

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.

FILED

JUL - 8 2005

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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

¹While 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.

²The 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

³The 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.

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

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