IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 7

WCC No. 2004-1092

RAYMOND JOHNSON

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION TO COMPEL

Summary: Respondent Liberty Northwest Insurance Corporation moved the Court to compel Petitioner to reveal the terms of a settlement agreement between Petitioner and International Paper Company. Liberty argues that in the original petition to the Workers' Compensation Court, Petitioner alleged that he suffers asbestos-related lung disease as a result of his employment with Champion International Company and\or Stimson Lumber Company. Petitioner entered into a disputed liability settlement agreement with International Paper (successor-in-interest to Champion) on April 20, 2005. Thereafter, International Paper was dismissed from the case. Liberty, Stimson's insurer, argued that Petitioner was judicially estopped from pursuing his claim against Liberty if the settlement terms revealed that International Paper and Petitioner settled the case for a substantial sum.

Held: Liberty's motion to compel is denied. The settlement between Petitioner and International Paper is a disputed liability settlement agreement. Because no set of facts contained in the settlement agreement would support Respondent's judicial estoppel argument, the Court will not compel Petitioner to reveal the terms of the agreement.

Topics:

> **Estoppel and Waiver: Judicial Estoppel.** Liberty argues that like the claimant's inconsistent position in *Birch v. Liberty Mutual Fire Ins. Co.,* 1995 MTWCC 18, Petitioner's settlement with Stimson may create facts supporting a judicial estoppel argument if the settlement was for a substantial sum.

However, the inconsistent positions taken by the claimant in *Birch* were that she maintained she was an independent contractor for purposes of her tort action and then alleged she was an employee for purposes of her workers' compensation claim. The Court's comment on the size of her District Court settlement was merely in response to the claimant's argument that she was not successful in maintaining her District Court action and only settled for "nuisance value."

Estoppel and Waiver: Judicial Estoppel. It is not inconsistent for a petitioner to bring a claim in the alternative against two employers, settle with one on a disputed liability basis, and then proceed against the other. Having settled on a disputed liability basis, the settlement is, by definition, uncertain or undetermined as it pertains to the other employer/insurer. Therefore, judicial estoppel does not apply.

Settlements: Disputed Liability. It is not inconsistent for a petitioner to bring a claim in the alternative against two employers, settle with one on a disputed liability basis, and then proceed against the other. Having settled on a disputed liability basis, the settlement is, by definition, uncertain or undetermined as it pertains to the other employer. Therefore, judicial estoppel does not apply.

¶ 1 On July 2, 2004, Petitioner Raymond Johnson filed a Petition for Hearing naming both International Paper Company (International Paper), successor-in-interest to Champion International Company (Champion) and Liberty Northwest Insurance Corporation (Liberty), insurer for Stimson Lumber Company (Stimson). Petitioner alleged that his asbestos-related lung disease was caused by his employment at Champion and/or Stimson.[1]

¶ 2 Petitioner and International Paper entered into a disputed liability settlement on April 20, 2005. Thereafter, International Paper was dismissed from the case.[2] Liberty contends that Petitioner's settlement with International Paper may create facts supporting a judicial estoppel argument. Upon these grounds, Liberty requests this Court to compel Petitioner to reveal the terms of the settlement. In support of its argument, Liberty cites *Birch v. Liberty Mutual Fire Insurance Company.*[3] In *Birch,* this Court set forth four elements necessary to succeed on a claim of judicial estoppel. They are as follows:

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[1] Petition for Hearing at 2.

[2] December 12, 2005, Order of Dismissal With Prejudice.

[3] 1998 MTWCC 18.

1) the estopped party must have knowledge of the facts at the time the original position is taken;
2) the party must have succeeded in maintaining the original position;
3) the position presently taken must be actually inconsistent with the original position; and
4) the original position must have misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party.[4]

¶ 3 In *Birch,* the claimant claimed independent contractor status for purposes of a tort case filed in District Court. This Court noted that the case eventually settled for "a substantial sum which contradicts any characterization of the settlement as for 'nuisance value.'"[5] In her subsequent workers' compensation petition, the claimant claimed employee status. This Court dismissed the workers' compensation case against Liberty because "[t]he doctrine (of judicial estoppel) precludes a party from taking a position or asserting a fact in one judicial proceeding and thereafter taking an inconsistent position in a subsequent proceeding."[6] Relying on *Birch*, Liberty argues that if Petitioner's settlement with International Paper was for "a substantial sum," Petitioner is judicially estopped from holding Liberty liable for Petitioner's asbestos disease. Liberty's reliance is misplaced.

¶ 4 Although this Court noted in *Birch* that the claimant had settled her District Court action for a "substantial sum," this did not form the basis of the Court's conclusion that she was judicially estopped from maintaining her workers' compensation claim. In the final analysis, the size of the claimant's District Court settlement had little bearing on this Court's conclusion that she was taking inconsistent positions in her tort and workers' compensation claims. Rather, the inconsistent positions taken by the claimant in *Birch* which judicially estopped her from pursuing her workers' compensation claim was that she maintained she was an independent contractor for purposes of her tort action and then alleged she was an employee for purposes of her workers' compensation claim. The Court's comment on the size of her District Court settlement was merely in response to the claimant's argument that she was not successful in maintaining her District Court action and only settled for "nuisance value."

