

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 5

WCC No. 2003-0839

FRANCES BAKER, widow of BRUCE C. BAKER

Petitioner

vs.

TRANSPORTATION INSURANCE COMPANY

Respondent/Insurer.

DECISION AND ORDER REGARDING PENDING MOTIONS

Summary: The widow of a deceased worker who allegedly contracted asbestos related lung disease during his employment with W.R. Grace at its Libby, Montana mine seeks death benefits under the Occupational Disease Act. The deceased worker retired on August 25, 1985. He died on February 4, 2002. His widow submitted a claim for compensation on September 5, 2002.

Held: The claim in this case is barred by section 39-72-403(3), MCA (1983), which is a statute of repose.

Topics:

Limitations Periods: Claim Filing: Occupational Disease. Under the 1983 Occupational Disease Act, a claim which is not filed within three years of cessation of employment with the employer where the occupational exposure took place is barred even though the disease caused by the exposure does not manifest itself and is not discovered until after the limitations period has run. § 39-72-403(3), MCA (1983).

Limitations Periods: Claim Filing: Occupational Disease. Subsection (3) of 39-72-403, MCA (1983), which provides that a claim for an occupational disease must be brought within three years after the employee ceases employment with the employer where the occupational exposure took place, is not tolled by the fact that the disease did not manifest itself and the claimant did not discover it until after the limitations period had run. The limitation is a statute of repose not subject to tolling. Moreover, the subsection expressly overrides the latent disease doctrine which is part of the previous two subsections.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-72-403, MCA (1983). Under the 1983 Occupational Disease Act, a claim which is not filed within three years of cessation of employment with the employer where the occupational exposure took place is barred even though the disease caused by the exposure does not manifest itself and is not discovered until after the limitations period has run. § 39-72-403(3), MCA (1983).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-72-403, MCA (1983). Subsection (3) of 39-72-403, MCA (1983), which provides that a claim for an occupational disease must be brought within three years after the employee ceases employment with the employer where the occupational exposure took place, is not tolled by the fact that the disease did not manifest itself and the claimant did not discover it until after the limitations period had run. The limitation is a statute of repose not subject to tolling. Moreover, the subsection expressly overrides the latent disease doctrine which is part of the previous two subsections.

Constitutional Law: Full Redress. A statute of repose with respect to occupational disease claims does not violate the Full Redress Clause of the Montana Constitution, Art. II, section 16.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-72-403, MCA (1983). Section 39-72-403(3), MCA (1983), which is a statute of repose with respect to occupational disease claims, does not violate the Full Redress Clause of the Montana Constitution, Art. II, section 16.

Constitutional Law: Equal Protection. A statute of repose barring occupational disease claims filed more than three years after the claimant terminates the employment where the exposure occurred does not violate the Equal Protection Clause of the Montana Constitution since the bar applies to all occupational disease claims and claimants.

Pending Motions

¶1 Three motions are presently before the Court. The first is a motion for summary judgment filed by the respondent insurer. The motion urges that the present action is time-barred. The second motion is one by petitioner asking that the motion for summary judgment be deferred until further discovery can be done. The third motion, by respondent, requests that the petitioner's discovery be quashed.

Facts

¶2 The facts essential to the motions are undisputed. They are as follows:

¶2a The petitioner, Frances Baker (petitioner), is the widow of Bruce C. Baker ("Bruce Baker" or "Bruce").

¶12b Bruce Baker worked at the W.R. Grace mine near Libby, Montana, from May 13, 1969 until August 25, 1985.

¶12c Bruce died on February 4, 2002, allegedly on account of an asbestos related lung disease he acquired while working for W.R. Grace.

¶12d On September 5, 2002, the petitioner filed a claim for occupational disease benefits. The claim was submitted to Transportation Insurance Company (Transportation), which denied the claim. This action ensued.

Discussion and Resolution

¶13 The basic principles governing motions for summary judgment are well established and need little explication here. To succeed, the moving party (Transportation) must demonstrate that the uncontroverted facts material to the motion show it is entitled to judgment dismissing the petition. “Summary judgment is appropriate where the movant shows there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” *Cook v. Hartman*, 2003 MT 251, ¶ 17; and see Workers’ Compensation Court Rule 24.5.329(2).

¶14 The facts essential to Transportation’s motion are not in dispute. Initially, Transportation does not deny it is the insurer at risk. Rather, relying on this Court’s recent decision in *Hardgrove v. Transportation Ins. Co.*, 2003 MTWCC 57, it argues that the claim in this case is untimely. With respect to the timeliness issue, there is no dispute that Bruce Baker’s last day of work for W.R. Grace was August 25, 1985, and that the claim at issue in this case was not filed until September 5, 2002. There is also no dispute that Mr. Baker died on February 4, 2002. For purposes of the motion, the Court assumes he died of an asbestos related lung disease caused by his employment with W.R. Grace.

