

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 57

WCC No. 2002-0666

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WILLIAM HARDGROVE

Petitioner

vs.

TRANSPORTATION INSURANCE COMPANY

Respondent/Insurer.

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DECISION AND JUDGMENT

AFFIRMED 12/01/04

*[Hardgrove v. Transportation Ins. Co., 2004 MT 340 \(No. 03-678\)](#)*

**Summary:** Claimant and insurer jointly petitioned the Court for a determination as to whether the claimant's asbestosis claim is time-barred. He ceased working for W.R. Grace in 1984. At the time of his retirement section 39-72-403(3), MCA, provided that any claim for occupational disease benefits must be brought within three years after the claimant ceased employment. The provision was repealed in 1985. In 1998 claimant was diagnosed with asbestosis resulting from his work for W.R. Grace.

**Held:** The claim is time-barred. The 1985 repeal of section 39-72-403(3), MCA (1983), was expressly made applicable to exposures occurring after the 1985 repeal. The latent injury doctrine is inapplicable since subsection (3) is a statute of repose and in any event expressly overrides the doctrine. Finally, the subsection is not unconstitutional either under the Full Redress Clause or the Equal Protection Clause.

**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 claimant did not discover it until after the limitations period had run. The limitations 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).

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**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.

**Statutes: Retroactivity.** The repealer of a statute of repose in the Occupational Disease Act which is expressly made applicable to exposures occurring after the enactment of the repealer by its plain terms does not apply to exposures occurring before the enactment. Thus, the 1985 repeal of subsection 39-72-403(3), MCA, is inapplicable to an occupational disease claim where the occupational exposure ceased prior to the repeal.

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**Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-72-403, MCA (1983).** 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.

**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.

¶1 The present case is before the Court on a joint petition of claimant and the insurer for W.R. Grace & Company (W.R. Grace). The question presented is whether a claim for an asbestosis-related disease contracted in the course and scope of the claimant's employment is time-barred.

#### Facts

¶2 The petition sets out stipulated facts. Those facts, which I have rephrased, are as follows:

¶2a Claimant was employed by W.R. Grace at its Libby, Montana mine from 1967 to April 2, 1984.

¶2b W.R. Grace was insured by Transportation Insurance Company (Transportation) during the claimant's employment.

¶2c As a result of his employment, claimant contracted asbestosis. His asbestosis was not diagnosed until September 1, 1998.

¶2d Claimant filed an occupational disease claim on October 2, 1998. Transportation denied the claim as time-barred based on section 39-72-403, MCA (1983).

#### Statute at Issue

¶13 The 1983 version of the Occupational Disease Act (ODA) was in effect on the last day of the claimant's employment. Section 39-72-403, MCA (1983), provided a limitations period for filing a claim for occupational disease benefits. Subsection (1) provided a general one-year limitation for filing a claim. That one year commences on the date "claimant knew or should have known that his total disability condition resulted from an occupational disease." Under subsection (2) the old Division of Workers' Compensation was authorized to waive the filing requirement for "up to an additional 2 years," thus providing a maximum three-year filing period following discovery of a totally disabling OD. However, subsection (3) provided a further, absolute limitations period which is the subject of the present proceeding. That subsection provided:

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 was claimed.

#### Discussion

##### I. Effect of the 1985 Repeal of Subsection (3)

¶14 The 1985 legislature amended section 39-72-403, MCA (1983), by deleting subsection (3). 1985 Mont. Laws, ch. 112. § 2. Citing *Williams v. Wellman-Power Gas, Inc.*, 174 Mont. 387, 571 P.2d 90 (1977), claimant argues that the amendment must be applied in this case.

¶15 *Williams* held that legislative amendment to a limitations period is applicable to claims which are not already barred under pre-amendment statutes. The Court adopted reasoning of the California Supreme Court in which that court said that "a party has no vested right in the running of a statute of limitation prior to its expiration." 174 Mont. at 391, 571 P.2d at 93 (quoting from *Mudd v. McColgan*, 30 Cal.2d 463, 183 P.2d 10, 13 (1947).) More recently, our Supreme Court has held:

Statutes of limitations are generally considered laws of procedure. If the legislature passes a new statute of limitations, all rights of action are to be enforced under the new procedure regardless of when the cause of action accrued unless there is an explicit savings clause set forth in the statute.

