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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000788-WC

LETCHER COUNTY BOARD OF EDUCATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-01407

ROGER HALL; HON. CHRISTINA HAJJAR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: The Letcher County Board of Education appeals from a decision of the Workers' Compensation Board (hereinafter referred to as Board) which reversed a decision of Administrative Law Judge (ALJ) Christina Hajjar, dismissing Roger Hall's claim for occupational disability as time-barred pursuant

to Kentucky Revised Statute (KRS) 342.316(4)(a). Appellant argues on appeal that the Board exceeded its statutory authority and scope of review when it reversed the decision of the ALJ. Specifically, Appellant claims the Board reevaluated the evidence presented to the ALJ in full, substituting its own findings of fact for those of the ALJ. Roger Hall, the injured worker in this case, argues that the Board acted correctly and that a decision in his favor was compelled by the evidence. We hold that the Board did not exceed its authority and affirm.

Roger Hall was an employee of Appellant. From 1976 until the late 1980s, Hall worked in the Letcher County High School. In 1988 or 1989, Hall began teaching in a Quonset hut[1] outside the main high school building. In 1990, construction began on a new Letcher County High School. The new school was completed in 1992, at which time Hall was transferred there where he remained until his retirement in 2003. After the move to the new high school however, the boiler room in the old high school continued to be used as a break and lunch room for the teachers, including Hall.

On September 4, 2015, Hall filed a Form 102 occupational disease claim, alleging entitlement to workers' compensation benefits due to recently diagnosed mesothelioma caused by exposure to asbestos. The testimony in this case indicates that in 1988 or 1989, the boiler in the old high school tested positive

[1] A Quonset hut is a prefabricated structure made of corrugated galvanized steel.

for asbestos. In 1990, the asbestos containing materials were removed from the boiler. However, tiles on the floor also contained asbestos, but were not removed. It was believed that these tiles posed a minimal risk so long as they were waxed and sealed. As these tiles broke and wore down, they were removed. These tiles were still being removed when Hall retired in 2003. Even though Hall did not work in the old high school building after approximately 1989, the teachers still used the boiler room as a teacher's lounge and Hall went there on a daily basis.

Dr. Fred Rosenblum, a pulmonary specialist, examined Hall on December 16, 2016. Dr. Rosenbloom concluded that Hall's mesothelioma was caused by exposure to asbestos during his time at the high school.

A hearing before the ALJ was held on August 29, 2017. In her opinion and order, the ALJ determined that Hall met his burden to prove that he developed mesothelioma due to his exposure to asbestos at work. However, the ALJ held that he was barred from collecting benefits due to the statute of limitations/repose found in KRS 342.316(4)(a). KRS 342.316(4)(a) states:

> The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a claim is filed with the commissioner within three (3) years after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease, whichever shall last occur; and if death results from the occupational disease within that period, unless a

> claim therefor be filed with the commissioner within three (3) years after the death; but that notice of claim shall be deemed waived in case of disability or death where the employer, or its insurance carrier, voluntarily makes payment therefor, or if the incurrence of the disease or the death of the employee and its cause was known to the employer. However, the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard, except that, in cases of radiation disease, asbestos-related disease, or a type of cancer specified in KRS 61.315(11)(b), a claim must be filed within twenty (20) years from the last injurious exposure to the occupational hazard.

The ALJ held that Hall met the three-year manifestation date, but that he did not file his claim within twenty years of his last injurious exposure to asbestos. The ALJ found that Hall's last injurious exposure to asbestos occurred in 1990, when the asbestos in the boiler was removed and therefore dismissed Hall's claim for workers' compensation benefits.

Hall then appealed this decision to the Board. He argued that the ALJ's finding that he was not exposed to asbestos after 1990 was not supported by substantial evidence. Hall argued that Dr. Rosenblum indicated in his report that Hall was exposed to asbestos from the boiler insulation and the floor tiles, and that the mesothelioma was causally related to Hall's work environment. In addition, Hall claimed that even though the asbestos from the boiler was removed in 1990, he provided evidence that the boiler room tiles contained asbestos and were not

removed prior to his retirement. The Board reversed the decision of the ALJ finding that because the tiles in the boiler room contained asbestos, Hall's last date of injurious exposure was the date of his retirement in 2003. This appeal followed.

