IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 26

WCC No. 2002-0627

DAVID STEWART

Petitioner

vs.

ATLANTIC RICHFIELD COMPANY

Respondent.

ORDER DENYING SUMMARY JUDGMENT

Summary: The claimant seeks a hearing aid. He attributes his hearing loss to his employment with ARCO, from which he retired in 1984. ARCO moves for summary judgment on the ground that his request is time-barred.

Held: ARCO has not established as a matter of law that the claim is time-barred since its own facts indicate grounds to estop it from asserting a statute of limitations defense. Specifically, ARCO assured the claimant and other workers that hearing aids for job-related hearing loss would be paid for through their union contracts.

Topics:

Pro Sé. The Workers' Compensation Court will initially accept pro sé petitions submitted in the form of a letter and not conforming to its rules governing petitions, however, the petitioner will be required to file a formal petition in compliance with the rules. The Court has provided a fill-in-the-blank form to make that task easier.

Limitations Periods: Claim Filing: Estoppel. Where the employer through its union contract told employees it would pay for hearing aids for job-related hearing loss, that action may have lulled a claimant into believing that his hearing aids would be taken care of and into the belief that he did not have to file an occupational deafness or occupational disease claim. Under such circumstances, the employer's insurer may be estopped from asserting a statute of limitations defense on account of the claimant's failure to file a claim and is certainly not entitled to summary judgment finding the claim time-barred.

¶1 Pending before the Court is a petition filed by the claimant, David Stewart, seeking a hearing aid. The claimant is representing himself, thus appearing pro sé.

¶2 The claimant first brought his claim to the Court's attention through an August 15, 2002 handwritten letter in which he wrote:

> Michele [Fairclough, the respondent's adjuster] said I should write to you in regards to her denial of help for a hearing aid for me. This is her letter. I have never held another job since my retirement. All the damage to my ears happened while working for Ana. Co., and Atlantic Richfield for 42 years. Dr. Rodgers here in Butte did the hearing tests then, and now. Yes I am older now, but in good overall health. I hope you can help me to get a hearing aid which I really need.

The Court deemed the claimant's letter sufficient to open a case but instructed him to complete and return a Petition for Hearing form (Occupational Disease), which the Court mailed to him. The form enables pro sé claimants to fill in the blanks with the essential information required by ARM 24.5.301.

¶3 The Court received the completed form on August 20, 2002. In pertinent part, with underlined portions indicating blanks completed in handwriting, the petition provides:

> That on July, 1984, petitioner became aware of an occupational disease arising out of or contracted in the course and scope of her/his employment with Ana. Co. & Arco Co. in Silver Bow County, Montana. Petitioner suffers from the following disease: Hearing Loss which originated through employment as follows: Working in the Mine and the Pumps for 42 years with heavy machine noise, and very little hearing protection.

(Petition for Hearing, ¶ 1.) Where the form requested explanation of the nature of the dispute, the claimant wrote:

> Michele Fairclough does not think I am entitled to a hearing aid. I think I am as all of my hearing problems were caused at my Ana. Co. job.

(Petition for Hearing, ¶ 3.) As for relief requested, the claimant wrote "that I am entitled to get a hearing aid." (Petition for Hearing, Prayer.)

¶4 The matter now before the Court is respondent Atlantic Richfield Company's (ARCO) motion for summary judgment on the ground that the claim is time-barred. The claimant has not responded to the motion. Since the claimant is proceeding pro se' the Court does not deem his failure to respond to the motion as an admission it is well taken, ARM 24.5.316(4), but instead addresses the motion on its merits. For the reasons explained below, the motion is denied.

Undisputed Facts

¶5 The respondent asserts the following facts through an affidavit of its counsel:

> ¶5a That the records and files in this matter reflect that the Petitioner herein was employed by The Anaconda Company for an extended period of time prior to September 1, 1984.
>
> ¶5b The records and files in this matter further reflect that the last day that the Petitioner in this case worked for The Anaconda Company was September 1, 1984, which is shown as the Petitioner's retirement date.
>
> ¶5c Affiant cannot locate any claim for compensation claiming benefits by reason of an occupational disease or an occupational deafness that was filed by the Petitioner at any time prior to the filing of his Petition for Hearing before this Court.

(Affidavit in Support of Respondent's Consolidated Motions at 1-2.)

¶6 While the claimant did not file a response to the motion, he has provided a number of documents to the Court. The Court reviewed those documents as potential evidence in opposition to the motion for summary judgment.

