

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 35

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 GRANTING INTERNATIONAL PAPER COMPANY'S
MOTION TO DISMISS

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. International Paper Company, which later merged with or acquired Champion, moves to dismiss the petition, alleging that it is barred by the statute of limitations found in section 39-72-403, MCA, and also moves for summary judgment respecting the claimant's request for indemnity benefits.

Held: Statutes of limitation are procedural, thus the limitations period in effect at the time the petition is filed applies. The period for filing a written occupational disease claim in this case is therefore governed by 2003 law. The 2003 version of section 39-72-403, MCA, required the claimant to file his occupational disease claim within one year of learning that he was suffering from an occupational disease. Since his petition shows that he filed his claim against International Paper Company more than one year after learning of his alleged disease, his claim is barred.

Topics:

Procedure: Motion to Dismiss. Motions to dismiss are viewed with disfavor and will be granted only where the allegations of the petition or

complaint either shows that the petitioner is not entitled to relief of any sort or discloses an “insuperable bar” to recovery, such as the running of the applicable statute of limitations.

Procedure: Motion to Dismiss. For purposes of the motion, all well-pleaded allegations of the petition are deemed true.

Limitations Periods: Claim Filing: Occupational Disease. The limitations period in effect on the date the claim is filed governs the timeliness of the claim.

Limitations Periods: Claim Filing: Occupational Disease. Where an occupational disease claim is filed in March 2004, section 39-72-403, MCA (2003), which was in effect on the date of filing, applies in determining the timeliness of the claim.

Limitations Periods: Retroactivity. A statute of limitations is procedural. Therefore, the statute in effect at the time an action or a claim is filed governs its timeliness.

Statutes: Retroactivity. The rule that statutes are not retroactive unless the legislature expressly provides for retroactivity is inapplicable to statutes of limitation since such statutes are procedural and their application to claims and actions brought after their effective dates do not constitute retroactive applications.

¶1 The petitioner (claimant) has been diagnosed with asbestos-related lung disease. In his petition he attributes his disease to exposure to asbestos at a lumber mill in Libby, Montana, where he worked from 1960 to May 1998. From 1960 to November 1993, the mill was owned by Champion International Company (Champion), which was self-insured. 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).

¶2 The claimant names both International Paper and Stimson’s insurer – Liberty Northwest Insurance Corporation (Liberty) – as respondents to his occupational disease claim. International Paper moves to dismiss and in the alternative for summary judgment.

Decision

I. Motion to Dismiss

¶3 In its motion to dismiss, International Paper asserts that the claim against it is barred by the statute of limitations set forth in section 39-72-403(2), MCA.

¶4 Motions to dismiss are viewed with disfavor and will be granted only where the allegations of the petition or complaint either show that the claimant is not entitled to relief of any sort, *Steele v. McGregor*, 1998 MT 85, ¶ 9, 288 Mont. 238, 956 P.2d 1364, or discloses an “insuperable bar” to recovery, *Varco-Pruden v. Nelson*, 181 Mont. 252, 255, 593 P.2d 48, 49 (1979), such as the running of the applicable statute of limitations, *Beckman v. Chamberlain*, 673 P.2d 480, 482 (Mont. 1983). For purposes of the motion, all well pleaded allegations of the petition are deemed true. *Cape v. Crossroads Correctional Center*, 2004 MT 265, ¶ 10, 323 Mont. 140, 99 P.3d 171.

¶5 On its face, the petition shows that at least by November 2001 the claimant believed that he was suffering from an occupational disease caused by his work at the Libby lumber mill. That was the date on which he filed a claim against Stimson. (Petition for Hearing, ¶ V.) His claim against International Paper, however, was not filed until March of 2004. (*Id.*, ¶ IV.)

¶6 The statute of limitations for filing a written claim for compensation under the Occupational Disease Act is fixed by section 39-72-403, MCA. In its brief in support of its motion to dismiss, International Paper cites both the 1993 version of the statute and the 1997 version. (International Paper’s Motion to Dismiss and Supporting Brief at 2.) The 1993 version was in effect at the time Champion took over the mill and employed the claimant. The 1997 version was in effect at the time the claimant retired.

¶7 The 1993 and 1997 versions of section 39-72-403, MCA, are different and lead to different results. Thus, although neither International Paper nor the claimant addresses what version of the statute applies, the Court must do so.

¶8 In relevant part, the version in effect in 1993 when the claimant last worked for International Paper provided:

39-72-403. Time when claims must be presented. (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 department within 2 years 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 department 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 department 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.¹

(Emphasis added.) Under this version, the event triggering the commencement of the limitations period is the claimant's knowledge "that his **total disability** condition resulted from an occupational disease." (Emphasis added.) Thus, until the claimant becomes totally disabled and is aware that his total disability resulted from an occupational disease, the limitations period does not commence running.

¶9 The petition does not allege the date on which the claimant asserts he became totally disabled. It is entirely possible that the claimant was not totally disabled at the time he filed his claim with Liberty and that total disability arose less than two years prior to his filing his claim against International Paper. Thus, the petition on its face does not show that the 1993 statute of limitations has run.² The motion to dismiss would therefore have to be denied if the 1993 statute applies.

