

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 27, 2021

CLAIM NO. 201901495

TRUSEAL TECHNOLOGIES

PETITIONER

VS.

**APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE**

DENNIS MILLS
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and BORDERS, Members.

STIVERS, Member. TruSeal Technologies (“TruSeal”) appeals from the April 16, 2021, Opinion, Award, and Order and the May 17, 2021, Order of Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ awarded Dennis Mills (“Mills”) permanent total disability benefits and medical benefits due to the effects of work-related asbestosis. On appeal, TruSeal asserts the ALJ erred by failing to find

Mills' last injurious exposure to asbestos occurred in 1997 and his claim is barred by the statute of repose.

BACKGROUND

The Form 102, filed December 12, 2019, alleges that on July 24, 2012, Mills contracted work-related asbestosis due to exposure to asbestos in the workplace.

The Form 111, Notice of Claim Denial or Acceptance, asserts "Running of periods of limitations or repose under KRS 342.185, 342.270, 342.316, or other applicable statute" as a Special Answer.

Mills was deposed on February 28, 2020. He began working for TruSeal, then known as "TremCo," after he graduated from high school in June 1979. He started as an extrusion mix operator. TruSeal purchased TremCo in 1997. He described his duties as follows:

A: We just – we make like that – I don't know if you know what they made or anything like that. They made like windshield tape and stuff like that for – well, then in '79 we made it for Ford Motor Company and we would make the bulk and then distribute it out and then they would take out into the plant and run it out into tape.

Mills also worked in "swiggle," mastics, packaging, shipping and receiving, and maintenance. When Mills worked as an extrusion mix operator for TremCo, he was exposed to asbestos, carbon black, xylene, crystalline quartz, silica, resin, calcium carbonate, and wood flower. When he worked in the shipping and receiving department, he unloaded asbestos, carbon black, and other items off the trucks. In "winding," he worked in the lab testing the materials. He testified, "Like whenever we'd get them in we'd have to bring them up and do tests on them and

stuff.” In maintenance, Mills was also exposed to hazardous materials. He testified as follows: “Yeah, because we had to go unpack the mixers and do that. I mean, because they always leaked and everything and we had to go over and do that, pack the mixers and work on the mixers and stuff, work on everything else in the plant.”

Mills testified that he was exposed to hazardous materials on a daily basis when working for TruSeal. He testified as follows:

Q: Oh, got you. How frequently would you say you were exposed to irritants, respiratory irritants?

A: Every day.

Q: Do you recall any specific ones that you were exposed to every day?

A: Not specific. I mean there’s asbestos and everything else, you know. Just not –

Q: And were you ever provided any safety equipment such as a mask or –

A: They would – when we first started they give you the dust mask and that was it. Then later on they give us a fresh air hood to use.

Q: Do you recall – you said when you first started they gave you the mask. Do you recall what period they utilized the mask or they gave you the masks?

A: They would just – they – it was like a box of dust masks.

Q: Uh-huh (yes).

A: And they’d just put them over on the desk and they’d tell you to use it whenever – you could use them whenever you was putting it in, putting material in.

Q: And next they supplied fresh air hoods, is [sic] what you called them?

A: It wasn’t the next day. It was like years later.

Q: Right. Do you recall when they started using, or when they switched to fresh air hoods?

A: No, not really. It was years down the road. It was probably twenty years down the road.

Q: So when you say twenty years down, so would that be sometime in the nineties?

A: Yeah.

Q: And were you required to wear the masks or the protective hoods?

A: Yeah.

Q: And did you always wear a mask or any protective equipment?

A: Yes.

Q: How many hours did you work per day?

A: I averaged eight, but a lot of times we worked twelve.

Q: And was that five days a week?

A: Yes. Sometimes seven days.

Mills was unsure when the company stopped using raw asbestos. He explained:

Q: Do you know when you were last exposed to asbestos?

A: I'm not for sure. No, I'm not for sure of the exact date because we changed pipes out and everything up there too and I'm not for sure.

Q: Do you recall the year?

A: I don't know. I'm not for sure the exact year that we quit using the really raw asbestos.

Q: But there was a point where you stopped, the company stopped using raw asbestos, is that my understanding? Is that correct?

A: I think so. I don't remember the exact year. I mean I know they did kind of not put it in some of the batches and stuff like that. They went to something else or something.

Q: Do you recall what they went to?

A: No.

Mills testified that his last exposure to any of those hazardous materials was on July 24, 2012, the last day of his TruSeal employment.

At the February 17, 2021, Hearing, Mills detailed his asbestos exposure while working at TremCo:

Q: Okay. Okay. All right. Were you exposed to asbestos while working in the mixing department at Tremco?

A: Oh, yeah, definitely.

Q: Was that on a daily basis?

A: Yes.

Q: Was that just while you were doing the mixing?

A: Yeah, mixing, setting up materials and stuff like that.

Q: Okay. Now, in that mixing department, is it like a mixing room? Is it like a segregated room compared to everything else?

A: Yeah. We had like one mixing room. Before Truseal bought it out, there was just one room. It was called – I mean, it was just the mixer in one. And there were four mixers in there, and it was – it had two – excuse me – it had four mixers in there, and then that's the only thing we used. But then later on, they put another mixer in, and we had a whole lot more mixers.

Q: Okay. Let's talk about that mixing room, the mixing room 1 that you discussed.

A: Okay.

Q: While you worked in the mixing room at Tremco –

A: Yeah.

Q: -- was there any type of asbestos inspection or asbestos removal in the mixing room?

A: No. We used asbestos all the time in there.

Q: Okay. So was asbestos ever cleaned out from the mixing room 1?

A: They would sweep it out, you know. We'd just clean it up like that. There wasn't nothing, no coming in and moving it out. Or no -- well, they didn't really come in to clean it up until we went into Truseal, until later when it was Truseal.

Mills recounted the measures TruSeal took to clean the mixing room:

Q: All right. So when Truseal took it over, what did they do to clean up the mixing room 1?

A: They come in and they washed the mixing room 1 down. They took a water hose and washed the walls and stuff down one time, and then that's about it.

Q: Okay. When they washed it down, did they include the ceiling?

A: No, because there was too much electric up there that they were afraid of. They did have damage to some of their stuff, and they had to quit doing that. They had to quit cleaning.

Q: What about, were there any pipes in the mixing room?

A: Oh, yes, there's all kinds of pipes, overhead.

Q: Were those cleaned?

A: Not to my recollection, not that I know of, you know. If they did -- you know, they -- I mean, the only time they got cleaned really by washing it clean was whenever the pipes were shaking, and it would just fall off.

Q: This is going to be [sic] horrible example, and I apologize.

A: Yeah, I know.

