IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 34

WCC No. 2005-1292

ELDON FLEMING

Petitioner

vs.

INTERNATIONAL PAPER COMPANY,
as successor-in-interest to
CHAMPION INTERNATIONAL COMPANY,
and
LIBERTY NORTHWEST INSURANCE CORPORATION

Respondents.

DECISION AND ORDER DENYING LIBERTY NORTHWEST'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

Summary: The claimant alleges he suffers from asbestos-related lung disease as a result of his employment at a Libby, Montana, lumber mill from 1960 to May 28, 1998. The mill was owned by Champion International Company until November 1, 1993. It was thereafter owned by Stimson Lumber Company, which is insured by Liberty Northwest Insurance Corporation. Liberty moves to dismiss the petition, arguing that (1) the claimant failed to mediate his claim against it; (2) the petition is barred by the statute of limitations governing petitions to the Workers' Compensation Court; (3) the claimant is judicially estopped from pursuing a claim against Liberty; and (4) the latency period for the claimant's lung disease is so long that his disease cannot be legally attributed to his employment with Stimson.

Held: (1) The claimant filed for mediation but the mediation was derailed by Liberty. The claimant is entitled to complete the mediation process and the Court has jurisdiction to order the Department of Labor and Industry to do so and to retain jurisdiction over his petition pending such completion. (2) The statute of limitations, § 39-71-2905(2), MCA (1997-2003), was tolled by the claimant's filing for mediation and has not run. (3) The filing of a district court complaint against other parties who allegedly were responsible for the claimant's exposure to asbestos is not inconsistent with his claim that asbestos at his workplace contributed to or caused his asbestos lung disease; none of the elements for a judicial estoppel are met. (4) Liberty's evidence concerning the latency period for

asbestos lung disease does not demonstrate as an uncontroverted matter that the claimant was not injuriously exposed to asbestos during his employment with Stimson.

Topics:

Mediation: Right to Mediation. A claimant who files for mediation has a right to have his claim mediated by the Department of Labor and Industry. Since mediation is a prerequisite to filing a petition with the Workers' Compensation Court, the Court has jurisdiction to compel mediation.

Mediation: Compelling Mediation. A claimant who files for mediation has a right to have his claim mediated by the Department of Labor and Industry. Since mediation is a prerequisite to filing a petition with the Workers' Compensation Court, the Court has jurisdiction to compel mediation.

Jurisdiction: Workers' Compensation Court: Scope. The Workers' Compensation Court has inherent jurisdiction to assure access to the Court. Since mediation is a prerequisite to filing a petition with the Workers' Compensation Court, the Court has jurisdiction to compel mediation.

Jurisdiction: Workers' Compensation Court: Mediation Requirement. While mediation is required before a claimant may petition the Workers' Compensation Court for benefits, where a claimant has requested mediation and mediation is derailed through no fault of the claimant, the Court has jurisdiction to entertain a petition for benefits and order the Department of Labor and Industry to complete mediation so that the claimant may proceed with his petition.

Limitations Periods: Workers' Compensation Court Petitions. The statute requiring the claimant to petition the Workers' Compensation Court for benefits within two years of an insurer's denial of benefits, § 39-71-2905(2), MCA (1997-2003), is tolled during mediation. *See Preston v. Transportation Ins. Co.*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527.

Limitations Periods: Tolling. The statute requiring the claimant to petition the Workers' Compensation Court for benefits within two years of an insurer's denial of benefits, § 39-71-2905(2), MCA (1997-2003), is tolled during mediation. *See Preston v. Transportation Ins. Co.*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2905(2), MCA (1997-2003). The statute requiring the claimant to petition the Workers' Compensation Court for benefits within two years of an insurer's denial of benefits, § 39-71-2905(2), MCA (1997-2003), is tolled during mediation. *See Preston v. Transportation Ins. Co.*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527.

Cases Discussed: *Preston v. Transportation Ins. Co.*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527. The statute requiring the claimant to petition the Workers' Compensation Court for benefits within two years of an insurer's denial of benefits, § 39-71-2905(2), MCA (1997-2003), is tolled during mediation.

