 39 (quoting *Doubek v. CNA Ins. Co.*, 2004 MTWCC 76, ¶ 13).

ORDER

¶17 Respondent's motion to dismiss is **DENIED**.

¶18 Respondent's motion for a protective order is **DENIED**.

¶19 Respondent's motion for summary judgment is **DENIED**.

DATED in Helena, Montana, this 20th day of April, 2006.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: Tom L. Lewis
Larry W. Jones
Submitted: September 23, 2005