*Fisher v. First Citizens Bank*, 2000 MT 314, ¶ 14. 302 Mont. 473, 14 P.3d 1228 (citations omitted).

¶16 During oral argument in this matter, I queried why *Williams* would not require application of the 1985 amendments to section 39-72-403, MCA, since the existing

limitations period had not expired at the time of the 1985 enactment<sup>(1)</sup>. Counsel for Transportation responded that the 1985 repealer does not apply because subsection (3) of the 1983 law is a statute of repose and not a statute of limitations. He also argued that application of the 1985 amendment would amount to a retroactive application of the law. I then requested briefs as to whether there are cases holding that a rule different from that applied in *Williams* applies to statutes of repose.

¶7 The briefing exercise turns out to be unnecessary. Prior to oral argument I had not reviewed the 1985 Session Laws to determine the effective date of the amendments to section 39-72-403, MCA. Apparently, counsel had not looked at the session laws either since they did not bring section 6 of the chapter in question to my attention.

¶8 The 1985 amendments to section 39-72-403, MCA, were enacted through Chapter 112 of the 1985 Montana Session Laws. Section 6 of that chapter provides:

Section 6. **Applicability.** This act applies to claims arising from exposures occurring on or after the effective date of this act. [Emphasis added.]

The provision is the equivalent to the "savings clause" mentioned in *Fisher*. 302 Mont. at 478, 14 P.3d at 1231. Since claimant terminated his employment, and thus his exposure, prior to the enactment of the 1985 amendments to section 39-72-403, MCA, subsection 6 of the Session Laws precludes the application of the amendments to his claim. Accordingly, claimant's *Williams*' argument is immaterial and without merit.

## II. Tolling argument

¶9 Claimant also argues that subsection (3) is tolled by claimant's lack of knowledge of his condition and its relationship to his employment. He relies on the *latent injury* doctrine, citing *Bowerman v. State Compensation Ins. Fund*, 207 Mont. 314, 673 P.2d 476 (1983). *Bowerman* held that the time limitation period fixed for filing a workers' compensation claim "does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probably, compensable character of his latent injury." 207 Mont. at 319, 673 P.2d at 479. *Bowerman* was decided under section 39-71-601, MCA, of the WCA. Claimant urges that the latent injury doctrine should be applied by analogy to section 39-72-403, MCA (1983).

¶10 Section 39-71-601, MCA, is a statute of limitations and the discussion and holding in *Bowerman* was in that context. The statute in this case is not a statute of limitations, rather it is a statute of repose. A statute of repose is an "absolute time limit beyond which liability no longer exists." *Joyce v. Garnaas*, 1999 MT 170, ¶ 15, 295 Mont. 198, 983 P.2d 369 (quoting from *First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 866 (4<sup>th</sup> Cir. 1989).) Subsection (3) fits that description, providing an

absolute bar which overrides the general limitations period set out in the previous two subsections. Whatever inequities flow from a statute of repose, it is not subject to tolling. *Blackburn v. Blue Mountain Women's Clinic*, 286 Mont. 60, 73, 951 P.2d 1, 9 (1997).

¶11 The latent injury doctrine invoked by the claimant is already encompassed in the discovery rule of subsection (1) of section 39-72-403, MCA (1983). The subsection reads in relevant part:

When a claimant seeks benefits under this chapter, his claims for benefits must be presented in writing to the employer, the employer's insurer, or the division within 1 year from the date **the claimant knew or should have known that his total disability condition resulted from an occupational disease.** [Emphasis added.]

It is that very rule that subsection (3) overrides. Thus, the claimant's latent injury argument flies in the face of the statute irrespective of whether it's characterized as a statute of repose or a statute of limitations.<sup>(2)</sup> The Court cannot rewrite that statute.

