IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 19

WCC No. 2003-0894

LOIS DICKERMAN,
widow of AL DICKERMAN

Petitioner

vs.

TRANSPORTATION INSURANCE COMPANY

Respondent/Insurer.

ORDER DENYING MOTION TO SUPPLEMENT;
DECISION AND JUDGMENT

<u>Summary</u>: The widow of a deceased Libby mine worker who suffered from asbestosis brought a claim for death benefits. The worker retired in 1983. His asbestosis was not diagnosed until 2002 and a claim was not filed until 2003. The respondent insurer moved for summary judgment based on section 39-72-403(3), MCA (1983), which was in effect at the time of the claimant's retirement in this case and bars claims filed more than three years after retirement.

<u>Held</u>: The claim is barred by section 39-72-403(3), MCA (1983), which is a statute of repose and not subject to tolling. The petitioner's constitutional challenge to the statute was recently rejected in *Hardgrove v. Transportation Ins. Co.,* 2004 MT 340, 324 Mont. 238. Her request to supplement the record with facts she believes might lead to an overruling of *Hardgrove* is without legal support as well as late, and is denied.

<u>Topics</u>:

> **Limitations Periods: Claim Filing: Occupational Disease.** Under section 39-72-403(3), MCA (1983), an occupational disease claim for asbestosis is barred unless a claim is filed within three years after the worker retired and ceased working for the employer. The section is a statute of repose and cannot be tolled for any reason. *Hardgrove v. Transportation Ins. Co.,* 2004 MT 340, 324 Mont. 238.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-72-403(3), MCA (1983). Under section 39-72-403(3), MCA (1983), an occupational disease claim for asbestosis is barred unless a claim is filed within three years after the worker retired and ceased working for the employer. The section is a statute of repose and cannot be tolled for any reason. *Hardgrove v. Transportation Ins. Co.,* 2004 MT 340, 324 Mont. 238.

Constitutional Challenges: Equal Protection. Equal protection analysis does not encompass an evidentiary trial or fact-finding by a judge or jury. Accordingly, a late proffer of evidence to support an argument attacking the constitutionality of a statute recently held constitutional by the Supreme Court is rejected.

¶1 This is another Libby asbestosis case, this one involving Al Dickerman (Dickerman), who worked at the W.R. Grace & Co. Libby mine from 1968 to October 3, 1983. (Petition for Trial, ¶ 1.) He was diagnosed with asbestosis in April 2002 and died on September 8, 2003, his death hastened by asbestos-related lung cancer. (*Id.*, ¶ 2 and Pretrial Order, Stipulated Fact ¶ 4.) Following his death, on September 16, 2003, Dickerman's widow filed a claim for occupational disease benefits. (*Id.,* ¶ 7.) A month later, on October 16, 2003, Dickerman's widow filed her Petition for Trial with this Court, requesting death benefits and naming Transportation Insurance Company, (Transportation) as the respondent. In its response to the petition, Transportation admits it is the insurer at risk for the claim. (Response to Petition for Trial of Transportation Insurance Company, ¶ 1.)

¶2 On December 30, 2003, Transportation filed Respondent's Motion for Summary Judgment, urging that the petitioner's claim is barred by section 39-72-403, MCA (1983), which, prior to October 1, 1985,[1] barred any occupational disease claim not filed within three years after the claimant ceased working for the employer against whom the claim is made. The petitioner filed an answer brief, styled Provisional Opposition to Motion for Summary Judgment.[2] In that brief, which is lengthy and detailed, she argued that the

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[1]The 1985 legislature repealed subsection (3) but did not specify an effective date. Under the law at the time of the repeal, statutes which did not specify an effective date were effective on October 1st of the year of passage. § 1-2-201, MCA (1983).

[2]Petitioner indicated that she had captioned her brief as "provisional" because she wished to conduct discovery before the Court decided the motion and therefore reserved the right to supplement her arguments in light of any such discovery. The discovery issue was resolved with the parties later stipulating to submitting the case on the pleadings, stipulated facts, and exhibits. (Pretrial Order, at 2.)

three-year limitations period set out in section 39-72-403(3), MCA (1983), was equitably tolled; that Transportation is equitably estopped from raising the limitations defense; and that if the statute barred her claim then it is unconstitutional under the equal protection and full legal redress clauses of the Montana Constitution.

