

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 28

WCC No. 2004-1189

DUANE KESSEL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER OF CERTIFICATION

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.348. Since ARM 24.5.348(2) places no conditions on the Court's certification for purposes of appeal, it would appear some discretion is granted to the Court in certifying matters as final for purposes of appeal.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: § 39-71-2904. Since § 39-71-2904, MCA, provides that appeals from this Court shall be done in the manner provided by law for appeals from the district court in civil cases, the Court looks to Rule 54(b), Mont. R. Civ. P., for guidance in determining whether certification is proper.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure - By Section: Rule 54(b). With respect to Rule 54(b) certification, the Montana Supreme Court has held that the lower court must do more than "merely recite the magic words" in certifying a case, but "must clearly articulate the reasons and factors underlying its decision to order a Rule 54(b) certification." *Kohler v. Croonenberghs*, 2003 MT 260, ¶ 14, 317 Mont. 413, 77 P.3d 531.

Appeals (To Supreme Court): Certification. With respect to Rule 54(b) certification, the Montana Supreme Court has held that the lower court must do more than "merely recite the magic words" in certifying a case, but "must clearly articulate the reasons and factors underlying its decision to order a

Rule 54(b) certification.” *Kohler v. Croonenberghs*, 2003 MT 260, ¶ 14, 317 Mont. 413, 77 P.3d 531.

Appeals (To Supreme Court): Certification. Adopting the guiding principles for Rule 54(b) certification that the Montana Supreme Court set forth in *Kohler v. Croonenberghs*, 2003 MT 260, ¶ 16, 317 Mont. 413, 77 P.3d 531, this Court determined an order of certification is appropriate in a case in which Respondent’s motion for summary judgment was denied where the parties agreed this is the “infrequent harsh case” meriting a favorable exercise of jurisdiction, certification is in the interest of sound judicial administration and public policy, and the five factors articulated in *Kohler*, ¶ 15, which an appellate court will normally consider in determining whether certification is proper, also favor certification.

¶1 The parties have filed a stipulation with this Court seeking an Order of certification for appeal of the Court’s August 4, 2005, Order denying Respondent’s motion for summary judgment.¹ Pursuant to this stipulation, and for the reasons set forth below, this matter is certified as final for purposes of appeal.

¶2 Section 39-71-2904, MCA,² provides, in pertinent part, that an appeal from a final decision of the Workers’ Compensation Judge shall be filed directly with the Supreme Court of Montana in the manner provided by law for appeals from the district court in civil cases. Moreover, ARM 24.5.348(2) states: “The [workers’ compensation] court’s final certification for the purposes of appeal shall be considered as a notice of entry of judgment.” Since this rule places no conditions on the Court’s certification for purposes of appeal, it would appear some discretion is granted to the Court in certifying matters as final for purposes of appeal.

¶3 However, since § 39-71-2904, MCA, provides that appeals from this Court shall be done in the manner provided by law for appeals from the district court in civil cases, the Court believes it appropriate to look to the procedures followed by the district courts in certifying matters as final for purposes of appeal. Therefore, the Court looks to Rule 54(b), Mont. R. Civ. P., for guidance in determining whether certification in this case is proper. The Montana Supreme Court has previously held the Workers’ Compensation Court may

¹ Respondent had moved for summary judgment claiming that Petitioner’s petition was time barred under § 39-71-2905(2), MCA (1995-2003). This Court denied Respondent’s motion upon the grounds that, with respect to occupational disease claims, § 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.

² Since the subject of this Order pertains to procedural matters, citations to statutes shall be to the current statutes (2005) unless otherwise indicated within the text of this Order.

look to the Montana Rules of Civil Procedure for guidance in procedural matters which are not encompassed in its own rules.³

Rule 54(b) provides, in pertinent part:

When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

¶4 With respect to Rule 54(b) certification, the Supreme Court has recently held that the lower court must do more than “merely recite the magic words” in certifying a case.⁴ “Rather, the trial court ‘must clearly articulate the reasons and factors underlying its decision to order a Rule 54(b) certification.’”⁵

¶5 In this regard, the Supreme Court has set forth three guiding principles for Rule 54(b) certification. These are: “(1) the burden is on the party seeking final certification to convince the district court that the case is the ‘infrequent harsh case’ meriting a favorable exercise of discretion; (2) the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final; (3) the district court must marshal [sic] and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated.”⁶

