

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 36

WCC No. 2005-1260

BILLIE SCHULL

Petitioner

vs.

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

Respondents/Insurers.

ORDER DENYING MOTIONS 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 is judicially estopped from pursuing an occupational disease claim and in any event cannot prove that any exposure to asbestos while working for its insured was injurious. International Paper Company, which previously owned the mill and employed the claimant, joins in ground one.

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 case, like *Fleming v. International Paper Co. and Liberty Northwest Ins. Corp.*, WCC No. 2005-1292, is an asbestos case involving a Libby, Montana, lumber mill. As set forth in this Court's recent *Fleming* order denying Liberty's motions to dismiss and for

summary judgment, 2005 MTWCC 34, the mill was owned by Champion International Company from at least 1960 until November 1, 1993, when it was acquired by Stimson Lumber Company.

¶2 The claimant in this case worked at the mill from 1973 until November 9, 2001. He alleges that he suffers from asbestos-related lung disease attributable to his employment.

¶3 As in *Fleming*, Liberty moves to dismiss or for summary judgment.¹ It proffers two grounds: (1) judicial estoppel based on a district court action commenced by the claimant against W.R. Grace & Company and others; and (2) lack of a causal connection between the claimant's disease and his employment based on the latency period for asbestosis. Both grounds were rejected in *Fleming* and must be rejected for identical reasons here. As in *Fleming*, the claimant may have been exposed to multiple sources of asbestos while living and working in Libby, thus there is no inconsistency in his bringing district court and Workers' Compensation Court actions. Moreover, the district court action is still pending and has not resulted in affirmative relief benefitting the claimant. As to the latency argument, the period of the claimant's alleged exposure to asbestos while working for Stimson is not so insignificant as to require dismissal of his petition under any of the last injurious exposure standards identified in this Court's decision in *Fleming*.

ORDER

¶4 Liberty's motions to dismiss and for summary judgment are **denied**.

¶5 International Paper's motion for summary judgment on judicial estoppel grounds is similarly **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: May 12, 2005

¹Liberty filed a written request for a hearing on its motions but when contacted by the Court later on it orally withdrew the requests.