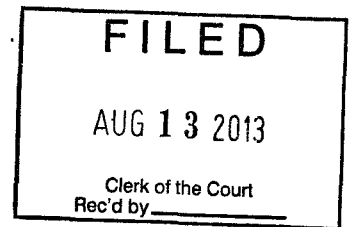


IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
April 22, 2013 Session

**ARMETHIA D. LIVELY EX REL. ROBERT E. LIVELY v. UNION
CARBIDE CORPORATION**

Appeal from the Circuit Court for Anderson County
No. B1LA0154 Donald R. Elledge, Judge

No. E2012-02136-WC-R3-WC - Mailed June 4, 2013



Upon the death of her husband from asbestos-related pulmonary disease, the plaintiff filed suit for workers' compensation benefits. Because her husband had previously settled a disability claim for 400 weeks of benefits, the employer denied the claim. The trial court awarded the funeral expenses of the husband but declined to grant benefits to the plaintiff as his dependent over and above the amount of the settlement. Her appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. Although the plaintiff may make a separate claim for benefits, she is not entitled to any recovery beyond funeral expenses because the amount of her entitlement, as controlled by the date of her husband's injury, would not be in excess of the amount of his settlement. The judgment is, therefore, affirmed.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right; Judgment
of the Trial Court Affirmed**

GARY R. WADE, C.J., delivered the opinion of the Court, in which E. RILEY ANDERSON, SP. J., and JON KERRY BLACKWOOD, SR. J., joined.

Loring Justice and B. Chadwick Rickman, Knoxville, Tennessee, for the appellant, Armethia D. Lively.

Kristi McKinney Stogsdill, Oak Ridge, Tennessee, for the appellee, Union Carbide Corporation.

OPINION

I. Facts and Procedural History

Robert Lively (the "Employee"), a sheet metal worker for Union Carbide Corporation (the "Employer") at its Y-12 facility in Oak Ridge, received a "medical termination" on February 26, 1982. Because of chronic bronchitis, emphysema, and osteoarthritis of the spine, the Employer classified the Employee as permanently and totally disabled.¹ After being diagnosed with asbestosis on May 11, 2006,² the Employee filed a claim for workers' compensation benefits against both the Employer and the Second Injury Fund.³ The Employee, the Employer, and the custodian of the Second Injury Fund entered into a settlement on August 24, 2009.⁴

The settlement provided that the Employee's asbestosis was caused by his exposure to asbestos at the Employer's Y-12 facility prior to his medical termination in 1982. The terms of the settlement designated February 26, 1982 as the date of his injury, and granted a lump sum of \$90,000.00 as "compensation based upon an agreed residual permanent total disability of 100%, which equates to 400 weeks of benefits at a negotiated compromised workers' compensation rate of \$225.00 per week." Several paragraphs emphasized that the award was for asbestosis and not for occupational asthma. The settlement further provided that the Employer was "exonerated from any and all further liability with regard to disability benefits related to the [Employee's] occupational lung injuries." The Employee's "claim for occupational asthma and related lung diseases from work-related exposures prior to February 26, 1982 [was] dismissed with prejudice."

¹ The Employee did not, however, receive workers' compensation benefits at that time. His respiratory conditions were later termed "occupational asthma," although it is unclear when or why this change in terminology occurred. In any event, neither asthma nor asbestosis was diagnosed at the time of the Employee's termination.

² Asbestosis is "a chronic lung disease caused by the inhalation of asbestos fibers that results in the development of alveolar, interstitial, and pleural fibrosis. . . . The disease is progressive: Shortness of breath develops eventually into respiratory failure." Mosby's Dictionary of Medicine, Nursing & Health Professions 148 (7th ed. 2006). The stipulation of facts recited the date of diagnosis as July 10, 2006; at trial, however, May 11, 2006 was set as the correct date.

³ See Tenn. Code Ann. § 50-6-208 (2008). It appears from the record that the Second Injury Fund was included as a defendant because the Employee had previously received ninety weeks of benefits due to work-related hearing loss.

⁴ Judge Donald R. Elledge, who presided over the proceedings in this case, also approved the 2009 settlement. In this proceeding, Judge Elledge took "into consideration the Court's own records" concerning the Employee's prior related claims, which had been consolidated by court order prior to the settlement. Neither party objected to judicial notice of the prior claims.

