

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 57

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/Insurers.

ORDER DENYING THE FILING OF A REPLY BRIEF AND RECONSIDERATION OF
ORDER DISMISSING INTERNATIONAL PAPER COMPANY

*Appealed to Supreme Court 12/27/05
Reversed and Remanded 09/23/08*

Summary: The petitioner 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. Upon its motion, this Court previously dismissed International Paper Company pursuant to § 39-72-403, MCA (2003). Liberty Northwest's motion to dismiss was denied. From the Court's order dismissing International Paper, Petitioner sought reconsideration. This motion was denied on August 17, 2005. Petitioner then filed a second motion for reconsideration of this Court's Order denying Petitioner's first motion for reconsideration. With respect to Petitioner's second motion for reconsideration, he also moves the Court for leave to file a reply brief.

Held: Petitioner's motion for leave to file a reply brief is denied. ARM 24.5.337 provides only for the filing of an initial brief in support of a motion for reconsideration and, upon receipt of a response or the expiration of the time for filing a response, the motion is deemed submitted. The rule does not allow for the filing of a reply brief in support of a motion for reconsideration and the Court declines to read such a provision into the rule.

Being fully briefed, Petitioner's motion for reconsideration is deemed submitted and is denied. Although ARM 24.5.337(1) allows for reconsideration of *any* order or decision of the Workers' Compensation Court, which would include an order denying a motion for reconsideration, the interests of judicial economy and finality mandate that the Court will entertain motions for "re-reconsideration" only under compelling circumstances. The Court finds no such circumstances in the present case. To the extent that Petitioner raises a new argument which was not raised in either his response to International Paper's motion to dismiss, by way of Petitioner's own motion before International Paper was dismissed from this suit, or in Petitioner's first motion for reconsideration, the Court does not reach the merits of this argument because it is being raised for the first time in Petitioner's second motion for reconsideration. Petitioner has offered no compelling reason why this argument was not raised before a second motion for reconsideration. Absent such a compelling reason, the Court will not consider an issue that has not been raised previously despite ample opportunity to do so.

Topics:

Procedure: Issues. Absent compelling circumstances, new issues may not be raised for the first time in a motion for reconsideration.

Procedure: Post-Trial Proceedings: Motion for Reconsideration. Absent compelling circumstances, new issues may not be raised for the first time in a motion for reconsideration.

Procedure: Post-Trial Proceedings: Motion for Reconsideration. ARM 24.5.337 provides, in pertinent part, that "[u]pon receipt of the response, or the expiration of the time for such response, the motion will be deemed submitted for decision unless the court requests oral argument." The rule does not allow for the filing of a reply brief in support of a motion for reconsideration and the Court declines to read such a provision into the rule.

Procedure: Post-Trial Proceedings: Motion for Reconsideration. Although ARM 24.5.337(1) allows for reconsideration of *any* order or decision of the Workers' Compensation Court which would include an order denying a motion for reconsideration, the interests of judicial economy and finality mandate that the Court entertain motions for "re-reconsideration" only under compelling circumstances.

Procedure: Rules. While the Workers' Compensation Court may look to the Montana Rules of Civil Procedure where its own rules are silent, it is not required to adopt the Rules of Civil Procedure.

¶1 Eldon Fleming (Petitioner) requests leave to file a reply brief to International Paper Company's (International Paper) response to Petitioner's brief in support of a second motion to reconsider.

¶2 The rule controlling motions for reconsideration in the Workers' Compensation Court is ARM 24.5.337, Motion for Reconsideration. This rule provides as follows:

(1) Any party may move for reconsideration of any order or decision of the workers' compensation court. The motion shall be filed within 20 days after the order or decision is served. The opposing party shall have 10 days thereafter to respond unless the court orders an earlier response. Upon receipt of the response, or the expiration of the time for such response, the motion will be deemed submitted for decision unless the court requests oral argument.

This rule does not allow for a reply brief to be filed by the moving party. Accordingly, the motion to file a reply brief must be denied.

¶3 Because the motion to file a reply brief is denied, the Court deems Petitioner's second motion for reconsideration submitted based upon the receipt of International Paper's response to Petitioner's second motion for reconsideration.

