

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 51

WCC No. 2008- 2056

LUCILE KILGORE

Petitioner

vs.

TRANSPORTATION INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

APPEALED TO MONTANA SUPREME COURT - JANUARY 2, 2009

Dismissed by Joint Motion for Remand

Summary: Petitioner was an employee of the W.R. Grace mine in Libby and was diagnosed with asbestos-related disease. Petitioner petitioned the Court for permanent partial disability benefits in the form of an impairment award in the amount of 45 percent. Petitioner also sought a penalty, costs, and attorney fees. Before trial, the parties stipulated to Petitioner's treating physician's 45 percent impairment rating. Respondent argued, however, that Petitioner's claim was time-barred pursuant to this Court's ruling in *Fleming v. International Paper Co.*

Held: Petitioner is entitled to permanent partial disability benefits in the form of a 45 percent impairment rating. After the trial in this matter concluded, the Montana Supreme Court reversed this Court's decision in *Fleming*. The Supreme Court's ruling is dispositive of Respondent's statute of limitations defense in this matter. Respondent's denial of Petitioner's claim was premised upon this Court's ruling in *Fleming*, which was not reversed until after this matter had gone to trial. Respondent's reliance on this Court's decision was reasonable. Therefore, Petitioner is not entitled to attorney fees or a penalty.

Topics:

Penalties: Insurers. Where Petitioner's nurse practitioner noted that she had a long history of asthma and asbestosis, and a progress note from

Partnership Health stated that Petitioner planned on obtaining documentation on possible asbestosis, Respondent reasonably relied upon the Workers' Compensation Court's ruling in *Fleming v. International Paper Co.*, 2005 MTWCC 35 (reversed in *Fleming*, 2008 MT 327), in arguing that Petitioner's claim was untimely filed pursuant to § 39-72-403, MCA (2001).

Attorney Fees: Cases Denied. Where a nurse practitioner noted that Petitioner had a long history of asthma and asbestosis, and a progress note from Partnership Health stated that Petitioner planned on obtaining documentation on possible asbestosis, Respondent reasonably relied upon the Workers' Compensation Court's ruling in *Fleming v. International Paper Co.*, 2005 MTWCC 35 (reversed in *Fleming*, 2008 MT 327), in arguing that Petitioner's claim was untimely filed pursuant to § 39-72-403, MCA (2001).

Attorney Fees: Reasonableness of Insurers. Where a nurse practitioner noted that Petitioner had a long history of asthma and asbestosis, and a progress note from Partnership Health stated that Petitioner planned on obtaining documentation on possible asbestosis, Respondent reasonably relied upon the Workers' Compensation Court's ruling in *Fleming v. International Paper Co.*, 2005 MTWCC 35 (reversed in *Fleming*, 2008 MT 327), in arguing that Petitioner's claim was untimely filed pursuant to § 39-72-403, MCA (2001).

¶ 1 The trial in this matter was held on Tuesday, August 19, 2008, in Kalispell, Montana. Petitioner Lucile Kilgore was present and represented by Laurie Wallace. Respondent Transportation Insurance Company was represented by Bryce R. Floch.

¶ 2 Exhibits: Exhibits 1-3, 6-8, and 20-22 were admitted without objection. Respondent's proposed Exhibits 23 and 24 were excluded as untimely. Exhibits 4-5 and 9-19 were withdrawn pursuant to stipulation of counsel.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Dr. Michael Curtis, and Dr. Thomas Shull Lemire were taken and made a part of the record. Petitioner was sworn and testified at trial.

¶ 4 Issues Presented: The Court must determine the following contested issues of law contained in the Pretrial Order¹:

¹ At trial, the parties stipulated to striking the first contested issue of law – Whether the Petitioner suffered an occupational disease arising out of and in the course of her employment with W.R. Grace – from the Pretrial Order.

- ¶ 4a Whether Petitioner is entitled to permanent partial disability benefits, in the form of an impairment award in the amount of 45 percent.
- ¶ 4b Whether Petitioner is entitled to an increase in [an] award for unreasonable delay or refusal to pay proper workers' compensation benefits pursuant to § 39-71-2907, MCA.
- ¶ 4c Whether Petitioner is entitled to costs and attorneys' fees pursuant to § 39-71-611 and/or 612, MCA.²

FINDINGS OF FACT

¶ 5 Petitioner was a credible witness and the Court finds her testimony at trial credible.

¶ 6 Petitioner was employed by W.R. Grace & Co. from approximately 1978 through September 1987.³ She worked in the labor pool, warehouse, test lab, and in maintenance.⁴ Petitioner worked in the mine and mill as required by her maintenance job duties.⁵

¶ 7 W.R. Grace was enrolled in Plan II of the Occupational Disease Act. Respondent is the insurer of W.R. Grace.⁶

¶ 8 Petitioner filed her claim for compensation on or about July 21, 2001, alleging that she suffered from asbestos-related lung disease arising out of her W.R. Grace employment.⁷ Respondent denied Petitioner's claim on December 2, 2005.⁸

¶ 9 On March 12, 1985, Petitioner was examined at the Rockwood Clinic in Spokane, Washington. The treatment note states that Petitioner was referred to the clinic by Dr.

