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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,

Consolidated Cases

Cause No. AC 17-0694

**DEFENDANT BNSF RAILWAY
COMPANY'S RESPONSE TO
PLAINTIFFS' MOTION FOR
RELIEF FROM DEFERRED
DOCKET ORDER DUE TO
COVID-19**

Applicable to All Cases

COMES NOW, Defendant BNSF Railway Company ("BNSF"), through counsel, and respectfully submits this response to MHSL Plaintiffs' Motion for Relief from Deferred Docket Order Due to COVID-19.

INTRODUCTION

The MHSL Deferred Docket Plaintiffs ask the Court for a six-month extension to complete their Court-mandated annual examinations, citing COVID-

19 and the CARD Clinic not seeing patients from mid-March to mid-May as the basis for their requested extension. This motion is not the first time the MHSL Plaintiffs have tried to avoid their obligation to have an annual examination completed before July 1 of each year. They have been trying to avoid their annual examination obligation long before COVID-19 began to spread. While the Court should not ignore the need to remain flexible to accommodate unexpected events on a case-by-case basis, it should also not allow Plaintiffs to use COVID-19 as a pretextual justification to deprive BNSF of its due process rights. The MHSL Plaintiffs have known that they must undergo an annual examination by July 1 of each year since the Court implemented the deferred docket in 2018. The current situation caused by COVID-19 does not justify a universal extension of the annual examination deadline.

ARGUMENT

A. The MHSL Plaintiffs Have Not Tried to Comply with the Court-Ordered Annual Examination Requirement in Good Faith.

The Court implemented a deferred docket over defendants' objections in 2018. After careful consideration, the Court granted the plaintiffs' requests for a deferred docket but required every deferred docket plaintiff to complete an annual examination by July 1 of each year. As explained in the Court's September 13, 2018 Order, the annual examinations are an essential safeguard to protect the

defendants' due process rights and ensure that the plaintiffs are not unilaterally allowed to decide when a deferred docket case is activated.

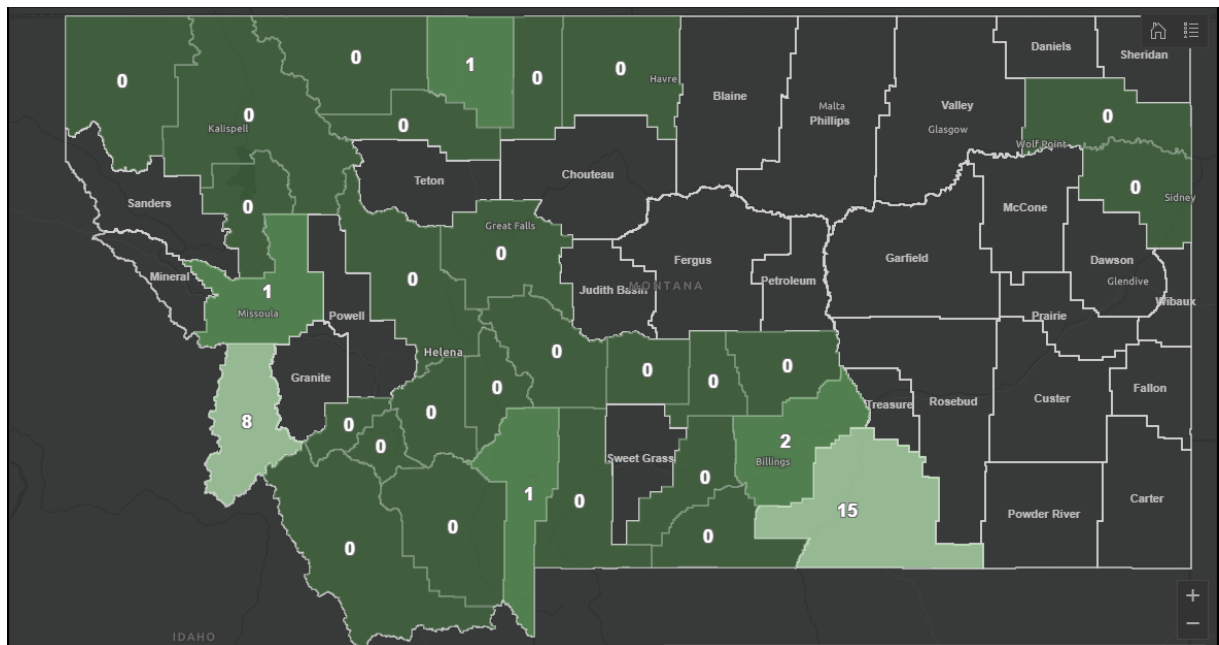
Thus, the deferred docket plaintiffs have known about their July 1 deadline to undergo an annual examination since 2018. Yet, from the outset, the MHSL Plaintiffs have consistently resisted complying with the annual examination requirement in good faith. For example, in 2019, *only half* of the MHSL Deferred Docket Plaintiffs completed an annual examination by the July 1 deadline. (See MHSL Pl's Response to Rule 41 motion to dismiss, p. 3). Further, the MHSL Plaintiffs have asked the Court to eliminate its annual examination requirement at least twice before filing this motion. The MHSL's past conduct shows that they do not take the defendants' due-process rights seriously and will try to deprive the defendants of even a modicum of due process, for any reason.