¶ 5 In the present case, Petitioner brought claims against both International Paper and Liberty because, as alleged in his petition, his asbestos-related lung disease was caused by his employment at Champion "and/or" Stimson. This is the very definition of "pleading

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[4] *Id.*, ¶ 7.

[5] *Id.*, ¶ 13.

[6] *Id.,* ¶ 5.

in the alternative."[7] The Montana Rules of Civil Procedure specifically provide for pleading in the alternative. Moreover, in *Fleming v. International Paper Co. and Liberty Northwest Ins. Corp.*,[8] this Court addressed, and rejected, a substantively identical argument brought by Liberty. In *Fleming*, the petitioner filed a District Court action against several nonoccupational defendants alleging his asbestos disease was due to their actions. The petitioner also filed a claim in the Workers' Compensation Court alleging his asbestos disease was due to his employment. This Court found that none of the elements needed to satisfy the four-part judicial estoppel test were satisfied. This Court further held that a claimant has the right to "sue all of the entities possibly responsible for the exposure and ask the courts to determine which entities, if any, are liable for the harm caused by the exposure."[9]

¶ 6 Like the petitioner in *Fleming,* Petitioner sued all entities possibly responsible for his asbestos exposure. For whatever reason, International Paper chose to enter into a settlement with Petitioner. In so doing, it specifically chose to enter into a ***disputed liability*** settlement and did not accept liability for causing Petitioner's alleged disease. Had International Paper admitted liability, then Liberty's judicial estoppel theory might be well taken. Those are not the facts before this Court, however.

¶ 7 Respondent further asks this Court to apply a second type of judicial estoppel "best understood as the doctrine of preclusion of inconsistent positions."[10] Respondent asserts that this Court failed to address this second type of judicial estoppel in *Fleming.* This second type of judicial estoppel, Respondent argues, was recognized by the Montana Supreme Court in *Brown v. Small.*[11] In *Brown,* the plaintiff [Brown] recovered a second settlement from his insurance company premised upon allegations that the insurer wrongfully concealed an endorsement to Brown's policy during the first settlement of his claim. After recovering an additional sum from the insurer, Brown then filed a malpractice claim against his attorneys, arguing that they were negligent in not discovering the endorsement.[12] In affirming the District Court's grant of summary judgment in favor of the defendants, the Supreme Court noted: "If the insurer actively concealed the endorsement

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[7] *See Black's Law Dictionary, 1191 (8th ed. 2004).*

[8] *Fleming v. International Paper Co. and Liberty Northwest Ins. Corp.*, 2005 MTWCC 34.

[9] *Fleming,* ¶ 28.

[10] Liberty's Brief in Support of Motion to Compel at 2.

[11] 251 Mont. 414, 825 P.2d 1209 (1992).

[12] *Id.*

in bad faith, it is difficult to see how [the defendants] were negligent in not discovering it."[13] The Supreme Court held that Brown was judicially estopped from maintaining two such inconsistent positions.

¶ 8 *Brown* is, indeed, a good example of judicial estoppel. It fails, however, to advance Liberty's argument in the present case. As the Supreme Court noted in *Brown*:

> The . . . purpose [of judicial estoppel] is to suppress fraud and prevent abuse of the judicial process *by deliberate shifting of positions to suit the exigencies of a particular action,* and it will not be applied when the previous act or statement is uncertain or based on undetermined facts, but only when it is clear and certain.[14]

¶ 9 It is inconsistent, as in *Brown,* for a plaintiff to sue an insurance company for bad faith when it hides the ball and then sue the attorney who represented him for not discovering that which the insurance company was hiding. It is not inconsistent, as in the present case, for a petitioner to bring a claim in the alternative against two employers, settle with one on a disputed liability basis, and then proceed against the other. Having settled on a disputed liability basis, the settlement is, by definition, uncertain or undetermined as it pertains to International Paper's liability for Petitioner's claimed injuries. Therefore, consistent with the Supreme Court's holding in *Brown*, judicial estoppel should not be applied.

¶ 10 If this Court were to accept Liberty's argument in the case at bar, it would effectively mean that the act of settling would, *de facto*, constitute an admission of liability, notwithstanding an insurer or employer expressly maintaining that liability is disputed. The end result would be the abrogation of the very concept and purpose of a disputed liability settlement. This Court is reluctant to venture down this path.

¶ 11 Because Petitioner's settlement with International Paper was on a disputed liability basis and, therefore, cannot support Liberty's judicial estoppel argument, the Court denies Liberty's motion to compel.

ORDER

¶ 12 Respondent's motion to compel is **DENIED**

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[13] *Id.* at 418, 825 P.2d at 1212.

[14] *Id.* (Emphasis in original.)

DATED in Helena, Montana, this 7th day of February, 2007.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Laurie Wallace
Jon L. Heberling
Larry W. Jones
Charles E. McNeil
Leo S. Ward
Submitted: February 17, 2006