

FRED L. NORRBOM, deceased Employee, by MARY JANE NORRBOM, Petitioner/Appellant, v. REUTER MFG., INC., and IOWA NAT'L MUT. INS./MIGA, Employer-Insurer, REUTER MFG., INC., and PACIFIC INDEM. CO., Employer-Insurer, REUTER MFG., INC., and ACCEPTANCE INDEM. CO./CRAWFORD & CO., Employer-Insurer, REUTER MFG., INC., and FIREMAN'S FUND INS. CO., Employer-Insurer, REUTER MFG., INC., and WEST BEND MUT. INS. CO., Employer-Insurer, REUTER MFG., INC., and HOME INS. CO./RISK MGMT., Employer-Insurer, REUTER MFG., INC., and CHUBB GRP., Employer-Insurer, REUTER MFG., INC., and HARTFORD INS. CO., Employer-Insurer, REUTER MFG., INC., and TWIN CITY FIRE INS. CO., Employer-Insurer, REUTER MFG., INC., and NORTHBROOK PROP. & CAS., Employer-Insurer, and REUTER MFG., INC., and ST. PAUL FIRE & MARINE, Employer-Insurer, and GRP. HEALTH PLAN, INC., Intervenor, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS  
DECEMBER 2, 1999

No. [REDACTED SSN]

HEADNOTES

OCCUPATIONAL DISEASE - SILICOSIS; OCCUPATIONAL DISEASE - STATUE OF REPOSE; PRACTICE & PROCEDURE - DISMISSAL. Where the employee submitted a medical report indicating that his emphysema, mycobacteriosis, and pneumothorax were separate and distinct disease processes from his silicosis, a fact issue was created as to whether those conditions were barred by Minn. Stat. § 176.66, subd. 3 (1970), the statute of repose, and the compensation judge erred in dismissing those claims following an unrecorded pre-trial hearing with no formal evidentiary record. Because, however, the judge did not rule on apparently undisputed contentions by several insurers that the employee was not substantially exposed to silica during their periods of insurance coverage, the matter would be remanded for consideration and resolution of the dismissal motions on causation grounds.

Reversed and remanded.

Determined en banc.

Compensation Judge: Jeanne E. Knight.

OPINION

DEBRA A. WILSON, Judge

The petitioner appeals from the compensation judge's conclusion that her claim for dependency benefits is barred by the statute of repose.<sup>1</sup> We reverse and remand for further

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<sup>1</sup> Prior to the order now on appeal, there were two pending claims: one by the employee, for wage loss, permanency, and rehabilitation benefits, and one by the employee's spouse,

proceedings.

## BACKGROUND

The employee, Fred L. Norrbom, worked for Reuter Manufacturing, Inc. [the employer], in 1960 and again from 1963 to September of 1994. From 1963 until 1969 or 1970, he was allegedly exposed to substantial silica dust in the course and scope of his job. In early 1985, the employee was diagnosed as having probable silicosis, and in early 1988, the employee's then attorney, Fred Brixius, wrote to the employer "to notify [them] of a potential silicosis claim," indicating, however, that the employee was not making any claim for workers' compensation benefits at that time.

The employee allegedly became totally disabled due to occupational lung disease in August or September of 1994, and on May 1, 1995, he filed a claim petition, against the employer and Iowa National Mutual Insurance/MIGA [Iowa National] and Pacific Indemnity Company [Pacific Indemnity], alleging entitlement to benefits for wage loss from and after September 2, 1994, an unknown amount of permanent partial disability, and a rehabilitation consultation, due to silicosis. Group Health Plan, Inc., was subsequently allowed to intervene for medical expenses, which eventually totaled more than \$60,000.

On December 18, 1995, the employee filed an amended claim petition, alleging entitlement to various benefits due to silicosis and also emphysema, mycobacteriosis, and pneumothorax, naming Acceptance Indemnity Insurance Company [Acceptance], in addition to Iowa National and Pacific Indemnity, as a liable insurer. All three insurers ultimately moved to dismiss the employee's claims on various grounds, including Minn. Stat. § 176.66, subd. 3 (1970), the statute of repose. In an order issued on October 15, 1996, the compensation judge concluded that the employee's silicosis claim was in fact barred by that provision.<sup>2</sup> However, noting the employee's contention that claims relating to his other conditions were not similarly barred, but not ruling on that contention, the judge ordered the employee to amend his claim petition "to include all appropriate insurers necessary to proceed with his remaining claims." No appeal was taken from this order.

In an apparent response to the compensation judge's order, the employee filed amended claim petitions, alleging entitlement to benefits as a result of emphysema, mycobacteriosis, and pneumothorax, and naming eight additional insurers, and the Special

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subsequent to his death, for dependency benefits. The compensation judge specifically dismissed only the claim for dependency benefits; however, the employee's claim was by implication also dismissed. Our decision here applies to both the petitioner's claim for dependency benefits and to the employee's claim.

