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IN THE MONTANA ASBESTOS CLAIMS COURT

IN RE ASBESTOS LITIGATION,)	Cause No. AC-17-0694
)	
Consolidated Cases.)	Applicable to
)	<i>Hutt v. Maryland Casualty Co. et al.,</i>
)	Eighth Judicial District Court,
)	Cause No. DDV-18-0175
)	
)	MCC’S REPLY IN SUPPORT OF
)	MOTION IN LIMINE ON BAD
)	FAITH DAMAGES
)	

Defendant Maryland Casualty Company (“MCC”) submits this Reply in support of its
Motion in Limine on Bad Faith Damages and states as follows:

INTRODUCTION

Hutt's Opposition repeatedly suggests that establishing negligence would be sufficient to establish bad faith despite the fact that bad faith requires a bad purpose or intent, and further, Hutt fails to establish any bad purpose or intent on MCC's part. Moreover, without any evidence that Hutt would have been entitled to any benefits under MODA, he should not be permitted to present evidence related to those benefits to support his bad faith claim. MCC accordingly requests that the Court grant its Motion in Limine on Bad Faith Damages.

ARGUMENT

I. Hutt's Response to MCC's Motion Conflates His Negligence Claim and His Bad Faith Claim.

Hutt's Response conflates issues of negligence with issues of bad faith, despite the fact that MCC's Motion relates specifically to damages with respect Hutt's *bad faith claim*. For example, in Section E, Hutt discusses at length his allegations that MCC's services were negligent and/or that it failed to warn. Hutt's Resp. at 5. But negligence and bad faith are distinct claims. On the one hand, negligence requires Hutt to establish that MCC had a duty and that it breached that duty. *Peterson v. Eichhorn*, 2008 MT 250, ¶ 23, 344 Mont. 540, 546, 189 P.3d 615, 620–21. Bad faith, on the other hand, requires more than an act or a failure to act, but also a bad purpose or intent on the part of the MCC. *See* BAD FAITH, Black's Law Dictionary (10th ed. 2014) (defining bad faith as dishonesty of belief, purpose, or motive). Hutt fails to explain how any of the alleged actions or omissions he alleges rise to the level of bad faith on MCC's part. A simple example focuses on Hutt's assertion that MCC did not disclose the results of the 1969 x-ray, where Hutt fails to address how this could constitute "bad faith" by MCC, particularly in light of the evidence that MCC believed that he already knew about the results from his employer Grace, and the evidence that MCC did not have any control over Grace's employee or former employee Hutt at

the time. Hutt fails to show how MCC's not expressly informing Hutt of his x-ray results, when it is clear that MCC believed that he had been advised of these results, could constitute bad faith. Ex. A, Common Exhibit 133 ("I would assume that all these men have been advised of their physical examination findings....").¹

Furthermore, Hutt conflates issues of negligence and issues of bad faith with respect to allegations that he was prevented from pursuing and obtaining occupational disease benefits owed to him under the Montana Occupational Disease Act ("MODA"). Specifically, Hutt asserts that MCC withheld the following: (1) the dust contained asbestos; (2) the asbestos content of dust was 60-80%; (3) the exposures were excessive-exceeded safe levels by every measurement standard and by as much as 10 to 100 times; and (4) the degree of asbestos exposure was causing lung impairment in a high percentage of workers other than Hutt. But these generic allegations of negligence, which are not even specific to Hutt, do not show that Hutt could have made a compensable claim under MODA. As explained in detail below, Hutt has presented no evidence that demonstrates that he could have made a workers' compensation claim.

II. Hutt Should Be Precluded from Presenting Evidence of Alleged Damages Related to Benefits Under MODA When He Cannot Show He Could Have Been Entitled to Workers' Compensation Benefits.

Hutt incorrectly states that MCC argues that it is speculative whether Hutt would have filed an occupational disease claim. Hutt's Resp. at 4. Actually, it is Hutt who speculates that he would have filed a claim. MCC asserts that, even if Hutt had filed a workers' compensation claim, he would not have been entitled to any benefits under MODA. Accordingly, Hutt should be precluded

¹ Hutt also asserts that a letter by MCC supervisor L.E. Park, in which the 1969 x-ray findings were described, is relevant to negligence issues. Hutt's Resp. at 3. As negligence is not the relevant issue in this motion, Hutt's assertion is irrelevant.

from presenting, in support of his bad faith claim, evidence of benefits under MODA, which he claims, without supporting evidence, he would have been entitled to receive.

At the time that Hutt terminated his employment with W.R. Grace, in October 1969, MODA provided for compensation to be “paid to an employee who becomes disabled by reason of occupational disease arising out of his employment . . . when claims are presented and notices given” pursuant § 92-1312 and § 92-1313. *See* Mont. Code § 92-1311 (1963).