¶12 I therefore conclude that the claimant's latent injury argument is without merit.

### III. Full Redress

¶13 Claimant urges that if subsection (3) applies and is not tolled by claimant's lack of knowledge of his disease, then the subsection violates his constitutional right to full legal redress, Mont. Const., Art. II, § 16. In relevant part, section 16 provides, "No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state."

¶14 Claimant argues cogently that if his petition is barred by subsection (3) he has no remedy whatsoever. His argument is premised on the exclusive remedy provision set forth in section 39-72-305(1), MCA (1979-2003), as interpreted in *Lockwood v. W.R. Grace & Co.*, 272 Mont. 202, 900 P.2d 314 (1995). In *Lockwood* the Supreme Court held that a 1979 amendment to section 39-72-305, MCA, precluded claimant's estate and widow from suing his employer even though the claim was denied by W.R. Grace's insurer "on the basis that the three-year statute of limitations contained in § 39-72-403, MCA (1983), had run." The Court distinguished its prior decision in *Gidley v. W.R. Grace & Co.*, 221 Mont. 36, 717 P.2d 21 (1986), which had held that a claimant could sue his employer where his claim was time-barred prior to his discovery of his OD. It pointed out that the exclusive remedy provision at issue in *Gidley* was the 1977 version and that the legislature had changed the language of the provision in 1979. It found that the change in language required a different conclusion in *Lockwood*.

¶15 In rendering its decision in *Lockwood*, the Court did not address whether a claim under the ODA was barred, saying, "Issues relating solely to whether Lockwood's MODA claim is barred by the applicable statute of limitations are not properly before us in this action and must await resolution in the event Lockwood litigates a MODA claim." 272 Mont. at 206, 900 P.2d at 316. Since *Gidley* was based on the fact that claimant discovered his disease after the limitations period had run, and the facts in *Lockwood* were that Lockwood also did not discover his disease until after the expiration of the three-year limitations period laid out in section 39-72-403(3), MCA, it is clear that the Court in *Lockwood* concluded that the running of the limitations period prior to discovery of a disease was immaterial to its interpretation of the exclusive remedy provision.

¶16 It is difficult for me to reconcile the *Lockwood* decision with the Court's decision eight months later in *Stratemeyer v. Lincoln County*, 276 Mont. 67, 915 P.2d 175 (1996), in which the Court held that the exclusive remedy provision of the WCA did not apply to negligence claims for mental stress since mental stress is not compensable under the Act. Central to the Court's decision was its observation that workers' compensation coverage is the *quid pro quo* for the exclusive remedy provision. The Court said:

The *quid pro quo* between employers and employees is central to the Act; thus, it is axiomatic that there must be some possibility of recovery by the employee for the compromise to hold. The scope of immunity from tort relates to the definition of injury under § 39-71-119, MCA. As Professor Larson observed:

If . . . the exclusiveness defense is a "part of the *quid pro quo* by which the sacrifices and gains of employees and employers are to some extent put in balance," it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except where something of value has been put in their place.

2A Arthur Larson, *The Law of Workmen's Compensation* § 65.40 (perm. ed. rev. vol. 1995). 276 Mont. at 75, 915 P.2d at 179-80. The point was reinforced two paragraphs later when the Court addressed the specific issue in the case:

Thus, it is unequivocally clear that mental injuries, such as Stratemeyer's, are beyond the scope of coverage of the Workers' Compensation Act. Accordingly, under Lincoln County's theory, employees would have no possibility of recovery for mental injuries and yet the employer would be shielded from all potential liability. If that were the case, the *quid pro*

quo, which is the foundation of the exclusive remedy rule would be eliminated. Such a result would be contrary to the spirit and intent of the Workers' Compensation Act. *Cunningham v. Northwestern Improvement Co.* (1911), 44 Mont. 180, 222, 119 P. 554, 566. *Stratemeyer* asserts that in light of the restrictive definition of injury in § 39-71-119, MCA, as well as the policy statement in § 39-71-105(5), MCA, there is no quid pro quo for workers who suffer "mental-mental" injuries. We agree. **Absent the quid pro quo, the exclusive remedy cannot stand, and the employer is thus exposed to potential tort liability.** *Errand v. Cascade Steel Rolling Mills* (1995), 320 Or. 509, 888 P.2d 544, 552; *Day v. NLO, Inc.* (S.D.Ohio 1992), 811 F.Supp. 1271, 1279. [Emphasis added.]

