**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1999 MTWCC 7**

**WCC No. 9809-8058**

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**MARY ANN HAYES, MARY THOMPSON OWEN,**

**ELIZABETH SLEATH and GLENDA TRUESDELL**

**Petitioners**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent/Insurer for**

**WEST MONT HOME HEALTH MANAGEMENT SERVICES, INCORPORATED**

**Employer.**

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ORDER GRANTING SUMMARY JUDGMENT

**Summary:** Four petitions containing nearly identical allegations were consolidated. All petitioners want to reopen settlements they made on occupational disease claims, alleging mutual mistake of fact in that they were not aware they suffered from Dursban poisoning. After petitioners moved for summary judgment, respondent State Compensation Insurance Fund filed its own motion for summary judgment, alleging the four petitions were time-barred.

**Held:** State Fund's motion for summary judgment is granted. Undisputed evidence demonstrates that petitioners filed an Amended Complaint and Demand for Jury Trial in District Court on January 11, 1996, which included allegations that they suffered permanent injuries through exposure to Dursban at work. Under section 27-2-203, MCA, the period for commencing a claim to reopen based on mistake was two years. Where the petitions to reopen were not filed in the Workers' Compensation Court until September 21, 1998, the claims to reopen are time-barred.

**Topics:**

> **Constitutions, Statutes, Regulations and Rules: Montana Code: section 27-2-203.** A petition to reopen a workers' compensation settlement because of mutual mistake of fact is subject to the two-year limitations period set out in section 27-2-203, MCA. The statute commences running when the facts are such that the party

bringing the action would have discovered the mistake had he or she exercised ordinary diligence. Here, as shown by allegations in an amended complaint filed in a civil action in District Court, petitioners were aware more than two years before filing the WCC petition that they were exposed to Dursban and that Dursban causes some of the specific health problems about which they complained. A petition alleging mutual mistake in the form of ignorance of those facts is time-barred.

**Limitations Periods: Reopening of Settlements.** A petition to reopen a workers' compensation settlement because of mutual mistake of fact is subject to the two-year limitations period set out in section 27-2-203, MCA. The statute commences running when the facts are such that the party bringing the action would have discovered the mistake had he or she exercised ordinary diligence. Here, as shown by allegations in an amended complaint filed in a civil action in District Court, petitioners were aware more than two years before filing the WCC petition that they were exposed to Dursban and that Dursban causes some of the specific health problems about which they complained. A petition alleging mutual mistake in the form of ignorance of those facts is time-barred.

**Settlements: Reopening: Mistake of Fact.** A petition to reopen a workers' compensation settlement because of mutual mistake of fact is subject to the two-year limitations period set out in section 27-2-203, MCA. The statute commences running when the facts are such that the party bringing the action would have discovered the mistake had he or she exercised ordinary diligence. Here, as shown by allegations in an amended complaint filed in a civil action in District Court, petitioners were aware more than two years before filing the WCC petition that they were exposed to Dursban and that Dursban causes some of the specific health problems about which they complained. A petition alleging mutual mistake in the form of ignorance of those facts is time-barred.

Petitions

¶1 This cause is brought by four petitioners in four separate petitions. Because the petitions have common facts and prayers, they were consolidated.

¶2 The petitions are nearly identical. Each alleges that its petitioner contracted an occupational disease while employed by West Mont Home Health Management Services, Incorporated (West Mont). The date the occupational disease was contracted varies from July 1, 1993 to October 1, 1993, inclusive. The petitions further allege that occupational disease claims were filed and thereafter settled in August 1995.

¶3 Petitioners now seek to reopen the settlements on account of a mutual mistake of fact. Specifically, each petitioner alleges in paragraph 4:

> A dispute exists between the parties in that the Respondent has unreasonably refused to reopen the claim based on a mutual mistake of fact. The claim was settled without definitive diagnosis and without the parties' knowledge and understanding of Dursban poisoning. Subsequent to settlement, Petitioner received additional information as to the nature and extent of her diagnosis and disability. Thus, the claim was settled based on a mutual mistake of fact, and Petitioner is entitled to have her claim reopened and payment of appropriate benefits under the Occupational Disease Act.