Q: When you're talking about this mixing room, in my mind, I'm sort of seeing a cartoon witch with a big bowl turning it or something like that. Is that sort of what it's like?

A: No.

Q: Okay. Go ahead.

A: It was like the mixer just – it was like a big square mixing thing and it had a lid on it, and you just poured the stuff in the hole, and it would mix in like that. It had a screw on it and stuff.

Q: Okay. Was it completely enclosed or did any type of air particles come out of the mixing bowls?

A: Yeah, we had a porthole that we put the stuff in.

Q: What?

A: We had a porthole that we put the raw materials in, like asbestos and carbon black and powder, like 204 powder, and different stuff.

Q: Okay. Did any type of fumes or gases leak out of the mixing – the mixers and go into the ceiling?

A: Oh, yeah. We had a dusk [sic] collector on, but it wouldn't catch everything. It would still – like whenever the mixer would catch air pockets and just blow out and stuff like that – yeah, it done that.

TruSeal increased the number of mixers from seven to nine, and added an extra mixing room. Mills continued to mix with raw asbestos after TruSeal took over, as it was used in the second mixing room.

Mills testified he was also exposed to asbestos after he moved to maintenance. He described the nature of exposure as follows:

Q: All right. Were you exposed to any type of asbestos while you worked in maintenance?

A: We had the pipes that had asbestos in them, and we had to – we was always up around them, something like that, you know, next to the ceiling or something.

Q: How do you know there was asbestos in the pipes?

A: They always had it marked.

Q: Can you please explain that?

A: Like a lot of times what it was, was if we had a bad spot in the pipe, you know, if it had been hit with a fork truck or something that hit it or damaged it, they would take and maybe put a plastic bag over it just to keep it sealed, and we would – you know, like sometimes we had to go up and take it down.

Q: All right. When you say take it down, are you talking [sic] the plastic bag?

A: No. If the plastic bag got torn up or anything, like, if it got hit or something and it got torn up, then we had to go up and have somebody replace the plastic bag. Or if it was too bad, we had to take it down and put it in another bag and dispose of it.

Q: So when you say it was too bad, what do you mean?

A: If it was hit too bad and torn up more.

Q: Okay. Do you know why you had to replace the bag or the pipe?

A: Well, if the bag was torn up or something like that, then we had to replace the bag.

Q: Okay. What was the reasoning for that?

A: Well, because it was asbestos and it would – well, when it got airborne, it was all over the place.

Mills recounted his actions when he occasionally removed the bags covering the pipes:

Q: Who is Keith Spencer?

A: He was the safety and health inspector or safety and health trainer.

Q: Okay. Did he teach all of the employees about how to remove asbestos?

A: No. Just whenever something needed to be done. I mean, he wouldn't get up and do it, he would send one of us up to do it.

Q: Okay. And did you ever have to do that?

A: Yes.

Q: Can you please tell us about that?

A: I think it was me and one of my coworkers, Wallace Engle, had to go up in the ceiling one time and I think either replace the bag or – I can't – it's been so long, I can't remember exactly. I know we had to go up and replace the bag or just get him a sample of it.

Q: Okay. So what would you have to do to get a sample of it?

A: Just rake whatever was on top of it off in like a little cup or something and bring it down to him.

He elaborated further regarding TruSeal's efforts to clean the plant:

Q: Okay. Were there ever any times when Truseal hired any people to come in and clean out the facility, clean out the pipes, blow them out or anything like that?

A: They just had us workers do it sometimes, take the water hose and spray them down. But I – you know, I always tried not to work that day.

Q: Why was that?

A: That was a mess. That was a mess. It was a hard – it was a big job to clean up and stuff.

Q: Okay. Can you sort of elaborate? What do you mean it was a mess? What caused the mess?

A: All the powder and the asbestos and the carbon black and all of that stuff. I mean, when you would spray it, it

would just fall all over you and everything. You would be a mess when you left.

Mills worked 33 years at the plant.

Mills detailed his asbestos exposure while employed by TruSeal:

Q: Sir just walk us through. I know you touched on it. I just want to hear your testimony, you know. Just tell us about your exposure to asbestos while working at Truseal.

A: Well, I mean, we just – we made batches and stuff like that, and it would call for different kinds of asbestos. We had 95 and 94, 50-94 and 50-95. Then we had 50-392 asbestos, and that was raw. They was all raw asbestos. And we would take and put it in the mixer, and we would like add oil to the mixture, and we'd add rubber. We'd add asbestos, and we'd add some powder – different other kinds of powders and stuff and resins, and then it would mix in. And whenever – most of the time what we done when we put the asbestos in, we would wear little masks, and then we put it in. And then when we got ready to turn it on, we shut the lid and would take off because we knowed it was going to blow out on us if we didn't There was some times, you know, you didn't have time to get out of there in time.

Q: Okay. What about instead of just in the direct production, what about within the facility, were you ever around asbestos within the facility?

A: Oh, yeah. I worked in shipping and receiving where we unloaded all the trucks and brought it off the trucks, you know.

Q: During your time at Truseal?

A: Yeah. Well, earlier in the part of Truseal, yeah.

Q: Okay. And you may know this, you may not. When Tremco was bought out by Truseal, was there raw asbestos material left over?

A: Yeah, there was a little bit left over. There was some that we used – still used.

Q: That's what I was going to ask you. What happened to that leftover asbestos raw material?

A: Well, we used it until it was gone.

Q: And that was while you were at Truseal?

A: I'm pretty sure.

Q: All right.

The June 30, 2020, deposition of Keith Spencer ("Spencer") was introduced. Spencer began working for TremCo in Fall 1993 as the health and safety technician. His job duties were: "To manage the health and safety programs and to assist in improving, continually improving, the health and safety performance of the facility." In 1993, the year Spencer was hired, TremCo had just completed an asbestos management survey entitled "Asbestos Management Plan and Operations and Maintenance Program" which is attached to his deposition as Exhibit A. Spencer testified that an asbestos management plan is the "end result of conducting a survey to determine the types, amounts and condition of asbestos-containing building material, or what they call 'ACEM,' in your facility." When high-hazard asbestos-containing building materials were identified, they were encapsulated. TremCo's policy in 1993 regarding all pipe elbows testing positive for asbestos was to leave them undisturbed.

Spencer testified that once asbestos is properly encapsulated, it is no longer airborne and harmful. Spencer carried out yearly reassessments after implementation of the asbestos management plan. In 1997, TremCo was still engaged in asbestos abatement:

Q: Do you recall in 1997 whether Tremco proceeded with further abatement of asbestos-containing building material?

A: Yes. There was an abatement, and it was – yes, it was '97. That's correct.

Q: Do you recall if they hired an outside company or was this something that –

A: Yes. Yes, I do recall an outside company, North Brothers, I think it was.

