

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 8

WCC No. 9604-7536

THEDA BEA BOULDIN

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

BIG SKY CARVERS

Employer.

ORDER REGARDING APPLICABLE LAW

Summary: In occupational disease case, insurer argued that 1995 version of the OD Act applied because claimant's last day of employment was March 14, 1996, although her occupational disease arose prior to the effective date of the 1995 OD Act. Insurer relied on statements in Supreme Court decisions where the issue was running of the statute of limitations in a permanent total disability case, not the issue here.

Held: Where claimant's right to compensation accrued at the time she filed her occupational disease claim, the law in effect at that time controls. This is consistent with the general rule in workers' compensation cases that the law in effect at the time of injury controls the case.

Topics:

Occupational Disease: Applicable law. Where claimant's right to compensation accrued at the time she filed her occupational disease claim, the law in effect at that time controls. This is consistent with the general rule in workers' compensation cases that **the law in effect at the time of injury controls the case.**

Statutes and Statutory Interpretation: Applicable law. Where claimant's right to compensation accrued at the time she filed her occupational disease claim, the law in effect at that time controls. This is consistent with the general rule in workers' compensation cases that the law in effect at the time of injury controls the case.

During a conference with claimant, Ms. Theda Bea Bouldin, and Mr. Larry W. Jones, who represents Liberty Northwest Insurance Corporation (Liberty) in this matter, Mr. Jones raised an issue with regard to the law applicable to this case. Specifically, he contends that the Occupational Disease Act (ODA) *as amended by the 1995 legislature* is controlling even though claimant filed her claim prior to the effective date of the 1995 amendments. The amendments adversely impact the payment of claimant's medical expenses by incorporating the medical expense limitations found in the 1995 Workers' Compensation Act. § 39-72-704, MCA (1995). Those limitations are not present in the 1993 ODA. § 39-72-704, MCA (1993).

The effective date of the 1995 amendments to the Montana ODA was July 1, 1995. 1995 Montana Laws, ch. 243, §29. In workers' compensation cases, the Montana Supreme Court has consistently held that the law in effect on the date of the worker's industrial injury governs his or her entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Liberty argues, however, that in the case of an occupational disease the governing date is the last day of employment. It says that claimant's last day of employment was March 14, 1996, thus the 1995 version of the ODA applies. (Respondent's Memorandum Re: Determination of Governing Occupational Disease Act at 1.)

Liberty relies on *Grenz v. Fire and Casualty of Connecticut*, 924 P.2d 264 (Mont. 1996), which stated, "The Montana Occupational Disease Act (MODA) statutes in effect on an employee's last day of work govern the resolution of an occupational disease claim." *Grenz* cited *Lockwood v. W.R. Grace & Co.*, 272 Mont. 202, 205, 900 P.2d 314, 316 (1995) as authority for the statement. In turn, *Lockwood* cited *Gidley v. W.R. Grace & Co.*, 221 Mont. 36, 38, 717 P.2d 21, 22 (1986), for the identical proposition.

In *Gidley* the husband of the claimant had retired from W.R. Grace in July 1977, was diagnosed with cancer in June 1981, and died in May 1992. Claimant, as her husband's beneficiary, filed an occupational disease claim in July 1982. One of the issues on appeal was which version of the ODA applied to the claim. The Supreme Court ultimately concluded, as it did in *Lockwood* and *Grenz*, that the law in effect on the last day of employment governed the claim. **However**, the *Gidley* decision provides the following analysis on the point:

Our initial question is which MODA statutes control the claim; those in effect on Mr. Gidley's last actual day of work in July 1977, or those in effect at the alleged time of discovery of the disease in June 1981, or those in effect when the claim was originally filed in July 1982? As to MODA, this issue is novel. However, **it has been considered a number of times in workers' compensation cases and the Court has concluded that the statute in effect at the date of accident or injury controls.** See *Iverson v. Argonaut Insurance Company* (1982), 198 Mont. 340, 342,

645 P.2d 1366, 1367; *Yurkovich v. Industrial Accident Board* (1957), 132 Mont. 77, 86, 314 P.2d 866, 872; *Chisholm v. Vocational School for Girls* (1936), 103 Mont. 503, 510, 64 P.2d 838, 842-43. **We conclude that the same rationale should be applied in MODA claims.** Here, Mr. Gidley's last actual day of work was in July 1977. We therefore conclude that MODA statutes in effect on his last actual day of work are controlling.

221 Mont. at 38-39, 717 P.2d at 22 (emphasis added).

In all three cases, the core issue involved the statute of limitations applicable to MODA claims. In *Gidley* and *Lockwood* the statute provided that a claim had to be filed within one year of when the "claimant knew or should have known that his **total disability condition** resulted from an occupational disease claim." § 39-72-403(1), MCA (1977-1983) (emphasis added). The statute at issue in *Grenz* provided for a two-year period from discovery, but was otherwise identical. § 39-72-403(1), MCA (1985).

The applicable statutes in both *Gidley* and *Lockwood* also provided for an absolute limitation of three years from the date the claimant or the claimant's decedent ceased employment. Subsection (3) of section 39-72-403, MCA (1977-1983), provided:

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, no claim to recover benefits under this chapter may be maintained unless the claim is properly filed within 3 years after the last day upon which the claimant or the deceased employee actually worked for the employer against whom compensation is claimed.

Subsection (3) was repealed in 1985. 1985 Montana Laws, ch. 112, § 2.

In each of the three cited cases the claimant or the claimant's decedent had ceased working **prior** to the filing of the claim for compensation. *In that context* the Supreme Court found that the occupational disease claim was governed by the law in effect on the last day of employment.

The claimant in this case is not presently permanently totally disabled. She filed her claim while still working. While she may have ceased working for her original employer on March 14, 1996, documents in the Court file indicate that she continues to work, albeit at a different job for a different employer. Under this circumstance, the Court must heed the underlying rationale set forth in *Gidley*.

Gidley requires that the rationale applicable to workers' compensation claims be applied in occupational disease cases. Under the WCA, the law in effect at the time of the accident or injury controls. The rule reflects the fact that the right to compensation accrues at the time of the industrial injury. In this case the claimant's right to compensation accrued at the

time she filed her claim since she was suffering from an occupational disease at that time.
Thus, the 1993 law applies to her claim.

SO ORDERED.

DATED in Helena, Montana, this 4th day of March, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Theda Bea Bouldin - Certified Mail

Mr. Larry W. Jones

Submitted: December 13, 1996