THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

Before: D J MAY QC

Attendances

For the Appellant: Mr Pirie, Advocate instructed by the Office of the Solicitor to the Advocate General.

For the Respondent: Miss Harry, Clydeside Asbestos Action Group.

The appeal is allowed.

The decision of the tribunal given at Glasgow on 22 October 2015 is set aside.

The Judge of the Upper Tribunal remakes the decision that the First-tier Tribunal ought to have given. It is as follows:

> The decision appealed against to the First-tier Tribunal is upheld and the claimant's appeal to the First-tier Tribunal is dismissed.

REASONS FOR DECISION

1. The Secretary of State has appealed against the decision of the tribunal which was to the effect that the appellant has suffered from Prescribed Disease Number D8A from 11 August 2014 for life, the relevant loss of faculty being impaired lung function. The tribunal also found that the extent of the resulting disablement was assessed at 100% for the period from 11 August 2014 for life. It was a final assessment. The claimant in this case had died on 20 January 2015 and his claim was pursued by his brother as appointee.

2. The relevant findings in fact were as follows:

> "9. The appellant was diagnosed with primary carcinoma of the lung on 11.08.14.
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> 10. The appellant started working in Port Glasgow Shipyards when he left school, aged 15 in 1952. After National Service and pursuing other occupations he started work as a stager in shipyards operated by either James Lamont & Company Limited or Lithgows Limited until 1971. A Stager erects scaffolding within ships under construction. Much of the appellant's work involved erecting, adjusting and removing scaffolding with associated platforms within the engine rooms of vessels under construction. The scaffolding platforms so erected were used by a variety of trades including laggers. The work of a lagger involved coating pipe work with asbestos paste and joiners cut sheet asbestos.
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> 11. Scaffolding and staging erected by the appellant was frequently coated in asbestos dust. The appellant was exposed to asbestos dust generally in the workplace but

particularly when dismantling scaffolding and staging heavily coated with asbestos lagging overspill and/or dust from cut sheet asbestos.

12. The appellant was not provided with a face mask or any other respiratory protection. His clothing and hair and body were frequently heavily covered in asbestos dust.

13. The appellant changed job on or about 1971. Thereafter any exposure to asbestos dust in the work place would be minor and incidental."

3. In giving reasons for its decision the tribunal was satisfied that the claimant had primary carcinoma of the lung and that there was no accompanying evidence of asbestosis. It also found that Prescribed Disease 8A Schedule 1 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 as amended was established.

4. It set out the relevant occupations in respect of the prescribed disease in paragraph 15 of its decision which is as follows:

"15. The relevant occupations in relation to Prescribe Disease D8A is "Exposure to asbestos in the course of –

(a) the manufacture of asbestos textiles; or
(b) spraying asbestos; or
(c) asbestos insulation work; or
(d) applying or removing materials containing asbestos in the course of shipbuilding where all or any of the exposure occurs before 1 January 1975 for a period of or periods which amount in aggregate to 5 years or more or otherwise for a period of or periods which amount in aggregate to 10 years or more."

5. In explaining in how it reached its decision it said:

"17. The appellant's employment as a stager involved erecting scaffolding usually within the enclosed confines of the engine room of a ship in construction, daily dismantling and re-erecting to provide access for others as work progressed and the dismantling and removing the scaffolding and platforms when work was complete. The tribunal is satisfied on the available evidence that the scaffolding and staging materials used by the appellant were heavily contaminated with and frequently coated in the overspill of materials containing asbestos or asbestos dust and we are satisfied that his employment in shipbuilding satisfies occupation D above. In reaching this conclusion the tribunal has had particular regard to the precise wording of the prescribed occupation. The tribunal also had regard to the comments of Upper Tribunal Judge May QC in Secretary of State for Work & Pensions v ER [2012] UKUT 204 (AAC) where he discusses the intention of Parliament in relation to the amendments made to Prescribed Disease D8 in the light of the recommendations contained in the report by the Industrial Injuries Advisory Council in accordance with Section 171 of the Social Security Administration Act 1992 reviewing the prescription of asbestos related diseases. We are satisfied that the appellant's primary occupation in ship building in the period 1959 to 1971 does not meet Prescribe Disease D8A Occupations (a), (b), or (c) but in our view clearly satisfies Occupation (d)."