Q: What kind of company is North Brothers?

A: They are – they were an asbestos-removal contractor.

Q: Mr. Spencer, I have a document titled “Ten Day Report Form for Prior Notification of Asbestos Abatement Activities” and it's dated January 3rd, 1997 through January 14th, 1997; do you recognize this document?

A: Yes.

Q: And is this a true and accurate copy of the Ten Day Report Form for Prior Notification of Asbestos Abatement Activities dated January 3rd, 1997 through January 14th, 1997, kept in the ordinary course of business?

A: Yes.

...

Q: And if you would, just kind of explain what this document is, please.

A: Okay. The very front page is the notification of the state that asbestos abatement activities are going to occur. You had a ten-day notification requirement for that. And then after that is the project report from North Brothers, and following that is all of the work permits and daily logs and list of activities that were conducted during that removal process.

Q: Did North Brothers remove all the identified asbestos-containing building material?

A: I couldn't hear you. Could you repeat that, please?

Q: Yes. I'm sorry. Did North Brothers remove all identified asbestos-containing building material?

A: Well, from – it looks like they removed – I was looking at this. It looks like they removed a total of 93 linear feet. So they removed all of the asbestos-containing material identified in that initial management program and the survey prior to that management program. However, a little bit more asbestos-containing building material was found in 2008 when I did a survey, so ...

After North Brothers completed its work, a survey conducted in 2008 identified other presumed asbestos-containing materials. Spencer explained:

Q: As far as those areas that did remain, do you recall what happened with those?

A: In 2008 there was a survey, and that survey identified nine other elbows that were previously presumed, however, not removed during that '97 removal process. And I do not know what happened to those after the survey.

Q: As far as your knowledge, though, following the removal in 1997, were [sic] those presumed areas remained encapsulated?

A: Yes. I believe - hang on. Let me look here. Yeah, there's some photographic evidence of their condition.

After Spencer left TruSeal, he started his own environmental health and safety consulting firm called IESO. In 2008, IESO was hired by TruSeal to perform an asbestos survey.

Q: And I know you mentioned this before; do you recall in 2008 IESO was hired by TruSeal to perform an asbestos-containing building material survey?

A: Yes.

Q: And I have with me that survey titled ‘Asbestos-Containing Building Material Survey Observation Report’ submitted by IESO dated November 26th, 2008; do you recognize this document?

A: Yes.

...

Q: Did they want to confirm presumed asbestos-containing building material?

A: Yes. Yes.

Q: And it looks like, according to this survey, nine out of the ten locations that were tested actually tested positive for asbestos?

A: Correct.

Spencer testified that all but one of the locations were in “good shape.”

He offered the following opinion:

Q: Mr. Spencer, based on your knowledge and your history, after January 1997 would an employee been exposed to asbestos-containing building material?

...

A: Not under normal circumstances following the guidelines of the management plan.

Spencer acknowledged other pipe elbows which were not checked could have possibly contained asbestos. In the 2008 inspection, three samples were taken from packaging which were positive. Spencer acknowledged the employees regularly worked in the packaging department.

Numerous other lay depositions were filed in the record. Pertinent to the issue on appeal is the January 15, 2021, deposition of Wallace Engle (“Engle”). Engle began working for TremCo in 1979 in the mixing department. At that time,

TremCo utilized raw asbestos. After TruSeal took over, Engle was unaware of the use of raw asbestos. However, he testified asbestos was still present in the building:

A: Now, TruSeal – as far as I know TruSeal didn't use no asbestos in it, but there was asbestos in that building because you couldn't have got that much asbestos out.

Q: Okay.

A: Say you use a 2500 pounds or something, or 3,000 a shift on two mixers and maybe 1200 on the other two mixers, that's a lot of asbestos in 22 years. And how do you expect to get that out of there? And it would go everywhere. The doors in the packaging was open. The doors – they had the big door going in to winding where they made the tape. And the winding was right before you got to shipping. All that was open. Ain't no way in the world they got that stuff out of there.

Even though the mixing room was painted, the ceiling was full of powder. He explained:

A: The ceiling up there had so much powder on it. You know, you had your rails going across and your beams up there. You could get up there and it'd be about that thick, just pure dust.

Q: Can you quantify that? Is that an inch? Two inches? Three inches?

A: Huh?

Q: Is that an inch? Two inches? Three inches you're showing us, or what is that?

A: That's about three inches.

Q: All right. So –

A: Well –

Q: Go ahead.

A: We tried to use vacuum cleaners on it, but more hit the floor. You know, it'd just fall down and go

everywhere. Just like that – well, shoot – well, it would fall down and then, finally, they got up there and just knocked it off, you know, just – and it was a real mess.

Concerning his exposure to asbestos, he elaborated:

Q: Okay. When TruSeal took over TremCo were there any – was there any asbestos raw materials left over from TremCo?

A: Buddy, I don't know about that.

Q: Okay. When you worked at TruSeal were you exposed to asbestos?

A: Yeah.

Q: All right. Remember, I'm talking about TruSeal not TremCo?

A: Well, they're the same building, buddy.

Q: Right. But I'm talking while you were working for TremCo.

A: Yeah.

Q: Were you exposed to asbestos while you – not TremCo. I'm sorry. While you were working for TruSeal were you exposed to asbestos?

A: Not in raw materials, but in the building you are.

Q: Okay. Where were you exposed to asbestos in the building?

...

A: You mean TruSeal or TremCo?

Q: TruSeal.

A: Like I said, buddy, that stuff was in the building. You could not get rid of all that stuff.

Q: Okay. Do you know where in the building it was?

A: Well, when the asbestos came in there, it came out of Canada. It came in on trucks and it came in the railcar. Now, you pull in a railcar after it's come from Canada and everything and asbestos in there – you go in there with a tow motor that blows out the back end, that runs off of gas – you know, propane. It blows that all over the place – on top of the skids, all that. And trucks, when you unload them – and you bust bags too. I've seen it strewn from the receiving dock, all the way up to where they stage it. You know, the guy unloading it – the bags in front might be tore and they just keep going up through there. And in receiving – I've seen them in receiving unload the 94 when I worked in material handling and the dock would be full back in the back where they couldn't get in and they'd back up there and unload it sometimes.

Q: Okay.

A: I'm just telling you it was all over the place. It couldn't help from being all over the place.

Q: Okay. When you last worked at TruSeal were there any – do you believe there were remnants of asbestos still in the building?