I. This case merits a favorable exercise of jurisdiction.

¶6 In the present case, the parties have jointly agreed that this is the “infrequent harsh case” meriting a favorable exercise of jurisdiction. They note that if this case were to go to final judgment and this Court’s holding is reversed on appeal, the only adequate remedy would be repayment of costs and recapture of lost time, neither of which are allowed by law. Additionally, the parties jointly note that the Court’s Order in this case impacts other cases and it would be an injudicious use of both the Court’s and the respective parties’ time and resources in these other cases to proceed through trial only to discover later that the Court’s ruling may have been in error.

³ *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 436, 849 P.2d 1036, 1037 (1993).

⁴ *Kohler v. Croonenberghs*, 2003 MT 260, ¶ 14, 317 Mont. 413, 77 P.3d 531.

⁵ *Id.* (Citation and internal quotations omitted.)

⁶ *Id.*, ¶ 16.

II. Certification is in the interest of sound judicial administration and public policy.

¶7 In addition to the present case, the parties note that three other cases currently pending before this Court are directly affected by the Court's ruling in this case. Also, four other petitions have been filed solely to toll the statute of limitations in the event this case is reversed on appeal. Additionally, in light of the fact that these cases all involve allegations of asbestos exposure at the Stimson mill in Libby, it is entirely likely that additional cases will be filed which will be affected by this Court's ruling in the present case.

III. Factors upon which this Court has relied in granting certification.

¶8 In *Kohler*, the Montana Supreme Court set forth five factors that an appellate court will normally consider in determining whether certification is proper. These are:

- (1) The relationship between the adjudicated and unadjudicated claims;
- (2) the possibility that the need for review might or might not be mooted by future developments in the district court;
- (3) the possibility that the reviewing court might be obliged to consider the same issue a second time;
- (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final;
- (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.⁷

¶9 Depending on the particular case, all or some of the above factors may bear upon the propriety of an Order granting a Rule 54(b) certification.⁸ In the present case, the Court agrees with the parties and finds these factors preponderate in favor of certification.

¶10 With respect to the relationship of the adjudicated claim to the unadjudicated claims, Respondent's motion is for summary judgment based on the statute of limitations. If, ultimately, Respondent prevails on this matter on appeal, the unadjudicated claims are disposed of in their entirety.

⁷ *Id.*, ¶ 15 (citing, *Roy v. Neibauer*, 188 Mont. 81, 87, 610 P.2d 1185, 1189 (1980)).

⁸ *Roy v. Neibauer*, 188 Mont. 81, 87, 610 P.2d 1185, 1189 (1980).

¶11 There is no possibility that the need for review might be mooted by future developments in this Court. The parties have jointly stated in their Stipulation for Certification that “no matter what the outcome is of the trial on the merits . . . the August 4, 2005, ruling of the Court will be appealed.” Aside from taking the parties at their word, this makes sense to the Court. If Petitioner prevails on the merits, no doubt Respondent will appeal, among other issues, this Court’s denial of the summary judgment motion for which the parties are now seeking certification. Conversely, if Respondent prevails on the merits, Petitioner will appeal which would, in turn, invite a cross-appeal from Respondent of this Court’s denial of Respondent’s summary judgment motion.

¶12 As noted above, multiple cases currently pending in this Court, and one that has already been appealed,⁹ may be impacted by the decision in the present case. Therefore, the interests of judicial economy and consistency mitigate in favor of certification.

ORDER

¶13 For the reasons set forth above, it is **ORDERED** that this Court’s ruling of August 4, 2005, denying Respondent’s motion for summary judgment is certified as final for purposes of appeal.

DATED in Helena, Montana, this 10th day of July, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Laurie Wallace
Jon L. Heberling
Larry W. Jones
Charles E. McNeil

⁹ On December 27, 2005, this Court received Petitioner’s Notice of Appeal in the matter of *Fleming v. International Paper Co.*, WCC No. 2005-1292. *Fleming* involved another employee of the same mill in Libby who has alleged an occupational disease claim stemming from asbestos exposure. This Court denied Petitioner’s second motion for reconsideration of the Court’s earlier Order dismissing Respondent, International Paper, pursuant to § 39-72-403 (2003).