(Petition for Hearing at 1-2)

Summary Judgment Motions

¶4 On November 23, 1998, the petitioners moved for partial summary judgment asking the Court to find that they are entitled to reopen their settlements. In their supporting brief, petitioners set forth the following facts, which they allege are uncontested:

> 1. Petitioners worked at West Mont in various positions until leaving their employment in 1993 and 1994 due to medical problems.
>
> 2. Petitioners' symptoms include short- and/or long-term memory loss, inability to understand or concentrate, pain, headaches, tremors, seizures, fatigue, stiffness, shortness of breath, bladder and stomach problems, loss of voice, and coordination and balance problems with visual changes.
>
> 3. Petitioners filed occupational disease claims and retained Attorney Norman Grosfield to represent them in 1993 or 1994.
>
> 4. Respondent paid to claimants various workers' compensation benefits from September or October 1993 to June 1995, but the claims were not formally accepted by the Respondent until the time of settlement.
>
> 5. All claims were settled for the statutory maximum limit of $10,000.00 plus a varied number of weeks for rehabilitation assistance.
>
> 6. All claims were settled based on Dr. Dana Headapohl's determination that the claimants had reached maximum healing, that they could return to their time-of-injury jobs or other similar jobs, and that they had no permanent impairment.
>
> 7. At the time of settlement, no one knew the specific cause of the claimants' problems, but all parties believed the diagnoses were neurotoxicity and sick building syndrome (SBS) caused by exposure from a number of different sources at West Mont including toxic materials primarily related to remodeling projects, i.e., carpet glue. No one knew the claimants were suffering from Dursban poisoning.

8. The only reference to Dursban poisoning from a physician prior to settlement of the claims is in Dr. Headapohl's West Mont Work Environment and Exposures report dated June 14, 1994, and in her report regarding Elizabeth Sleath dated July 7, 1994.

9. At the time of settlement, no one knew anything about Dursban or Dursban exposure and its side effects.

10. At the time of settlement, the parties were unaware of the extent or duration of Dursban application at West Mont.

11. Claimants were not aware they were suffering from Dursban poisoning nor of the extent of their disability until after being examined by Dr. Kaye Kilburn in May 1997, and by Dr. Sheila Bastien in July 1997 (Sleath) and March 1998 (Hayes, Owen and Truesdell).

12. Subsequent to settlement of the claims, Petitioners worked sporadically or out of their homes under special circumstances.

13. Attorney Norman Grosfield and Claims Adjusters Kevin Bartsch and Dean Blackaby believe a mutual mistake of fact occurred in that it was unknown that the claimants were suffering from Dursban poisoning at the time the cases were settled.

14. In all four cases, the diagnosis of cognitive disorder secondary to chemical toxic exposure to Dursban, has been made and Dr. Bastien has indicated that, to a reasonable degree of medical certainty, the health problems were caused by Dursban exposure and the claimants are all permanently and totally disabled with a poor prognosis.

15. This diagnosis is confirmed by Dr. Kaye Kilburn.

(Motion for Partial Summary Judgment and Supporting Memorandum at 2-4,citations omitted.)

¶5 Respondent (State Fund) replied to the motion and shortly thereafter filed its own motion for summary judgment alleging that all four petitions are time-barred. The factual basis for the motion is not controverted by petitioners. (petitioners' brief in opposition to respondent's motion for summary judgment and waiver of oral argument at 1.) The facts are:

1. Petitioners filed their petitions in the Workers' Compensation Court to reopen their settled claims on September 21, 1998.

2. Petitioners allege that there was a mutual mistake of fact at the time of settlement, which should allow their settlements to be reopened.

3. Petitioners allege that their exposure to Dursban was the primary cause of their occupational disease.

4. Petitioners allege that the parties' lack of knowledge of the nature and extent of their exposure to Dursban was the mutual mistake of fact.

5. On January 11, 1996 Petitioners caused an amended complaint to be filed in District Court for Lewis and Clark County, Montana.

6. That complaint alleges that the Petitioners suffered injury and disability from their exposure to Dursban.

(Respondent's Motion for Summary Judgment at 2, citations omitted.) A copy of the amended complaint and demand for jury trial filed in District Court is attached to the motion. It is also part of the Hayes' deposition, which has been submitted as part of the record upon which the petitioners base their summary judgment motion. (Hayes Dep. Ex. 1 at 742-52.)

¶6 The petitioners have expressly waived oral argument. (petitioners' reply brief in opposition to respondent's motion for summary judgment and waiver of oral argument; petitioners' reply brief in support of motion for partial summary judgment and waiver of oral argument.) While the State Fund has not expressly waived oral argument, its failure to submit a written request for oral argument constitutes such waiver. ARM 24.5.329(5).