The Employee died of asbestosis on October 4, 2010. In April of 2011, his widow, Armethia Lively (the "Plaintiff"), brought this action against the Employer seeking benefits under the Workers' Compensation Law based upon the Employee's "asbestosis and/or occupational lung disease" that resulted in his death. The Plaintiff requested "[s]tatutory death benefits including, but not limited to, funeral and burial expenses," and "[a]ll other benefits provided under Tennessee Law." A trial was held in November of 2011, at which no testimony was presented by either party. After reviewing court records, considering stipulations of fact, and hearing arguments by counsel, the trial court found that the Employee had died as a result of a compensable occupational disease and, therefore, the Plaintiff, as his dependent, was entitled to "the maximum total benefit, established at 400 weeks times the applicable workers' compensation rate, less the amount of workers' compensation disability benefits paid directly to [the Employee]."⁵ The trial court determined that the 2009 settlement established by agreement the applicable workers' compensation rate (\$225.00 per week) and date of injury (February 26, 1982), resulting in a maximum total benefit of \$90,000.00 (\$225.00 per week times 400 weeks). The court then deducted the \$90,000.00 settlement from the maximum total benefit, resulting in a net sum of \$0.00. While awarding the Plaintiff funeral expenses in accordance with Tennessee Code Annotated section 50-6-204(c) (2008), the trial court concluded that the Plaintiff was "not entitled to any additional monetary disability benefits" because the amount of the 2009 settlement was equal to the maximum total benefit, leaving nothing more for the Plaintiff to recover.

Afterward, the Plaintiff filed a motion to alter or amend the judgment, challenging the trial court's determinations as to the applicable date of injury and maximum total benefit. The Plaintiff asked the trial court to find that there were actually two different dates of injury—one in 1982 for the Employee's medical termination due to occupational asthma, and one in 2010 for the Employee's death from asbestosis. As stated, the trial court found the date of injury to be February 26, 1982—the date of the Employee's medical termination—as established in the 2009 settlement. According to the Plaintiff, however, if the Employee's medical termination was actually the result of "occupational asthma/asthmatic bronchitis," and not the asbestosis that caused his death, then his date of death—October 4, 2010—would control as the date of his injury. Using the 2010 date, the Plaintiff calculated her maximum total benefit as \$306,000.00,⁶ subject to deduction of the \$90,000.00 settlement, resulting in

⁵ See Tenn. Code Ann. §§ 50-6-210(e)(10), 50-6-102(13), (14)(A), 50-6-207(5) (2008).

⁶ See Tenn. Code Ann. § 50-6-102(14)(A)(ix) (2008). The benefit rate for injuries occurring after July 1, 2004 is 100% of the state's average weekly wage, as determined by the Department of Labor and Workforce Development, which lists the rates at <http://www.tn.gov/labor-wfd/WCRATETB.pdf>. The benefit rate in effect on the date of the Employee's death was \$765.00 per week (\$765.00 per week times 400 weeks
(continued...)

a maximum potential recovery of \$216,000.00.

When the trial court denied the motion to alter or amend, the Plaintiff filed a second motion asking the trial court to reconsider the date of injury and seeking to supplement the record with decisions of the United States Department of Labor's Division of Energy Employees Occupational Illness Compensation ("EEOIC"). Her stated purpose was "to clarify and correct" any "misperception" by the trial court "that the [Employee's] February 26, 1982 medical retirement was related to the occupational disease of asbestosis pleural disease that caused his death." The decisions of the EEOIC purportedly corroborated the Plaintiff's claim that the asbestosis that caused the Employee's death in 2010 was not present at the time of his medical termination in 1982. In response, the Employer contended that the Employee was forced to retire due to a "respiratory disorder," and that no proof existed "one way or the other" as to whether it was occupational asthma or asbestosis that caused the retirement. According to the Employer, the EEOIC decisions showed that the Employee was not diagnosed with occupational asthma until 2009, three years after he was diagnosed with asbestosis and twenty-seven years after he retired. The trial court refused to consider the EEOIC decisions as evidence, denied the Plaintiff's motion, and upheld the judgment denying any benefits other than funeral expenses.

In this appeal, the Plaintiff continues to argue that she is entitled to additional death benefits because there is a distinction between the cause of the Employee's medical termination in 1982 and the cause of his death in 2010. Her brief summarizes the related issues as follows:

(1) Did the trial court err in its . . . determination [that] the [Plaintiff] was entitled to no monetary benefits for the occupational death of [the Employee]?

(2) Did the trial court err in determining the "date of injury" for [the Plaintiff's] claim for the occupational death of [the Employee] was February 26, 1982 and in reasoning that by this "date of injury" [the Employee's] prior award for his own claim, received while he was living, totally offset any benefit [the Plaintiff] might receive for his occupational death?

a. More specifically, did the . . . trial court err in appearing to determine the February 26, 1982 medical retirement of [the Employee] from employment at the Oak Ridge nuclear reservation with the [Employer] was connected to asbestos? . . .

⁶(...continued)
equals \$306,000.00).

b. Did the trial court err in finding that the parties stipulated [the Employee's] medical retirement in 1982 was due to asbestos related disease?

c. Alternatively stated, did the trial court err, conceptually, in connecting the date [the Employee] medically retired due to other occupational illnesses with [the Plaintiff's] rights to compensation, as a surviving widow, that accrued upon [the Employee's] death from asbestosis in October 2010?