¶15 The parties agree that at the time of Bruce Baker’s retirement from W.R. Grace, the 1983 version of section 39-72-403(3), MCA, was in effect. While the provision was repealed by the 1985 legislature, the repealer was expressly applicable only to “claims arising from exposures occurring on or after the effective date of this act.” 1985 Mont. Laws, ch. 112, § 6. The act in question, 1985 Mont. Laws, ch. 112, did not specify an effective date, therefore, pursuant to section 1-2-201, MCA (1983-85), the act was effective October 1, 1985. Accordingly, the repealer applied only to “exposures occurring on or after” October 1, 1985.

¶16 In *Hardgrove*, I held that section 39-72-403(3), MCA (1983), is a statute of repose barring any occupational disease claims filed more than “3 years after the last day upon which the claimant or the deceased employee actually worked for the employer against whom compensation was claimed.” *Hardgrove* at ¶¶ 3, 8, and 10. Petitioner argues that my decision in *Hardgrove* is flawed.

¶17 Petitioner initially challenges my conclusion that the section is a statute of repose, however, I reaffirm that conclusion based on my analysis in *Hardgrove*.

¶18 One of the arguments most vigorously advanced by the petitioner is that the time limits in section 39-72-403(3), MCA (1983), should be equitably tolled based on the failure of Transportation and W.R. Grace to inform workers of the dangers of asbestos exposure. She has submitted affidavits which support her factual contentions. The Montana Supreme Court, however, has specifically held that a statute of repose cannot be tolled by fraudulent concealment or any other acts unless the statute itself expressly provides for tolling. *Joyce v. Garnaas*, 1999 MT 170, ¶ 22, 295 Mont. 198, 983 P.2d 369 (citing *Blackburn v. Blue Mountain Women's Clinic*, 286 Mont. at 60, 73, 951 P.2d 1, 9 (1997)). “[A] statute of repose is not tolled without the presence of modifying or limiting language.” *Joyce*, ¶ 22. There is no tolling provision in section 39-72-403(3), MCA (1983), therefore, even assuming her factual contentions to be true the limitations period is not tolled.

¶19 Citing *Bowerman v. State Compensation Ins. Fund*, 207 Mont. 314, 673 P.2d 476 (1983), and the latent injury doctrine, the petitioner further argues that section 39-72-403(3), MCA (1983), is tolled by Mr. Baker’s lack of knowledge of his disease. Petitioner’s argument is answered by my discussion in the previous paragraph and by my discussion in *Hardgrove*.

¶10 Petitioner further argues that if this Court holds her claim is barred by section 39-72-403(3), MCA (1983), then her right to equal protection is violated because the Montana Workers’ Compensation Act allowed tolling for injury claims. Her argument is based on recent cases holding distinctions between the Occupational Disease Act and the Workers’ Compensation Act unconstitutional. The cases are *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456; *Stavenjord v. Mont. State Fund*, 2003 MT 67, 314 Mont. 466, 67 P.3rd 229; *Schmill v. Liberty Northwest Ins. Co.*, 2003 MT 80, 315 Mont. 51, 67 P.3rd 290.

¶11 I considered a similar argument in *Hardgrove* and rejected it. I pointed out that the decisions cited by the petitioner apply to the 1987 revisions to the Workers’ Compensation and Occupational Disease Acts and that none of them have overruled *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d 862 (1989). *Eastman* held that differences in the Workers’ Compensation and Occupational Disease Acts prior to the 1987 revisions do not violate equal protection guarantees. Whether *Eastman* will survive renewed challenge is a matter of speculation; the fact remains that it is still the law and must be followed until and unless the Supreme Court overrules it.

¶12 In *Hardgrove*, I also rejected tolling arguments and constitutional challenges based on the Full Redress Clause of the Montana Constitution, Art. II, § 16. Petitioner in this case disagrees with my ruling and renews the argument. My decision in *Hardgrove* has been appealed and, as with her other arguments, this argument should be addressed to the Supreme Court.

¶13 In conclusion, I reaffirm my decision in *Hardgrove* and find, as a matter of law, that the claim in this case is time-barred under section 39-72-403(3), MCA (1983). The respondent's motion for summary judgment is therefore granted.

¶14 My disposition of the motion for summary judgment also disposes of the remaining two motions. I have held that section 39-72-403(3), MCA (1983), is not subject to tolling on equitable or other grounds. Therefore, further discovery regarding the petitioner's equitable tolling argument is immaterial. The petitioner's Motion for Continuance of Summary Judgment is therefore denied. The Respondent's Motion for Protective Order is granted.

ORDER

¶15 The respondent's motion for summary judgment is granted.

¶16 The petitioner's Motion for Continuance of Summary Judgment is denied.

¶17 The Respondent's Motion for Protective Order is granted.

¶18 Since both parties have indicated an interest in having the Court address the merits of the claim so that further proceedings would be unnecessary if the Supreme Court reverses *Hardgrove* and my summary judgment in this case, I am not at this time entering judgment and do not at this time certify this order as final for purposes of appeal. I will discuss further proceedings with counsel and then determine whether final judgment and certification are appropriate or whether I should proceed to the merits and resolve all issues.

DATED in Helena, Montana, this 15th day of January, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Jon Heberling

Mr. Todd A. Hammer

Submitted: November 12 and 24, 2003