Limitations Periods: Statutes of Repose. The statute requiring the claimant to file a petition within two years of a denial of benefits, § 39-71-2905(2), MCA (1997-2003), is a statute of limitations, not a statute of repose.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2905(2), MCA (1997-2003). The statute requiring a claimant to file a petition within two years of a denial of benefits, § 39-71-2905(2), MCA (1997-2003), is a statute of limitations, not a statute of repose.

Limitations Periods: Statutes of Repose. Use of the word "must" in a statute governing the time in which an action must be commenced does not make the statute one of repose rather than one of limitations. Only where the language of the statute indicates it overrides other limitations periods and/or unequivocally indicates that it cannot be tolled will it be held to be a statute of repose.

Limitations Periods: Retroactivity. Unless some other time is indicated, a statute adopting a new limitations period for bringing an action, or amending an existing statute of limitations, applies to all proceedings that are brought thereafter even though the cause of action arose prior to passage. Statutes of limitations are procedural and not subject to the rule precluding retroactive application of statutes which do not expressly provide for retroactivity. *See Fisher v. First Citizens Bank,* 2000 MT 314, 302 Mont. 473, 14 P.3d 1228.

Estoppel and Waiver: Judicial Estoppel. To judicially estop a party, four elements must typically be met. Those elements are: (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.

Estoppel and Waiver: Judicial Estoppel. Where a claimant may have been exposed to multiple sources of asbestos, some or all of which may have contributed to his asbestos-related disease, he is not judicially estopped from pursuing a petition for occupational disease benefits even though he is pursuing a district court action against non-employers allegedly responsible for some of his exposure. The Rules of Civil Procedure permit a party to join multiple defendants who are potentially liable for his injuries and to pursue his action in the alternative. Since the Workers' Compensation Court has exclusive jurisdiction over occupational disease claims, a claimant of necessity may be required to file both a district court action and a Workers' Compensation Court petition to achieve the same end.

Occupational Disease: Last Injurious Exposure. Where a claimant is exposed to asbestos which gives rise to lung disease, the exposure occurred over a period of years, and the exposure involved more than one employer, the insurer for the employment at which the claimant was "last injuriously exposed" is solely liable for his disease.

Occupational Disease: Last Injurious Exposure. The last injurious exposure rule applicable to sequential injuries or diseases is different from the last injurious exposure rule applicable where the claimant suffers a single disease from long-term exposure to fumes, dust, or chemicals. *Caekaert v. State Compensation Mut. Ins. Fund,* 268 Mont. 105, 111, 885 P.2d 495, 499 (1995) and *Liberty Northwest Ins. Corp. v. Champion Int'l. Corp.,* 285 Mont. 76, 945 P.2d 433 (1997), are distinguished.

Occupational Disease: Last Injurious Exposure. In applying the last injurious exposure rule, difficulty may arise in determining the degree of exposure necessary to find the exposure injurious. Montana courts have not addressed this problem and have not adopted a standard for determining the degree of exposure necessary. According to Larson's Workers' Compensation Law treatise, "[t]raditionally, courts applying the last injurious exposure rule have not gone on past the original finding of some exposure to weigh the relative amount or duration of exposure under various carriers and employers." § 153.02[7][a] at 153-19. However, some courts have adopted more stringent requirements.

Summary Judgment: Disputed Facts. The insurer is not entitled to summary judgment based on the fact that asbestos disease has a long latency period where the evidence upon which it relies does not show as an uncontroverted matter that the claimant's exposure to asbestos at the insured's place of employment was so short and trivial as to be wholly non-contributory to his disease. The insurer's proof is insufficient to entitle it to summary judgment under any of the standards identified in Larson's Workers' Compensation Law treatise as governing the degree of exposure necessary to impose liability under the last injurious exposure doctrine.

