IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 5

WCC No. 2015-3518

ROBERT WOMMACK

Petitioner

vs.

NATIONAL FARMERS UNION PROPERTY & CASUALTY, CO.; NATIONWIDE MUTUAL FIRE INS CO.; MONTANA STATE FUND; CHS INC.; LIBERTY MUTUAL FIRE INS CO.; and DOES 1-5, inclusive

Respondents/Insurers.

ORDER GRANTING RESPONDENT CHS INC.'s
MOTION FOR SUMMARY JUDGMENT

Summary: Respondent CHS Inc. moves for summary judgment on the grounds that it is not liable for Petitioner's OD under the last injurious exposure rule, as codified in § 39-72-303(1), MCA (1997). Petitioner worked at the Cenex refinery in Laurel when he was exposed to asbestos. After Petitioner left employment with Cenex, Cenex was part of the merger that formed CHS Inc., which is a self-insured employer. CHS Inc. argues that it is not liable because it was never Petitioner's employer's insurer and, therefore, not the insurer at risk when Petitioner was exposed to the hazards of his alleged OD.

Held: Since Petitioner left employment before his employer merged with another company and became CHS Inc., a self-insured employer, he was never injuriously exposed to the hazard of his alleged OD while CHS Inc. was the insurer at risk. In a recent case involving asbestos exposure at the Cenex refinery, the Montana Supreme Court explained, "liability for and administration of [an OD] claim should correspond with the period in which the injurious exposure occurred." There is no genuine issue of material fact as to CHS Inc.'s liability and, therefore, CHS Inc. is entitled to judgment as a matter of law.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. While § 39-72-303(1), MCA, is written in terms of

"employer" liability, it is the employer's insurer that is actually liable for the payment of benefits. Since Petitioner was never injuriously exposed to asbestos when CHS was at risk as a self-insured employer, CHS is not liable for Petitioner's asbestos-related disease as a matter of law.

Medical Condition: Asbestos-Related Disease. While § 39-72-303(1), MCA, is written in terms of "employer" liability, it is the employer's insurer that is actually liable for the payment of benefits. Since Petitioner was never injuriously exposed to asbestos when CHS was at risk as a self-insured employer, CHS is not liable for Petitioner's asbestos-related disease as a matter of law.

Occupational Disease: Last Injurious Exposure. While § 39-72-303(1), MCA, is written in terms of "employer" liability, it is the employer's insurer that is actually liable for the payment of benefits. Since Petitioner was never injuriously exposed to asbestos when CHS was at risk as a self-insured employer, CHS is not liable for Petitioner's asbestos-related disease as a matter of law.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-303. Section 39-72-303(2), MCA, does not apply here and CHS cannot be liable for Petitioner's disease. Although it was the insurer when Petitioner was diagnosed with asbestosis, CHS' coverage and Petitioner's diagnosis occurred after Petitioner quit working. Interpreting subsection (2) of the statute to make an insurer liable for an OD that was contracted years before it became the insurer at risk would be an absurdity.

Occupational Disease: Last Injurious Exposure. Section 39-72-303(2), MCA, does not apply here, and: CHS cannot be liable for Petitioner's disease. Although it was the insurer when Petitioner was diagnosed with asbestosis, CHS' coverage and Petitioner's diagnosis occurred after Petitioner quit working. Interpreting subsection (2) of the statute to make an insurer liable for an OD that was contracted years before it became the insurer at risk would be an absurdity.

¶ 1 Respondent CHS Inc. (CHS), a self-insured employer, moves for summary judgment, arguing it is not liable for Petitioner Robert Wommack's occupational disease

(OD) under § 39-72-303(1), MCA, because it was never his employer's insurer.[1] Wommack opposes the motion.[2] None of the other insurers potentially liable for Wommack's OD has opposed CHS's motion.