Hutt incorrectly asserts that preservation of a claim under § 92-1312 and § 92-1313 of the Occupational Disease Act requires notice of injury and filing of a claim. In fact, the § 92-1312 requires “notice of *disability*,” not injury, and the statute defines disability as “the event of becoming physically incapacitated by reason of an occupational disease as defined in this act from performing any work for remuneration or profit.” *See* Mont. Code § 93-1302(5); § 92-1312. Specifically, § 92-1312 (1963) states that “notice of disability . . . in respect to which compensation is payable under this act . . . shall be given to the employer, the insurer or the board within thirty (30) days after the employee. . .knew or should have known the nature of the impairment . . and its relationship to the employment, but in no event shall notice be filed more than one year after the last day upon which the employee actually worked for the employer against whom compensation is claim.”

As of one year after his last day of employment at the Grace facility, Hutt was not impaired or disabled, nor could it be said that he had an occupational disease. Hutt himself concedes that his 1969 x-ray *did not* reveal an occupational disease, specifically asbestosis. Hutt’s Resp. at 3. Therefore, even if he had known about the 1969 x-ray findings, they would have had no impact on his ability to provide the required notice of a disability for a workers’ compensation claim.

Hutt acknowledges that asbestosis requires at least a decade to manifest. Hutt's Resp. at 3. Further, the evidence supports this position, as Hutt claims he was not diagnosed with asbestos related disease until well after the one-year statute of repose. MODA expressly provided that the Notice of Disability may not be filed more than one year after leaving Grace's employment. Hutt has pointed to nothing in the statute, or otherwise, to support his theory that he could submit a Notice of a Disability in 1969 for a disability or occupational disease that he did not have in 1969, and then seek to collect workers' compensation benefits after he was diagnosed with asbestosis years later. *See Frances Baker v. Transportation Insurance Company*, 2004 MT Wrk. Comp. LEXIS 4, 2004 MTWCC 5 (finding, with respect to the 1983 version of the Occupational Disease Act, that the statute of repose is not tolled by the fact that the disease did not manifest itself and the claimant did not discover it until after the limitations period had run). Furthermore, allowing such a claim would be illogical, as it would be difficult for the workers' compensation court to determine whether Hutt contracted the disease on the job at Grace, or outside of his employment at Grace. *Hardgrove v. Transp. Ins. Co.*, 2004 MT 340, P22, 324 Mont. 238, 244, 103 P.3d 999 (2004) (raising the question, with respect to the pre-1987 MODA, of whether the legislature believed that determining the cause of occupational disease was difficult after three years).

Furthermore, to the extent Hutt attempts to rely on a document called the Employment Relation Division First Report of Injury Instruction, this document has no application to the issues here. First, although Hutt does not attach the document, it appears that this is a document currently available on the Montana Workers' Compensation website, but it is not evident whether this document existed in 1969. Second, to the extent that Hutt points to language referring to a minor injury developing into a more serious condition, the definitions of injury and occupational disease under MODA have changed substantially since 1969, and therefore, this language has no bearing

on Hutt's argument. Finally and most importantly, Hutt admits that as of 1969, he had not suffered an injury. Hutt's Resp. at 3. Because Hutt cannot show that he would have been entitled to workers' compensation benefits under MODA, he is precluded from presenting evidence of alleged damages related to these benefits.²

III. Hutt's Statement that Only Exposures After 1969 are Relevant is a Clear Mischaracterization of MCC's Position.

Contrary to Hutt's assertions, MCC is not contending that only exposures after the 1969 x-ray report would be relevant, but rather that Hutt has not connected *any* alleged failure to disclose by MCC to the length of time that he was exposed to asbestos. Hutt fails to address this argument. Moreover, with respect to alleged increased exposure, Hutt again fails to address alleged "bad faith," which is the purpose of MCC's Motion. Instead, Hutt again attempts to rely on generic negligence arguments, asserting that *if* a jury concluded that MCC was negligent or failed to warn, then there was increased exposure to asbestos. Hutt completely fails to address how such actions would rise to the level of "bad faith" on MCC's part. Because Hutt has failed to present evidence showing "bad faith" by MCC and connecting said "bad faith" to alleged increased exposure to asbestos, Hutt should be precluded from presenting evidence of damages related to increased asbestos exposure.

CONCLUSION

For the foregoing reasons, MCC respectfully requests that the Court grant its Motion in Limine on Bad Faith Damages.

² On page 4 of his response, Hutt asserts that relevant question is whether "MCC's bad faith deprived him of the opportunity to preserve" his workers' compensation claim. But lost opportunity does not equal recoverable damages. Without evidence that he suffered *loss or harm* as provided under Montana Code § 27-1-317, there are no recoverable damages resulting from this alleged "lost opportunity."

Dated: December 7, 2018

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Dated this 7th day of December, 2018.

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