¶1 This is an asbestos case. The petitioner (claimant) has been diagnosed with asbestosis-related lung disease. In his petition he attributes his disease to exposure to asbestos while working at a lumber mill in Libby, Montana. He worked at the mill from 1960 to May 1998. From 1960 to November 1993, the mill was owned by Champion International Corporation (Champion). In November 1993, the mill was sold to Stimson Lumber Company (Stimson), which operated it thereafter. Sometime after the sale, Champion merged with or was acquired by International Paper Company (International Paper) but will be generally referred to hereinafter as "Champion" rather than International Paper.

¶2 Champion was self-insured during the claimant's employment, or at least it was at the time it sold the mill to Stimson. With respect to the present claim, Stimson is insured by Liberty Northwest Insurance Corporation (Liberty). The claimant is seeking, in the alternative, benefits from Champion or Liberty.

Liberty's Pending Motions

¶3 Liberty moves in the alternative to dismiss the petition and for summary judgment. (Liberty's Motion to Dismiss (Rule 12(b)(6)) and Motion for Summary Judgment and Supporting Brief.) In its motion, Liberty tenders four grounds in support of its request that the petition be dismissed. Those grounds, as restated, are:

¶ 3a The claim against it has not been mediated.

¶ 3b The claim is barred by the two-year statute of limitation set out in section 39-71-2905(2), MCA (1997-2003).

¶ 3c Based on a district court action commenced against the State of Montana, Burlington Northern Santa Fe Railway Company, Robinson Insulation Company, John Swing, and unnamed "Does", the claimant is judicially estopped from claiming benefits on account of his work at the lumber mill.

¶ 3d The latency period for asbestosis is so long that the claimant's current disease could not be due to his exposure while working for Stimson.

Admitted and Uncontested Facts

¶4 The facts material to Liberty's motions are found in the non-controverted allegations of the petition; affidavits of Gary Schild, Cindy Brown Felton, and Ed Roberts, to which numerous exhibits are attached; a copy of a complaint filed on behalf of the claimant in the Montana Eighth Judicial District Court; and exhibits attached to Petitioner's Response to Liberty NW's Motion to Dismiss and Motion for Summary Judgment.[1] The uncontroverted facts are as follows:

¶ 4a The claimant was continuously employed at a lumber mill near Libby, Montana, from 1960 through May 28, 1998. (Petition for Hearing ¶ 1 and Liberty Northwest's Response to Petition for Hearing at 2.[2])

¶ 4b The lumber mill was owned and operated by Champion from 1960 until November 1, 1993. Champion has since been merged with or been acquired by International Paper.

¶ 4c On November 1, 1993, the Libby mill was purchased by Stimson. Stimson began operating the mill on November 5, 1993. (Affidavit of Ed Roberts at 1.)

¶ 4d Upon purchasing the Libby mill, Stimson rehired the claimant as its employee. The claimant continued working at the mill until he retired on May 28, 1998, a period of approximately four and a half years. (*Id.* at 2.)

¶ 4e On December 4, 2001, Liberty, which insures Stimson, received a written claim for compensation from the claimant. The claim was signed on

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[1]While not verified by affidavit, the authenticity of the documents has not been disputed by either of the respondents and in any event consist of correspondence and other documents associated with the claimant's request for mediation. The documents were generated by the parties' attorneys or are of the type the attorneys would have personal knowledge of.

[2]The allegation of employment and the time frame of employment are not denied by either of the respondents in their written responses to the petition.

November 26, 2001,[3] and stated that the claimant was suffering from "[l]ung disease caused by years of asbestos exposure" while working at Stimson. (Affidavit of Gary Schild, Ex. A.)

¶ 4f Liberty's claims adjuster initially requested medical records respecting the claim. (*Id.,* Exhibit B at 2.) Thereafter, on March 11, 2003, Liberty denied liability for the claim. (*Id.* at 1.)

