DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC312/16/02007, made on 20 February 2017 at Enfield, did not involve the making of an error on a point of law.

REASONS FOR DECISION

1. The issue in this case is whether disease D8A is prescribed in respect of the claimant. Schedule 1 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI No 967) provides that it is prescribed for those who have experienced:

> Exposure to asbestos in the course of-
>
> (a) the manufacture of asbestos textiles; or
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> (b) spraying asbestos; or
>
> (c) asbestos insulation work; or
>
> (d) applying or removing materials containing asbestos in the course of shipbuilding,
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> where all or any of the exposure occurs before 1st January 1975, for a period of, or periods which amount in aggregate to, five years or more, or otherwise, for a period of, or periods which amount in aggregate to, ten years or more.

Only head (c) is relevant.

2. The Secretary of State refused the claim on the basis that the claimant had not been employed directly in the asbestos insulation industry. On appeal, the First-tier Tribunal found that the claimant had been involved in asbestos insulation for seven weeks in 1970 as a summer job in his uncle's business. He had also worked for one year from 1970-1971 with insulating air conditioning and heating systems. This had involved removing and later replacing lagging. It is the claimant's work thereafter that is in issue.

3. From 1971 to 2001, the claimant worked as an engineer in air-conditioning, central heating and fire alarms. His primary duty was to install fire alarm systems, but this involved cutting, drilling and disturbing lagging. The tribunal found that this generated significant amounts of dust, but did not involve preparing or applying lagging.

4. Accordingly, the tribunal dismissed the appeal, but nonetheless gave the claimant permission to appeal to the Upper Tribunal.

5. This prescribed disease was considered in detail by Upper Tribunal Judge May in *Secretary of State for Work and Pensions v ER* [2012] UKUT 204 (AAC), on which the First-tier Tribunal relied. I can avoid extensive explanation by relying on Judge May's industry. His decision contains a statement of the legislative background, a discussion of the report of the Industrial Injuries Advisory Council (just 'the Council' from now on) that led to the insertion of prescribed disease D8A, and a statement of the general principles of interpretation that apply. It is sufficient to set out the Council's conclusion:

> 65. In summary, lung cancer can be attributed to occupation where workers have been exposed to substantial asbestos exposure. Workers with substantial asbestos exposure are those where asbestosis is present, or workers in the following categories: asbestos textile workers, asbestos sprayers, asbestos insulation workers including those applying and removing asbestos-containing materials in shipbuilding. The Council recommends that workers in the jobs listed require at least 5 years asbestos exposure before 1975 or at least 10 years asbestos exposure after 1975 to fulfil the terms of prescription. Recent evidence indicates that diffuse pleural thickening is an unreliable marker of asbestos exposure and the Council recommends removing the requirement for the presence of diffuse pleural thickening from the terms of prescription for PD D8.

6. In *ER*, the claimant was a scaffolder who had worked in close proximity to person using asbestos to lag pipes. The judge held that this was not within the prescription. On the interpretation of head (c), he noted that the legislation did not follow precisely the prescription recommended by the Council, but decided that this made no difference:

> 13. However, I have reached the conclusion that the Secretary of State altered the regulations in the light of the advice that he was given by the Council. As is apparent from their report the Council carried extensive and exhaustive investigations in relation to the prescription and gave that advice in the context of the provisions contained in section 108(2) of the Contributions and Benefits Act. There was no suggestion that there was any other advice given to the Secretary of State and … the Upper Tribunal is not only entitled but bound to look at the Report as an aid to the construction of the subordinate legislation. If that is done it is apparent that there was a reasoned restriction of occupations on their part. Notwithstanding that the Secretary of State did not adopt the formula for the description of the occupation related to the prescribed disease proposed by the Council and although the occupation could be read on a somewhat wider basis than the Secretary of State suggests I am persuaded in the light of the advice which was given to the Secretary of State that the regulation should be interpreted in the context of that advice.