"19. In the present case the appellant's job title as stager may imply that his job did not involve participating in the activities referred to in the regulation but in our view clearly concerned active involvement in such activities to the extent that we are satisfied that he was in an occupation to which the Prescribed Disease applies. The appellant's occupation can be distinguished from those occupations where a worker may simply work

alongside or be in casual or incidental contact with workers whose occupations meet the prescribed occupations for D8A."

6. In presenting his argument Mr Pirie explained that Prescribed Disease D8A primary carcinoma of the lung was added to the 1985 regulations by the Social Security (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 2006 following a recommendation by the Industrial Injuries Advisory Council reviewing the prescription of asbestos related diseases CM 6553. This report had recommended a number of changes to the terms of prescription of asbestos related diseases. The change which is material to this case was set out in paragraphs 55-59 of the report. At paragraph 59 of the report it is said:

"59. The link between the risk of asbestosis and lung cancer is clear (see paragraph 54). However, despite the publication of more than 40 research studies, the mechanisms leading to the development of lung cancer due to asbestos remain unclear and there remains debate as to whether lung cancer is a consequence of fibrosis (asbestosis) or is independent of it. Evidence presented to the Council suggested that there was a doubling of risk of lung cancer following substantial exposure to asbestos which occurred without clinical evidence of asbestosis. However, the research evidence indicates that low level exposures to asbestos do not result in a doubling of risk for lung cancer."

7. The report went on to say:

"62. The Council has reviewed the literature and found evidence of a greater than doubled risk for lung cancer in the following group of workers who have experienced substantial occupational asbestos exposure: workers in asbestos textile manufacture; asbestos Sprayers; asbestos insulation workers, including those applying and removing asbestos-containing materials in shipbuilding and gas mask manufacturers.

63. The Council has given careful consideration to the qualifying conditions for the exposure sufficient to double the risk of lung cancer. The risk of lung cancer depends upon the level of cumulative (intensity x duration) asbestos exposure. It is also dependent on the type of asbestos, amphibole (crocidolite - blue, and amosite - brown) being more carcinogenic than chrysotile - white asbestos. Military gas masks manufactured during the Second World War contained pure crocidolite (blue) asbestos. The risk of lung cancer in those employed in the manufacture of military gas masks is doubled in those who worked for less than one year. In contrast, in textile workers who were employed in a UK factory in Rochdale, Lancashire where the asbestos used in textile manufacture was 95% chrysotile (white) asbestos and 5% crocidolite (blue) asbestos, the risk of lung cancer was only doubled in those who worked 10 or more years. The majority of asbestos used in textile manufacture and insulation material was a mixture of chrysotile and amphibole asbestos - crocidolite or amosite - or both, in a proportion generally greater than 5% and up to 50%. There is also evidence that the risk of lung cancer in asbestos workers fell after the introduction of the 1969 Asbestos regulations, probably as a consequence of a reduction in the use of and associated exposure to asbestos, particularly amphiboles. The Council therefore recommends that lung cancer in those who were employed 5 or more years before 1975, and 10 or more years after 1975 should be prescribed in the listed occupations: asbestos textile workers, asbestos Sprayers, asbestos insulation workers, including those applying and removing asbestos containing materials in ship building."

The council therefore recommends that lung cancer and those who are employed 5 or more years before 1975 and 10 or more years after 1975 should be prescribed in their listed occupations: asbestos textile worker, asbestos sprayers, asbestos insulation workers

including those applying and removing asbestos-containing materials in shipbuilding. In paragraph 68 the Council then made the following recommendations:

> "c) Workers with lung cancer without asbestosis, but who have a history of substantial asbestos exposure should be added to the terms of prescription for PD D8. The Council recommends that the list of occupational exposures for workers with lung cancer without asbestosis should be: workers in asbestos textile manufacture; asbestos Sprayers; asbestos insulation workers, including those applying and removing asbestos-containing materials in shipbuilding. For exposures occurring before 1975 workers should have been in the occupations listed for at least 5 years. For exposures occurring after 1975 workers should have been in the occupations listed for at least 10 years."