¶ 4g On March 22, 2004, the claimant submitted a similar claim to Champion, alleging that his asbestos-related lung disease arose from his employment during the Champion years. Champion denied the claim on April 1, 2004. (Petition for Hearing ¶ IV.)[4]

¶ 4h On September 21, 2004, the claimant underwent a medical panel evaluation by Dr. Richard L. Sellman. In his report, Dr. Sellman opined that the claimant was suffering from "pleural thickening" caused by his exposure to asbestos during his employment; however, Dr. Sellman opined that the "pleural thickening is in no way responsible for his dyspnea on exertion, and this does not equate to the diagnosis of asbestosis."[5] (Ex. 3 to Petitioner's Response to Liberty NW's Motion to Dismiss and Motion for Summary Judgment at 3.)

¶ 4i Sometime prior to January 26, 2005, the claimant filed a request for mediation with respect to his claim against Champion. The request was filed with the Workers' Compensation Mediation Unit of the Department of Labor and Industry (Department). (*See* Ex. 5 to Petitioner's Response to Liberty NW's Motion to Dismiss and Motion for Summary Judgment.) Mediation as to Champion apparently took place but was unsuccessful.

¶ 4j On February 16, 2005, the claimant submitted a written request for mediation with respect to Liberty's denial of liability. (Affidavit of Gary Schild, Ex. C.) Mediation was scheduled for March 16, 2005. (Ex. 1 to Petitioner's

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[3]The Affidavit of Gary Schild, to which the claim is attached, states that the claimant's signature was dated November 29, 2001, however, I read the date as November 26, 2001.

[4]The allegation concerning submission of the claim to Champion and its denial of liability are not controverted by Champion in its response to the petition.

[5]This fact is set forth solely for historical purposes only and not to indicate that the doctor's opinions are undisputed.

Response to Liberty NW's Motion to Dismiss and Motion for Summary Judgment.)

¶ 4k On March 2, 2005, Liberty's attorney requested that mediation scheduled for March 16, 2005, be vacated until the claimant had undergone an occupational disease medical panel examination with respect to the claim against Liberty. In that letter, Liberty's attorney specifically noted that a panel evaluation was necessary under section 39-72-602, MCA, so that Liberty could "review the report and respond" to it.[6] (Affidavit of Gary Schild, Ex. D and Petitioner's Response to Liberty NW's Motion to Dismiss and Motion for Summary Judgment, Ex. 2.)

¶ 4l On March 4, 2005, the Mediation Unit vacated the scheduled mediation "until the Occupational Disease evaluation has been completed." (Affidavit of Gary Schild, Ex. E and Petitioner's Response to Liberty NW's Motion to Dismiss and Motion for Summary Judgment, Ex. 4.)

¶ 4m The claimant thereafter requested a medical panel examination;

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[6]The occupational disease panel provisions in effect at the time of the mediation request provided as follows:

39-72-602. Insurer may accept liability -- procedure for medical examination when insurer has not accepted liability. (1) An insurer may accept liability for a claim under this chapter based on information submitted to it by a claimant.

(2) In order to determine the compensability of claims under this chapter when an insurer has not accepted liability, the following procedure must be followed:

(a) The department shall direct the claimant to an evaluator on the list of physicians for an examination. The evaluator shall conduct an examination to determine whether the claimant is totally disabled and is suffering from an occupational disease. In the case of a fatality, the evaluator shall examine the records to determine if the death was caused by an occupational disease. The evaluator shall submit a report of the findings to the department.

(b) Within 7 working days of receipt, the department shall mail the report of the evaluator's findings to the insurer and claimant.

(c) Upon receipt of the report, if a dispute exists over initial compensability of an occupational disease, it is considered a dispute that, after mediation pursuant to department rule, is subject to the jurisdiction of the workers' compensation court.

however, the Department, which is responsible for arranging for such examinations, denied the request. In its denial, the Department indicated that the examination done in September 2004, satisfied the occupational disease panel requirements of section 39-72-602, MCA. The letter further stated:

> The role of the occupational disease panel is to determine if a claimant is totally disabled and is suffering from an occupational disease. The panel physician does not determine which employment is responsible for the occupational disease.
>
> Since the lung condition has been paneled and the information provided to the panel doctor covered the time from 1992 thru 2002, it appears the requirements set for the [sic] in Section 39-72-602, MCA.[sic], have been met by the Department. Therefore, an Occupational Disease panel Examination with [sic] not be scheduled.