¶4 As a general proposition, this Court is reluctant to entertain multiple motions for reconsideration. Although ARM 24.5.337(1) allows for reconsideration of *any* order or decision of the Workers' Compensation Court which, given a liberal interpretation, would include an order denying a motion for reconsideration, this Court does not believe it should routinely entertain motions for "re-reconsideration." In the interests of judicial economy and finality, the cycle of reconsideration must stop at some point in time. Therefore, only under compelling circumstances does the Court contemplate granting a second motion for reconsideration. In the present case, the facts and circumstances do not rise to such a level.

¶5 On August 17, 2005, this Court issued its original Order denying reconsideration of the Order dismissing International Paper. In that Order, the Court stated, "the arguments raised by the petitioner were not raised in its original response to International Paper Company's . . . motion to dismiss. The motion should therefore be denied for that reason alone."¹

¹ Order Denying Reconsideration of Order Dismissing International Paper Company, ¶ 2.

¶6 In his second motion for reconsideration, Petitioner raises two grounds ostensibly warranting reconsideration of the Court's previous Order. First, Petitioner argues that this Court lacked jurisdiction to enter its August 17, 2005 Order because Rule 24(d), Mont. R. Civ. P. (2005), requires notice to the Montana Attorney General in decisions involving questions of Montana constitutional law. Rule 24(d) states:

When the constitutionality of any act of the Montana legislature is drawn in question in any action, suit or proceeding to which neither the state nor any agency or any officer or employee thereof, as such officer or employee, is a party, the party raising the constitutionality of the act shall notify the Montana attorney general and the court of the constitutional issue. This notice shall be in writing, shall specify the section of the code or chapter of the session law to be construed and shall be given contemporaneously with the filing of the pleading or other document in which the constitutional issue is raised. The attorney general may within 20 days thereafter intervene as provided in Rule 24(c) on behalf of the state.

Mont. R. Civ. P. 24(d) (2005). However, this Court has not formally adopted Mont. R. Civ. P. 24(d), and is not bound by the rule. In *Polk v. Planet Ins. Co.*, 2001 MTWCC 44A, ¶ 3 (May 31, 2002), this Court held:

Rule 24(d) has never been formally adopted by this Court. While the Workers' Compensation Court may look to the Montana Rules of Civil Procedure for guidance in procedural matters which are not encompassed in its own rules, *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 436, 849 P.2d 1036, 1037 (1993), it is not required to do so in every instance.

¶7 However, even if this Court decided to adopt Rule 24(d) in the present case, the Montana Attorney General was given notice by the Court (August 5, 2005) and by Petitioner (August 3, 2005). The Attorney General filed a Notice of Intent Not To Intervene on August 23, 2005. Therefore, Petitioner suffered no harm due to the Court's failure to wait for a response from the Attorney General before issuing its August 17, 2005 Order.

¶8 Petitioner's second argument is that § 39-72-103, MCA, is unconstitutional because it violates his right to equal protection under Article II, Section 4, of the Montana Constitution. The Court does not reach the merits of this argument, however, because it is being raised for the first time in Petitioner's second motion for reconsideration. Assuming the merits of this argument, Petitioner has offered no compelling reason why it was not raised either in response to International Paper's motion to dismiss, by way of Petitioner's own motion before International Paper was dismissed from this suit, or in Petitioner's first

motion for reconsideration. Absent such a compelling reason, the Court will not consider an issue that has not been raised previously despite ample opportunity to do so. See, e.g., *Bauer v. C.N.A. Commercial Ins.*, 2002 MTWCC 2A, ¶¶ 3-4; *Wiard v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 31A, ¶ 2; *Hiatt v. Montana Schools Group Ins. Auth.*, 2001 MTWCC 66, ¶ 2.

ORDER

¶9 Petitioner's motion for leave to file a reply brief with respect to his second motion for reconsideration is **denied**.

¶10 Pursuant to ARM 24.5.337, Petitioner's second motion for reconsideration is deemed **submitted**.

¶11 Petitioner's second motion for reconsideration is **denied**.

¶12 This Order is certified as final for purposes of appeal.

¶13 Any party to this dispute may have twenty days in which to request a rehearing from this Order Denying the Filing of a Reply Brief and Reconsideration of Order Dismissing International Paper Company.

DATED in Helena, Montana, this 20th day of December, 2005.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Ms. Laurie Wallace
Mr. Jon L. Heberling
Mr. Leo S. Ward
Mr. Larry W. Jones
Mr. Charles E. McNeil
Submitted: October 11, 2005