II. Standard of Review

Although the evidence was presented by stipulation and no witnesses testified at the trial, the Plaintiff's claim presents issues of both fact and law.⁷ We review a trial court's factual findings "de novo upon the record . . . , accompanied by a presumption of the correctness of the finding[s], unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2012); see also Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006). The interpretation and application of our workers' compensation statutes, however, are questions of law that are reviewed de novo with no presumption of correctness. Nichols v. Jack Cooper Transp. Co., 318 S.W.3d 354, 359 (Tenn. 2010). "Our primary objective when engaging in statutory construction is to carry out the intent of the legislature without unduly broadening or restricting the statute[s]." Id. at 359-60. "We determine legislative intent from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning." State v. Flemming, 19 S.W.3d 195, 197 (Tenn. 2000).

⁷ At least one unreported case has addressed the appellate courts' standard of review based on stipulated facts:

In a case in which all of the adjudicative facts are stipulated by the parties and there are neither bases for factual contradiction nor issues of credibility, it may be that the appellate court is in the same position as the trial court to review the facts as presented. The stipulated facts presented in this case, however, are not, by the very nature of the stipulation, at issue; rather, the conflicting inferences which may be drawn from these facts frame the issue.

State v. Tucker, No. M2001-02298-CCA-R3-CD, 2002 WL 1574998, at *7 (Tenn. Crim. App. July 17, 2002) (citation omitted); see also id. at *8 (concluding "that the trial court was free to draw inferences from the stipulated facts, and that its inferences were reasonable and supported by the facts" (citation omitted)).

III. Analysis

Initially, an employer's potential liability for death benefits is guided by various statutory provisions. Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 277-78 (Tenn. 2009); see, e.g., Tenn. Code Ann. §§ 50-6-204(c) (burial expenses), 50-6-207(5) (deductions in case of death), 50-6-209 (maximum compensation), 50-6-210 (compensation payments to dependents), 50-6-221 (receipts for payments), 50-6-226(a)(3) (attorney's fees), 50-6-227 (alien dependents). Relevant to this case, surviving dependents are entitled to workers' compensation benefits when an occupational disease causes the death of an employee. Tenn. Code Ann. § 50-6-303(a)(1) (2008); see also Tenn. Code Ann. § 50-6-301 (2008 & Supp. 2012) (defining "occupational disease" as a disease "arising out of and in the course of employment"). A dependent's recovery for death benefits is subject to the maximum total benefit in effect on the date of the employee's injury. Tenn. Code Ann. § 50-6-210(e)(10) (2008); see also Tenn. Code Ann. § 50-6-205(b)(1) (2008) ("The total amount of compensation payable under this part shall not exceed the maximum total benefit . . . in any case, exclusive of travel reimbursement, medical, hospital and funeral benefits."). In consequence, any recovery by the dependent—exclusive of travel reimbursement or medical, hospital, and funeral benefits—must be reduced by the amount of payments made to the employee during his or her lifetime. Tenn. Code Ann. § 50-6-207(5) (2008 & Supp. 2012).

Because these statutory rights of dependents vest upon the death of an employee, "arise out of the death," and are independent of the employee's rights, the employee cannot do anything during his or her lifetime to deprive surviving dependents of the benefits to which they are entitled under the Workers' Compensation Law. Hotel Claridge Co. v. Blank, 89 S.W.2d 758, 761 (Tenn. 1936) ("Under our statute, which this court has said creates contractual rights by reason of the statutory provisions, the employer is charged with the liability to pay the statutory compensation to the injured employee, and upon his death, to make the statutory payments to the dependents of the employee, when death results under such facts as to create liability."); see also Excel Polymers, 302 S.W.3d at 277 (observing that an employer's liability to an employee ends at the time of the employee's death, and that the employer's "potential liability for death benefits is a separate issue governed by different statutory authority"). A dependent's claim for death benefits is not barred if the employee previously settled a disability claim. Hotel Claridge, 89 S.W.2d at 761. To the contrary, even if an employee has previously filed his or her own claim, a surviving dependent should file upon the employee's death "a separate proceeding where issues relating to causation of death, identity and classification of legal dependents, burial expenses and other such issues may be litigated." Excel Polymers, 302 S.W.3d at 278.

In this instance, the Plaintiff, as a surviving dependent of the Employee, properly filed a separate cause of action for workers' compensation benefits shortly after the death of the Employee. While her claim for death benefits is not barred by the Employee's 2009

settlement, the amount of her recovery is determined by the statutory provisions guiding the distribution of death benefits—namely, whether the Employee’s death is compensable, whether the Plaintiff’s potential recovery is subject to any deductions, and whether the Plaintiff may recover any amount up to the maximum total benefit, exclusive of any travel reimbursement or medical, hospital, and funeral benefits. The parties stipulated that the Employee’s death was caused by asbestosis, a compensable occupational disease. The Plaintiff has conceded that any compensation she may receive—apart from the funeral benefits she was awarded—is subject to deduction of the \$90,000.00 settlement with the Employee. It is also undisputed that the Plaintiff’s recovery is subject to the maximum total benefit in effect on the date of the Employee’s injury. What is in dispute, as indicated, is whether the Employee’s injury occurred in 1982, the date of his medical termination, or in 2010, the date of his death.

