

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 35

WCC No. 2010-2470

JON PECK

Petitioner

vs.

**INTERNATIONAL PAPER CO., as successor-in-interest to CHAMPION
INTERNATIONAL CO.**

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moved for summary judgment, arguing that Petitioner brought his claim against the wrong insurer as he has not correctly identified which entity was his employer at the time he left his employment. Petitioner filed a cross-motion for summary judgment, alleging that Respondent is correctly identified as the party liable for his occupational disease claim.

Held: Under the control test, Petitioner was an employee of the company for which Respondent is the successor-in-interest. Therefore, Respondent is properly identified as Petitioner's employer for the purposes of Petitioner's occupational disease claim.

Topics:

Employers: Identifying. Who an injured worker believed to be his employer is immaterial when determining whether an employer-employee relationship exists.

Occupational Disease: Insurer Liable. The control test may be used to determine who the employer is, in a given situation. An employee will have been transferred from one employer to another when the right to control the details of his work has passed from one to another. Where the right to control the details of an injured worker's work never transferred

from one employer to another, the first employer is still considered his employer for an occupational disease claim.

Independent Contractor: Elements: Right of Control. While the control test has most often been used to determine whether or not an individual is an independent contractor or an employee, it may also be used to determine who the employer is, in a given situation. An employee will have been transferred from one employer to another when the right to control the details of his work has passed from one to another. Where the right to control the details of an injured worker's work never transferred from one employer to another, the first employer is still considered his employer for an occupational disease claim.

¶ 1 Petitioner Jon Peck filed a claim for occupational disease benefits, alleging that he sustained asbestos-related lung disease as a result of asbestos exposure while employed at the Libby, Montana, lumber mill by Champion International Co. (Champion) from December 19, 1953, through June of 1986.¹ Respondent International Paper Co.² (IPC) moves for summary judgment on the grounds that Peck has brought his claim against the wrong insurer. IPC contends that Peck was an employee of Montana Light & Power (MLP) at the time he left his employment in June 1986. In June 1986, Montana State Fund insured MLP. In June 1986, Champion was self-insured. Accordingly, IPC argues that Peck should have brought his claim against Montana State Fund.

¶ 2 Peck responded to IPC's motion and filed a cross-motion for summary judgment. Peck argues that MLP was a wholly-owned subsidiary of Champion that did nothing other than run the powerhouse at the mill. Peck argues that the designation of powerhouse employees as MLP employees was essentially an internal accounting issue that did not result in a transfer of the right to control Peck's work. Relying principally on *State ex rel Ferguson v. District Court*,³ Peck argues that Champion was Peck's employer because Champion controlled Peck's employment at the mill. Peck also argues that Champion should be equitably estopped from denying it was Peck's employer when Peck last worked at the mill in June of 1986 because Peck filed his claim in 2006, alleging Champion was his employer, and IPC did not deny that Champion was Peck's employer until it filed its motion for summary judgment in 2010.

¹ Petition for Hearing at 1.

² Respondent International Paper Co. is a successor-in-interest to Champion.

³ 164 Mont. 84, 519 P.2d 151 (1974).

Undisputed Material Facts

¶ 3 Peck began working at the Libby mill on December 19, 1953, when the mill was owned by J. Neils Lumber Co. Peck was hired as a maintenance worker and assigned to the powerhouse.⁴ At the time Peck began working at the mill, the powerhouse was owned by MLP, which was a wholly-owned subsidiary of J. Neils Lumber Co.⁵ Even though MLP owned the powerhouse, Peck was paid by J. Neils Lumber Co.⁶

¶ 4 On January 1, 1957, J. Neils Lumber Co. merged with St. Regis Paper Co. MLP became a wholly-owned subsidiary of St. Regis Paper Co.⁷ Peck continued his same job duties at the powerhouse as an employee of St. Regis Paper Co.⁸ At some time after St. Regis Paper Co. purchased the mill, Peck's checks began to identify MLP as the employer. Other than the name change on Peck's paycheck, nothing else about his job changed.⁹

¶ 5 At some time between the late 1960s and early 1980s, the powerhouse began to generate excess power. In order to sell the excess power back to the grid, the power had to be generated by a utility. Robert Petrusha, the former superintendent of the powerhouse, recalls that at this time, MLP became the employer of the mill workers working in the powerhouse. Petrusha considered this to be a name change only as none of his employment duties changed.¹⁰