<sup>2</sup> The compensation judge apparently concluded that the employee could not show any significant exposure to silica after July 2, 1970.

Compensation Fund, as potentially liable parties. The named insurers, including the three listed on the employee's original claim petition, provided workers' compensation insurance coverage for the employer for various periods during the employee's employment by the employer through September 2, 1994.

Between July of 1997 and April of 1998, the insurers filed motions to dismiss the employee's claims, some alleging that the claims were barred by the statute of repose or statute of limitations, and some alleging that the employee had no exposure to silica while they were on the risk for insurance coverage. During this period, in September of 1997, the employee died as the result of his alleged work-related occupational disease. A death certificate in the file lists the primary cause of death as respiratory failure secondary to severe obstructive and restrictive lung disease. The certificate also lists as a cause "acute, spontaneous left pneumothorax -unresponsive to the treatment," and "mixed dust pneumoconiosis with silicates and cicatricial emphysema." Following the employee's death, on February 20, 1998, the employee's surviving spouse filed a petition for dependency benefits. In September of 1998, counsel for petitioner filed a petition for consolidation of the petitioner's claim with the employee's claim, but several insurers objected, alleging that the pending dismissal motions should be resolved prior to consolidation. We find no evidence in the file of any order on the employee's consolidation request.

The insurers' motions to dismiss were evidently considered at a pretrial hearing held on June 8, 1998. Subsequently, in September of 1998, January of 1999, April of 1999, and June of 1999, attorneys contacted the compensation judge to inquire as to when a ruling on the dismissal motions might be forthcoming. The judge issued such an order on July 2, 1999, concluding that, since the pending claims were derivative of the employee's silicosis claim, which was barred by the statute of repose, those pending claims were also barred. The judge therefore dismissed "the Amended Claim Petition filed February 20, 1998," that is, the petitioner's claim for dependency benefits. The petitioner appeals.

## STANDARD OF REVIEW

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

## DECISION

The parties apparently argued the motions to dismiss at the time of the June 1998 pretrial hearing. However, that hearing was not recorded, there is no indication as to whether the parties delineated the scope of the record relevant to the compensation judge's consideration of the motions, and the judge cited no "evidence" in her order. Therefore, for purposes of this appeal, we will assume that the compensation judge considered the entire division file, including several medical reports by Dr. Charles Dashe, the employee's treating physician; a report by Dr. Steven Bozivich, apparently an expert examiner for Acceptance; and the employee's

deposition testimony.

As previously indicated, the insurers had moved to dismiss the petitioner's claim on several grounds, some arguing that the employee had no exposure to silica during their period of coverage, some raising the statute of repose and/or the statute of limitations. In her order, the compensation judge disposed of the petitioner's claims based on the statute of repose alone. In so doing, the compensation judge indicated that she "accept[ed] as true that emphysema, mycobacteriosis and pneumothorax are consequences of silicosis," and she ruled that, because the employee's underlying silicosis claim was barred, "any consequential injuries such as the claimed emphysema are also barred." The compensation judge also rejected the theory that the petitioner's dependency claim was governed by the law in effect on the date of the employee's death, rather than by the statute of repose, which was repealed in 1973. Because of those rulings, the compensation judge did not resolve the insurers' causation and statute of limitations arguments.

The statute of repose, Minn. Stat. § 176.66, subd. 3, repealed effective July 1, 1973,<sup>3</sup> provided as follows:

Neither the employee nor his dependents are entitled to compensation for disability or death resulting from occupational disease, unless such disease is due to the nature of his employment as defined in section 176.011, subdivision 15, and was contracted therein within 12 months previous to the date of disablement; except in the case of silicosis or asbestosis, in which cases disablement of the employee must occur within three years from the date of such employee's last exposure with an employer in an employment to the nature of which the disease may have been a hazard . . . .

(Emphasis added.) It is undisputed that the employee's claims for disability resulting from silicosis per se are barred by operation of this provision; the compensation judge ruled to this effect in October of 1996, and no appeal was taken from that order. We are also satisfied that the judge ruled correctly, in her most recent order, that the statute of repose bars assertion of any dependency claims resulting solely from silicosis, as the statute specifically contemplated claims for "death," that is, dependency benefits, and the three-year time limitation established by the statute for such claims ran prior to the employee's disablement.<sup>4</sup> We are not, however, convinced that the compensation judge's dismissal of all pending claims was appropriate, at this stage of the proceedings, under Stillson v. Peterson & Hede Co., 454 N.W.2d 430, 42 W.C.D. 1000 (Minn.

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<sup>3</sup> See Act of May 24, 1973, ch. 643 §§ 12, 13, 1973 Minn. Laws 1584, 1594.