Uncontroverted Facts

¶ 2 Wommack worked for Cenex for approximately 30 years both at its Laurel refinery and in its management offices, where he was Eastern Regional Manager of Residual Fuels. Wommack believes that he was exposed to asbestos during his entire career with Cenex until his retirement on April 1, 1998.[3]

¶ 3 Cenex was insured by four insurers during the time Wommack worked there: (1) Respondent National Farmers Union Property & Casualty Co. provided coverage from December 21, 1973, to September 30, 1985; (2) Respondent Nationwide Mutual Fire Ins. Co. provided coverage from September 30, 1985, to October 16, 1986; (3) Respondent Montana State Fund provided coverage from October 16, 1986, to July 1, 1994; and (4) Respondent Liberty Mutual Fire Ins. Co. (Liberty) provided coverage from July 1, 1994, to June 1, 1998.[4]

¶ 4 On June 1, 1998, Cenex merged with Harvest States Cooperatives to form Cenex Harvest States Cooperatives (CHS). Since then, CHS has been self-insured under Plan I of the Montana Workers' Compensation Act.[5]

¶ 5 Wommack is suffering from asbestos-related disease that was first diagnosed on March 26, 2013.[6]

Law and Analysis

¶ 6 Generally, the law in effect when a claimant files his claim, or on his last day of work, whichever is earlier, governs an OD claim.[7] This Court will apply the 1997

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[1] Respondent CHS Inc.'s Motion for Summary Judgment and Supporting Brief (CHS's Motion) at 4-6, Docket Item No. 8.

[2] Petitioner's Response to CHS Inc.'s Motion for Summary Judgment (Petitioner's Response), Docket Item No. 14.

[3] [Petitioner's] Second Petition for Trial (Second Petition) at 1, Docket Item No. 1; Respondent CHS Inc.'s Motion for Summary Judgment and Supporting Brief at 2, Docket Item No. 8.

[4] Second Petition at 2.

[5] CHS's Motion at 2 & Ex. A.

[6] Second Petition at 1.

[7] *Hardgrove v. Transportation Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citing *Grenz v. Fire & Cas.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996)); *Bouldin v. Liberty Northwest Ins. Corp*., 1997 MTWCC. 8.

Occupational Disease Act (ODA) since that was the law in effect on Wommack's last day of employment.

¶ 7 The last injurious exposure rule is codified in the 1997 ODA at § 39-72-303, MCA, which states as follows:

> **Which employer liable**. (1) Where compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.
>
> (2) When there is more than one insurer and only one employer at the time the employee was injuriously exposed to the hazard of the disease, the liability rests with the insurer providing coverage at the earlier of:
>
> (a) the time the occupational disease was first diagnosed by a treating physician or medical panel; or
>
> (b) the time the employee knew or should have known that the condition was the result of an occupational disease.

¶ 8 The Montana Supreme Court has recognized that the purpose of the last injurious exposure rule is to ensure that the insurer at risk when a worker contracts an OD is liable for it. In *Liberty Northwest Ins. Corp. v. Montana State Fund* (*In re Mitchell*), the Court addressed the issue of the "quantum of proof required under the 'last injurious exposure' rule to establish initial liability for an OD claim when a claimant has worked for successive employers, and was arguably exposed to the hazard of the OD during each employment."[8] The Court adopted the "potentially causal" standard because the standard placed liability on the insurer at risk when the worker was exposed to a sufficient amount of the hazard of the disease to cause the disease. The Court explained as follows:

> We conclude that the "potentially causal" standard is consistent with § 39-71-407(10), MCA (2005), and will be applied in this and future cases in Montana. Under this approach, the claimant who has sustained an OD and was arguably exposed to the hazard of an OD among two or more employers is not required to prove the degree to which working conditions with each given employer have actually caused the OD in order to attribute initial liability. Instead, the claimant must present objective medical evidence demonstrating that he has an OD and that the working

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But cf. Nelson v. Cenex, Inc., 2008 MT 108, ¶¶ 29-33, 342 Mont. 371, 181 P.3d 619 (indicating that the law in effect on the last day of an employee's exposure to the hazards of an OD controls).

[8] *In re Mitchell*, 2009 MT 386, ¶¶ 19, 24, 353 Mont. 299, 219 P.3d 1267.