(Affidavit of Gary Schild, Ex. F, and Petitioner's Response to Liberty NW's Motion to Dismiss and Motion for Summary Judgment, Ex. 7.)

¶ 4n On April 13, 2005, Liberty notified the claimant and the Department that it "continues to deny Mr. Fleming's claim against Stimson even in light of the OD evaluation that was done on the Champion claim." (Affidavit of Gary Schild, Ex. G.)

¶ 4o As of May 4, 2005, mediation with respect to the claim against Stimson was never rescheduled. (Affidavit of Cindy Brown Felton.) While mediation has not been completed, there is no evidence that the petition for mediation with respect to the claim against Liberty was dismissed.

¶ 4p Meanwhile, on April 14, 2005, the claimant filed his petition with this Court.

DECISION

¶5 A motion to dismiss will be granted where the facts alleged in the petition show that no claim for relief can be stated under any legal theory, *Duffy v. Butte Teachers' Union*, No. 332, AFL-CIO, 168 Mont. 246, 253, 541 P.2d 1199, 1203 (1975), or where they affirmatively demonstrate that there is an insuperable bar to recovery, such as the statute of limitations, *Beckman v. Chamberlain*, 673 P.2d 480, 482 (Mont. 1983). While Liberty

captions its motion as a motion to dismiss and an alternative motion for summary judgment, the motion to dismiss is ultimately subsumed in the motion for summary judgment. I therefore apply summary judgment standards in disposing of the motions.

¶6 "Summary judgment is an extreme remedy and should never be substituted for trial if a material factual controversy exists." *Spinler v. Allen*, 1999 MT 160, ¶ 16, 295 Mont. 139, 983 P.2d 348 (1999). On the other hand, if the facts material to the motion are undisputed and entitle a party to summary judgment, then summary judgment is proper. *Mogan v. Cargill, Inc.*, 259 Mont. 400, 403, 856 P.2d 973, 975 (1993). What facts are material are determined by the substantive law applicable to the case. *DeVoe v. State*, 281 Mont. 356, 366, 935 P.2d 256, 263 (1997).

I. Failure to Mediate Defense

¶7 Liberty argues that the petition must be dismissed on account of the claimant's failure to mediate his claim against it. Mediation is mandatory, §§ 39-71-2408, -2905, MCA, and jurisdictional, *Peterson v. Montana Schools Group Ins. Auth.*, 2005 MTWCC 30.

¶8 The claimant attempted to comply with the mediation requirement by requesting mediation. His request was derailed at the insistence of Liberty and it is a bit disingenuous for Liberty to now attempt to derail the claimant's petition because mediation was never completed. Mediation should have proceeded.

¶9 As the facts set out earlier show, the claimant requested mediation on February 16, 2005. Liberty objected to the mediation, citing the claimant's failure to submit to an occupational disease panel evaluation required under section 39-72-602, MCA (2003), and earlier versions of that section.[7] Liberty did so despite the fact that the claimant had undergone a panel evaluation in connection with his claim against Stimson, an evaluation which found that the claimant was suffering from pleural lung thickening due to his exposure while working at the Libby lumber mill. Based on Liberty's objection, the scheduled mediation session was cancelled. The claimant then attempted to satisfy Liberty's objection by requesting a second panel evaluation but was rebuffed by the Department, which is responsible for arranging such evaluations, because he had already been examined. The Department reasoned that an evaluation with respect to the claim against Liberty was unnecessary in light of the fact that the evaluation previously done covered the claimant's long-term exposure at the mill, including his exposure when Champion owned the mill. (*See* ¶ 4.)

[7]The 2003 version of the section is set out in full in footnote 6.

¶10 The Department's determination that a second evaluation was unnecessary was clearly correct. However, for whatever reason, a mediation hearing was never rescheduled with respect to the claimant's February 16, 2005 mediation request and mediation has never been completed. That failure deprived the claimant of his statutory right to mediate his claim and prevented him from satisfying the requirement that a claim be mediated before petitioning the Workers' Compensation Court.