<sup>4</sup> Once a claim has been extinguished by the running of a limitations provision, a subsequent repeal of that provision will not act to revive the claim. See, e.g., Guggenberger v. Cold Spring Granite Co., 332 N.W.2d 655, 35 W.C.D. 846 (Minn. 1983); Klimmek v. Independent School Dist. No. 487, 299 N.W.2d 501, 32 W.C.D. 226 (Minn. 1980).

1990).

The employee in Stillson was exposed to asbestos at work and developed both asbestosis and lung cancer. After a hearing following the employee's death from lung cancer, the compensation judge concluded that the employee's exposure to asbestos caused asbestosis, which in turn substantially caused his lung cancer, and that the employee's claim was barred in its entirety by the statute of repose. On appeal, the Workers' Compensation Court of Appeals affirmed the judge's decision as to asbestosis but reversed as to the lung cancer claim, ruling, as a matter of "statutory construction," that the statute of repose language in question was restricted to "the diseases of asbestosis and silicosis. Other related diseases such as pulmonary fibrosis are clearly not included within the scope of the exception." Stillson, 42 W.C.D. 989, 994 (W.C.C.A. 1989). Noting that all testifying medical experts "agreed that asbestosis and broncogenic lung cancer are separate and distinct disease processes," the court went on to conclude that "the plain language of the statute requires a determination that lung cancer is a separate and distinct occupational disease and is, therefore, not included within the scope of the three year statute of repose of Minn. Stat. § 176.66, subd. 3 (1967)." Id. On further appeal, the Minnesota Supreme Court agreed, reiterating that the plain language of the statute restricts its application to asbestosis and silicosis, and explaining that, because medical evidence established a causal connection between the employee's lung cancer and workplace asbestos exposure, the three year limitation for asbestosis and silicosis in the statute of repose did not bar claims for disability resulting from the lung cancer. Stillson, 454 N.W.2d 430, 433, 42 W.C.D. 1000, 1002-03.

In the present case, the compensation judge did not cite Stillson in her order, ruling only that she "accepted" that "emphysema, mycobacteriosis and pneumothorax are consequences of silicosis." The medical evidence in the file might support that conclusion. However, in his February 2, 1998, report, Dr. Dashe indicated that the three claimed conditions were "separate and distinct disease entities in that they can be identified radiographically and physiologically and pathologically and are distinct from the silicosis itself. That is, one can have silicosis without having these complications." This report at the very least creates a fact issue as to the nature of the employee's conditions, and as to causation. Case law would also suggest that the medical expense claims of the intervenor, Group Health, are not barred by the statute of repose in any event.<sup>5</sup> See Megarry v. Megarry Bros., Inc., 55 W.C.D. 276 (W.C.C.A. 1996) (the 1984 amendments to Minn. Stat. § 176.135 evidenced legislative intent to restore medical benefit claims for employees whose claims would otherwise be barred by the statute of repose).

At oral argument, counsel for one of the insurers argued that the employee's emphysema, mycobacteriosis, and pneumothorax were "part and parcel" of the employee's silicosis, contending that an employee whose claims for silicosis are barred by the statute of repose should not be allowed to overcome the statutory bar merely by asserting a claim for shortness of breath. Given Dr. Dashe's report, the aptness of the analogy is questionable. In any event, there is a fact issue here not appropriately resolved following an unrecorded conference with no formal

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<sup>5</sup> The employee himself was not claiming medical expenses in any of his claim petitions.

submission of evidence. We therefore reverse the judge's dismissal of the claims on statute of repose grounds. That issue may be raised again at a separate formal evidentiary hearing or may be reserved, at the compensation judge's discretion, for trial with the remaining issues. Because the insurers' statute of limitations defenses under Minn. Stat. § 176.151(4), raise factual issues as well,<sup>6</sup> those defenses must also await evidentiary proceedings. However, the motions to dismiss on causation grounds - - that is, based on no significant silica exposure - - should be determined without further delay unless some fact issue not now apparent exists as to those defenses.<sup>7</sup> On the present record, there appears to be no justification for requiring several of the insurers to continue as parties to this proceeding. We therefore remand the matter to the compensation judge for a ruling on this issue at her earliest convenience.

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<sup>6</sup> Such as when the employee became disabled due to the conditions. There is conflicting evidence in the file on this issue.

<sup>7</sup> At oral argument, and in their briefs, several insurers asked this court to rule on these motions; in response, the employee indicated that he had joined all the insurers currently in the case only because the compensation judge essentially instructed him to do so in her October 1996 order. However, the compensation judge has not ruled on the issue, and this court's authority on appeal is generally limited to review of orders and/or decisions of a court below. See Minn. Stat. § 176.421, subd. 1. It is in any event the compensation judge's responsibility to rule on such matters in the first instance.