IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 19

WCC No. 2015-3568

JOHN CARLOCK

Petitioner

vs.

LIBERTY NW INS. CORP, MACO, and MONTANA MUNICIPAL INTERLOCAL AUTHORITY

Respondents/Insurers.

ORDER DENYING MACO's MOTION FOR SUMMARY JUDGMENT

Summary: In this last injurious exposure case, the insurer for the second of three employers moved for summary judgment relying entirely on Petitioner's interrogatory answer that he suffered a "significant asbestos exposure" when the insurer for the third employer was at risk.

Held: The insurer that moved for summary judgment failed to meet its burden that there are no issues of material fact or demonstrate that it is entitled to judgment as a matter of law. Since medical causation requires expert opinion or testimony, Petitioner's conclusory statement that he suffered a "significant asbestos exposure" when he worked for the third employer does not, by itself, establish that his claimed exposure was of the type and kind which could have caused his alleged occupational disease.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. In a last injurious exposure case, the claimant's answer to an interrogatory that he had a "significant asbestos exposure" while employed with the City of Libby, the last employer where he was injuriously exposed to asbestos, is, by itself, insufficient to prove that the City's insurer is liable for his alleged OD.

Occupational Disease: Last Injurious Exposure. In a last injurious exposure case, the claimant's answer to an interrogatory that he had a

"significant asbestos exposure" while employed with the City of Libby, the last employer where he was injuriously exposed to asbestos, is, by itself, insufficient to prove that the City's insurer is liable for his alleged OD.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.329. A motion for summary judgment, supported only by the claimant's answer to an interrogatory that he had a "significant asbestos exposure" while employed with the City of Libby, does not prove that he has an OD or that his alleged OD was caused by his City of Libby employment. Medical causation requires expert opinion or testimony; the movant presented no evidence of the criteria claimant used to form his opinion that his asbestos exposure was "significant," or that he has sufficient knowledge and expertise to say that the conditions under which he worked for the City of Libby could have caused his alleged OD.

Asbestosis Cases. A motion for summary judgment, supported only by the claimant's answer to an interrogatory that he had a "significant asbestos exposure" while employed with the City of Libby, does not prove that he has an OD or that his alleged OD was caused by his City of Libby employment. Medical causation requires expert opinion or testimony; the movant presented no evidence of the criteria claimant used to form his opinion that his asbestos exposure was "significant," or that he has sufficient knowledge and expertise to say that the conditions under which he worked for the City of Libby could have caused his alleged OD.

Summary Judgment: Motion for Summary Judgment. A motion for summary judgment, supported only by the claimant's answer to an interrogatory that he had a "significant asbestos exposure" while employed with the City of Libby, does not prove that he has an OD or that his alleged OD was caused by his City of Libby employment. Medical causation requires expert opinion or testimony; the movant presented no evidence of the criteria claimant used to form his opinion that his asbestos exposure was "significant," or that he has sufficient knowledge and expertise to say that the conditions under which he worked for the City of Libby could have caused his alleged OD.

¶ 1 Respondent MACo moves for summary judgment on the grounds that Petitioner John Carlock's answer to an interrogatory that he suffered a "significant asbestos exposure" while working for the City of Libby establishes that MACo is not liable for

Carlock's alleged occupational disease as a matter of law.[1] Respondent Montana Municipal Interlocal Authority (MMIA), which insured the City of Libby, opposes MACo's motion.[2]

¶ 2 MMIA requested oral argument.[3] However, since this Court is ruling in MMIA's favor for the reasons set forth in MMIA's brief, an oral argument is unnecessary.

FACTS

¶ 3 Carlock alleges that he suffers from an occupational disease arising out of his employment with either: Stimson Lumber, where he worked from November 1993 to January 2007; Lincoln County, where he worked from April 2008 to October 2008; or the City of Libby, where he worked from July 2009 to October 2012.[4]

¶ 4 Respondent Liberty NW Ins. Corp. insured Stimson Lumber. Respondent MACo insured Lincoln County. Respondent MMIA insured the City of Libby.[5]

¶ 5 In answer to an interrogatory asking Carlock to identify all of his employers and whether he was exposed to asbestos, he stated, *inter alia*, that he worked for the City of Libby from July 2009 to October 2012 as a "[s]easonal city service worker" and that during that employment he "[w]orked running numerous pieces of equipment that resulted in disturbance of contaminated soil which resulted in a significant asbestos exposure . . . ."[6]

ANALYSIS

¶ 6 ARM 24.5.329(2), states: "Subject to the other provisions of this rule, the court renders summary judgment forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for production, together with the affidavits, if any, show that no genuine issue exists as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Montana Supreme Court has explained, "Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter

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[1] Brief in Support of Respondent MACO Workers' Compensati[o]n Trust's Motion for Summary Judgment (MACo's Brief) at 2, Docket Item No. 13.

[2] Respondent Montana Municipal Interlocal Authority's Response to Respondent MACO's Motion for Summary Judgment and Request for Oral Argument (MMIA's Brief), Docket Item No. 17.