¶ 6 Petrusha did not have the authority to hire or fire employees as superintendent of the powerhouse. If Petrusha believed an employee was not working out at the powerhouse, he would advise the employee that he could no longer work in the powerhouse, which would mean that the employee would go to the mill personnel office and bid on another job in the mill. If there was an opening in the powerhouse, any mill employee was allowed to bid on that position.¹¹

⁴ Petitioner's Response to Respondent's Motion for Summary Judgment and Petitioner's Cross Motion for Summary Judgment (Petitioner's Response and Cross-Motion) at 2, Ex. 1, Peck Affidavit, ¶ 2.

⁵ Petitioner's Response and Cross-Motion at 2, Ex. 2.

⁶ Petitioner's Response and Cross-Motion at 2, Ex. 1, Peck Affidavit, ¶ 4.

⁷ Petitioner's Response and Cross-Motion at 2, Ex. 2.

⁸ Petitioner's Response and Cross-Motion at 2, Ex. 1, Peck Affidavit, ¶ 4.

⁹ Petitioner's Response and Cross-Motion at 2, Ex. 1, Peck Affidavit, ¶ 6.

¹⁰ Petitioner's Response and Cross-Motion, Ex. 3, Petrusha Affidavit, ¶ 5.

¹¹ Petrusha Affidavit, ¶ 3.

¶ 7 During the time that Petrusha was in charge of the powerhouse, all billing and purchasing was done through the mill billing and purchasing department. The mill and the powerhouse did not exchange invoices for either labor or materials.¹²

¶ 8 St. Regis Paper Co. merged with Champion in 1984. MLP became a wholly-owned subsidiary of Champion.¹³ Peck's employment situation remained unchanged.¹⁴

¶ 9 On December 3, 2002, Daniel Larson was deposed in the case of *Crill v. International Paper Co.*¹⁵ Larson was both the general manager of the mill and the vice-president of MLP when Peck last worked at the mill. Despite holding positions with both MLP and Champion, Larson did not receive two separate paychecks.¹⁶

¶ 10 Larson testified that the powerhouse employees were paid out of a general account under the category of MLP, "the same as the sawmill employees would be in the category of the sawmill."¹⁷

¶ 11 Larson reported to B. Taggart Edwards, who was both president of MLP and executive vice-president of Champion.¹⁸

¶ 12 In 1986, Peck sustained an on-the-job back injury.¹⁹ The employer's first report of injury identifies Peck's employer as MLP.²⁰ Peck pursued his workers' compensation claim for his back injury against Montana State Fund, as the insurer for MLP.²¹ Peck signed at least four documents regarding this claim, all of which identified MLP as his

¹² Petrusha Affidavit, ¶ 4.

¹³ Petitioner's Response and Cross-Motion at 3, Ex. 6.

¹⁴ Peck Affidavit, ¶ 7.

¹⁵ WCC No. 2001-0408; Petitioner's Response and Cross-Motion, Ex. 4, Larson Dep.

¹⁶ Larson Dep. at 25:5 – 26:6.

¹⁷ Larson Dep. at 23:14-15.

¹⁸ Petitioner's Response and Cross-Motion at 3; Larson Dep. at 25:12-25.

¹⁹ Brief in Support of International Paper Company's Motion for [Summary] Judgment (International Paper Co.'s Opening Brief), Ex. B.

²⁰ International Paper Co.'s Opening Brief, Ex. B.

²¹ International Paper Co.'s Opening Brief, Ex. C.

employer.²² Peck reached a full and final compromise settlement of total disability benefits regarding this claim with Montana State Fund in 1990.²³

Analysis and Decision

¶ 13 Peck's last day of employment was June 1986. Therefore, the 1985 law applies.²⁴

¶ 14 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.²⁵ The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 15 IPC argues that the Court should dismiss Peck's petition because he has brought his claim against the wrong insurer. Peck does not dispute that he was employed, at least nominally, by MLP and that MLP was insured by Montana State Fund whereas Champion was self-insured at the time Peck left his employment. However, Peck argues:

Whether Champion was Peck's employer on his last day of work in June of 1986 does not turn solely on whether Champion's name was on Peck's payroll checks at that time. The Montana Supreme Court has long used the "control test" to determine the identity of employers in workers' compensation disputes.²⁶

¶ 16 Peck cites a number of cases in support of his argument that the control test should determine the identity of his employer in this case.²⁷ Of the cases upon which Peck relies, most on point to the present case is *State ex rel Ferguson v. District*

²² International Paper Co.'s Opening Brief, Ex. C.; International Paper Company's Reply Brief in Support of Motion for Summary Judgment and in Opposition to Cross Motion for Summary Judgment (International Paper Co.'s Reply Brief), Exs. E, F, and G.