The maximum benefit rate in effect on the date of the Employee’s medical termination was \$126.00 per week, subject to a maximum total benefit of \$50,400.00. Tenn. Code Ann. §§ 50-1007, -1008 (Supp. 1981). After the Employee was diagnosed with asbestosis in 2006, he agreed to a “negotiated compromised workers’ compensation rate of \$225.00 per week” for the maximum 400 weeks, resulting in a maximum total benefit of \$90,000.00. At the time of the Employee’s death, the maximum benefit rate was \$765.00 per week, subject to a maximum total benefit of \$306,000.00. Tenn. Code Ann. § 50-6-102(14)(A)(ix) (2008).⁸ While observing that “the 1982 date” would ordinarily be used to determine the appropriate rate of compensation, the trial court expressly found that the negotiated upgrade to \$225.00 per week controlled based upon the prior settlement.

Obviously, the amount to which the Plaintiff is entitled under her theory of recovery is vastly different than that advocated by the Employer. If the applicable date of injury is the Employee’s date of death in 2010, the maximum total benefit available to the Plaintiff is \$306,000.00, subject to deduction of the \$90,000.00 settlement, resulting in a potential recovery of \$216,000.00. If the date of injury is the date of the Employee’s medical termination in 1982, however, the maximum total benefit is \$50,400.00, subject to deduction of the \$90,000.00 settlement, resulting in no recovery for the Plaintiff. The critical question, therefore, is which date of injury should be used to calculate the maximum total benefit available to the Plaintiff.

Tennessee Code Annotated section 50-6-303(a)(1) (2008) provides that “the partial or total incapacity for work or the death of an employee resulting from an occupational

⁸ The benefit rate for injuries occurring after July 1, 2004 is 100% of the state’s average weekly wage, as determined by the Department of Labor and Workforce Development. The Department maintains a listing of those rates at <http://www.tn.gov/labor-wfd/WCRATETB.pdf>.

disease . . . shall be treated as the happening of an injury by accident or death by accident.” Tenn. Code Ann. § 50-6-303(a)(1) (2008) (emphasis added). The statute of limitations applicable to instances of occupational disease begins “as of the date of the beginning of the incapacity for work resulting from an occupational disease or upon the date death results from the occupational disease.” Tenn. Code Ann. § 50-6-306(a) (2008) (emphasis added). If the occupational disease results in a compensable injury—either the partial or total incapacity for work or death—compensation must be given to either “the employee, or in case of the employee’s death, the employee’s dependents.” Tenn. Code Ann. § 50-6-303(a)(1) (2008); see also Tenn. Code Ann. § 50-6-102(12) (2008) (defining “injury” to include “occupational diseases arising out of and in the course of employment that cause either disablement or death of the employee” (emphasis added)).

The Plaintiff argues that these statutes establish two different dates for this type of injury to an employee: (1) as to an employee who files a claim for workers’ compensation benefits during his or her lifetime, the date of injury is the day the employee becomes partially or totally incapacitated for work as a result of an occupational disease; and (2) as to a surviving dependent who files a claim for death benefits, the date of injury is the day that the employee dies as a result of the occupational disease. In our view, however, the plain language of the legislation establishes that if an employee becomes partially or totally unable to work as a result of an occupational disease that later results in his or her death, then the employee’s death cannot provide a new and separate date of injury. The statutes contemplate that the date of injury for an occupational disease may be either the date that an employee becomes disabled from work or the date that the employee dies, but it cannot be both. When an employee suffers a partial or total incapacity for work due to occupational disease, the date of the beginning of the incapacity for work is the date of injury. See Adams v. Am. Zinc Co., 326 S.W.2d 425, 427 (Tenn. 1959) (observing that the “beginning of the incapacity” is equivalent to the “happening of the injury”); see also Brown v. Erachem Comilog, Inc., 231 S.W.3d 918, 923 (Tenn. 2007) (“For the purpose of the statute of limitations, ‘the beginning of the incapacity for work resulting from an occupational disease’ starts when the employee is unable to perform her regular employment duties . . .”). When an employee dies as a result of an occupational disease but did not previously suffer an incapacity for work, the date of injury must be the date of death. An employee’s dependent may not, however, file a workers’ compensation claim using the employee’s date of death as a separate date of injury when the employee has already received workers’ compensation benefits using the date of partial or total incapacity for work as the date of injury. We hold, therefore, that while a dependent maintains the right to seek any available benefits if an employee dies from an occupational disease, nothing in the Workers’ Compensation Law authorizes a claim based upon the employee’s death as a new and wholly separate injury when the employee

was previously incapacitated from work due to the same occupational disease.⁹

Applying these principles, it is clear that in order for the Plaintiff to successfully establish the Employee's date of death as a new and separate date of injury, his incapacity for work in 1982 had to result from something other than asbestosis. The Plaintiff submits that the Employee's medical retirement was caused by one disease—occupational asthma—while the Employee's death was caused by a different work-related disease—asbestosis.¹⁰ The trial court, however, concluded from the evidence presented at trial that the Employee's medical retirement was the result of asbestosis, and, therefore, the Plaintiff's date of injury was the 1982 date. In our assessment, the stipulated evidence does not preponderate against those findings.¹¹