Appellant now claims on appeal that the Board exceeded its statutory authority in reversing the decision of the ALJ by substituting its own factual findings for those of the ALJ. "KRS 342.285 designates the ALJ as the finder of fact. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985), explains that the fact-finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence." *AK Steel Corp. v. Adkins*, 253 S.W.3d 59, 64 (Ky. 2008).

> The claimant bears the burden of proof and risk of persuasion before the [ALJ]. If he succeeds in his burden and an adverse party appeals to the [Board], the question before the [Board] is whether the decision of the [ALJ] is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the [ALJ], and he himself appeals to the [Board], the question before the [Board] is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. App. 1984). "For the evidence to be compelling, the evidence produced in favor of the claimant-appellee must be so overwhelming that no reasonable person could reach the conclusion of the [ALJ]." *REO Mech. v. Barnes*, 691 S.W.2d 224, 226 (Ky. App. 1985),

overruled on other grounds by Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

"The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

The Board held that Hall was injuriously exposed to asbestos until 2003. The Board found that Dr. Rosenblum "unequivocally noted" that asbestos insulation was not repaired until 1990, that the heating pipes in the classrooms were insulated with asbestos, and that the floor tiles in the school were made with asbestos and not removed until after Hall's retirement. In essence, Dr. Rosenblum indicated that all the building materials in the school which contained asbestos contributed to Hall's mesothelioma.

In addition, the Board held that the ALJ erroneously relied on the testimony of Marion Whitaker,[2] maintenance supervisor for Appellant, that Hall's last exposure was in 1990. The Board found that Whitaker was not a doctor nor was there any showing that he had any expertise regarding the degree or quantity of exposure to asbestos needed to cause mesothelioma. Furthermore, Whitaker and

[2] Whitaker maintained the asbestos management plan for the Board and was the contact person for everything asbestos related.

Hall both testified that the tiles in the boiler room contained asbestos and were present the entire time Hall worked for Appellant. The Board ultimately held that Whitaker's testimony was not substantial evidence that Hall's last injurious exposure to asbestos occurred in 1990.

The ultimate question for this Court is whether or not the Board was correct in holding that the evidence was so overwhelming as to compel a finding in Hall's favor that his last injurious exposure to asbestos occurred in 2003.

> KRS 342.0011(4) defines "injurious exposure" as "that exposure to occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made."
>
> We have held the statute requires only that exposure could independently cause the disease—not that it did in fact cause the disease. "All that is required . . . is that the exposure be such as *could* cause the disease independently of any other cause."

Miller v. Tema Isenmann, Inc., 542 S.W.3d 265, 271 (Ky. 2018) (citation omitted and emphasis in original).

We find that the Board did not err in reversing the decision of the ALJ. The ALJ found, and the record supports, that Hall's mesothelioma was caused by his exposure to asbestos while working for Appellant. The medical records from Dr. Rosenblum indicated that Hall's exposure to the asbestos in the boiler insulation and in the floor tiles caused his mesothelioma. While Whitaker testified that the asbestos in the boiler room was removed in 1990, additional

testimonial and documentary evidence indicates that his exposure to asbestos continued thereafter. The floor tiles in the old high school and boiler room contained asbestos but were not removed in 1990. Only as these tiles broke and wore down were they removed. Although Whitaker believed the tiles only posed a minimal risk of asbestos exposure so long as they were waxed and sealed, this does not mean they posed no risk. Further, as these tiles would wear down and break, they were no longer sealed and exposure to asbestos continued.

The evidence in the record indicates that Hall was exposed to asbestos until his retirement in 2003. The evidence in this case was so overwhelming as to compel the Board to find in Hall's favor and the Board did not exceed its statutory authority.

Based on the foregoing, we affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE ROGER HALL:

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