¶7 The documents include a letter dated October 22, 1984, from Dr. Neal L. Rogers to Mr. Roger Oren of the Anaconda Company, Claim Department. The letter states:

> Dear Sir:
>
> Mr. Stewart was examined on 10/19/84. He has a severe bilateral sensory neural hearing loss.
>
> He has a 69% binaural hearing impairment and is in need of fitting for aids binaurally at Easter Seals. He definitely needs two aids and please have him fitted that way.
>
> Thank you.

(Petitioner's Trial Exhibits.)

¶8 Also included in the claimant's proposed trial exhibits are records that appear to reflect regular hearing examinations of the claimant by or at the behest of ARCO's predecessor, The Anaconda Company, in the 1970s. These, along with Dr. Rogers' letter of October 22, 1984, suggest that ARCO tested its employees for hearing loss and had notice of the claimant's hearing loss as early as the 1970s and certainly by the time of his 1984 retirement.

¶9 After noting these exhibits, particularly the letter from Dr. Rogers, the Court requested additional briefing from both parties regarding whether Dr. Rogers' letter could be considered a claim for compensation. The respondent then submitted an affidavit of counsel asserting, on information and belief following investigation, that

> each of the union contracts that existed at the closure of the ARCO mining and smelting operations in Montana contained a provision for purchase of a hearing aid for employees whose hearing was **impaired by exposure to noise conditions on the job**. [Emphasis added.]

(Affidavit of Andrew J. Utick, ¶ 3.) Mr. Utick then recites a standard provision of the union contracts used by the company, as follows:

> In cases where the Company is satisfied that an employee's hearing is impaired, that such impairment is **due primarily to noise conditions occurring on the job and necessarily associated with his employment** and through no fault of the employee and that a hearing aid is required, it will provide one at no cost to the employee upon claim therefor. [Emphasis added.]

(*Id.*, ¶ 6.) Finally, as relevant to the current motion, that counsel

> learned that it was standard operating procedure at the time of retirement for the company to send the person retiring to have hearing tests conducted to determine his entitlement to a hearing aid under the union contract, and affiant is informed and believes that this is the procedure that was followed in the instant case, and that the medical report in question was generated by Dr. Rogers in pursuit of a hearing aid under the relevant union contract.

(*Id.*, ¶ 8.)

Discussion

¶10 Summary judgment is not a substitute for trial and will be granted only where there is no dispute concerning the facts material to the motion and those facts entitle the moving party to judgment as a matter of law. *Delaware v. K-Decorators, Inc.*, 1999 MT 13, ¶¶ 55-56, 293 Mont. 97, ¶¶ 55-56, 973 P.2d 818, ¶¶ 55-56. The burden is on the moving party to demonstrate its entitlement to judgment, and where based on the statute of limitations the burden is upon the party raising the defense to prove affirmative facts which establish the defense, *Preston v. Transportation Ins. Co.*, 2002 MTWCC 23, ¶ 30.

¶11 It is not clear whether the claimant's request for a hearing aid falls within the occupational deafness provisions of the Workers' Compensation Act (WCA) (sections 39-71-801, MCA (1979), et seq.), within the Occupational Disease Act (ODA) (sections 39-72-101, MCA (1979), et seq.), or within both. *See Wylie v. State Compensation Ins. Fund,* WCC No. 9707-7785 (1997) (noting that the occupational deafness provisions of the WCA may not be the exclusive remedy for occupational deafness where provisions of the ODA may also apply).

¶12 Part 8 of the WCA allows compensation to be "awarded for occupational deafness as provided in this part." § 39-71-801, MCA (1979-2003). "Occupational deafness" is defined in

section 39-71-802(1), MCA (1979-2003), as "permanent partial or permanent total loss of hearing of one or both ears due to prolonged exposure to noise in employment." The benefit provisions of Part 8 make no reference to hearing aids or other medical expenses, see §§ 39-71-807, MCA (1979-2003), 39-71-808 through -809, and -812, MCA (1971-2003). However, for present purposes the Court assumes that payment for hearing aids is a benefit under that part.

¶13 The time for filing a claim under Part 8 is addressed in section 39-71-813, MCA (1979-2003), which provides:

> **39-71-813. Limitation provisions applicable – when provisions begin to run.** The limitation provisions in this chapter control claims arising under this part. Such provisions run from the first date upon which claim may be filed or from the date of subsequent death, provided that no claim may accrue to any dependent unless an award has been issued or liability admitted.

By referencing the limitation provision "in this chapter," section 39-71-813, MCA (1979-2003), incorporates the timeliness requirements of section 39-71-601, MCA (1973-1987), which states:

> **39-71-601. Statute of limitation on presentment of claim -- waiver.** (1) In case of personal injury or death, all claims shall be forever barred unless presented in writing to the employer, the insurer, or the division, as the case may be, within 12 months from the date of the happening of the accident, either by the claimant or someone legally authorized to act for him in his behalf.
> (2) The division may, upon a reasonable showing by the claimant of lack of knowledge of disability, waive the time requirement up to an additional 24 months.