²³ International Paper Co.'s Opening Brief, Ex. D.

²⁴ *Fleming v. International Paper Co.*, 2008 MT 327, ¶¶ 27-28, 346 Mont. 141, 194 P.3d 77.

²⁵ ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

²⁶ Petitioner's Response and Cross-Motion at 4-5.

²⁷ *Kimball v. Indus. Accident Bd.*, 138 Mont. 445, 449, 357 P.2d 688, 691 (1960); *State ex rel Ferguson v. Dist. Ct.*, 164 Mont. 84, 88, 519 P.2d 151, 153 (1974); *Sharp v. Hoerner Waldorf Corp.*, 178 Mont. 419, 424, 584 P.2d 1298, 1301 (1978); *Carlson v. Cain*, 204 Mont. 311, 321, 664 P.2d 913, 918 (1983); *Walling v. Hardy Constr.*, 247 Mont. 441, 447, 807 P.2d 1335, 1338 (1991).

*Court.*²⁸ In *Ferguson*, the claimant George Hoffman was employed by Yellowstone Pine Company (Yellowstone Pine) as a truck driver. Shortly after Hoffman was employed, union representatives informed Yellowstone Pine that it would either have to move the trucking operation from the Yellowstone Pine mill or include the truck drivers in the union bargaining unit. To avoid including the truck drivers in the union bargaining unit, Yellowstone Pine moved the trucks to a rented shop at a location away from the mill.²⁹

¶ 17 Yellowstone Pine also made certain accounting changes regarding the trucking operation. Yellowstone Pine credited an adjustable haulage fee to Ben Ferguson, the assistant to the Yellowstone Pine president. Ferguson opened an account in his own name from which checks were drawn to pay the drivers' wages, withholding and social security taxes, and miscellaneous expenses of the trucking operation. Ferguson continued all of his other duties with Yellowstone Pine and supervised the trucking operation under the direction of the Yellowstone Pine president. Ferguson received no additional compensation, nor did he profit from the trucking operation.³⁰

¶ 18 Hoffman was injured in the course of his employment as a driver. After settling his workers' compensation claim with Yellowstone Pine, Hoffman filed a third-party action in district court, alleging that Ferguson was his employer. Hoffman argued that his employment was transferred from a first employer, Yellowstone Pine, to a second employer, Ferguson. The Montana Supreme Court rejected Hoffman's argument because it concluded that "it is clear from the undisputed facts that there was no transfer of employment."³¹

¶ 19 The Supreme Court held that the test to determine whether an employer-employee relationship exists is the control test. While acknowledging that the test has most often been used to determine whether or not an individual was an independent contractor or an employee, the Court held that the control test "may also be used to determine who the employer is, in a given situation."³² The Supreme Court held: "Under this test an employee will have been transferred from one employer to another when the right to control the details of his work has passed from one to another."³³ The Court concluded:

²⁸ 164 Mont. 84, 519 P.2d 151 (1974).

²⁹ *Id.* at 86, 519 P.2d at 152.

³⁰ *Id.* at 87, 519 P.2d at 152.

³¹ *Id.* at 88, 519 P.2d at 153.

³² *Id.* at 88, 519 P.2d at 153.

³³ *Id.*

Applying the test to the facts of the instant case, it is clear that the accounting changes undertaken by Yellowstone Pine did not result in a transfer of the right to control the details of Hoffman's work. Hoffman's work continued to be supervised by Ferguson acting as an employee of Yellowstone Pine. This supervision was done as directed by the president of Yellowstone Pine and had Ferguson deviated from those directions, he would have been replaced. Ultimate control of all the details of the work performed by Hoffman was in Yellowstone Pine. The fact that this control was exercised through Yellowstone Pine's employee, Ferguson, does not make him Hoffman's employer, even when considered together with the change in the name on Hoffman's pay-check.³⁴