¶11 The failure of the Department to proceed with mediation gives this Court jurisdiction to order completion of the mediation necessary to enable it to adjudicate the merits of the claim. "Jurisdiction as applied to courts is the power or capacity *given by law* to a court to entertain, hear and determine the particular case or matter." *State ex rel. Johnson v. District Court of Eighteenth Judicial Dist.*, 147 Mont. 263, 267, 410 P.2d 933, 935 (1966) (quoting from *State ex rel. Bennett v. Bonner,* 123 Mont. 414, 425, 214 P.2d 747, 753 (1950). "Whenever jurisdiction is conferred, all the means necessary to carry the same into effect are provided." *State ex rel. Eisenhauer v. Second Judicial Dist. Court*, 54 Mont 172, 168 P. 522, 523 (1917). Based on those jurisdictional principles, this Court may issue such orders as necessary to preserve its jurisdiction over workers' compensation and occupational disease disputes and to assure that its jurisdiction over such suits is not frustrated by a failure or refusal of a party or agency to act.

¶12 Subsequent to the Court's drafting the above determination concerning the mediation defense, the Court received a Case Status Report from claimant's counsel. That report states that mediation as to Liberty has now been completed. In that light, it is unnecessary to order the Department to complete mediation. In light of the interruption and delay of the mediation proceeding, the Court had jurisdiction over the petition when it was filed. Since mediation is now complete, this Court has full jurisdiction to adjudicate the merits of the claim.

II. Statute of Limitations

¶13 Liberty next urges that the claim against it must be dismissed in any event on account of the claimant's failure to bring his petition within two years of Liberty's denial of his claim.

¶14 The limitations period invoked by Liberty is found in section 39-71-2905(2), MCA (1997-2003), which provides:

> (2) A petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied.

This provision was enacted in 1997 and became effective on July 1, 1997. 1997 Montana Laws, ch. 276, §§ 29 and 34(2). It was applicable to "injuries occurring on or after" the

effective date.

¶15 The claimant was allegedly subjected to asbestos exposure at his workplace until May 1998, which was after the limitations period became effective. However, he suffers from an alleged occupational disease rather than an injury. Since the applicability section for the 1997 amendments mentions "injury," the question arises as to whether the limitations period applies to the occupational disease claim in this case.

¶16 In *Penrod v. Hoskinson*, 170 Mont. 277, 552 P.2d 325 (1976), the Supreme Court held that a specific statute of limitations applicable to medical malpractice actions which was enacted by the 1971 legislature did not apply to malpractice which occurred prior to the effective date of the statute. In so finding, the Supreme Court relied on the general rule that statutes are not "retroactive unless expressly so declared." 170 Mont. 277, 281. Since the legislature had not expressly provided that the new statute be applied retroactively, the Court held that the longer, general statute of limitations for torts which were in effect at the time of the malpractice governed the claim.

¶17 However, in the more recent case of *Fisher v. First Citizens Bank,* 2000 MT 314, 302 Mont. 473, 14 P.3d 1228, the Court held that statutes of limitation are procedural and that unless the legislature expressly provides otherwise, they should be applied to actions brought after the time they are effective, irrespective of when the actions accrue:

> ¶ 14 Statutes of limitations are generally considered laws of procedure. If the legislature passes a new statute of limitations, all rights of action are to be enforced under the new procedure regardless of when the cause of action accrued unless there is an explicit savings clause set forth in the statute. [Citations omitted.]

In *Fisher,* the legislature had enacted a savings clause expressly providing that it did not affect rights and duties that had matured or proceedings that had begun.

¶18 *Fisher* effectively overrules *Penrod.* The reference in *Fisher* to a "new statute of limitations" does not distinguish the decision in *Fisher* from that in *Penrod*; the statute in *Penrod* was a "new" and distinct statute for malpractice claims. Moreover, the holding in *Fisher* is based on the Court's characterization of statutes of limitation as "procedural." 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. *Haugen v. Blaine Bank of Montana*, 279 Mont. 1, 8-9, 926 P.2d 1364, 1368 (1996).