¶14 Also relevant is section 39-71-808(2), MCA (1971-2003), which defines the date of injury from which the statute of limitations commences running. In relevant part, that statute states:

> **39-71-808. Compensation for Occupational Deafness.**
> . . . .
> (2) In cases covered by this section, "time of injury," "incurred such injury," or "date of injury" shall be exclusively the date of occurrence of any of the following events to an employee;
> (a) transfer because of occupational deafness to nonnoisy employment by an employer whose employment has caused occupational deafness;
> (b) retirement;
> (c) termination of the employer-employee relationship;
> (d) layoff provided the layoff is complete and continuous for 1 year.

Under this provision, the limitations period for a claim for occupational deafness was one year after the claimant's retirement.

¶15 If the claimant's petition is analyzed under the ODA, the deadline for his claim is governed by section 39-72-403, MCA (1977-1984), which provides:

> **Time when claims must be presented.** (1) 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.
> (2) The division may, upon a reasonable showing by the claimant, or a decedent's beneficiaries that the claimant or the beneficiaries could not have known that the claimant's condition or the employee's death was related to an occupational disease, waive the claim time requirement up to an additional 2 years.
> (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.

¶16 In the present case, the claimant retired on September 1, 1984, and by his own admission he has been aware of his alleged occupational deafness since at least July of 1984. However, the affidavit provided by respondent shows that his employer had in place a program for testing for occupational hearing loss and an agreement under a union contract to pay for hearing aids. That information raises a factual issue as to whether the respondent is estopped from raising the statute of limitations as a defense. It has long been the rule that where an employer has through its affirmative actions lulled an employee into believing he did not have to file a workers' compensation claim, the employer and the insurer are estopped from asserting the statute of limitations as a bar to a claim.

¶17 The seminal case is *Lindblom v. Employers' Liability Assurance Corp.*, 88 Mont. 488, 295 P. 1007. In that case an agent for told the claimant, "We will take care of it," lulling him into the belief that he was going to be paid for his injury. 88 Mont. at 496, 295 P. at 1009.

¶18 In *Lindblom*, the Court invoked the doctrine of estoppel to bar the insurer from asserting a statute of limitations defense. It laid out a test of several parts for determining whether an estoppel arises. While that test was later characterized in *Wassberg v. Anaconda Copper Co.*, 215 Mont. 309, 316, 697 P.2d 909 (1985), as a four (4) part test, it was in fact a six (6) part test, as follows:

> 1. There must be conduct--acts, language, or silence,--amounting to a representation or a concealment of material facts. 2. These facts must be known to

> the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

295 P. at 1009 (quoting from *2 Pomeroy's Equity Jurisprudence* (4th Ed.) 1644.).

¶19 In *Wassburg*, the Court repeated the test and quoted approvingly the following, brief synopsis of the most common application of the doctrine:

> Questions of estoppel can arise in a wide variety of situations. Most common are those in which the employer or carrier says to the injured employee in effect, "Don't worry we'll take care of you," thereby "lulling" the employee into inaction until the filing period has passed.

215 Mont. at 319, 697 P.2d at 909, 915-16 (quoting from *McKaskle v. Industrial Commission of Arizona*, 659 P.2d 1313, 1316 (Az. 1982).).

¶20 In the present case, according to its own information, ARCO had a provision in its contracts with its union employees, which presumably included the claimant, to provide its employees suffering from hearing loss associated with their employment with hearing aids. It also had a policy of sending its retiring employees for testing and if appropriate fitting of hearing aids. A May 7, 2002 letter from Dr. Rogers, which the claimant has also tendered as a trial exhibit, indicates that the claimant was in fact furnished hearing aids about the time of his retirement.

¶21 Under these circumstances, ARCO's affirmative action in testing its employees and providing hearing aids through its contract, was equivalent to telling the claimant that the Company would take care of him. ARCO's actions go beyond mere silence or failure to tell the claimant he could file a claim. Compare with Wassberg and cases cited therein. The claimant may well have been lulled by ARCO's actions into not pursuing a worker's compensation or occupational disease claim at that time. On these facts the respondent is not entitled to summary judgment.

JUDGMENT

¶22 The respondent's motion for summary judgment is denied.

DATED in Helena, Montana, this 10th day of March, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. David Stewart
Mr. Andrew J. Utick
Submitted: January 21, 2004