¶3 On February 18, 2004, I held a telephone conference with counsel to discuss the motion for summary judgment and other pending motions. At that time I indicated to counsel that the issues presented by the motion were the same as in *Baker v. Transportation Ins. Co.,* WCC No. 2003-0839, which is another Libby asbestosis case involving, except for a co-counsel for petitioner in *Baker*, the same attorneys as in this case. I further indicated that the same ruling as made in *Baker* would ensue in this case. The ruling in question was my determination in *Baker* that section 39-72-403(3), MCA (1983), is a statute of repose barring any claim not filed within three years of an employee's retirement, that the three-year limitations period cannot be equitably tolled, and that the statute does not violate either equal protection guarantees or the constitutional right to full redress. *Baker v. Transportation Ins. Co.*, Decision and Order Regarding Pending Motions, 2004 MTWCC 5. *Baker,* in turn, simply reiterated and applied my holdings in another case – *Hardgrove v. Transportation Ins. Co.,* 2003 MTWCC 57. My decision in *Hardgrove* was affirmed by the Montana Supreme Court on December 1, 2004, however, on February 18, 2004, we did not have the benefit of that appellate decision. In any event, on February 18, 2004, counsel for Transportation represented that Transportation agreed that Dickerman's asbestosis was work related and hastened his death and that it would be liable for benefits if its legal defenses were rejected. Both counsel then agreed to a stay of proceedings and to submit a Pretrial Order setting out the facts of the case and their stipulations.

¶4 On May 3, 2004, the Pretrial Order was filed. The Pretrial Order set forth a series of agreed facts and stipulated that the 1983 version of the Occupational Disease Act applies and that the case "be submitted on the pleadings, the stipulated facts, and the exhibits." I then entered an order staying further proceedings "pending the Supreme Court decision in *Hardgrove*." (Order Staying Matter, July 16, 2004.)

¶5 Immediately following the Supreme Court decision in this case, the petitioner herein filed a Motion to Supplement the Record in which she requested leave to supplement the record with respect to her equal protection challenge. In a subsequent letter, the petitioner's counsel requested that the Court defer final decision in this case if it denies the motion so he could "bring another case to challenge the *Hardgrove* ruling, using a more complete record including the items sought to be supplemented into the record in Baker and Dickerman." (March 28, 2005 letter of Jon L. Heberling to Judge McCarter.)

¶6 After reviewing the Motion to Supplement the Record, the prior motion for summary judgment and supporting briefs, and the Pretrial Order, I have determined that the motion

to supplement should be denied, that the case is ready and ripe for decision, and that there is no good basis for further delaying entry of judgment dismissing the petition.

Discussion

¶7 There are two facts essential to the decision in this case. The first is the fact that Dickerman retired on October 3, 1983. The second is that no claim was filed with respect to his asbestosis until September 16, 2003. Those two facts require dismissal of his petition pursuant to section 39-72-403(3), MCA (1983), which provides:

> (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 was claimed.

The section is a statute of repose. *Hardgrove v. Transportation Ins. Co.,* 2004 MT 340, ¶ 9, 324 Mont. 238. (Citations to *"Hardgrove"* hereafter are to the Supreme Court decision just cited.) A statute of repose "extinguish[es] the existence of the underlying right itself," thus establishing an "absolute time beyond which no party is liable." *Id.,* ¶ 10. It cannot be equitably tolled. *Id.*

¶8 Moreover, equal protection and full redress challenges to the statute were raised and rejected in *Hardgrove.* While the petitioner may believe she can fashion more convincing arguments for unconstitutionality than did the petitioner in *Hardgrove,* her attorney filed an *amicus curiae* brief in the *Hardgrove* appeal and therefore had an opportunity to tender the arguments in that case. Moreover, equal protection analysis does not encompass fact-finding by a judge or jury. A "[l]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315, 113 S.Ct. 2096, 2098 (1993). Accordingly, the petitioner's proffer of further facts and evidence cannot avail her or bolster her constitutional arguments. Moreover, the proffer is belated, coming after the submission of the case upon stipulated facts, the pleadings, and exhibits.

¶9 Finally, all things must eventually come to an end. I find no basis for deferring entry of judgment in this case as the issues have already been put to rest in *Hardgrove* and the likelihood of the petitioner overturning that decision through the submission of additional facts is remote at best.

ORDER AND JUDGMENT

¶10 The Motion to Supplement the Record is **denied**.

¶11 The petition and the underlying claim on which it is based are barred by section 39-72-403(3), MCA (1983). Therefore, the petition is **dismissed with prejudice**.

¶12 This JUDGMENT is certified as final for purposes of appeal.

DATED in Helena, Montana, this 12th day of April, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Jon L. Heberling
Mr. David M. Sandler
Submitted: March 3, 2005