[3] *Id*. at 6.

[4] Petition for Hearing at 1-2, Docket Item No. 1.

[5] *Id*. at 2; [MACo's] Response to Petition for Hearing at 2, Docket Item No. 4; *see* Respondent Liberty NW Ins. Corp.'s Response to Petition for Hearing, Docket Item No. 5; [MMIA's] Response to Petition, Docket Item No. 3.

[6] MACo's Brief, Affidavit of Norman H. Grosfield, Ex. A at 2-3.

of law. Once the moving party has met its burden, the non-moving party must present substantial evidence essential to one or more elements of the case to raise a genuine issue of material fact."[7]

¶ 7 Relying solely on Carlock's interrogatory answer, MACo argues that it is entitled to judgment as a matter of law under the last injurious exposure rule, as codified in § 39-71-407, MCA. MACo argues, "it is clear that Petitioner's last injurious working exposure to asbestos was after his short tenure with Lincoln County."[8]

¶ 8 MMIA opposes MACo's motion, arguing that Carlock's statement that he had a "significant asbestos exposure" while working for the City of Libby is insufficient to prove that he has an occupational disease and insufficient to prove that his alleged exposure to asbestos while working for the City of Libby meets the "potentially causal" standard used to determine which insurer is liable in a last injurious exposure case.[9]

¶ 9 Carlock takes the middle ground, arguing:

> If the Court finds that Petitioner's assertions as to his asbestos exposure while working for the City of Libby are sufficient to impose liability on the City of Libby, the Petitioner would agree with MACO that it is not liable for Petitioner's asbestos-related occupational disease. If, on the other hand, the Court does not find that the facts currently before it are sufficient to impose liability on the City of Libby for the Petitioner's asbestos-related occupational disease, Petitioner would argue that MACO's Motion for Summary Judgment should be denied as there remain material issues of fact still in dispute regarding Petitioner's claim for asbestos-related occupational disease benefits.[10]

¶ 10 This Court agrees with MMIA that MACo has failed to meets its burden of establishing that there are no issues of material fact nor demonstrate that it is entitled to judgment as a matter of law. Carlock's interrogatory answer, by itself, is insufficient to prove that MMIA is the insurer liable for his alleged occupational disease. As set forth in *Liberty Northwest Ins. Corp. v. Montana State Fund* (*In Re Mitchell):*[11]

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[7] *Dvorak v. Montana State Fund*, 2013 MT 210, ¶ 15, 371 Mont. 175, 305 P.3d 873.

[8] MACo's Brief at 2.

[9] MMIA's Brief at 4-5.

[10] Petitioner's Response to Respondent MACO's Motion for Summary Judgment at 1-2, Docket Item No. 16.

[11] 2009 MT 386, ¶ 24, 353 Mont. 299, 219 P.3d 1267.

> [T]he claimant who has sustained an OD and was arguably exposed to the hazard of an OD among two or more employers is not required to prove the degree to which working conditions with each given employer have actually caused the OD in order to attribute initial liability. Instead, the claimant must present objective medical evidence demonstrating that he has an OD and that the working conditions during the employment at which the last injurious exposure was alleged to occur, were the type and kind of conditions which could have caused the OD.

¶ 11 Although Carlock says the amount of asbestos he was exposed to while working for the City of Libby was "significant," his interrogatory answer does not establish that his alleged occupational disease was caused by his work for the City of Libby because medical causation requires expert opinion or testimony.[12] MACo did not present any evidence of what criteria Carlock used to form his opinion that his alleged exposure to asbestos while working for the City of Libby was "significant," or that he has sufficient knowledge and expertise to say that the conditions under which he worked for the City of Libby could have caused his alleged occupational disease. Therefore, MACo is not entitled to summary judgment.[13]

ORDER

¶ 12 MACo's motion for summary judgment is **denied.**

¶ 13 MMIA's request for oral argument is **denied as moot**.

[12] *See Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶¶ 44, 49, 365 Mont. 405, 282 P.3d 687 (holding that causation in an injury case under the law since July 1, 1995, must be proved with medical expertise or opinion). *See also Kramlich v. Montana Mun. Interlocal Auth.*, 2014 MTWCC 21, ¶ 62 (citation omitted) (ruling that a claimant's "subjective beliefs are insufficient to prove an occupational disease").

[13] *See Cooper v. Sisters of Charity of Leavenworth Health Servs. Corp*., 265 Mont. 205, 208, 875 P.2d 352, 354 (1994) (holding that affidavits in premises liability case with opinions that property was unreasonably dangerous did not create an issue of material fact because there was no foundation that the affiants had any expertise in the construction, maintenance, or placement of sewer grates).

DATED this 21st day of October, 2015.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Laurie Wallace/Ethan Welder/Dustin Leftridge
Michael P. Heringer
Norman H. Grosfield
Oliver H. Goe/Morgan M. Weber

Submitted: October 14, 2015