



Illinois Asbestos Plaintiff Barred From Suing His Former Employer in Tort

May 31, 2012

In a case of first impression in Cook County Circuit Court, an employee who sustained injuries allegedly resulting from exposure to asbestos while engaged in the line of his duty as an employee, sued his former employer in tort, rather than under the Workers' Compensation Act. The real significance of the case was that it was based upon both negligence and *intentional tort theories*. Ordinarily, an Illinois employee may not sue his or her employer in tort in these situations. Instead, the employee may only bring a worker's compensation action against the employer.

The Illinois Workers' Compensation (Act) provides in pertinent part as follows:

No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agent or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, ***other than the compensation herein provided, is available to any employee*** who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury. 305 ILCS 305/5 (emphasis added). (The Illinois Occupational Disease Act contains similar language.)

There are, however, some exceptions to the above rule. The first is "noncompensability." The employee argued that because his disease did not manifest itself until after the applicable worker's compensation/occupational disease acts' statute of limitations periods had run, he was left without a legal remedy against his former employer. In other words, the employee argued, "how could [he] bring a Workers' Compensation Act claim when [he] wasn't sick yet"? The second exception to the rule is if the employer had a "specific intent" to harm the employee (i.e. intentional conduct), the employee may sue the employer directly in tort. The employee alleged and argued, with the assistance of a former coworker and designated "whistleblower," that the employer intended to harm him by subjecting him to asbestos exposure on a daily basis without proper safety precautions at work and failing to warn him of the dangers associated therein. The employer moved to dismiss under 735 ILCS 5/2-619 as to all counts and theories of the Complaint. The motion was fully briefed and argued before the court.

The court ruled that the running of a statute of limitations does not render the cause of action noncompensable under the Workers' Compensation Act. In essence, allowing the employee's interpretation of "noncompensable" would underscore the legislative intent of the statute and allow all asbestos claimants diagnosed after the time limit of their last exposure to file a common law claim. Rather, the employee failed to meet the condition precedent of developing a disability within the



described deadline of his last exposure as is required under the Act. As such, the court granted the employer's motion to dismiss.

The employee then timely moved to clarify the court's order or in the alternative, to reconsider it. The court clarified that the employee's claims did not rise to the level of an intentional tort against the employer. The court consequently dismissed all negligence claims, as well as all claims for intentional misconduct, fraud, and intent to commit bodily harm against the employer pursuant to 735 ILCS 5/2-619. It should be noted that the court also denied the employee's subsequent motion for certification of an interlocutory appeal of the court's above Order.

The impact of the court's ruling is that employees are now essentially barred from bringing suit against their employers "in tort" under virtually any circumstance for their asbestos-related injuries. The fact that an employee's disease does not manifest itself until after the applicable Workers' Compensation Act's statute of limitations period does not provide plaintiffs with an excuse to the rule. Moreover, the court reminded plaintiffs that Illinois law places a very high hurdle for them to overcome to show that the employer had a specific intent to injure them. Had the court reached a different result, the asbestos litigation in Cook County and other Illinois counties would have significantly expanded in scope.

Hinshaw attorneys [Craig T. Liljestrand](#) and [Lyndon M. Flosi](#) represented defendant employer in this case.

For further information, please contact [Craig T. Liljestrand](#), [Lyndon M. Flosi](#) or your regular Hinshaw attorney

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