² Pretrial Order at 3.

³ Trial Test.

⁴ Trial Test.

⁵ Trial Test.

⁶ Pretrial Order at 2.

⁷ *Id.*

⁸ *Id.*

Patton for evaluation of her cough and dyspnea.⁹ Petitioner reported to the clinic that her work included cleaning dust off the floors at a vermiculite mine where asbestos was present.¹⁰ Petitioner's exam revealed clear lungs, a chest x-ray within normal limits, and small airway disease.¹¹

¶ 10 On March 13, 1985, Petitioner's results showed that her cough was likely due to an allergic disease. The clinic report states that her smoking and the dust at work also contributed to her bronchial irritability.¹²

¶ 11 On March 13, 1985, Dr. Richard Byrd, performed a diagnostic fiberoptic bronchoscopy on Petitioner.¹³ Dr. Byrd noted that Petitioner had been exposed to asbestos and tobacco, and suffered from a cough that had been unresponsive to antibiotics.¹⁴ Dr. Byrd reported that the bronchoscopy revealed some evidence of acute and chronic bronchitis.¹⁵

¶ 12 Petitioner testified at trial that she informed Dr. Byrd that she worked around dust at W.R. Grace.¹⁶ Petitioner further testified that Dr. Byrd asked whether she could reduce the amount of dust she encountered at W. R. Grace. Petitioner informed him that she could not eliminate dust exposure at work.¹⁷

¶ 13 On June 15, 1994, nurse practitioner Beverly Rooley examined Petitioner.¹⁸ Rooley's treatment note states, "Lucille has a long history of asthma and asbestosis."¹⁹

⁹ Ex. 2 at 11.

¹⁰ *Id.*

¹¹ *Id.*

¹² Ex. 2 at 12.

¹³ Ex. 2 at 18.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Trial Test.

¹⁷ Trial Test.

¹⁸ Ex. 8 at 3.

¹⁹ *Id.*

Rooley's assessment did not mention any asbestos-related findings, but found acute exacerbation of asthma with a possibility of bronchitis.²⁰

¶ 14 A November 16, 1998, Partnership Health progress note states that Petitioner "[i]s planning on obtaining documentation on possible asbestosis . . . worked in [a] vermiculite mine (WR Grace) in Libby 1976-1987."²¹

¶ 15 Dr. Paul Loehnen examined Petitioner on December 10, 1998. Dr. Loehnen recorded that Petitioner worked around vermiculite in Libby from 1976 to 1987. Dr. Loehnen's impression revealed that Petitioner's asthma was well-controlled at that time and made no mention of any concern about asbestos-related disease.²²

¶ 16 Dr. Thomas Shull Lemire performed a follow-up exam of Petitioner on March 29, 2000. He noted Petitioner's history of asthma and questioned whether she might have asbestosis in light of her work around asbestos in the mine.²³

¶ 17 A July 25, 2000, Partnership Health treatment note from Dr. Michael Curtis assessed Petitioner with asthma and possible asbestosis.²⁴

¶ 18 Dr. Alan C. Whitehouse examined Petitioner on December 27, 2000.²⁵ Dr. Whitehouse noted that Petitioner came to see him for asbestosis.²⁶ Dr. Whitehouse took a history from Petitioner concerning her exposure to asbestos. Petitioner reported that she had worked in the W.R. Grace test lab. Dr. Whitehouse recorded that the test lab was known to be "a fairly high exposure area."²⁷ Petitioner recalled to Dr. Whitehouse that Dr. Lemire had previously stated that she had asthma and emphysema. Dr. Lemire also indicated to Petitioner in March 2000 that she might have an abnormal chest x-ray with

²⁰ *Id.*

²¹ Ex. 8 at 4.

²² Ex. 6 at 1.

²³ Ex. 7 at 3, 5.

²⁴ Ex. 8 at 11.

²⁵ Ex. 1 at 2-3.

²⁶ Ex. 1 at 2.

²⁷ *Id.*

asbestos-related changes, although Petitioner was not certain about this recollection.²⁸ Although Dr. Whitehouse observed fine pleural thickening along both lateral chest walls in an x-ray, he was not certain that the pleural changes were asbestos-related.²⁹ Dr. Whitehouse ordered a CT scan of Petitioner's chest to look for interstitial disease along with the pleural thickening.³⁰

¶ 19 A December 27, 2000, high-resolution chest CT scan showed moderate asbestos-related pleural disease and minimal asbestos-related parenchymal fibrosis.³¹ In a January 2, 2001, letter to Petitioner, Dr. Whitehouse reported that the CT scan confirmed a diagnosis of asbestosis and also some asbestos-related fibrosis within Petitioner's lungs.³²

¶ 20 Petitioner has never been advised by any of her doctors that she cannot work due to her asbestos-related disease.³³

CONCLUSIONS OF LAW

¶ 21 On August 14, 2008, the parties stipulated to Dr. Whitehouse's 45 percent impairment rating. Respondent argued, however, that Petitioner's claim is time-barred pursuant to this Court's ruling in *Fleming v. International Paper Co.*^{34,35} After the trial in this matter concluded, the Montana Supreme Court reversed this Court's decision in *Fleming*.³⁶ The Supreme Court's ruling is dispositive of Respondent's statute of limitations defense in this matter. Petitioner is entitled to an impairment award of 45 percent.