A: Like I said, it was all over the building. You can't get rid of that stuff as much as we used. That's 22 years that that stuff was used. I've seen them – you think you've got good workers that clean the mess up and then you've [sic] some that'll run from it. And like I said – and the bags – now, your bags, they was in, like, plastic 100-pound bags was 94 and 95. The 392 came in one bag and a plastic bag over top of it. Well, we used to take and just put them on a skid with our other bags for powder and stuff, push them down, take them back there and put them in the compactor. Then they come up with the deal to wear your masks --- wear one of these masks later on and put it under a 55-gallon drum with water in it. Push them down and let the water get in. Well, see that causes a [sic] air pocket. It poofs right back out in your face and everywhere. Same way with them mixers. They caused air pockets in them. You'd be putting asbestos in and, man, it'd blow it out and all over you. You take a 2,000-pound batch and oil and stuff in there. You pour it in there and it's got an air pocket. It shoots it right out.

Jack Partin (“Partin”) who worked for TremCo and TruSeal from July 7, 1979, through August 26, 2012, was also deposed. He testified TruSeal used raw asbestos after it purchased TremCo:

Q: All right. When TruSeal bought TremCo, did they use raw asbestos in the production of the products?

A: As far as I know, they used what they had left from when they bought the place out.

Q: Okay. So when TruSeal bought the place out was there raw asbestos material left?

A: Best I remember there was.

Q: Okay. And why did TruSeal use up that raw material?

A: To get rid of it, I guess. I mean, they was making the product and I guess they just used what they had to get rid of it and then ---

Q: All right. Did TruSeal try to phase out the asbestos?

A: Yes.

Q: Okay. Can you tell us how they did that, what they tried to do?

A: Well, they changed the product and eliminated the asbestos.

Q: Okay. When you say eliminated the asbestos, are you saying eliminated the raw asbestos material in the ---

A: Yes.

Partin testified that asbestos remained in the building in the “old insulation...in the pipe joints.” His testimony is as follows:

Q: Okay. Now, was this in a certain department or, you know, different areas?

A: It was in two different spots but in the same general vicinity of each other. Probably at that point, it'd be classified as finished good warehouse.

Q: Excuse me? What would it be classified as?

A: Finished goods warehouse.

Q: Okay. What is that?

A: That's where they would store all of their finished product before shipping it out. When they would manufacture it, they'd take it into the warehouse and store it for shipping.

He and Mills went into the warehouse when they worked for TruSeal.

Partin also worked in mixing during his time at TruSeal. He discussed what he observed in the mixing department:

Q: All right. Now, when you were working in the mixing, was there any type of debris or material that would fall from pipes or anything like that?

A: Yeah.

Q: Okay. Can you tell me about that?

A: Well, it was just – the dust would settle up in the air – you know, the things overhead or whatever. And if you hit one of them, then it would make it fall down.

Q: Okay. Do you know if that had any asbestos in it?

A: I couldn't swear to it either way whether it did or didn't.

Q: Okay. Did you ever see anything falling from the ceiling?

A: Yes.

Q: What did you see falling from the ceiling?

A: It was like – I guess you'd call it dust. Powder or dust, whatever you want to call it, as far as you know.

You couldn't really identify it because you could just see it.

Partin identified part of TruSeal's effort to remove asbestos from the building:

Q: All right. Do you know of any times when people came in and sprayed the water to clean anything?

A: Yeah. They brought an outfit in to wash it down once, the mixing department.

Q: When was that?

A: I can't remember the year.

Q: All right. Was that while you were at TruSeal?

A: Yes.

Q: All right. Was there ever a time when people came in and painted?

A: Yes.

Q: Okay. Was that while you were working at TruSeal?

A: Yes.

Q: All right. What was painted?

A: The building – the inside of the building.

Q: All right. Did the painters scrape the old paint off?

A: No.

Q: Okay. So they just painted over what was there?

A: Painted what was there.

Q: All right. Were there any type of paint chips or anything like that that fell?

A: There was so much falling, you know. We never really put a whole lot of thought into what was falling, but I'm sure it did. I wouldn't – I can't say either way on

that, a yes or no, whether there was any paint falling or not.

Q: Okay. Was there ever a time when TruSeal had people vacuuming pipes to clean them or anything like that?

A: Yes.

Q: Can you tell me about that?

A: Well, they could come in on third shift and had vacuum cleaners and they would try and vacuum off as much as they could.

Q: What would they vacuum? Like, you know –

A: The pipes and the busway for the air, the wire wraps and stuff overhead.

Q: Okay. Did that completely eliminate the dust or debris from the pipe?

A: No. No.

Q: Was that something that was continuous, you know, having dust or debris falling?

A: Yes. Yes.

He continued as follows:

Q: All right. Do you believe there was any asbestos in the facility when you last worked there?

A: I believe there was.

Q: All right. And what makes you say that?

A: Well, the stuff in the overhead, in the pipes and all of the rafters, everything that was up there. They couldn't – they didn't have – they didn't clean it all. They couldn't get to all of it.

Q: All right.

A: And after it's there, it ain't going to get up and walk off on its own.

Q: When you say “it”, what are you saying? What are you talking about?

A: The powders and the dust and the stuff that was already there. It had to be in the ceilings.

The January 15, 2021, deposition of Terry Mays (“Mays”) reveals he worked for TremCo and TruSeal between 1991 and 2012. Mays identified the different departments which dealt with the raw asbestos:

A: Well, early on it would come into the receiving department and then you’d have a paper. You could fill out what material you wanted brought into the mixing room. So it was held in basically two areas. And then the second area that it would come in, we would get it and then put it in the mixer. So basically, it had three steps before it went into the mixer.

Q: Okay. So now, you said there were two areas. So one was the receiving department. What was the other department the raw materials were used in?

A: Early on, they would bring it and put it in the mixing department. And then you could unload it off of a skid in the mixing department. Then you could put it in the mixer. And then they changed that. Then it just came into the receiving area. So it changed a little over the years.

Q: All right. Do you know when it changed into just coming into the receiving area?

A: They did change it to just the receiving area. They did.

Q: Yeah. Do you remember when that was?

A: No, sir. No, I don’t.

Q: All right. Do you know if that was when you worked TruSeal or TremCo?

A: To just the receiving area was TruSeal, best I remember.

Mays was still exposed to raw asbestos in production after TruSeal obtained the plant. “We ran it until we run – we ran it until we run everything we had out.” He furnished the locations of asbestos still in the building when raw asbestos was no longer present.

A: It was in the ceiling. It was in the ceiling and on the walls, around the pipes. We had pipes that was wrapped in it. It was basically throughout the whole building.

Q: Okay. And did you personally observe it?

A: Yes. Yes, sir.

...

Q: Okay. Was there a time when you worked at TruSeal where asbestos was sprayed down with the water hose? The asbestos dust?

A: Yeah. They cleaned it one weekend. They cleaned it one weekend, sir. They just took a water hose and sprayed the pipes and stuff down and sucked it up with a – sucked the water up.

