

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 7

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 NATIONAL FARMERS UNION PROPERTY &
CASUALTY, CO.'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent National Farmers Union Property & Casualty Co. moves for summary judgment, arguing that it is not liable for Petitioner's OD. *Inter alia*, National Farmers Union Property & Casualty Co. argues that it is not liable under the last injurious exposure rule because Petitioner was exposed to asbestos at work for years after its coverage ended. Petitioner opposes the motion but does not specifically argue that National Farmers Union Property & Casualty Co. is or could be liable. Neither Respondent Nationwide Mutual Fire Ins. Co. nor Respondent Montana State Fund opposes the motion. Respondent Liberty Mutual Fire Ins. Co. opposes the motion to argue that the 1997 WCA is applicable and that it is not liable under the last injurious exposure rule; however, it does not argue that National Farmers Union Property & Casualty Co. is or could be liable.

Held: National Farmers Union Property & Casualty Co. is entitled to summary judgment under the last injurious exposure rule. The undisputed facts show that Petitioner was exposed to asbestos "on a daily basis" for years after National Farmers Union Property & Casualty Co.'s coverage of Petitioner's employer ended, while other insurers were insuring his employer.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-303. Where a claimant continued to be exposed to asbestos under the type and kind of conditions that could have caused his asbestos-related disease after a particular insurer ceased covering the employer, the insurer was entitled to summary judgment since it was not the insurer at risk during Petitioner's last injurious exposure.

Occupational Disease: Last Injurious Exposure. Where a claimant continued to be exposed to asbestos under the type and kind of conditions that could have caused his asbestos-related disease after a particular insurer ceased covering the employer, the insurer was entitled to summary judgment since it was not the insurer at risk during Petitioner's last injurious exposure.

Medical Condition: Asbestos-Related Disease. Where a claimant continued to be exposed to asbestos under the type and kind of conditions that could have caused his asbestos-related disease after a particular insurer ceased covering the employer, the insurer was entitled to summary judgment since it was not the insurer at risk during Petitioner's last injurious exposure.

Summary Judgment: Generally. Where no respondents presented argument that National Farmers Union is or could be liable for Petitioner's OD, and where Petitioner merely argues that liability for his last injurious exposure lies among the insurers providing coverage during his years of employment but does not specifically argue that National Farmers Union was liable, National Farmers Union is entitled to judgment as a matter of law in accordance with § 39-72-303(1), MCA, *In re Mitchell*, and *Nelson*, since it was not the insurer during the last years of Petitioner's exposure to asbestos.

¶ 1 Respondent National Farmers Union Property & Casualty Co. (National Farmers Union) moves for summary judgment, claiming that it is not liable for Petitioner Robert Wommack's occupational disease (OD) of asbestos-related disease on several theories, including: (1) under the 1973 and 1983 statutes, notice was not timely given, and the statute of repose barred recovery; (2) under the last injurious exposure rule, regardless of which Occupational Disease Act (ODA) applies, it cannot be held liable for

Wommack's OD; and (3) it was not the insurer at the time Wommack's asbestos-related disease was first diagnosed, and thus not liable pursuant to § 39-72-303(2), MCA.¹

¶ 2 Wommack opposes the motion but does not dispute that he was exposed to asbestos after September 30, 1985, when National Farmers Union ceased its workers' compensation coverage for his employer.² Neither Respondent Nationwide Mutual Fire Ins. Co. (Nationwide) nor Respondent Montana State Fund (State Fund) opposes the motion. Liberty Mutual Fire Ins. Co. (Liberty) is the sole insurer opposing National Farmers Union's motion. It does so for the purpose of proclaiming itself not liable for Wommack's OD, and that the 1997 ODA governs Wommack's claim.³

Uncontroverted Facts

¶ 3 Wommack worked for Cenex in Laurel for approximately 30 years — from 1968 to April 1, 1998. Wommack believes that he was exposed to asbestos during his entire career with Cenex, although he has indicated that his last significant exposure to asbestos occurred in 1992 or 1993, when he was promoted from working in the refinery to management and began working in the Cenex office building.⁴

¶ 4 Cenex was insured by four insurers during the time Wommack worked there: (1) National Farmers Union provided coverage from December 21, 1973, to September 30, 1985; (2) Nationwide provided coverage from September 30, 1985, to October 16, 1986; (3) State Fund provided coverage from October 16, 1986, to July 1, 1994; and (4) Liberty provided coverage from July 1, 1994, to June 1, 1998.⁵

¶ 5 Wommack testified that he was exposed to asbestos "on a daily basis" at work after September 30, 1985.⁶ When he was exposed to asbestos, he did not wear a mask or respirator because it was not required.⁷ One of Wommack's coworkers testified that

¹ Respondent National Farmers Union Property & Casualty, Co.'s Motion for Summary Judgment and Supporting Brief (National Farmers Union's Motion) at 4-8, Docket Item No. 5.

² Petitioner's Response to National Farmers Union Property & Casualty, Co.'s Motion for Summary Judgment (Petitioner's Response) at 3-4, Docket Item No. 13.

³ Liberty Mutual Fire Ins. Co.'s Response to National Farmers Union Property & Casualty Co.'s Motion for Summary Judgment and Supporting Brief (Liberty's Response) at 3-4, Docket Item No. 25.

⁴ [Petitioner's] Second Petition for Trial (Second Petition) at 1, Docket Item No. 1; National Farmers Union's Motion at 2, Ex. B at 5, 10-11.

⁵ Second Petition at 2.

⁶ Wommack Dep. 129:4-11.

⁷ Wommack Dep. 129:17-22.

