

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002531-WC

DONALD R. HOLBROOK

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-004083

AK STEEL CORPORATION; RON CHRISTOPHER,
DIRECTOR OF SPECIAL FUND; J.
LANDON OVERFIELD, ADMINISTRATIVE
LAW JUDGE; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING
** ** *

BEFORE: COMBS, DYCHE, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This petition for review of a decision of the Workers' Compensation Board (Board) stems from the dismissal of a claim for occupational disease benefits for failure of Donald R. Holbrook (Holbrook) to provide due and timely notice of his asbestosis to his employer, AK Steel Corp. (AK Steel). Having reviewed the facts of this case, we reverse and remand.

Holbrook worked for AK Steel for almost 42 years, primarily as a brick layer, which required handling asbestos-laden products. He last worked on January 5, 1995, went on sick

leave, and retired on April 30, 1995. He filed his claim on April 10, 1996.

The administrative law judge (ALJ) initially dismissed the claim in February 1997 because he determined that Holbrook knew about his condition in either 1992 or 1993 but provided no notice of his intent to file a claim against AK Steel until April 1996. In so concluding, the ALJ relied on the facts that Holbrook was told of his asbestosis and breathing deficiencies in 1991 or 1992, mentioned a class action asbestos litigation at work in either 1993 or 1994, AK Steel was aware that he had an attorney in the litigation and some chest disease by the time he retired in April 1995, and although Holbrook told his supervisor that he had received a check from the litigation, he never said anything about his intent to file a state workers' compensation claim.

The Board reversed and remanded because it could not determine on what the ALJ had relied in reaching his conclusion. Upon remand, the ALJ explained that he believed Holbrook's conversations with his supervisor did not amount to giving notice because they failed to communicate his belief that he had a work-related condition. The ALJ pointed out that by the time Holbrook ceased working in January 1995, he had been told of the asbestosis but did not inform AK Steel of same until he filed his claim in April 1996.

The Board affirmed the dismissal, finding there was no evidence of the employer's knowledge that Holbrook's asbestosis was the result of his exposure at AK Steel. The Board felt the

evidence did not compel a finding that Holbrook's communication to AK Steel was equivalent to notice of his exposure there.

We have reviewed Holbrook's deposition and hearing testimony. In his deposition, he stated that he, along with other workers, was involved in a class action lawsuit for asbestosis and was represented by an attorney named Humphreys. Humphreys sent Holbrook to Kings' Daughters' Hospital for a chest x-ray. Holbrook received a letter telling him that he had asbestosis, and later began receiving settlement checks as a result of the litigation.

Holbrook also testified that he was told that an x-ray showed he had asbestosis in 1991 or 1992. He said that he mentioned it to co-workers, including his turn foreman, Teddy Hall, in either 1993 or 1994, before he retired. On the other hand, Holbrook stated that he first learned that he had a lung condition due to industrial dust when Dr. Smith in Paintsville told him so in 1996 based on an x-ray. He did not, however, give a date of when this occurred.

At the hearing in November 1996, Holbrook stated that no doctor informed him that he had a lung disease until his workers' compensation attorney sent him to a doctor in April 1996. Holbrook testified that he told his supervisor, Teddy Hall, that he had received a check from Attorney Humphreys as a result of the asbestosis class action. He mentioned this between one and six months after talking to Humphreys. He said that they discussed this many times at lunch, but he did not tell Hall at

that time that he was going to file a workers' compensation claim.

Regarding Holbrook's testimony about receiving a letter from Attorney Humphreys' office informing him that he had asbestosis, he specifically testified:

Q. Do you remember ever, at any time, not telling him what was going on with Humphreys? In other words, I am trying to find out if you just told them that you got the check, or if they knew when you went to get the screening and breathing tests? In other words, if they knew all of that?

A. I think, as best I could. This was just starting out and the checks weren't that big. Most of them were just maybe a hundred dollars or two-hundred dollars every once in awhile you get. I didn't think much about it, really. And me being my job and all, I talked it over with them, but what plans in detail, I really can't answer anymore than what I already have on that.

The following exchange took place with the ALJ:

THE COURT: Did you understand from that letter that some doctor had read an X-ray and said that your X-ray was consistent with having asbestosis?

WITNESS: I might have thought that, but it didn't really say that.

THE COURT: Did you understand from that letter that you had a lung problem caused by asbestos?

WITNESS: According to that letter, that's what I had.

THE COURT: Did you have any idea from that letter how that lung problem came to be?

WITNESS: It was from my exposure to the different products in the field that I worked with.

THE COURT: They may have asked you this, and maybe I missed it. That was in, what 1991 or 1992?

WITNESS: Probably, maybe even in '93. I can't remember when I started that, really. Might have been '93, might have been '92. I don't remember what year it was.

KRS 342.316(2) (a) is the notice statute governing this claim. It states in relevant part:

[N]otice of claim shall be given to the employer as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur[.]

Newberg v. Slone, Ky., 846 S.W.2d 694 (1992) made clear that a communication sufficient to inform the employer of a work-related condition satisfies the notice requirement.

In this case, we believe that Holbrook's supervisor was well aware of the asbestos litigation and that this was sufficient to put AK Steel on notice of a work-related condition. After all, Holbrook had worked nowhere else for 42 years. The problem, however, is that Holbrook was not clear in his testimony as to how long after learning of the disease he informed his foreman. He testified that he learned of the asbestosis in either 1992 or 1993 when he received a letter from Attorney Humphreys. There is also testimony that he first learned he had an industrial lung condition in 1996 from a Paintsville physician. He further stated that he informed his foreman in either 1993 or 1994. At another point in his testimony, Holbrook

asserted that he talked to his supervisor within one to six months after receiving the letter from Humphreys.

Based on the contrary testimony, the ALJ was free to determine what portion of Holbrook's statements to believe. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Therefore, concluding that Holbrook knew of his diagnosis in 1992 but did not inform his employer until 1993 or 1994 would be supported by the evidence, and it cannot be said that a contrary result is compelled. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). The further finding that this delay in providing notice rendered it untimely would also be supported by substantial evidence. Id.

Unfortunately, the ALJ did not dismiss the claim for the reasons we cite. The ALJ did not believe that the conversations Holbrook had with his employer were sufficient to notify AK Steel that he believed he had a work-related condition. As stated above, we disagree with this conclusion as a matter of law. Therefore, AK Steel had notice well before Holbrook filed his claim in April 1996. Based on Holbrook's testimony, the ALJ may conclude either that there was a span of as little as one month or as much as two years in providing notice. While the latter would clearly not amount to timely notice, the former may. But because this is a finding for the ALJ alone to make, we remand for such a determination.

Accordingly, the Board's decision is reversed and remanded to the ALJ for further considerations consistent with this opinion.

COMBS, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

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