²⁸ *Id.*

²⁹ Ex. 1 at 5.

³⁰ Ex. 1 at 3.

³¹ Ex. 1 at 6.

³² Ex. 1 at 10.

³³ Trial Test.

³⁴ *Fleming v. Int'l Paper Co.*, 2005 MTWCC 35.

³⁵ Minute Book Hearing No. 3966, Docket Item No. 42.

³⁶ *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶ 29.

¶ 22 Petitioner's last day of work was in September 1987, and the 1987 law applies to this claim.³⁷

¶ 23 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.³⁸

¶ 24 Petitioner filed her claim for compensation on or about July 21, 2001.

¶ 25 Section 39-72-403, MCA, requires a claimant to present her claim in writing within two years from the date the claimant knew or should have known that her total disability condition resulted from an occupational disease.

¶ 26 No medical evidence or testimony presented to the Court established that Petitioner is totally disabled as a result of her asbestos-related disease. Therefore, under the 1987 Occupational Disease Act (ODA), Petitioner's claim for compensation was timely filed.

¶ 27 Section 39-71-2907, MCA, reads in pertinent part:

(1) When payment of compensation has been unreasonably delayed or refused by an insurer, either prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant compensation benefits, the full amount of the compensation benefits due a claimant between the time compensation benefits were delayed or refused and the date of the order granting a claimant compensation benefits may be increased by the workers' compensation judge by 20%. The question of unreasonable delay or refusal shall be determined by the workers' compensation judge, and such a finding constitutes good cause to rescind, alter, or amend any order, decision, or award previously made in the cause for the purpose of making the increase provided herein.

¶ 28 In the case of *Fleming v. International Paper Co.*,³⁹ this Court held that statutes of limitations are procedural and, therefore, the statute of limitations in effect at the time a claim is filed applies.⁴⁰ *Fleming* was appealed to the Montana Supreme Court. Following the conclusion of the trial in the present case, the Supreme Court reversed this Court's

³⁷ *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

³⁸ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

³⁹ *Fleming*, 2005 MTWCC 35.

⁴⁰ *Id.*, ¶¶ 14-15.

ruling in *Fleming*. The Supreme Court held that statutes of limitations in effect on a claimant's last day of employment apply in an occupational disease claim.⁴¹

¶ 29 In the present case, Respondent relied upon this Court's ruling in *Fleming* in arguing that Petitioner's claim was untimely filed pursuant to § 39-72-403, MCA (2001), which required a claimant to file her claim within one year of when she knew or should have known that her condition resulted from an occupational disease. Among the evidence Respondent relied upon in support of this contention was Rooley's June 15, 1994, treatment note which stated, "Lucille has a long history of asthma and asbestosis"⁴² as well as the November 16, 1998, progress note from Partnership Health which stated that Petitioner "[i]s planning on obtaining documentation on possible asbestosis . . . worked in [a] vermiculite mine (WR Grace) in Libby 1976-1987."⁴³ In light of the Supreme Court's ruling in *Fleming*, I need not rule upon the sufficiency of this evidence as it may have pertained to Respondent's statute of limitations defense. However, *Fleming* was not decided until after this matter had gone to trial. Prior to the Supreme Court's decision in *Fleming*, Respondent had a reasonable basis for maintaining a statute of limitations defense and denying liability. Therefore, Petitioner is not entitled to a penalty in this matter.

¶ 30 Section 39-71-611, MCA, states, in pertinent part:

(1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:

(a) the insurer denies liability for a claim for compensation or terminates compensation benefits;

(b) the claim is later adjudged compensable by the workers' compensation court; and

(c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

¶ 31 Having already determined that Respondent's basis for denying liability was not unreasonable, I conclude that Petitioner is not entitled to her attorney fees.

⁴¹ *Fleming*, 2008 MT 327, ¶ 28.

⁴² Ex. 8 at 3.

⁴³ Ex. 8 at 4.

¶ 32 As the prevailing party, Petitioner is entitled to her costs.⁴⁴

⁴⁴ *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand* 1996 MTWCC 33).

JUDGMENT

¶ 33 Petitioner is entitled to permanent partial disability benefits in the form of an impairment award in the amount of 45 percent.

¶ 34 Petitioner is entitled to her costs.

¶ 35 Petitioner is not entitled to her attorney fees.

¶ 36 Petitioner is not entitled to a 20 percent penalty.

¶ 37 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 4th day of December, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA

JUDGE

c: Laurie Wallace
Jon L. Heberling
Todd A. Hammer
Bryce R. Floch

Submitted: October 27, 2008