> conditions during the employment at which the last injurious exposure was alleged to occur, were the type and kind of conditions which could have caused the OD. As the Nebraska Supreme Court recognized in *Olivotto,* proving that an exposure is of a type which could cause the OD does demonstrate, in a certain sense, that the exposure bears a casual relationship to the onset of the OD.[9]

¶ 9 Likewise, in *Nelson v. Cenex, Inc.*,[10] the Court addressed which version of the ODA applies when an employee has two periods of employment with the same employer. Nelson was exposed to asbestos when he worked for Cenex at its Laurel refinery between 1952 and 1967. He then left Cenex for other employment. Nelson returned to Cenex in 1980 and worked there sporadically through 1985. He was not exposed to asbestos during his second stint of employment. After he was diagnosed with asbestos-related lung disease, Nelson brought tort claims against Cenex.

¶ 10 Cenex argued that the 1983 version of the ODA applied to Nelson's claim because his last day of work for Cenex was in 1985. Thus, it argued that his tort claim was barred because of the exclusive remedy provision in the 1983 ODA. Nelson argued that the pre-1979 version of the ODA applied because the last day on which he was exposed to asbestos occurred during his first stint of employment with Cenex. Under *Gidley v. W. R. Grace & Co.*,[11] the exclusive remedy in the pre-1979 ODA did not apply if the deadline for filing an OD claim, which required a claim to be filed within three years of the last day of employment, passed before the worker was diagnosed with an OD.

¶ 11 Relying upon the policy that "liability for and administration of a claim should correspond with the period in which the injurious exposure occurred," the Court held that the pre-1979 ODA controlled Nelson's claims because that was when he was last injuriously exposed to asbestos.[12] The Court stated:

> Nelson worked for CHS during two different periods of time separated by almost thirteen years. It is undisputed that it was during Nelson's first period of employment with CHS (from 1952 to 1967) that he was exposed to asbestos. By his second period of employment with CHS (from 1980 to 1985), he was not exposed to asbestos as CHS had taken steps to remove the asbestos from the refinery. Thus, Nelson's injury occurred

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[9] *Id*., ¶ 24 (citing *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 684-85, 732 N.W.2d 354, 365 (2007)).

[10] *Nelson*, 2008 MT 108, 342 Mont. 371, 181 P.3d 619.

[11] *Gidley*, 221 Mont. 36, 717 P.2d 21 (1986).

[12] *Nelson*, ¶¶ 29, 33.

> only during his first period of employment with CHS. This Court made it clear in *Gidley* that we were applying to the MODA the same rationale used in the WCA–i.e., that the date of accident or injury controls. However, because an occupational disease does not occur on one single day or at one exact time, but rather, is ongoing, we used the employee's last day of work–the last day the employee could possibly have been exposed to asbestos–as the point in time from which the occupational disease claim would flow. Thus, we determined, in effect, that liability for and administration of a claim should correspond with the period in which the injurious exposure occurred.[13]

¶ 12 Although Wommack did not work for successive employers or have a break in his employment with Cenex, the last injurious exposure rule applies to the facts of this case. Pursuant to § 39-72-303(1), MCA, Cenex is the employer liable for Wommack's claim, as it is undisputed that it was the employer in whose employment Wommack was last injuriously exposed to asbestos. CHS is not liable under the last injurious exposure rule because its coverage does not correspond with the period in which Wommack was injuriously exposed. CHS is correct that while subsection (1) is written in terms of "employer" liability, it is the employer's insurer that is actually liable for paying benefits.[14] Since Wommack was not injuriously exposed to asbestos when CHS was at risk as a self-insured employer, CHS is not liable for his asbestos as a matter of law.

¶ 13 Wommack argues that CHS would be liable for his claim if § 39-72-303(2), MCA, applied, as CHS has successor liability for Cenex.[15] However, under the facts of this case, subsection (2) is inapplicable.