*Id.* at 76, *Id.* at 180. In cases where a claimant terminates employment prior to the discovery of a slowly developing disease, such as this in this case, there is "no possibility of recovery" under the ODA, thus the logic of *Stratemeyer* would appear to require a conclusion that the exclusive remedy provision is inapplicable to such cases. Nonetheless, *Lockwood* has not been overruled or revisited.

¶17 The situation presented here is the very situation *Stratemeyer* did not address - employees with latent diseases "have no possibility of recovery" under the ODA and "yet the employer . . . [is] shielded from all potential liability." *Stratemeyer* at 76, 915 P.2d at 180. A good argument can be made that this situation creates an issue under the Full Redress Clause of the Montana Constitution. While the Full Redress Clause has been invoked principally in third-party cases, e.g., *Francetich v. State Compensation Mutual Ins. Fund*, 252 Mont. 215, 827 P.2d 1279 (1992), on its face it prohibits denial of full redress for injuries suffered in employment *except* against the employer and co-employees and *then only if* there is coverage under the workers' compensation laws. Again, Mont. Const., Art. II, § 16 provides:

No person shall be deprived of this full legal redress *for injury incurred in employment* for which another person may be liable ***except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state.*** [Emphasis added.]

Arguably, the section does not apply just to third-party actions against persons other than the employer but extends to the employer and fellow employees unless the "employer provides coverage under the Workmen's Compensation Laws of this state." Since there is no possibility of recovery in latent disease cases where the diseases are discovered more than three years after the employee terminates employment, arguably there is no *quid pro quo* and the Full Redress Clause is violated.<sup>(3)</sup>

¶18 Transportation points out that other statutes of repose have been upheld against constitutional attack even though the injury is not discovered until after the statute has run.

It cites *Reeves v. Ille Electric Co.* 170 Mont. 104, 551 P.2d 647 (1976), a case involving a ten-year statute of repose with respect to builders and architects. In that case the claimant was electrocuted in a whirlpool bath. His estate sued the architect and the builder who installed the whirlpool, however, more than ten years had passed since the installation. As in this case, the actual harm was not discovered, and in fact it did not occur, until after the statute of repose had run. Nonetheless, the Supreme Court upheld the constitutionality of the statute against due process and equal protection challenges, in part because the statute preserved a cause of action against the "owner, tenant, or person in actual possession and control of the improvement at the time a right of action arises," thus affording the plaintiff alternative remedies. In this case no alternative remedy is apparent. More importantly, *Reeves* did not consider the constitutionality of a statute of repose under Art. II, section 16.

¶19 However, even if I were to embrace the foregoing analysis, it is still possible, if not likely, that subsection (3) is constitutional under the Full Redress Clause. That possibility arises because there is an equally if not more compelling possibility that the exclusive remedy provision, as applied to latent disease cases barred under section 39-72-403(3), MCA (1983), is the unconstitutional provision. That is because the Full Redress Clause does not require workers' compensation coverage, it merely prohibits the denial of full redress where there is no coverage. Since the legislature did not extend coverage to latent diseases in situations like the one in this case, it would seem that the clause would be violated not by the lack of coverage but by the bar against the claimants suing their employers in tort. *Lockwood* did not address or grapple with constitutional issues, thus it does not preclude the possibility.

¶20 That said, this Court has no jurisdiction to consider the constitutionality of the exclusive remedy provision since that provision can only be invoked in a district court proceeding. On the other hand, it is claimant's burden to persuade the Court "beyond a reasonable doubt" that section 39-72-403(3), MCA (1983), is unconstitutional. *Zempel v. Uninsured Employers' Fund*, 282 Mont. 424, 428, 938 P.2d 658, 661 (1997). In light of the foregoing discussion, I cannot say "beyond a reasonable doubt" that the section is unconstitutional.

