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South Carolina workers' comp statute ends asbestos claim in two ways

The U.S. District Court for the District of South Carolina recently dismissed a complaint after finding the plaintiff was a "statutory employee" for the purposes of the South Carolina Workers' Compensation Act and within the scope of the exclusive remedy provision and the act's statute of repose.

The case is *Matthews v. E. I. du Pont de Nemours & Co.*, Civil Action No. 4:16-CV-02934-RBH, 2018 U.S. Dist. LEXIS 193735 (D. S.C., Nov. 13, 2018).

Jerry L. Matthews sued DuPont and various other defendants in 2016, alleging he developed lung cancer by breathing in defendants' asbestos-containing products. Matthews was employed at Armstrong Contracting & Supply during the early 1960s.

During that time, DuPont had divisions including a construction department. DuPont's construction department handled new construction and renovations at DuPont facilities, government buildings and other companies.

DuPont regularly hired contractors to assist with construction, maintenance, repair and remodeling of its facilities. DuPont contracted with AC&S for "asbestos workers" to perform asbestos insulation on pipes at DuPont facilities during various construction projects. DuPont's employees occasionally performed the same insulation work as the contractors. Matthews worked as an insulation apprentice with AC&S at DuPont facilities and was exposed to asbestos.

DuPont was the only remaining defendant when Matthews died in 2017. Matthews' complaint was amended to substitute a personal representative of his estate and add a wrongful-death claim.

DuPont filed a motion for summary judgment, arguing for dismissal because Matthews' exclusive remedy was under the Workers' Compensation Act. Further, the South Carolina Workers' Compensation Commission has

exclusive jurisdiction. The only issue before the court was whether Matthews was a statutory employee of DuPont.

Coverage under the act depends on the existence of an employment relationship. Employees of an independent contractor may be deemed a statutory employee of the hiring party if the work performed is part of the party's "trade, business or occupation." If the work is not part of the trade or business of the party, the contractee employee would not be considered a statutory employee and could maintain a suit for damages.

An employee is a "statutory employee" if (1) the activity is an important part of owner's business or trade; (2) the activity is a necessary, essential and integral part of the owner's trade, business or occupation; or (3) the identical activity has previously been performed by the owner's employees.

DuPont argued that the work Matthews performed at DuPont's plants was part of DuPont's business because it had a construction department. DuPont also argued the work Matthews performed was essential, necessary and integral to its business as it enabled the continued production of its products and ensured that DuPont could handle expansion and renovation at its facilities.

The plaintiff countered that DuPont has never been an insulation company or insulation contractor; DuPont did not manufacture insulation and any work Matthews performed insulating pipes was incidental to DuPont's business.

Moreover, Matthews did not construct new facilities, he reinsulated pipe beams; therefore, DuPont having a construction company is not dispositive. The plaintiff asserted that DuPont was not equipped to handle major insulation jobs, did not provide contractors with equipment to install insulation and did not employ full-time workers to perform the work Matthews performed.

The court acknowledged con-

TOXIC TORT TALK



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struction work ordinarily falls outside the trade of a business manufacturer; but it noted that if a business has an ongoing program of construction, its own construction division or handled its own construction in the past, then the delegated construction work may be considered part of business or trade.

The court cited the South Carolina Appellate Court stating the work a business uses contractors for may be considered "part of" the trade of business if the work is an integral part of the company's operations such that without it, the company could not function. The court determined Matthews' work was important to DuPont's business objectives because it helped further the construction of facilities.

The court stated DuPont could not manufacture its products without properly functioning facilities and Matthews' work was essential to the running of DuPont's facilities. The court said DuPont's business is to manufacture chemicals, as well as construct new facilities to accomplish that goal, and proper functioning of a plant is an integral and necessary part of DuPont's business.

The court concluded Matthews' work was necessary, essential and integral to DuPont, even if not an important part of the business.

The court noted that DuPont's employees occasionally performed the type of work Matthews performed, and there are no requirements for a company to have employees perform that work on a full-time basis.

The court stated a person is performing the trade, business or occupation of an owner if he is engaged in work essential to the function of the employer's business, even if the employer never performed that particular work with its own employees.

The court held the facts were sufficient to meet either of the first two tests and found Matthews' work at DuPont's facilities rendered him a "statutory employee" under the act; therefore, DuPont's motion for summary judgment was granted.

The plaintiff also argued the Workers' Compensation Act is not the exclusive remedy because there is no right to compensation under the act based upon the statute of repose.

The act provides for compensation for pulmonary diseases arising within two years of the last exposure to asbestos. The plaintiff argued that the lung cancer attributed to asbestos exposure has a long latency period and developed approximately 40 years after the last potential exposure, thus, the injury is not compensable under the act, and the exclusive remedy provision is inapplicable.

The court concluded the plain reading of statute requires claims for pulmonary disease arising out of the inhalation of organic or inorganic dusts to be brought within two years after the last exposure.

Noting the result seemed unfair, the court deferred to the legislature and said Matthews' injury developed well past the period provided for in the statute of repose and his claim must be governed by the Workers' Compensation Act and its exclusivity provision.