Q: All right. Now, was this while it was TremCo or TruSeal?

A: TruSeal.

Q: All right. When this cleaning occurred on that weekend, was your production still going?

A: They stopped all production in that room so they could clean it.

Q: Okay. Was it just one room?

A: The one that they cleaned, yeah.

Q: Where did they clean? What department?

A: It was in extrusion mix. We had two rooms that was extrusion mix. We had mix room one and mix room two. And mix room one is the one that they cleaned.

Q: Okay. Do you know why it was cleaned?

A: Yes. To clean everything off the ceilings and the walls. And the reason – the best I remember, you know, it's been a long time ago. Best I remember, the reason we didn't do mix room two is because water was sprayed around the electrical stuff and we had problems getting the mixers and stuff started again so we didn't do mix room two.

Q: Okay. Was there any point in time while you worked at TruSeal when they did some painting inside the facilities?

A: Yes. I remember a guy came in and painted the walls and stuff.

Q: Okay. And when that happened, do you know if the people or person who did the painting – whether they scraped the prior paint off or anything like that?

A: No. They just sprayed over everything.

Mays testified he is able to identify asbestos and that the presence of asbestos in the building was common knowledge. He specified his exposure to asbestos during his "TruSeal" employment:

A: I worked in the mixing department. So like I told you earlier, us adding it in a mixer, we would put it in a mixer, shut the lid on the mixer, then we would turn around, and we would take the bags and put them in a garbage bag, like a big leaf bag. We would lay it on top of the skid and haul it out and put it in the compactor and we crushed it. And then we went from that to putting it in a drum. We would put it in a drum, pour some water in it, and smash the drum down. They did that so they could get more bags and stuff in the drum for hazardous waste. And then we would get in the mixers and clean them out. We done that quite a bit. And then we had one mixer that dumped – you know, the lid would lift straight up and back and the bottom part of the mixer would dump, pretty much like a dump truck. You would have a bucket there and then all the – you could see the blue, the purple around the mixer lid, which was asbestos. When you picked it up, you'd have

to go over there beside of it, and you hit a start button and it would dump it over into a bucket. Then you would take that bucket and put it in an extruder and extrude it.

Mills introduced the February 5, 2020, Form 108 – CWP – Medical Report of Dr. Bob Moldoveanu. After performing a physical examination of Mills and a medical records review, Dr. Moldoveanu diagnosed asbestosis and provided the following causation opinion:

Our patient has significant interstitial lung disease and a history of intensive exposure to silica and crystalline quartz. Patient has had extensive time period of exposure being 1997-2012. Therefore, based on expert opinion, it is likely that the exposure to dust in the workplace is a significant contributor to the pulmonary fibrosis diagnosed by Dr. Jain.

Dr. Moldoveanu assessed a 40% whole body impairment rating pursuant to Chapter 5, Table 5-12, of the 5TH Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment.

TruSeal introduced the June 17, 2020, Medical Questionnaire completed by Dr. Moldoveanu generated after reviewing the following additional materials: May 30, 1997, Asset Purchase Agreement; March 1993 Asbestos Management Plan and Operations & Maintenance Program; March 7, 1995, TremCo R & D monthly report; and the January 6, 1997, through January 14, 1997, TremCo Asbestos Insulation Management System. Pertinent to the issue on appeal are the following questions and answers:

4. Based upon May 30, 1997 Asset Purchase Agreement, March 1993 Asbestos Management Plan and Operations & Maintenance Program, March 7, 1995 Tremco R & D monthly report, and the January 6, 1997 through January 14, 1997 Tremco Asbestos Insulation

Management System which establish asbestos was removed from the employees work environment:

Do you agree the patient's last date of injurious exposure to asbestos occurred on or before January 14, 1997? Yes

Handwritten note: To my knowledge

5. Within a reasonable degree of medical probability:

Is the patient/employee's disease or condition causally related to his/her work environment with Tremco from June 11, 1979 through May 29, 1997? Yes

Handwritten note: Diagnosis of Asbestosis is more likely related to period of heavy known asbestos exposure than period of minimal (illegible) asbestos exposure.

Is the patient/employee's disease or condition causally related to his/her work environment with Truseal Technologies from May 30, 1997 through July 24, 2012? No. (Please explain)

Handwritten note: Documents seem to indicate no significant asbestos exposure occurring during 1997-2012.

6. Within a reasonable degree of medical probability:

Is any pulmonary impairment caused in part by factors stemming from the patient's work environment (e.g. asbestos) with Tremco from June 11, 1979 through May 29, 1997? Yes. (Please explain)

Handwritten note: See above.

Is any pulmonary impairment caused in part by factors stemming from the patient's work environment (e.g., asbestos) with Truseal Technologies from May 30, 1997 through July 24, 2012? No (please explain)

Handwritten note: By this I mean that pulmonary impairment due to asbestos exposure is unlikely to be due to working with asbestos free "swiggle" from 1997 to July 2012. Or due to environmental asbestos in the plant as to my knowledge asbestos had been remediated in the plant environment.

7. Within a reasonable degree of medical probability:

Do you believe the above diagnosis is related to the patient's work activities with Tremco from June 11, 1979 through May 29, 1997? Yes (please explain)

Handwritten note: Patient is more likely to have Dx. Of Asbestosis from heavier exposure to asbestos.

Do you believe the above diagnosis is related to the patient's work activities with Truseal Technologies from May 30, 1997 through July 24, 2012? No (please explain)

Handwritten note: To my knowledge there was no Sig asbestos exposure during this time so diagnosis is less likely to be correlated with any exposure during this time period.

During Dr. Moldoveanu's October 28, 2020, deposition, he offered the following testimony:

Q: Okay. Well, Doctor, based on the May 30th, 1997 Asset Purchase Agreement; the March 1993 Asbestos Management Plan and Operation & Maintenance Program; the March 7th, 1995 Tremco R & D Monthly report; the January 6th, 1997 through January 14th, 1997, Tremco Asbestos Insulation Management System; which all establish that asbestos was removed from the employee's work environment, would you agree that then – that the patient's last date of injury exposure to asbestos occurred on or before January 14th, 1997?

A: As I said, to – to my knowledge, if evidence – yeah. With all the evidence, it appears that they had abated and removed asbestos from the patient's work environment to a large degree. Of course, it's never able to be removed completely, but yes.

Q: Okay. Well, presuming witness testimony confirms that Tremco did abate and, you know, stopped using raw asbestos in manufacturing of its product and also removed the presence of asbestos in its Barbourville facility before January 14th, 1997, you know, presuming

A: Yes.

Q: -- witness testimony, would you agree that --

A: Yes.