According to employment records and correspondence from his treating physician, the Employee was granted a medical retirement in 1982 as a result of chronic bronchitis, emphysema, and osteoarthritis of the spine. It is undisputed that the Employee never worked after the date of his medical retirement, and there is nothing in the record to indicate that the Employee either could have worked or attempted to work after that date.¹² After the Employee was diagnosed with asbestosis in 2006, he agreed that the date of his medical retirement controlled as his date of injury for purposes of the 2009 settlement. It is undisputed that the asbestosis was caused by the Employee's exposure to asbestos during those years he worked for the Employer. Indeed, the 2009 settlement resolved all of the Employee's claims against the Employer and resulted in a lump sum payment of \$90,000.00

⁹ For the same reasons, if an employee is rendered unable to work because of one compensable occupational disease but later dies as a result of a second compensable occupational disease, there may indeed be two dates of injury: one for the partial or total incapacity for work based on the first occupational disease, and one for the death caused by the second occupational disease. *See Potts v. Celotex Corp.*, 796 S.W.2d 678, 685 (Tenn. 1990) (“It would be unreasonable and unfair to allow the manifestation of one disease caused by exposure to asbestos to preclude recovery for a second, unrelated disease also caused by exposure to asbestos.”).

¹⁰ This appears to contradict allegations made in the Plaintiff's complaint, which asserted a cause of action based upon the Employee's “asbestosis and/or occupational lung disease.” (Emphasis added.)

¹¹ The trial court declined to consider the EEOIC decisions that were submitted by the Plaintiff at the post-judgment motion hearing on October 1, 2012. According to the Plaintiff, these documents would distinguish occupational asthma from asbestosis as the cause of the Employee's medical retirement. Like the trial court, however, we have not considered these documents as part of the record because they were not properly admitted as evidence in the trial court, and the Plaintiff has not challenged the trial court's decision to exclude the documents from the evidence.

¹² The Employee's treating physician in 1982 opined that the Employee was “no longer able to work at his usual occupation” and “doubt[ed] if he [was] fit for any type of gainful employment.”

as compensation for the asbestosis the Employee suffered “based on exposures prior to his retirement on February 26, 1982.” The settlement explicitly provided that all payments were made for asbestosis, and no payments were made for occupational asthma.

These facts are in contrast to other cases where an employee is diagnosed with an occupational disease but is able to continue working until the symptoms of the disease later cause a partial or total incapacity for work. See, e.g., Brown, 231 S.W.3d at 924 (holding that although employee was aware she had cancer while she continued to work for employer, she did not suffer a compensable injury until her capacity for work was affected by the disease). Asbestos-related diseases, on the other hand, can often remain dormant and yet produce disabling symptoms for years before the disease is actually identified as the cause of a compensable injury. Wyatt v. A-Best Prods. Co., 924 S.W.2d 98, 101 (Tenn. Ct. App. 1995) (noting employee’s retirement in 1984 “due to health problems, including unexplained shortness of breath,” five years prior to his diagnosis of asbestosis); accord Christopher v. Consolidation Coal Co., 440 S.W.2d 281, 282-83 (Tenn. 1969) (allowing claim based on 1967 diagnosis of silicosis although employee had become disabled in 1963 due to rock and coal dust in his lungs); see also Mosby’s Dictionary of Medicine, Nursing & Health Professions, at 148 (describing asbestosis as a progressive disease that begins with shortness of breath before ultimately resulting in respiratory failure). Moreover, asbestosis is often difficult to diagnose because its symptoms may resemble the symptoms of asthma, bronchitis, and other lung disorders.¹³ Taurel v. Cent. Gulf Lines, Inc., 947 F.2d 769, 770-71 (5th Cir. 1991) (allowing claim based on 1987 asbestosis diagnosis although employee had “complained of pulmonary and respiratory difficulties” and “difficulty in breathing” as early as 1963, and had been treated for bronchitis in 1984); accord Consolidation Coal Co. v. Porter, 64 A.2d 715, 716-17 (Md. 1949) (allowing claim based on 1947 diagnosis of silicosis although employee had become disabled in 1944 because of chest pain, weakness, and a cough, which was originally diagnosed as a “bronchial condition”); Greener v. E. I. Du Pont De Nemours & Co., 219 S.W.2d 185, 187 (Tenn. 1949) (“It is a matter of common knowledge that some symptoms of a given disease, particularly in its early stage, may likewise be symptoms of any one of several other diseases.”).

