

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 39

WCC No. 2004-1092

RAYMOND JOHNSON

Petitioner

vs.

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

Respondents/Insurers.

ORDER DENYING MOTION TO DISMISS AND
FOR SUMMARY JUDGMENT

Summary: The claimant alleges he suffers from an occupational disease as a result of his exposure to asbestos at a Libby lumber mill. The facts are similar to those in *Fleming v. International Paper Co. and Liberty Northwest Ins. Corp.*, WCC No. 2005-1292, as reported in 2005 MTWCC 34. As in *Fleming*, Liberty Northwest Insurance Corporation, which insured the claimant's last employer at the mill, moves to dismiss on grounds that the claimant cannot prove any exposure he had to asbestos while working for Stimson Lumber Company was injurious.

Held: The motions are denied for the reasons set forth in *Fleming v. International Paper Co. and Liberty Northwest Ins. Corp.*, 2005 MTWCC 34.

Topics: See topics in *Fleming v. International Paper Co. and Liberty Northwest Ins. Corp.*, 2005 MTWCC 34.

¶1 This is another in a series of four asbestos cases involving application of the last injurious exposure rule, § 39-72-303(1), MCA (1993-2003). As in the other three cases,¹

¹*Fleming v. International Paper Co.*, WCC No. 2005-1292; *Schull v. International Paper Co.*, WCC No. 2005-1260; and *Young v. Liberty Northwest Ins. Corp.*, WCC No. 2005-1262.

the claimant worked for a time at a Libby, Montana, lumber mill operated by Champion International Company (Champion) for a number of years and then by Stimson Lumber Company (Stimson). As in the other three cases, Liberty Northwest Insurance Corporation (Liberty), which insured Stimson, moves for summary judgment, urging that the claimant's exposure to any asbestos while working for Stimson was noninjurious and that it cannot therefore be held liable for the claimant's asbestos-related lung disease. As in the other three cases, Liberty's motion for summary judgment must be denied.

Procedural Background

¶2 Liberty filed a motion for summary judgment on February 10, 2005. Thereafter, at Liberty's request, oral argument was held. The argument focused on whether the claimant's exposure while working for Stimson was "injurious." At the close of the hearing, I asked the claimant's counsel to provide a post-hearing memorandum indentifying "the specific portions of Dr. Whitehouse's affidavits which she contends show that any exposure claimant had while working for Stimson was an 'injurious' exposure." (March 28, 2005 Minute Entry.) I stated that the motion would then be "deemed submitted for decision." (*Id.*)

¶3 Subsequent to the hearing, the claimant moved for leave to take Dr. Whitehouse's deposition for purposes of elucidating the nature of any injury caused by the claimant's work for Stimson. Liberty did not object to the motion as long as it was provided an opportunity to take a later deposition of Dr. Whitehouse if its motion is denied. I granted the motion, and that is where the matter stood until I began working on the decision just issued in *Fleming v. International Paper Co. and Liberty Northwest Ins. Corp.*, 2005 MTWCC 34. At that point, based on legal research into what constitutes a "last injurious exposure" for purposes of an occupational disease,² I determined that the motion for summary judgment in this case, as well as in *Fleming* and the other two cases, must be denied.

Decision

²As I noted in *Fleming*, 2005 MTWCC 34, ¶¶ 46-53, no Montana case addresses degree of exposure necessary to constitute a "last injurious exposure" where the exposure occurs over a long period of time and results in a single disease. Montana cases have addressed the last injurious exposure rule where a claimant suffered from a prior injury or previously diagnosed occupational disease and allegedly suffered a new and further material aggravation of the injury or disease. None of the parties in this or any of the other cases provided legal research concerning case law or treatises addressing the last injurious exposure rule in the context of a single disease diagnosed after a long-term, cumulative exposure.

¶4 In the present case, the claimant worked at the Libby mill from 1963 until August 31, 2001. His employment thus overlapped both Champion's and Stimson's ownership of the mill. Champion owned the mill until November 1, 1993, therefore the claimant's employment by Stimson lasted nearly eight years. The claimant was diagnosed with asbestos-related lung disease in 2001; however, a retrospective review by Dr. Alan C. Whitehouse indicated that he had x-ray findings consistent with asbestosis as early as 1995. (See Liberty Northwest's Motion for Summary Judgment and Supporting Brief, Facts ¶¶ 5, 6, & 8 at 2.)

¶5 Dr. Whitehouse's "general affidavit" was filed by the respondent in connection with Liberty's motion for summary judgment in this case. I have discussed the affidavit in *Fleming*, and the possible legal standards applicable to it. As I noted in *Fleming*, the affidavit does not rule out a finding that the claimant's alleged exposure to asbestos while working for Stimson was sufficient to constitute an "injurious exposure" under any of the last injurious exposure standards adopted by other courts. Accordingly, Liberty was not in that case, or in any of the four cases, entitled to summary judgment based on its injurious exposure argument. That is not to say that it may be ultimately determined that the claimant's exposure during his employment with Stimson was not injurious for purposes of the rule. That ultimate determination will have to await further development of the nature, extent, and consequences of the exposure and a determination as to which legal standard Montana will follow or craft for determining the degree of exposure necessary to apply the last injurious exposure rule.

ORDER

¶6 Liberty's motion for summary judgment is **denied**.

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: March 21, 2005