He concluded:

> 14. … This is not a case where the label of what the claimant did was different from what he actually did. It is accepted that his job did not involve participating in the activities referred to in the regulation. The report in my view is concerned with active involvement and in interpreting the regulation in that way this is fatal to the assertion that a claimant satisfied that he was in an occupation to which the prescribed disease applied. To determine otherwise would be to artificially widen the statutory language. The Secretary of State's appeal accordingly succeeds.

7. Judge May took the same approach in the later case of *Secretary of State for Work and Pensions v EK (deceased)* [2016] UKUT 458 (AAC). The claimant was a scaffolder working in shipbuilding. The judge said:

> 12. … I consider that the ordinary meaning of the regulation demands physically performing the acts of applying or removing asbestos. Mr Pirie in my view rightly submits that what is required is in the act of doing the activities referred to and not just involvement in the process by providing the means by which access can be made to enable the work of applying and removing to be done.

8. The Secretary of State's representative has not supported the appeal, arguing that the case is governed by *ER*. I accept that argument.

9. The claimant's representative has argued as follows.

- Only head (c) of the prescription was relevant.
- *ER* decided that work in the proximity of asbestos insulation work was not within the prescription.
- This case was different, as the claimant had actually cut and drilled asbestos.
- The focus should be on what the claimant did, not on his job description.
- The claimant has provided a short statement that his work involved fixing cables to pipes using a bandage cloth soaked in asbestos. Mostly, he mixed his own; the laggers just gave him the powder and cloth.

10. I accept that the legislation has to be applied to the work that the claimant did, and not to the type of work that fell within his job description. I also accept that this case is factually different from *ER* as stated, but that does not mean that the difference is material. What matters is whether the work the claimant did comes within the prescription. The work of cutting and drilling does not come within the prescription, as it is not lagging work. It is work related to the preparation for installing the cables. It was not lagging or preparatory to lagging.

11. Strictly, I should not take account of the claimant's latest statement, as it was not evidence before the tribunal. However, it does not seem to me that it undermines the tribunal's decision. The work the claimant has described is the use of asbestos to fix cables to pipes. It may be that it did involve some insulating effect, but that was but a minimal aspect of the work he was doing. Looking at the work he did as a whole, it was not, and did not involve, asbestos insulation work within the proper meaning of the prescription. In coming to this conclusion,

I have taken account of the evidence on which the Council based its recommendation. It did so on the basis of an evidence review that supported a conclusion that there was an increased risk of lung cancer in certain circumstances, which were fairly closely defined and did not include a mere exposure to asbestos in the course of work. I regard that as a significant factor when the extent to which the claimant actually used asbestos was minimal and peripheral to his main duties. The words I have just used are not an attempt to gloss the legislation; nor should they be read as words that define the scope of the prescription. Rather, they should be read as an attempt to explain why the claimant's statement of his duties is not sufficient to show that he undertook insulation work.

12. Finally, I need to explain why I have refused the claimant's request for an oral hearing. The Upper Tribunal has a discretion whether or not to hold a hearing: rule 34(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698). The test I have to apply is whether 'fairness requires such a hearing in the light of the facts of the case and the importance of what is at stake': *R (Osborn) v Parole Board* [2014] AC 1115 at [2(i)]. I am required to have regard to the parties' views: rule 34(2). The Secretary of State's representative has not asked for an oral hearing. The claimant's representative has asked for one, arguing that the claimant needs to give his own testimony on what he did.

13. I have exercised the discretion against holding a hearing and have decided the appeal on the papers, because I have to decide whether the tribunal went wrong in law on the evidence before it. I cannot use evidence that was not put to the tribunal in order to show that it made an error of law. In any event, as I have explained, it seems from the short statement the claimant made in reply to the appeal that his duties did not involve lagging.

Signed on original
on 13 October 2017

Edward Jacobs
Upper Tribunal Judge