¶ 14 As CHS points out, this Court addressed a similar situation in *Travelers Property & Casualty Co. of America v. Royal Ins. Co. of America* (*In Re Telles)*.[16] Telles worked for Stream International (Stream) while it was insured by Royal Insurance Company of America (Royal). After Telles left her employment, Travelers Property & Casualty Company of America (Travelers) began insuring Stream. Three weeks after Travelers began insuring Stream, Telles' treating physician diagnosed her with carpal tunnel syndrome and attributed it to her employment at Stream.

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[13] *Nelson*, ¶ 29.

[14] *See American Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court*, 2012 MT 61, ¶ 13, 364 Mont. 299, 280 P.3d 240 (citation omitted) (stating, *inter alia*, "the insurer's duty to compensate the employee cannot be delegated to the employer").

[15] Petitioner's Response at 4, citing *Nelson*, ¶ 7.

[16] *In re Telles*, 2005 MTWCC 21.

¶ 15 This Court rejected Royal's argument that Travelers was the insurer liable under § 39-72-303(2), MCA, because it insured Stream at the time of diagnosis. The Court explained that Travelers was not liable because it was not the insurer at risk when Telles was exposed to the hazard of the disease:

> Subsection (2) applies where "there is **more than one insurer and** only one employer **at the time the employee was injuriously exposed to the hazard of the disease** . . . ." The qualifying language "at the time the employee was injuriously exposed" applies to both "more than one insurer" and "only one employer" since those terms are in the conjunctive and the qualifying language makes sense only if applied to both. If the qualifying language applied only to "one employer," the subsection would not apply to a situation where a claimant had a second job, even if the second job did not involve an injurious exposure, a result that makes no sense. The subsection makes sense only if the language is construed as applying where the employer responsible for the injurious exposure is insured by two different insurers during the period of the injurious exposure. Thus, subsection (2) has no application to a situation where, as here, the employer becomes insured by another insurer **after** the last injurious exposure. Travelers did not insure the employer at any time during the claimant's injurious exposure, or indeed at any time during the claimant's employment; hence, it is not liable for her CTS.[17]

¶ 16 As in *In re Telles*, CHS is not liable as a matter of law for OD benefits for Wommack under subsection (2) because CHS became the insurer at risk after Wommack's last injurious exposure and, in fact, after Wommack's last day of employment. While there may have been more than one insurer at the times Wommack was exposed to asbestos at Cenex, it is undisputed that CHS was not one of them. Therefore, subsection (2) does not apply and CHS cannot be liable for his OD claim even though it was the insurer at risk when Wommack was diagnosed with asbestos-related lung disease. Moreover, interpreting (2) in a way that would make CHS liable would result in an absurdity, as it would make an insurer liable for an OD that was contracted years before it became the insurer at risk and therefore, liability would not correspond with the period in which the injurious exposure occurred. Montana law does not allow for such a result.[18]

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[17] *Id.*, ¶ 5 (emphasis in original).

[18] *See, e.g.*, *MC, Inc. v. Cascade City-Cnty. Bd. of Health*, 2015 MT 52, ¶ 14, 378 Mont. 267, 343 P.3d 1208 (citations omitted) (stating that statutes are read and construed so as to avoid an absurd result and to give effect to the purpose of the statute).

¶ 17 CHS has established that there are no remaining genuine issues of material fact and that therefore, it is entitled to judgment as a matter of law.[19]

ORDER

¶ 18 For the foregoing reasons, CHS Inc.'s motion for summary judgment is **granted**.

DATED this 14th day of April, 2015.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Ben A. Snipes
Joe C. Maynard
Charles G. Adams
Melissa Quale
Kelly M. Wills
Michael P. Heringer

Submitted: March 2, 2015

[19] *See Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285 (citation omitted) (To attain summary judgment, "[t]he moving party must establish both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Once the moving party has met its burden, the opposing party must, in order to raise a genuine issue of material fact, present substantial evidence essential to one or more elements of its case rather than mere conclusory or speculative statements."); ARM 24.5.329. *See also Lewis v. Nine Mile Mines, Inc.*, 268 Mont. 336, 340, 886 P.2d 912, 914 (1994).