Q: -- his last date of injury exposure was on or before January 14th, 1997?

A: Yes.

Q: Okay. Within a reasonable degree of medical probability, would you agree that the patient's disease or condition was most likely caused by his work environment with Tremco prior to January 14th, 1997?

A: Well, it is more likely than not, and I'm basing this on that the diagnosis of asbestosis is performed by the diagnosis of pulmonary fibrosis, which is diagnosed in this gentlemen, and it can occur many years later, and it is most consistent with both, you know, high duration of exposure and high intensity of exposure of asbestos fibers.

That seems -- that seems -- so it would seem that it is more likely to be -- occurred during a period of time where you have high asbestos exposures.

Q: And I guess would you agree then before they stopped using asbestos -- Tremco, before they stopped using asbestos in the manufacturing of their products, would you agree then that that would qualify as high exposure?

A: That would have most likely been a high -- a significantly higher exposure than after they stopped using asbestos in their -- in their products.

Q: Okay. And Doctor, within a reasonable degree of medical probability, do you believe that the patient's pulmonary impairment is most likely caused by his work environment with Tremco prior to January 14th, 1997?

A: It would seem more likely that it would occur during -- due to his employment with heavier exposure of asbestos, and the documents seems to indicate, as I said here, no significant asbestos exposure occurring from 1997 to 2012.

Q: Okay. And Doctor, do you believe the diagnosis of asbestosis is related to the patient's work with Tremco on or before January 14th, 1997?

A: It seems – it seems most likely, yes.

Q: Doctor, you recommend a restriction for Mr. Mills as far as avoiding contact with silica, chemicals, excessive dust –

A: Yes.

Q: -- avoid jobs with heavy exertion, excessive heat, high humidity and cold. Is it more probable that the patient's work restrictions are most likely due to his employment with Tremco prior to January 14th, 1997?

A: His work restrictions are more likely – let me say this. Work restrictions are related to his pulmonary impairment, which is related to his – probably to his diagnosis of asbestosis and pulmonary fibrosis.

Given that the patient's work environment occurred – given that the patient's work environment from 1997 to 2012, did not have significant asbestosis, I do not believe that through the mechanism of asbestos, the – what I'll say, through the mechanism of asbestosis that his exposure at that time is causing a significant component of his restriction.

Q: Okay. So I just want to clarify. So it's – I guess is it more likely that his current restrictions are the result of his work environment prior to January of 1997?

A: It is more likely that they're – yes, that they are. Yes.

The February 17, 2021, Benefit Review Conference Order and Memorandum lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, notice, average weekly wage, unpaid or contested medical expenses, injury as defined by the ACT, and credit for unemployment benefits. Under "Other" is the following: "Coverage under the Act, last date of injurious exposure, statute of limitations, statute of repose; Plaintiff is seeking a PTD [sic]."

In the April 16, 2021, Opinion, Award, and Order, the ALJ provided the following findings of fact and conclusions of law which are set forth *verbatim*:

...

II. Date of last injurious exposure

Frankly, with regards to this issue, the evidence is conflicting to some degree but, with respect, to the Defendant's position, I find that it more likely than not that the Plaintiff continued to be exposed to asbestos until his last day of work, July 24, 2012.

The fact that TruSeal did not actually bring in the asbestos or make an active decision to continue to purchase it after they bought the business from Tremco is not relevant. There is no rule of equity generally in Kentucky Workers' Compensation. It is a creation of statute. The statute provides for an employer inheriting the liabilities of a predecessor employer. KRS 342.316(1)(a) and (10).

TruSeal, by continuing to have asbestos in the work place was responsible for the occupational hazard that the Plaintiff was exposed to and which has created his occupational disease.

I am not persuaded that the asbestos situation had been entirely resolved in 1997 pursuant to TruSeal's abatement plan. As recently as 2008 testing done by Keith Spencer showed that 9 of 10 areas tested in the plant were positive for asbestos. In 2012, the Defendant took additional measures to test a specific workspace for asbestos, which was admittedly negative, but does create the impression that the Defendant was not entirely confident that all asbestos had been removed.

I am not persuaded by any testimony that the asbestos removal plan was or even could have been 100% successful. I am more persuaded by the fact that the Plaintiff and his co-workers, with several decades of experience between them, continued to believe they were exposed to asbestos, and possibly other hazardous material. The statement by Dr. Moldoveanu that 100% complete asbestos removal was unlikely persuades me.

I am not suggesting anything nefarious, this factory was torn down in 2012 after all and the Plaintiff's last date of employment was July 24, 2012. However, the Defendant, who is in control of all records of asbestos testing, has only provided, through depositions, those from 2008 and before, excepting the 2012 test when the bench was removed. However, even the 2008 test shows asbestos in 9 of 10 sites. This contradicts the Defendant's argument that asbestos was removed by 1997 and demonstrates that the information provided to Drs. De Andrade and Moldoveanu was inaccurate.

The standard of last injurious exposure by its very nature does not require that the majority of exposure take place in the last several months or even years before the last date of exposure. It only requires that on the last date of exposure that the Plaintiff was exposed to some of the hazardous material. There is no dispute that the Plaintiff was exposed to asbestos while working for Tremco and TruSeal. The question is when he was last exposed to it.

I believe, and find, that asbestos continued to be present in the Plaintiff's work areas up to his last date of work. I find, based on the foregoing analysis, that he was last exposed to it on July 24, 2012.

III. Statute of limitations and statute of repose

KRS 342.316(4)(a) provides a 20 years statute of limitations, which does not expire until July 24, 2032. The claim is not barred by the statute of limitations. Given the more specific statute of limitations set forth in KRS 342.316(4)(a) the statute of repose does not apply.

IV. Work-relatedness/causation and injury as defined by the Act

The Plaintiff was exposed to hazardous asbestos at the work place. According to the University Evaluator, he has an asbestos related pulmonary condition. The notion that he would have instead contracted this condition by putting brake pads on a Chevelle, however often he may have done that, is rejected. His condition is work-related.

V. Notice

The first time Mills began to experience a cough that would not, in his words, go away, was in February 2018. It was this symptom that caused him to seek medical treatment for his breathing issues. However, the first time that the Plaintiff was diagnosed with asbestosis was by Dr. De Andrade, who he first saw on May 19, 2019. The Plaintiff first gave notice of his claim by the filing of his Form 102 on December 12, 2019.

The purpose of the notice requirement is to allow the Defendant to adequately investigate a claim and to allow them to mitigate damages, if possible. *Smith v. Cardinal Const. Co.*, 13 S.W.3d 623 (Ky. 2000). At the time, the Plaintiff was first diagnosed with work-related asbestosis he had not worked for over seven years and was receiving social security retirement. He had not been exposed to asbestos during those seven years. Since he filed his claim, the Defendant has taken multiple lay depositions, with multiple exhibits, totaling hundreds of pages. They, for business reasons unrelated to workers' compensation I presume, tore down the building the Plaintiff worked in, in 2012, preventing any further asbestos testing.