¶19 There is no savings clause in the 1997 amendments, hence they apply to claims filed after the effective dates of the amendments. The 1999 amendments to section 39-72-403, MCA, did not change the limitations period adopted in 1995.

¶20 Therefore, if the legislature's reference to "injury" when making the new limitations inapplicable to injuries occurring prior to the effective date of the 1995 amendments does not encompass occupational diseases, the amendments apply to all occupational diseases irrespective of the date they arose or were diagnosed. If the reference does apply, then the section still applies since the occupational disease claim was not made until after July 1, 1997.

¶21 Liberty denied the claim against it on March 11, 2003. The petition in this case was filed on April 14, 2005, which is more than two years after the denial. However, in *Preston v. Transportation Ins. Co.*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527, the Montana Supreme Court held that mediation proceedings toll the statute of limitations. While the statute of limitations involved in that case was the statute applicable to rescinding a contract based on mistake of fact, section 27-2-203, MCA, the Court found that tolling arises out of the mandatory nature of the mediation statutes:

> ¶ 36 As § 39-71-2408(1), MCA, states, mediation is mandatory under the Workers' Compensation Act before a party can even petition the Workers' Compensation Court for relief. In addition, the Workers' Compensation Court does not have jurisdiction during the pendency of a statutorily-mandated mediation, given that a claimant may only petition the Workers' Compensation Court "after satisfying dispute resolution requirements otherwise provided" in the Workers' Compensation Act--such as mandatory mediation.
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> ¶ 37 Given these clear statutory constructs, we hold that the statute of limitations tolled during the pendency of Preston's mediation.

Preston, ¶¶s 36-37. The rationale of the Court requires the same tolling conclusion with respect to section 39-71-2905(2), MCA (1997-2003), unless, as Liberty argues, the two-year limitation period is a statute of repose rather than a statute of limitations.

¶22 Statutes of repose provide time limits which are absolute and which cannot be tolled. That is because they extinguish the underlying right giving rise to the cause of action. *Hardgrove v. Transportation Ins. Co.,* 2004 MT 340, ¶ 10, 324 Mont. 238, 103 P.3d 999. For a court to characterize a limitations period as a statute of repose rather than a statute of limitation, the language of the statute must clearly indicate legislative intent to extinguish the right of action after the stated period. That was the case in *Hardgrove*

where subsections (1) and (2) of the 1983 version of section 39-72-403, MCA,[8] established basic limitations periods – true statutes of limitation – for filing occupational disease claims, but went on to provide in subsection (3):

> (3) Notwithstanding the provisions of subsections (1) and (2) of this section, no claim to recover benefits under this chapter may be maintained unless the claim is properly filed within 3 years after the last day upon which the claimant or the deceased employee actually worked for the employer against whom compensation is claimed.

Similarly, in *Joyce v. Garnaas,* 1999 MT 170, 295 Mont. 198, 983 P.2d 369, the Supreme Court held that a requirement that any legal malpractice action be commenced within ten years of the malpractice was a statute of repose. In that case, as in *Hardgrove*, the statute established a basic limitations period – three years after discovery of the malpractice in the case of legal malpractice – but the legislature then expressly overrode that basic limitation with an absolute limitations period, providing that "in **no** case may the action be commenced after 10 years from the date of the act, error, or omission." *Id.* at ¶ 12, emphasis added.

¶23 The provision at issue in this case contains no similar, extraordinary or overriding provision. The use of the word "must" in the section does not change the provision into one of repose. Indeed, the word "must" was used in the basic statute of limitations period

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[8]Subsections (1) and (2) of 39-72-403, MCA (1983), provided:

> (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 1 year from the date the claimant knew or should have known that his total disability condition resulted from an occupational disease. When a beneficiary seeks benefits under this chapter, his claims for death benefits must be presented in writing to the employer, the employer's insurer, or the division within 1 year from the date the beneficiaries knew or should have known that the decedent's death was related to an occupational disease.
>
> (2) The division may, 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, waive the claim time requirement up to an additional 2 years.