As stated, the Employee’s medical retirement in 1982 was the result of a chronic cough, difficulty breathing, and pain in his lower back extending down to his legs. All of

¹³ For a particularly insightful discussion of the difficulties in diagnosing various occupational lung diseases, see Lawrence Martin, Pitfalls in Diagnosis of Occupational Lung Disease for Purposes of Compensation—One Physician’s Perspective, 13 J.L. & Health 49 (1998-1999). See also Asbestosis Diagnosis, The Mesothelioma Ctr., <http://www.asbestos.com/asbestosis/diagnosis.php> (last updated Feb. 11, 2013) (“Asbestosis is an aggressive pulmonary disease that can be challenging to diagnose since symptoms resemble those of less serious conditions like asthma and pneumonia.”) [hereinafter Asbestosis Diagnosis].

these are symptoms of asbestosis, even if they were not diagnosed as such at the time of the Employee's medical retirement.¹⁴ See Potts, 796 S.W.2d at 679 (identifying asbestosis as cause of pain in the neck, shoulders, and lower back); Liberty Mut. Ins. Co. v. Starnes, 563 S.W.2d 178, 178-79 (Tenn. 1978) (identifying asbestosis as cause of increasing lung dysfunction); Asbestosis Diagnosis, at <http://www.asbestos.com/asbestosis/diagnosis.php> ("Symptoms of asbestosis generally consist of respiratory problems. The two most common symptoms are coughing and shortness of breath . . ."). The trial court candidly acknowledged the difficulty of determining the date of injury but ultimately concluded that although the Plaintiff's right to bring a separate cause of action began upon the Employee's death in 2010, her "right of compensation was on February 26, 1982, when [the Employee] was medically terminated as a result of [the asbestosis]." While the 2009 settlement did not bar the Plaintiff's cause of action, its provisions support the trial court's finding as to the date of injury. Although the Plaintiff has argued that the Employee's medical retirement in 1982 was caused by asthma and could not have been caused by the asbestosis that was diagnosed in 2006,¹⁵ we cannot agree that the evidence demonstrated that the Employee's medical retirement was unrelated to the asbestosis that caused his death.

Parenthetically, the parties appear to have operated, at least briefly, under the erroneous assumption that the date of injury in an occupational disease case should be the day that the employee is diagnosed with the disease. As stated, the primary statute governing occupational disease cases provides that the "happening of an injury" occurs by either the partial or total incapacity for work or death; there is no mention of the date of diagnosis as an option for determining the date of injury. See Tenn. Code Ann. § 50-6-303(a)(1) (2008). In contrast, the statute of limitations for filing a claim based on an occupational disease is not triggered without "[f]irst, an incapacity for work; [and s]econd, either actual or constructive knowledge an occupational disease is the cause of the incapacity for work." Brown, 231 S.W.3d at 922 (emphasis added) (quoting Tenn. Prods. & Chem. Corp. v. Reeves, 415 S.W.2d 118, 119 (Tenn. 1967)); see also Nye v. Bayer Cropscience, Inc., 347 S.W.3d 686, 696 (Tenn. 2011) ("In 'creeping disease' cases, such as asbestos-related injuries, Tennessee law provides that the cause of action accrues with diagnosis of the disease."); Potts, 796 S.W.2d at 684 (holding that dependent's cause of action for employee's death by mesothelioma did not accrue until date of diagnosis even though employee's initial injury caused by exposure to asbestos occurred many years earlier); Mayton v. Wackenhut Servs.

¹⁴ These symptoms are also consistent with chronic bronchitis, emphysema, and osteoarthritis of the spine, the stated basis for the Employee's 1982 medical retirement.

¹⁵ Statements by counsel for the Employer indicated that the Employee was not diagnosed with occupational asthma or asthmatic bronchitis until 2009, three years after he was diagnosed with asbestosis and twenty-seven years after his retirement.

Inc., No. E2010-00907-WC-R3-WC, 2011 WL 2848198, at *3 (Tenn. Workers' Comp. Panel July 18, 2011) (observing that while the commencement of the statutory limitations period was not triggered until the employee knew or should have known that he had an occupational disease, the employee had become incapacitated from work because of the occupational disease when he was first placed on medical leave). In consequence, while the date of diagnosis in an occupational disease case is relevant insofar as the statute of limitations is concerned, it has no effect on the date of injury, which is determined by either the incapacity for work or the event of death.