Wommack could have been exposed to asbestos “nearly every day” that Wommack worked as a maintenance foreman from 1988 to 1993.⁸

¶ 6 Wommack is suffering from asbestos-related disease first diagnosed on March 26, 2013.⁹

¶ 7 Wommack filed his First Report of Injury or Occupational Disease on September 6, 2013.¹⁰

Law and Analysis

¶ 8 National Farmers Union argues that either the 1973 or the 1983 Workers’ Compensation Act (WCA) are applicable. Generally, however, the law in effect when a claimant files his claim, or on his last day of work - whichever is earlier - governs an OD claim.¹¹ This Court will apply the 1997 ODA, since that was the law in effect on Wommack’s last day of employment, and CHS, Wommack, and Liberty Mutual Fire Ins. Co. all agree, that is the law that governs Wommack’s claim.¹² This Court also applied the 1997 statutes when it granted Respondent CHS, Inc.’s summary judgment motion in this case.¹³

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

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

⁸ See, e.g., Petitioner’s Response, Ex. H at 9.

⁹ Second Petition at 1.

¹⁰ *Id.*

¹¹ *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. *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).

¹² CHS’s Brief at 2; Petitioner’s Response at 3; Liberty Mutual Fire Ins. Co.’s Response to National Farmers Union Property & Casualty, Inc.’s Motion for Summary Judgment and Supporting Brief at 3, Docket Item No. 25.

¹³ Order Granting Respondent CHS Inc.’s Motion for Summary Judgment, 2015 MTWCC 5, ¶ 6.

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.

¶ 10 This Court recently followed the Montana Supreme Court's guidance that under the last injurious exposure rule, "liability for and administration of a claim should correspond with the period in which the injurious exposure occurred."¹⁴ This Court also noted that in *Liberty Northwest Ins. Corp. v. Montana State Fund (In re Mitchell)*, the Supreme Court adopted the "potentially causal" standard for proving liability for an OD pursuant to the last injurious exposure rule, under which "the claimant must present objective medical evidence demonstrating that he has an OD and that the working 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."¹⁵

¶ 11 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. While § 39-72-303(1), MCA, is written in terms of "employer" liability, it is the employer's insurer that is actually liable for paying benefits.¹⁶ Thus, under § 39-72-303(1), MCA, *In re Mitchell*, and *Nelson v. Cenex*, the insurer at risk at the time of the claimant's last injurious exposure to asbestos — i.e., the insurer at risk when Wommack was last exposed to the type and kind of conditions that cause asbestos-related disease — is liable for his claim unless that insurer has a valid defense.

¶ 12 Under the uncontroverted facts, National Farmers Union was not the insurer at risk at the time of Wommack's last injurious exposure to asbestos. National Farmers Union met its burden of establishing that there are no issues of material fact with Wommack's testimony that he was exposed to asbestos throughout his time working in the refinery, including "on a daily basis" after 1985 when National Farmers Union was

¹⁴ *Id.*, ¶¶ 8-11 (citing *Liberty Northwest Ins. Corp. v. Montana State Fund (In re Mitchell)*, 2009 MT 386, ¶¶ 19, 24, 353 Mont. 299, 219 P.3d 1267; *Nelson*, ¶¶ 29, 33).

¹⁵ *Id.*, ¶ 8 (quoting *In re Mitchell*, ¶ 24).

¹⁶ *Id.*, ¶ 12 (citations omitted).

no longer providing workers' compensation coverage for Cenex.¹⁷ At least one coworker has corroborated his testimony. No party to this case has presented any evidence indicating that Wommack's last injurious exposure occurred before September 30, 1985, or that his exposures after September 30, 1985, were insufficient to meet the "potentially causal" standard. Thus, there are no issues of material fact.¹⁸

¶ 13 Moreover, no party has presented any argument that National Farmers Union is or could be liable for Wommack's OD under Montana law. Neither Nationwide nor State Fund opposed National Farmers Union's motion for summary judgment, thereby tacitly agreeing that National Farmers Union is not liable for Wommack's OD. Liberty argues the 1997 WCA applies to this case and that it is not liable for Wommack's OD under the last injurious exposure rule because Wommack's last injurious exposure occurred before it became the insurer at risk.¹⁹ However, Liberty does not argue that National Farmers Union is or could be liable for Wommack's OD. Wommack, who has the burden of proving which insurer is liable, argues that he was exposed to asbestos during his entire 30 years of employment with Cenex and that "liability for [his] last injurious exposure lies among the insurers responsible for these time frames,"²⁰ but does not specifically argue that National Farmers Union is liable for his OD. National Farmers Union is therefore entitled to judgment as a matter of law in accordance with § 39-72-303(1), MCA, *In re Mitchell*, and *Nelson*.²¹

ORDER

¶ 14 For the foregoing reasons, National Farmers Union Property & Casualty Co.'s motion for summary judgment is **granted**.

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¹⁷ Wommack Dep. 46:19 – 49:19; 53:19 – 59:12; 129:4-11.

¹⁸ See *Nelson*, ¶ 15 (citations omitted) ("Where the moving party is able to demonstrate that no genuine issue as to any material fact remains in dispute, the burden then shifts to the party opposing the motion. To raise a genuine issue of material fact, the party opposing summary judgment must present material and substantial evidence rather than merely conclusory or speculative statements. As this Court has previously observed, 'proof is required to establish the absence of genuine issues of material fact; a party may not rely on the arguments of counsel.'")

¹⁹ Liberty's Response at 3-4.

²⁰ Petitioner's Response at 1, 4.

²¹ See ARM 24.5.329(2).

DATED this 28th 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 6, 2015

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