8. That history was in Mr Pirie's submission relevant to how the application of the prescribed diseases should be made in any particular case. I will return to that submission in due course.

9. It was Mr Pirie's submission that the tribunal erred in law by misdirecting itself in law in deciding on his findings in fact that disease D8A was prescribed in this case. It was Mr Pirie's submission that in this case in the application subparagraph (d) of the statutory definition of prescribed disease D8A involves doing the activity contained therein namely applying or removing the materials containing asbestos in the course of shipbuilding. It was Mr Pirie's submission there was no finding in fact that the claimant actually applied or removed asbestos. He submitted that in finding 17 the finding in respect of the claimant's tasks as a stager involved the erecting of scaffolding and the dismantling of and removing of it and platforms when the work was complete. He noted that the finding made reference to the fact that the scaffolding and staging materials used by the claimant were heavily contaminated with and frequently coated in the spill materials containing asbestos or asbestos dust which arose by the work of someone else. It was his submission that contact with asbestos following upon application or removal of it was insufficient to bring the claimant's occupation within the scope of the regulation and that in deciding otherwise the tribunal erred in law.

10. In support of his submission he set out three principles in relation to the statutory interpretation of the provision. The first was that the ordinary meaning and natural meaning of the words used in the regulation should be applied and if that is done in this case application or removal of materials containing asbestos in the course of shipbuilding meant that a claimant had to be doing just that. He also submitted that the statutory instrument had to be read as a whole if paragraph 3 of the amended regulation is read as a whole it was apparent that in respect of the other prescribed diseases therein the activities set out, were wider and in particular in D8 which included the acts of others. He also submitted that regard had to be had to the mischief intended to be remedied by the paper and that only occupations with a level high enough to double the risk of the disease warranted prescription. Unless that element of risk was to the extent set out in the report the person in involved should not have his work prescribed to it. In these circumstances the findings in fact should be interpreted in such a way that the claimant fell out with the scope of the prescribed disease.

11. Miss Harry submitted on the facts found by the tribunal that the claimant came within the prescription set out D8A. She accepted that for the prescription to be applied it was necessary for the claimant to be applying or removing materials containing asbestos. Her approach was that the claimant was in fact removing asbestos because he was dismantling scaffolding which was coated with asbestos. It was her submission that the regulation had been framed in the manner it was because it was intended to encompass a wider range of

employment than directly and physically applying and removing asbestos. It was her submission that as the claimant was dismantling heavily coated scaffolding and platforms he was removing asbestos. Her submission was that subparagraph (d) was framed as it was to encompass such an occupation. She submitted that in these circumstances the tribunal have not artificially widen the scope of the regulation but had weighed the evidence before it and reached a conclusion to which it was entitled.

12. For myself I consider that the weakness in the tribunal's reasoning is in the first sentence of paragraph 19. This weakness was one which the tribunal recognised when it conceded that the job title may imply that his job did not participating the activities referred to in the regulation but concluded that in its view "clearly concerned active involvement in such activities to the extent that we are satisfied that he was in an occupation to which the Prescribe Disease applies." It underlines an appreciation by the tribunal that he was not physically involved in the activities and that in my view is what is required for satisfaction of it. 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.

13. Further as is clear from what I said under reference to authority in CSI/563/2011, which was cited to me, I am entitled in interpreting the legislation to have regard the advice given by the Advisory Council to the Secretary of State. I accept Mr Pirie's submission as to the mischief which the advice sought to deal with namely providing the benefit for those with lung cancer due to exposure to asbestos. However in setting out the advice as to which occupations should encompassed by the prescription close regard was had to the risk of contracting the disease and the extent of that risk. This was tightly prescribed as can be seen from the report. Thus the advice was given in respect of an occupation which doubled the risk and this was not a risk which was identified in relation to the work which the claimant did. This fortifies the interpretation I set out in paragraph 12.

14. In these circumstances I am satisfied that the facts found by the tribunal point to the opposite conclusion to that which it reached. In these circumstances I find that the tribunal erred in law and I have remade the tribunal's decision on its own findings in fact as set out in my decision above.

(Signed)
D J MAY QC
Judge of the Upper Tribunal
Date: 25 August 2016