In an issue closely related to the determination of the appropriate date of injury, the Plaintiff makes a separate argument that the trial court erred by applying the compensation rate that was agreed upon in the 2009 settlement, rather than the compensation rate that was in effect at the time of the Employee's death in 2010. Of course, the appropriate compensation rate, which is used to calculate the maximum total benefit, is dependent upon the date of the employee's injury. See Starnes, 563 S.W.2d at 179 (“[T]he applicable [rate schedule] in cases involving occupational diseases is that in effect on the date on which the employee becomes disabled as a result of the disease”); see also Shope v. Allied Chem. Corp., 611 S.W.2d 818, 819 (Tenn. 1981) (holding that statute in effect at time of employee's accident or injury ordinarily determines the benefits to be paid to a disabled worker). As stated, however, the trial court applied the negotiated settlement rate of \$225.00 per week with a maximum total benefit of \$90,000.00. Absent the agreement, the trial court would have likely applied the statutory rate in effect at the time of the Employee's injury in 1982,¹⁶ which was \$126.00 per week with a maximum total benefit of \$50,400.00. Although the difference in the negotiated rate contained within the settlement and that provided by statute in 1982 would have no effect on the outcome of this case, the lesser rate, in our view, should have been applied to calculate the claim of the Plaintiff before any reduction for payments made to the Employee. In any event, the date of the Employee's death does not control.

The Plaintiff relies upon several opinions by our supreme court to support her contention that the maximum benefit rate in effect on the date of the Employee's death—\$765.00 per week for 400 weeks—is applicable to her claim. In Mackie v. Young Sales Corp., the employee, James Mackie, was exposed to asbestos between 1948 and 1988. 51 S.W.3d 554, 555 (Tenn. 2001). Although Mackie voluntarily retired in 1989 or 1990 and did not work after his retirement, he retained his union membership and could have returned to work if he so desired. Id. In January of 1993, he was diagnosed with mesothelioma, an asbestos-related disease, and died of that disease four months later. Id. Mackie's widow sought workers' compensation benefits, which the trial court awarded in a net lump sum

¹⁶ Although the judgment of the trial court applied the negotiated rate of \$225.00 per week, the court also observed during the trial that “the 1982 date” would be used to determine the compensation rate.

award of \$62,529.15.¹⁷ Id. at 555 & n.2. The trial court calculated the widow's benefits based on the hourly wage of asbestos workers in 1993, the year Mackie was diagnosed and later died. Id. at 555. The case was appealed to the Special Workers' Compensation Appeals Panel, which found that the trial court had erred by awarding benefits at the maximum 1993 rate because Mackie was not working at the time of his death. Id. Our supreme court granted review, reversed the Panel, and reinstated the judgment of the trial court, concluding that "an employee's voluntary retirement does not preclude workers' compensation benefits for an injury arising out of and in the course of employment." Id. at 559.

The holding in Mackie does not support the Plaintiff's claim. Here, the Employee became disabled on the date of his medical termination. Unlike the Employee, Mackie retained the capacity to work from his retirement until the time of his death. In other words, Mackie did not suffer a compensable injury until he died because he had not previously been either partially or totally incapacitated for work due to the mesothelioma that caused his death. In making its ruling, the supreme court relied on "evidence in the record regarding the nature of Mackie's work, the retention of Mackie's union membership, and the proof regarding the availability and pay for such work at the time Mackie learned of his work-related malignant mesothelioma." Id. No such evidence was presented in this instance.

The Plaintiff also relies upon Bishop v. U.S. Steel Corp., 593 S.W.2d 920 (Tenn. 1980). Bishop worked in zinc mines from 1947 until 1970. Id. at 921. In 1970, he became totally disabled due to phlebitis,¹⁸ a condition caused by a leg injury he sustained during World War II. Bishop, 593 S.W.2d at 922. During the two years prior to his retirement and continuing afterwards, Bishop experienced shortness of breath and a chronic cough. Id. In 1971, he was diagnosed with silicosis due to his exposure to dust particles while working in the zinc mines. Id. The trial court awarded benefits based on the silicosis disease even though the unrelated condition of phlebitis had caused his disability. Id. On appeal, the supreme court affirmed the award, concluding that an employee could not be denied benefits for a compensable injury "merely because of the existence of an independent, concurrent, noncompensable cause of disability." Id. The court also linked the beginning of the silicosis to the time of Bishop's retirement, reasoning that because Bishop had not been exposed to

¹⁷ The trial court first awarded temporary total disability benefits from the date of the employee's diagnosis to the date of his death, for a total of sixteen weeks of temporary benefits. The court then awarded death benefits for the maximum period of 400 weeks, minus the sixteen weeks of temporary benefits, resulting in a total award of \$122,296.00. The court further reduced the total award by deducting the amounts of previous settlements. Finally, the court awarded the widow burial expenses and medical expenses.

¹⁸ Phlebitis is the inflammation of a vein. Taber's Cyclopedic Medical Dictionary 1773 (21st ed. 2009).

the dust of the zinc mines since he retired in 1970, “[i]t necessarily follows that his silicotic condition discovered in 1971 is attributable to the condition of his lungs when he took disability retirement.” Id. at 922-23.

