

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 45

WCC No. 2004-1189

DUANE KESSEL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

Appealed to Supreme Court 07/14/06

Affirmed 11/27/07

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Summary: The claimant petitioned the Court for a determination that he suffers from a work-related asbestos lung disease. The insurer moves to dismiss the petition as time-barred under section 39-71-2905(2), MCA (1995-2003).

Held: With respect to occupational disease claims, section 39-71-2905(2), MCA (1995-2003), does not commence running until after a medical panel evaluation has been conducted and the insurer denies the claim following the evaluation. A pre-panel evaluation denial is not a denial under section 39-71-2905(2), MCA (1995-2003), since it does not give rise to a dispute over which the Workers' Compensation Court has jurisdiction. Under 39-72-602, MCA (2001), is deemed a "nonacceptance" rather than a denial of benefits.

Topics:

Limitations Periods: Workers' Compensation Court Petitions. In occupational disease cases, the two-year limitations period prescribed by section 39-71-2905(2), MCA (1995-2003), begins to run only after the medical panel evaluation required in section 39-72-602, MCA (2001), has been held, a panel report issued, and the insurer has denied liability after

reviewing the report. The limitations period is not triggered by a pre-panel denial of liability.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-2905, MCA (1995-2003). In occupational disease cases, the two-year limitations period prescribed by section 39-71-2905(2), MCA (1995-2003), begins to run only after the medical panel evaluation required in section 39-72-602, MCA (2001), has been held, a panel report has issued, and the insurer has denied liability after reviewing the report. The limitations period is not triggered by a pre-panel denial of liability.

¶1 The petitioner (claimant) seeks occupational disease benefits for an asbestos-related lung disease allegedly caused by his exposure to asbestos while working at Stimson Lumber Company (Stimson) in Libby, Montana. Stimson was insured by the respondent, Liberty Northwest Insurance Corporation (Liberty). Liberty moves for summary judgment on the ground that the claimant's petition is time-barred.

Uncontested Facts

¶2 Through affidavits and exhibits attached to those affidavits, Liberty has tendered the following material facts, none of which are disputed by the claimant:

¶2a The claimant submitted a claim for compensation dated December 3, 2001, wherein he stated he was suffering from "[l]ung disease caused by years of asbestos exposure" while working for Stimson. (Ex. A to Affidavit of Gary Schild.)

¶2b On August 2, 2002, an adjuster for Liberty wrote a letter to the claimant notifying him that:

Based on the healthcare information received as of this date, this letter is to notify you that your claim for asbestos related disease is denied. It is our opinion there is not sufficient evidence to indicate this is related to your employment at Stimson Lumber Co.

(Ex. B to Affidavit of Gary Schild.)

¶2c On August 22, 2002, the Department of Labor and Industry notified the claimant and Liberty that a medical panel examination of the claimant had been scheduled for September 20, 2002. (Ex. B to Affidavit of Larry W. Jones.)

¶2d At the claimant's request, the examination was cancelled. (Exs. C and D to Affidavit of Larry W. Jones.) Liberty acquiesced to the cancellation but did so without waiving "any other rights or defenses that it may have with regard to these claims." (Ex. C to Affidavit of Larry W. Jones.)

¶2e On August 2, 2004, the claimant submitted a written request for mediation. The request was received by the Department of Labor and Industry on the same date. (Ex. C to Affidavit of Gary Schild.)

¶2f Mediation took place on August 27, 2004. (Ex. D to Affidavit of Gary Schild.) The mediator issued a recommendation on August 31, 2004, and mailed it to the parties on September 2, 2004. (Affidavit of Gary Schild.)

¶2g On October 18, 2004, the claimant underwent an occupational disease panel evaluation by Dr. Richard L. Sellman, who concluded that the claimant was suffering from an asbestos-related lung disease as a result of his employment. (Ex. 1 to Petitioner's Response to Respondent's Motion for Summary Judgment.)

¶2h On November 12, 2004, the claimant filed his petition in this case. (Petition for Hearing.)

Discussion

¶3 Liberty urges that the present petition is barred by the two-year limitations period prescribed by section 39-71-2905(2), MCA (1995-2003), which provides, "[a] petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." It urges that the provision is a statute of repose and is therefore not subject to tolling. However, this Court recently held the section is **not** a statute of repose and that mediation tolls the running of the limitations period. *Fleming v. International Paper Co. and Liberty Northwest Ins. Corp.*, 2005 MTWCC 34.

¶4 Citing *Bosch v. Town Pump, Inc.*, 2004 MT 330, 324 Mont. 138, 102 P.3d 32, Liberty urges that even if section 39-71-2905(2), MCA (1995-2003), is a statute of limitations rather than one of repose, the mediation did not toll the limitations period because the request was made more than two years after the denial of the claim and was therefore untimely. *Bosch*, however, holds that the limitations period must be calculated by excluding the day of the event which gives rise to the claim (*id.*, ¶ 8), which in this case was August 2, 2002. Since August 2nd is not counted, the limitations period commenced running on August 3, 2002. Thus, August 2, 2004, was the last day of the limitations period. Since the claimant filed for mediation on that date, the mediation proceedings tolled the limitations period during their pendency.

¶5 The claimant is still not out of the woods. The mediation recommendation issued on August 31, 2004. The claimant and Liberty then had twenty-five days in which to accept or reject the mediator's recommendation. The proceedings therefore extended the limitations period an additional fifty-four days, *Preston v. Transportation Ins. Co.*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527, or until September 25, 2005.

¶6 However, the claimant urges that the event triggering the limitations period under section 39-71-2905(2), MCA (1995-2003), is not Liberty's original denial but rather its denial **after** the medical panel evaluation. The Court agrees.

¶7 Statutes must be construed to give effect to all of their provisions if possible. *Montco v. Simonich*, 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997). "[T]erms used in the statute should not be isolated from the context in which they were used by the Legislature." *State v. Nye*, 283 Mont. 505, 510, 943 P.2d 96 (1997). In the present case, section 39-71-2905(2), MCA (1995-2003), and the word "denied" must be read together with and in the context of section 39-72-602, MCA (2001), which provides:

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.

The language of the section indicates that an initial, premedical panel denial of an occupational disease claim is to be treated as nonfinal, i.e., a "nonacceptance" rather than a denial. The section expressly requires that where a claim is not initially accepted, the medical panel provisions must be followed, and only after a report is issued does a denial

become a dispute which is both subject to mediation and to the jurisdiction of the Workers' Compensation Court. Thus, the Workers' Compensation Court lacks jurisdiction over an occupational disease claim which has not been accepted by an insurer until the medical panel provision is satisfied, and until such time, section 39-71-2905(2), MCA (1995-2003), does not come into play. I therefore conclude and hold that the limitations period under section 39-71-2905(2), MCA (1995-2003), did not commence running until November of 2004, **after** the medical panel report issued. Thus, the petition in this case is not time-barred.

¶8 Liberty notes that in acquiescing to the 2002 postponement of the medical panel examination it reserved all defenses. That reservation, however, does not change the result in this case. Compliance with section 39-72-602, MCA (2001), was mandatory. At the time Liberty issued its reservation, it had no statute of limitations defense. It could have insisted, but did not, that the evaluation proceed in 2002.

ORDER

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

¶10 A new scheduling order will be issued setting this matter on the next Kalispell trial docket.

DATED in Helena, Montana, this 4th day of August, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Jon L. Heberling
Mr. Larry W. Jones
Mr. Charles E. McNeil
Submitted: April 22, 2005