¶ 20 *Ferguson* particularly informs the present case because of the factual similarities. Both *Ferguson* and the present case involved companies that created subsidiary entities for business purposes. Yellowstone Pine operated a separate trucking operation to avoid including the truck drivers in the union bargaining unit. Champion operated a separate power generating facility to allow it to sell excess power back to the grid. In both cases, managers from the parent company controlled the subsidiary. Although Ferguson was the putative supervisor of the trucking operation, he continued in his capacity as assistant to the Yellowstone Pine president. The Yellowstone Pine president directed Ferguson's supervision of the trucking operation. In the present case, Larson functioned as both the general manager of the mill **and** the vice-president of MLP. Larson reported to Edwards, who was both president of MLP **and** executive vice-president of Champion. Neither Ferguson nor Larson received separate or additional compensation for their respective positions with the subsidiaries. In both cases, the subsidiaries engaged in accounting practices which ostensibly segregated the subsidiary from the parent company. Ferguson created a separate checking account in his own name to pay drivers' wages, withholding and social security taxes, and miscellaneous expenses of the trucking operation. Larson testified that the powerhouse employees were paid from the same general account as the mill employees but were placed under different categories.

¶ 21 If anything, the relationship between the parent company and subsidiary in *Ferguson* was more tenuous than the relationship in the present case. In *Ferguson*, the miscellaneous expenses of the trucking operation were paid through a separate account in Ferguson's name. In the present case, billing and purchasing for the powerhouse was done through the mill billing and purchasing department. The mill and the powerhouse did not exchange invoices for either labor or materials. In *Ferguson*,

³⁴ *Id.* at 88, 89, 519 P.2d at 153.

Ferguson had the authority to hire and fire drivers in the trucking operation. In the present case, Petrusha did not have the authority to hire or fire powerhouse employees as superintendent of the powerhouse. If Petrusha believed that an employee was not working out at the powerhouse, he would advise the employee that he could no longer work in the powerhouse, which would mean that the employee would go to the **mill personnel office** and bid on another job **in the mill**. If there was a vacancy in the powerhouse, any mill employee was allowed to bid on that position.

¶ 22 Despite the similarities between *Ferguson* and the present case, IPC does not attempt to distinguish *Ferguson*. IPC does not even acknowledge *Ferguson* in its reply brief, nor does IPC address in any fashion Peck's legal argument that the control test determines whether Champion was Peck's employer at the time he ceased working at the mill in 1986. Instead, IPC focuses solely on Peck's 1986 back injury claim which identified MLP as his employer and which Montana State Fund paid as MLP's insurer. IPC argues that this establishes, "who [Peck] really believed his employer was when he terminated his employment."³⁵

¶ 23 Peck contends in his reply brief that he did not specify an employer when he submitted his 1986 claim for benefits for his back injury. The employer's first report of injury – which Peck did not sign – specified MLP as his employer. Peck asserts that he considered himself to be a Champion employee when he ceased working at the mill in 1986. Ultimately, who Peck believed his employer to be is immaterial to the resolution of these motions.

¶ 24 IPC offers no legal authority to support the proposition that liability in a workers' compensation claim is determined by who the claimant "really believed" his employer to be and I am disinclined to blaze that trail in this case. It has long been established that in determining whether an employer-employee relationship exists, the court applies the control test. Although this issue typically comes up in disputes concerning independent contractor status, the Supreme Court noted in *Ferguson* that it is appropriate to apply the control test in situations like the present case.

¶ 25 As the Supreme Court explained in *Ferguson*, under the control test, an employee will have been transferred from one employer to another when the right to control the details of his work has passed from one to another. Applying this test to the present situation, I conclude that the right to control the details of Peck's work never transferred from Champion. Although Peck worked in the powerhouse, he was a mill employee. Therefore, IPC/Champion is correctly identified as the Respondent/Insurer for Peck's occupational disease claim.

³⁵ International Paper Co.'s Reply Brief at 2.

¶ 26 Since I have concluded that under the control test, Peck is entitled to summary judgment, I do not reach his argument that Champion is equitably estopped from denying that he was an employee.

Order

¶ 27 Respondent's motion for summary judgment is **DENIED**.

¶ 28 Petitioner's cross-motion for summary judgment is **GRANTED**.

¶ 29 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 16th day of December, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Laurie Wallace/Jon Heberling
Leo S. Ward

Submitted: May 5, 2010 and May 13, 2010