¶10 Section 39-72-403, MCA, was amended in 1995. The amendment deleted any reference to total disability and shortened the time for filing a claim to one year. In 1999, the legislature again amended the section; however, the amendments simply changed the waiver procedure of subsection (2), substituting the insurer for the Department of Labor and Industry as the party responsible for granting a waiver, and added a provision giving the Workers' Compensation Court jurisdiction over disputes regarding waivers. As it presently reads, section 39-72-403, MCA (2003), provides:

39-72-403. Time when claims must be presented. (1) When a claimant seeks benefits under this chapter, the claimant's claims for benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the claimant knew or should have known that the claimant's condition resulted from an occupational disease. When a beneficiary seeks benefits under this chapter, claims for death benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the beneficiaries knew

¹Subsection (2) has no application to the facts of this case since the claimant's filing of a claim in 2001 shows that by that time he clearly understood that he was suffering from an occupational disease. In light of that knowledge, there is no ground for extending the limitations period set out in subsection (1).

²In his response to International Paper's motion to dismiss, the claimant relies on an opinion by Dr. Richard L. Sellman, who conducted an occupational disease panel evaluation, that the claimant is not disabled from any sort of work on account of his asbestos-related lung disease. (Petitioner's Response to International Paper's Motion to Dismiss at 2.) The evaluation occurred on September 21, 2004.

or should have known that the decedent's death was related to an occupational disease.

(2) The insurer 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.

(3) Any dispute regarding a claim filing time is considered a dispute that, after mediation pursuant to department rule, is subject to jurisdiction of the workers' compensation court.

As can be seen from reading subsection (1), the limitations period is no longer tied in any way to total disability. Under the amended subsection, the claimant's knowledge that he suffered from an occupational disease, irrespective of whether it was disabling, commenced the running of the one-year limitations period.

¶11 The claimant's filing of a claim against Stimson in November 2001 undisputably demonstrates that he was aware he was suffering from an occupational disease stemming from his employment at the Libby lumber mill. Thus, the limitations period commenced at that time and expired a year later. The claim against International Paper would be therefore barred under the limitations period adopted in 1995 and under current law.³ The Court must therefore determine which version of section 39-72-403, MCA, applies in this case.

¶12 In *Penrod v. Hoskinson*, 170 Mont. 277, 552 P.2d 325 (1976), the Supreme Court held that a statute of limitations enacted by the 1971 legislature with respect to medical malpractice actions did not apply to medical 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."⁴ 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 was in effect at the time of the malpractice, governed the claim.

¶13 However, in the more recent case of *Fisher v. First Citizens Bank*, 2000 MT 314, 302 Mont. 473, 14 P.3d 1228, the Supreme Court held that unless the legislature

³The claimant does not allege that any waiver of the limitations period was ever granted. The time for seeking a waiver has expired since a waiver could extend the period only to November 2004, and that date is already passed.

⁴Section 1-2-109, MCA, provides: "[n]o law contained in any of the statutes of Montana is retroactive unless expressly so declared." The provision has been part of Montana law since 1895.

expressly provides otherwise a statute of limitations applies to all actions brought after its effective date irrespective of when the actions arose:

¶ 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. . . .

Fisher, 2000 MT 314, ¶14. In *Fisher*, the legislature had adopted a savings clause which stated that the new limitations period did not affect rights and duties that had matured or proceedings that had begun.

¶14 *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).

¶15 There is no savings clause in the 1995 and 1999 amendments to section 39-72-403, MCA. Thus, those amendments apply to the claim filed against International Paper since the claim was filed in March of 2004.

¶16 I therefore conclude as a matter of law that the claim against International Paper is barred under section 39-72-403, MCA (2003).

II. International Paper’s Motion for Summary Judgment

¶17 International paper also moves for summary judgment based on the claimant’s tender of Dr. Sellman’s September 21, 2004 report stating that the claimant is not disabled and can work without restrictions. It argues that in light of that report, the claims for indemnity benefits must be dismissed. Since the motion to dismiss must be granted, the motion for summary judgment is moot.⁵

¶18 Similarly, its joining in Liberty’s judicial estoppel defense (see International Paper Company’s Response to Liberty Northwest Insurance Corporation’s Motion to Dismiss and for Summary Judgment) is similarly moot and would be denied in any event (see Decision

⁵The Court therefore does not address the merits of the motion. However, I note that it is possible that the claimant became disabled after the report was issued.

and Order Denying Liberty Northwest's Motions to Dismiss and for Summary Judgment, 2005 MTWCC 34).

ORDER

¶19 International Paper's motion to dismiss is **granted**. The petition is **dismissed with prejudice** as to International Paper.

¶20 International Paper's motions for summary judgment are deemed **moot** in light of the granting of its motion to dismiss.

DATED in Helena, Montana, this 8th day of July, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Jon L. Heberling
Mr. Leo S. Ward
Mr. Larry W. Jones
Mr. Charles E. McNeil
Submitted: June 6, 2005