Discussion

¶7 The State Fund's summary judgment motion is dispositive, thus the Court will address it and need not address the petitioners' motion.

¶8 The statute of limitations applicable to setting aside contracts on account of a mutual mistake of fact is two years. Section 27-2-203, MCA, provides:

> **27-2-203. Actions for relief on ground of fraud or mistake.** The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

The limitation applies to petitions to reopen workers' compensation settlements. *Whitcher v. Winter Hardware Co.,* 236 Mont. 289, 296, 769 P.2d 1215, 1219 (1989).

¶9 The State Fund urges that the two-year statute of limitations commenced running on January 11, 1996, when claimants filed an amended complaint in district court alleging that they were disabled on account of their exposure to Dursban. If so, the limitations period expired on January 10, 1998. Since claimants did not file their petitions to reopen their settlements until September 21, 1998, their petitions would be time-barred.

¶10 The amended complaint and demand for jury trial filed in the Montana First Judicial District Court for Lewis and Clark County on January 11, 1996, alleges inter alia:

- Between 1991 and 1994 the claimants were exposed to Dursban on a regular basis while working at the West Mont Building in Helena. (¶s 11, 12 and 18.)

- "According to the Environmental Protection Agency, Dursban has been associated with significant long-term health problems for people exposed to it, **including neurological and respiratory problems.**" (¶15, emphasis added.

- As a result of their exposure to Dursban, claimants have "suffered permanent physical injuries, **including an acute sensitivity to many commonly-used chemicals and substances in the environment, impaired memories, and chronic fatigue**." (¶ 37, emphasis added.)

¶11 Nonetheless, claimants assert that they did not discover the facts constituting the mistake until *after* they filed their amended district court complaint. (petitioners' brief in opposition to respondent's motion for summary judgment and waiver of oral argument at 2.) They argue that even though they knew at the time they filed the amended complaint that they *may* have suffered injuries from it, they were not aware that they in fact were injured or of the extent of their injuries until 1997, when further medical information was developed. (*Id.* at 2-3.) They say that despite the allegations in their amended complaint, at that time there was no definitive medical opinion diagnosing Dursban exposure, indicating the nature and extent of claimants' disabilities, and relating their medical conditions to Dursban. (*Id.* at 3-4.)

¶12 Contrary to claimant's assertion, actual knowledge concerning the exact nature of their medical conditions and the relationship of the conditions to Dursban is not required to commence the running of the statute of limitations. In *Rath v. St. Labre Indian School,* 249 Mont. 433, 439-40, 816 P.2d 1061, 1065 (1991), the Montana Supreme Court rejected that very notion.

¶13 Actual knowledge of the mutual mistake is not required to start the [249 Mont. 440] running of the statute of limitations. Rather, the statute of limitations begins to run when the facts are such that the party bringing the action would have discovered the mistake had he or she exercised ordinary diligence. [Citations omitted.]In *Rath* the Court held that a claimant's awareness of the "possibility" of surgery was sufficient to trigger the statute of

limitations even though he did not learn that back surgery was a certainty until more than two and a half years later.

¶14 In this case, by January 11, 1996, the claimants were aware that they had been exposed to Dursban while working for West Mont. They were aware, at a minimum, that Dursban could cause disabling neurological and respiratory problems, chronic fatigue, loss of memory and sensitivity to other chemicals. The medical reports attached to claimants' motion for summary judgment document neurological symptoms, difficulty concentrating and remembering, chronic fatigue, and hypersensitivity to various chemicals, the very sort of problems expressly mentioned in their amended complaint. And, they were aware that their disabling conditions could be related to Dursban, indeed they expressly alleged that their disability was caused by their Dursban exposure.

¶15 Certainly, on January 11, 1996, the claimants had sufficient information and belief to cause them to document their case through medical examination and opinion. That they failed to obtain definitive medical advice until 1997 and 1998 does not toll the statute of limitations. The statute commenced running on January 11, 1996, and their present petitions are time-barred.

JUDGMENT

¶16 For the reasons set forth in the foregoing discussion,

¶17 IT IS HEREBY ORDERED AND ADJUDGED that the petitions in this cause be and are hereby **dismissed with prejudice**.

DATED in Helena, Montana, this 21st day of January, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen
Mr. David A. Hawkins
Date Submitted: December 23, 1998