In this instance, the Employee, like Bishop, learned of his compensable occupational disease after he had retired from the employment that caused his disease. Unlike Bishop, however, the Employee did not suffer from “an independent, concurrent, noncompensable cause of disability.” The key distinction is that the Employee was forced to retire due to a chronic cough, difficulty breathing, and pain in his lower back—all of which are symptoms of asbestosis—while the phlebitis that caused Bishop’s retirement was the result of a leg injury he sustained during World War II. Bishop’s leg injury was wholly unrelated to the shortness of breath and chronic cough—later diagnosed as silicosis—that he experienced due to dust inhalation in the zinc mines.

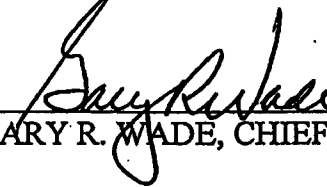
Finally, the Plaintiff relies on Kelley v. Union Carbide Corp., No. M2010-01563-WC-R3-WC, 2011 Tenn. LEXIS 870 (Tenn. Workers’ Comp. Panel Sept. 8, 2011). Kelley was exposed to asbestos from 1952 until he retired in 1985, and he was diagnosed with asbestosis in 1990. Id. at *2. In 1991, he filed suit for workers’ compensation benefits, which resulted in a settlement for \$31,752.00, representing 126 weeks of benefits at the statutory rate of \$252.00 per week. Id. at *5; see also Tenn. Code Ann. § 50-6-102(a)(5)(E) (Supp. 1989). Kelley died from asbestosis in 2007, and his widow sought death benefits under the Workers’ Compensation Law. Kelley, 2011 Tenn. LEXIS 870, at *2. The trial court, after finding that the widow’s suit was not barred by the 1991 settlement, awarded benefits based upon the maximum total benefit that was in effect at the time of Kelley’s asbestosis diagnosis. Id. at *5. In consequence, the trial court awarded the statutory maximum of \$100,800.00, Tenn. Code Ann. § 50-6-102(a)(7)(E) (Supp. 1989), and deducted the amount of the settlement and attorney’s fees, resulting in a net award to the widow of \$55,238.40. Kelley, 2011 Tenn. LEXIS 870, at *5. On appeal, our supreme court affirmed the judgment of the trial court. Id. at *6.

The Plaintiff’s reliance on Kelley is misplaced for three reasons: first, Kelley is consistent with our conclusion that the Plaintiff’s claim was not barred by the terms of the Employee’s settlement; second, Kelley confirms that the amount of the Employee’s settlement must be deducted from the amount of the Plaintiff’s award, if any; and finally, Kelley supports our conclusion that the statutory rate in effect on the date of the Employee’s injury is the statutory rate at which the benefits of the Plaintiff, as a dependent, should be calculated. Although the trial court incorrectly used the date of Kelley’s diagnosis rather than his incapacity for work as his date of injury, his date of death was not used to calculate his widow’s benefits, as the Plaintiff would have us do here. In our view, nothing in Kelley supports the Plaintiff’s claim that she should be awarded benefits at the rate in effect in 2010.

The widow in Kelley received workers' compensation benefits because Kelley had settled his claim for less than the statutory maximum. Here, the Employee not only settled his claim for the maximum 400 weeks, but was able to negotiate a higher rate than would have applied on the date of his injury in 1982, resulting in a lump sum award that exceeded the statutory maximum benefit available to the Plaintiff.

IV. Conclusion

While the Plaintiff was clearly entitled to make a separate claim as a dependent, the trial court properly found February 26, 1982 as the applicable date of injury. Although the trial court should have used the Employee's 1982 weekly benefit rate—instead of the amount specified in the settlement—in calculating the amount to which the Plaintiff is entitled to receive, the error had no effect on the amount of the judgment. Funeral expenses were properly granted. The judgment of the trial court is, therefore, affirmed. Costs are taxed to the Plaintiff and her surety, for which execution may issue, if necessary.

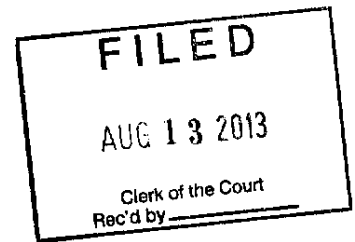

GARY R. WADE, CHIEF JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

ARMETHIA D. LIVELY EX REL. v. UNION CARBIDE CORPORATION

**Circuit Court for Anderson County
No. B1LA0154**

No. E2012-02136-SC-WCM-WC



ORDER

This case is before the Court upon the motion for review filed on behalf of the Estate of Armethia D. Lively pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are taxed to the estate of Armethia D. Lively and its surety, for which execution may issue, if necessary.

PER CURIAM

GARY R. WADE, C.J., not participating.