In other words, I cannot possibly see how a gap in giving notice between May and December, 2019, could have allowed them to investigate the claim any more than they have or to limit damages any more. As such, notice is sufficient.

...

IX. Conclusion

I understand that this claim is unusual, though hardly unprecedented, in workers' compensation and the fact that a Defendant who did not initially introduce the asbestos into the work place is now liable for it decades after it was initially introduced and almost 9 years after the Plaintiff left work.

That being said KRS 342.316(1) and (10) clearly contemplates that successor companies can be liable for occupational diseases originally the "fault", for want of a better word, of the company they purchased. KRS 342.316(4)(a) clearly contemplates a 20 year statute of limitations for asbestos related claims, not only making

this claim viable but demonstrating the determination that it might well reasonably take that long to assert such a claim.

The Plaintiff has a significant pulmonary condition and impairment rating caused by exposure to asbestos. I am convinced that he contracted this condition and was exposed to asbestos while working for Tremco and TruSeal, and only while working for them.

The evidence on the existence of asbestos in the work place was, at best conflicting. However, the testimony and exhibits of Mr. Spencer indicate, contrary to his earlier assertions and conclusory testimony, that there was still asbestos in the work place as recently as 2008. There was no evidence of testing done after that but the Plaintiff and his co-workers' testified it was there. The building was destroyed in 2012. Therefore, the opinions of Drs. De Andrade and Moldoveanu that the last injurious exposure was in 1997 was based on flawed information that they were provided.

A reasonable person could, perhaps, disagree that the last injurious exposure was on July 24, 2012, but a reasonable person can certainly find that the last injurious 20 exposure took place on July 24, 2012, as I have. The Plaintiff is entitled to the benefits as awarded.

Both parties filed Petitions for Reconsideration. TruSeal asserted the same argument it now makes on appeal. TruSeal also argued it was entitled to a credit for unemployment benefits Mills received and the ALJ erred in calculating the average weekly wage.

The ALJ sustained in part and overruled in part TruSeal's Petition for Reconsideration furnishing the following additional findings which are set forth *verbatim*.¹

1. I understand that this claim is most likely going to be appealed, possibly as far as the Supreme Court. Under the circumstances, it would be unwise to proceed with

¹ The ALJ sustained Mills' Petition for Reconsideration by separate order dated April 24, 2021.

any appeal without first filing a Petition for Reconsideration. I also understand that the issues presented herein, and the value of the claim, while not novel, are unusual. Nevertheless, I feel it is important to point out that this Petition represents, entirely, a re-argument of the facts and merits of the claim. There is substantial evidence to support all of my findings and Orders in the Opinion. I will, however, address the issues raised in the Petition.

2. As far as my decision to rely on Dr. Moldoveanu's initial opinion that the Plaintiff's asbestosis was caused by industrial exposure to asbestos last occurring in 2012, and not his subsequent opinions, nor the opinions of the other doctors, Administrative Law Judges are vested with wide latitude to accept or disregard various parts of the evidence including to accepting part of a doctor's opinions but not all of them. ALJs are even vested with the authority to accept the first opinion even if a doctor later revises that opinion. Therefore, my reliance on Dr. Moldoveanu's opinion that the Plaintiff was last exposed to industrial asbestos in 2012 is supported by substantial evidence.

3. As for the Defendant's argument, that the entire panel of doctors eventually opined that the Plaintiff's last injurious exposure was in 1997 or earlier that is flawed on two counts. First, and foremost, is that it is inaccurate. The Plaintiff presented multiple witnesses who testified that they continued to be exposed to asbestos well after 1997, up to 2012. I believed those witnesses, over the Defendant's witnesses, as is within my discretion. It stands to reason that either the Plaintiff's witnesses or the Defendant's witnesses are not accurate so I have to decide which is which and I have done that. So any doctor's opinion that states the Plaintiff was not exposed to asbestos after 1997 is unreliable and usable. *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004).

4. The second reason that those doctors are not reliable when they state that the Plaintiff was not exposed to asbestos after 1997 is that they are not qualified to make that determination. Simply because they are doctors, even a University Evaluator appointed pursuant to KRS 342.315 does not make them the final arbitrator and judge of all relevant facts in the claim. While I was not

asked to do an analysis under the Daubert standard for their testimony it does not require an expert to know that they are not experts, in either knowledge or independent access to the facts, regarding whether or not the facility was asbestos free in 2012. They were simply provided that information by the Defendant's counsel who asked them questions the gist of which was "assuming our witnesses are accurate that there was no asbestos after 1997 was the Plaintiff exposed to asbestos in 2012?"[1] I reject that premise and the Defendant's witnesses on the subject. As such even the opinions of Dr. Moldoveanu are not afforded a rebuttable presumption of the issue of whether or not there was asbestos in the work place in 2012. In addition, even if he were I explained why that presumption has been overcome. *Magic Coal v. Fox*, 19 S.W.3d 88 (Ky. 2000).

5. The Defendant cites to the Board's decision in *Paducah Area Transit Systems v. Terry Kerns Best One Tire*. That decision is a well thought out application of the law to the facts in that case. However, it does not preclude, in this case, from me making a determination in this case that the Plaintiff continued to be exposed to industrial asbestos as late as 2012. That exposure was sufficient to cause the Plaintiff's condition to worsen as is demonstrated by his lay testimony and the medical evidence. That is enough to make it an injurious exposure.

6. I am not trying to "discredit" the doctors I am merely accurately pointing out that if they were given inaccurate information regarding the amount of asbestos in the work place their opinions that the Plaintiff was not exposed to asbestos after 1997 must be flawed. Again, the Defendant has to present a case and they have done an excellent job in the facts, law and argument. In almost every case an ALJ has to believe one witness over another to some degree. It just stands out more obviously in this one. Clearly counsel, in good faith and probably not without reason, believes his witnesses and disagrees with me.

7. I reject all of the Defendant's witnesses to the extent that that testimony states, without qualification, there was no injurious exposure to asbestos in 2012 and there couldn't have been. The Plaintiff, and his co-workers' testified that there was loose asbestos in the work place

in 2012. That is sufficient probative evidence. I need not discuss in minute detail every contrary piece of evidence. *Martin County Board of Education v. Blackburn*, 2019-SC-0635-WC.

8. Again, I understand the arguments and their necessity but the Plaintiff, and his co-workers, testified they were exposed to asbestos in the workplace as late as 2012 and the Defendant's witnesses testified they weren't. I have to pick one, I did, and the rest of the claim falls into place after that.