#### IV. Equal Protection Argument

##### A.

¶21 Citing *Henry, Stavenjord, and Schmill*,<sup>(4)</sup> claimant argues that subsection (3) violates his right to equal protection because the WCA permits tolling with respect to latent injuries. However, all three of the cited cases were decided under 1987 amendments to the ODA. The Supreme Court held that the amendments changed the focus of the ODA from "the nature of the medical condition" to "the number of work shifts over which the worker incurs an injury." *Henry v. State Compensation Ins. Fund*, 1999 MT 126, ¶ 43, 294 Mont. 448, 982

P.2d 456. That change in focus led the Court to conclude that there was no rational basis to deny claimants suffering from occupational disease benefits available to those suffering from injuries. In light of the amendments, the Court concluded that "the historical justification for treating workers differently under the WCA and the ODA no longer exists" and went on to hold:

[W]e can see no rational basis for treating workers who are injured over one work shift differently from workers who are injured over two work shifts. Simply put, a herniated disc is a herniated disc. Rehabilitation benefits promote the policy of early return to work for both classes of workers.

*Id.* at ¶ 44.

¶22 This case does not arise under the 1987 Act. Rather it arises under the pre-1987 law which the Supreme Court held constitutional in *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d 862 (1989). In *Eastman*, the Court held that different treatment of workers suffering occupational disease from those suffering injuries had a rational basis and did not violate the Equal Protection Clause. The majority decisions in *Henry*, *Stavenjord*, and *Schmill* certainly undermine *Eastman*. However, the Supreme Court has not overruled that decision. Thus, as of this date, *Eastman* is still the governing precedent as to the constitutionality of the pre-1987 ODA and I must follow it. Claimant's equal protection argument should therefore be addressed to the Supreme Court.

B.

¶23 Claimant also argues that subsection (3) violates the Equal Protection Clause because it creates two classes of occupational disease claimants, the first consisting of claimants who continue working for their employers long enough for their disease to become symptomatic and discovered within three years of cessation of work, the second consisting of claimants, like the one here, who do not discover their diseases until more than three years after retiring or terminating their exposure.

¶24 "[T]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877. The class here is occupational disease claimants. All occupational disease claimants are subject to the same limitations period, therefore they are all treated equally.

## JUDGMENT

¶25 The claimant's claim for compensation under the Montana ODA is time-barred under section 39-72-403(3), MCA (1983).

¶126 This Judgment is certified as final for all purposes.

DATED in Helena, Montana, this 13<sup>th</sup> day of August, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Thomas A. Baiz

Mr. Tom L. Lewis

Mr. David M. Sandler

Mr. Jon L. Heberling - Courtesy Copy

Submitted: May 13, 2003

1. Since claimant had not discovered his disease when he ceased employment, the limitations period under subsections (1) and (2) had not even started.
2. Claimant urges that to avoid unconstitutionality the Court must interpret subsection (3) as encompassing a latent injury exception. (Petitioner's Brief in Support of Judgment as a Matter of Law on Stipulated Facts at 10.) However, as claimant points out, the rule providing for the Court to adopt a constitutional interpretation requires that there be alternative interpretations. Similarly, all the "liberal construction" in the world will not aid claimant. Subsection (3) is plain on its face and there is simply nothing to interpret.
3. While *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488 (1989), holds that the Full Redress Clause "guarantees only a right of access to courts to seek a remedy for wrongs recognized by common-law or statutory authority, and the legislature may alter common-law causes of action to promote a legitimate state interest," that was said in a non-workers' compensation context and did not consider the part of the Full Redress Clause at issue here.
4. *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 448, 982 P.2d 456; *Stavenjord v. State Compensation Ins. Fund*, 2003 MT 67; *Schmill v. Liberty Northwest Ins. Co.*, 2003 MT 83.