B. The Current COVID-19 Situation Does Not Justify A Universal Six-Month Extension of the Annual Examination Deadline.

While serious, the current COVID-19 situation does not justify a universal six-month deadline extension for the deferred docket plaintiffs to complete their annual examinations. According to the Montana Department of Health and Human Services, Lincoln County has had 7 total confirmed COVID-19 cases.¹ As of this

¹ Data according to the Montana Department of Health and Human Services. Map accessed on May 29, 2020 at: <https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b>

filing, there are **0 active** COVID cases in Lincoln County, or any of the surrounding counties:



Id.

BNSF does not presume to predict what will happen with COVID-19 in the coming months, or years. That said, the current situation likely means one of two things: (1) life in Montana is returning to the pre-COVID status quo, or (2) there is a new status quo. Neither situation warrants a universal six-month extension of the plaintiffs' deadline to complete their annual examinations.

First, if Montana's response has effectively diffused the COVID-19 situation for now, the short time Montanans had to shelter-in-place does not warrant a six-month extension of the annual examination deadline. The deferred docket plaintiffs had eight months to complete their annual examinations before Montana

put COVID-19 restrictions in place. They also will have had nearly two months after Montana began to lift the restrictions to complete their annual examinations before July 1, 2020. If there are any isolated, unique, situations in which a plaintiff legitimately cannot complete his or her annual exam before July 1, 2020, because of COVID-19, the Court can address those situations on a case-by-case basis. But, for most deferred docket plaintiffs, if life in Montana is returning to normal, the relatively short time Montanans were ordered to shelter-in-place does not justify a universal *six-month* extension of the annual examination deadline.

Second, if the current COVID-19 lull in Montana is only temporary, everyone, including the deferred docket plaintiffs, must adjust to the new status quo. That does not mean that litigation can stop. Nor does it mean that BNSF's and the other defendants' due process rights can be jettisoned.

The importance of the Court-ordered annual examinations cannot be overstated. The annual examinations are the only mechanism provided to BNSF and other defendants to monitor deferred docket plaintiffs' medical conditions and activate cases at the appropriate time. Without that safeguard, BNSF will be deprived of its right to due process.

Moreover, if life with COVID-19 risk is the new normal, the deferred docket plaintiffs will not be in any better position to complete their annual examinations in

six months than they are right now. Any risks that currently exist while Montana has very few active COVID-19 cases will also exist six months from now.

In the next six months, the deferred docket plaintiffs will not be in any better health, nor will be at less risk when going out into the public. In all likelihood, if the Court grants this motion and there is a resurgence of COVID-19 in Montana, six months from now the MHSL Plaintiffs will request yet another extension, or even worse, ask the Court to dispense with their obligation to undergo an annual examination, altogether. That cannot be allowed.

CONCLUSION

BNSF should not be allowed to use the COVID-19 situation to deprive BNSF and the other defendants of their due process rights. The Court should deny the MHSL Plaintiffs' request for a universal six-month extension of the annual examination deadline and instead address any unique situations in which a plaintiff has been unable to undergo an annual examination for reasons other than inexcusable neglect and delay on a case-by-case basis.

DATED this 29th day of May, 2020.

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