9. The Defendant asks me to state whether the 2012 exposure was "minimal, infrequent, not intense or inconstant." They leave out sufficient to cause an injurious exposure, which is what I have found and is explained in the Opinion and elsewhere in this Petition.

10. The AWW is supported by the Plaintiff's testimony, which is substantial evidence in this matter.

11. The Defendant is entitled to a credit of \$415.00 a week from August 25, 2012 through March 2, 2013 against past due PTD benefits for unemployment.

On appeal, TruSeal asserts the ALJ erred by failing to find Mills' last injurious exposure occurred in 1997. It claims Dr. Moldoveanu's first report upon which the ALJ relied, cannot constitute substantial evidence pursuant to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), as it is based upon an incorrect medical history. Consequently, as asserted by TruSeal, Mills' claim was filed outside the 20-year statute of repose as set forth in KRS 342.316(4)(a) and his claim should be dismissed. We affirm.

ANALYSIS

TruSeal possessed the burden of proving Mills failed to satisfy the 20-year statute of repose pursuant to KRS 342.316(4)(a). Lizdo v. Gentec Equipment, 74 S.W.3d 703, 705 (Ky. 2002). Since TruSeal was unsuccessful in its burden, the

question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Compelling evidence” is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

The statutory provision pertinent to the issue on appeal is KRS 342.316(4)(a) which reads, in full, as follows:

(4) (a) The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a claim is filed with the commissioner within three (3) years after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease, whichever shall last occur; and if death results from the occupational disease within that period, unless a claim therefor be filed with the commissioner within three (3) years after the death; but that notice of claim shall be deemed waived in case of disability or death where the employer, or its insurance carrier, voluntarily makes payment therefor, or if the incurrence of the disease or the death of the employee and its cause was known to the employer. However, the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard, **except that, in cases of radiation disease, asbestos-related disease, or a type of cancer specified in KRS 61.315(11)(b), a claim must be filed within twenty (20) years from the last injurious exposure to the occupational hazard.** (Emphasis added).

KRS 342.0011(4) defines “injurious exposure” as “that exposure to occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made.”

In Miller v. Tema Isenmann, Inc., 542 S.W.3d 265, 271 (Ky. 2018),

regarding “injurious exposure,” the Kentucky Supreme Court held as follows:

We have held the statute requires only that exposure could independently cause the disease—not that it did in fact cause the disease. “All that is required ... is that the exposure be such as *could* cause the disease independently of any other cause.” *Childers v. Hackney's Coal Co.*, 337 S.W.2d 680, 683 (Ky. 1960).

More recently, in Letcher County Board of Education v. Hall, 576

S.W.3d 123 (Ky. 2019), the Supreme Court stated as follows:

We note that the issue here is not whether Hall’s exposure to the tiles *caused* his mesothelioma. Rather, “the statute requires only that exposure could independently cause the disease--not that it did in fact cause the disease.” *Miller v. Tema Isenmann, Inc.*, 542 S.W.3d 265, 271 (Ky. 2018). *See also Childers v. Hackney’s Creek Coal Co.* 337 S.W.2d 680, 683 (Ky. 1960). It is abundantly clear from the evidence that Letcher County failed to eradicate all asbestos containing material from the school building. It is also clear that this material, including tiling, was present in the school until 2003 and beyond. This evidence compels reversal of the ALJ’s order. **Moreover, barring some clear evidence that Hall was not, or could not have been, exposed to the remaining asbestos material, Letcher County cannot meet its present burden.** In the absence of such evidence, the ALJ’s decision here is clear error. (Emphasis added).

Id. at 127.

Persuasive to the ALJ is Dr. Moldoveanu’s February 5, 2020, Form 108 – CWP – Medical Report. After performing a physical examination of Mills and a medical records review, Dr. Moldoveanu diagnosed asbestosis and opined as follows concerning causation:

Our patient has significant interstitial lung disease and a history of intensive exposure to silica and crystalline quartz. **Patient has had extensive time period of exposure being 1997-2012.** Therefore, based on expert opinion, it is likely that the exposure to dust in the workplace is a significant contributor to the pulmonary fibrosis diagnosed by Dr. Jain. (Emphasis added).

We acknowledge Dr. Moldoveanu modified his opinions in his answers to the Questionnaire and at his deposition after reviewing additional materials. It is important to point out here, however, that Dr. Moldoveanu framed many of his answers in his Questionnaire in equivocal terms such as “to my knowledge.” As a means of example is the following excerpt:

4. Based upon May 30, 1997 Asset Purchase Agreement, March 1993 Asbestos Management Plan and Operations & Maintenance Program, March 7, 1995 Tremco R & D monthly report, and the January 6, 1997 through January 14, 1997 Tremco Asbestos Insulation Management System which establish asbestos was removed from the employees work environment:

Do you agree the patient’s last date of injurious exposure to asbestos occurred on or before January 14, 1997? Yes

Handwritten note: To my knowledge

Nonetheless, assuming, *arguendo*, Dr. Moldoveanu had emphatically changed his opinions, Cepero v. Fabricated Metals Corp., *supra*, would not be implicated. Cepero involved deliberate subterfuge on behalf of the employee in order cover up a significant non-work-related injury to the left knee sustained only two-and-a-half years prior to the alleged work-related injury to the same knee. The prior, non-work-related left knee injury caused Cepero to be confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits

was not informed of this prior injury by the employee and had no other apparent means of becoming informed.

Here, there was no deliberate attempt by Mills to withhold information from Dr. Moldoveanu at the time of his first report. Nor is this a situation where Mills sustained a previous injury of which Dr. Moldoveanu was unaware at the time of this report. In the case *sub judice* Dr. Moldoveanu was presented with additional documents – specifically the May 30, 1997, Asset Purchase Agreement; March 1993 Asbestos Management Plan and Operations & Maintenance Program; March 7, 1995, TremCo R & D monthly report; and the January 6, 1997, through January 14, 1997, TremCo Asbestos Insulation Management System - and altered his opinions regarding Mills' last injurious exposure to asbestos. *However, Dr. Moldoveanu has no expertise in asbestos or asbestos abatement*, and the ALJ is free to reject his opinions in part or in full. As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). Importantly, the ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an

adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Further bolstering the ALJ's determination that Mills' last injurious exposure to asbestos was in 2012 is the testimony of various lay witnesses who worked in the plant and identified the presence of asbestos between 1997 and 2012. Spencer testified that his company, IESO, performed an asbestos-containing material survey at TruSeal in 2008 and nine of out ten locations tested positive for asbestos. Further, Mills, Partin, and Mays testified they encountered raw asbestos after TruSeal took over in 1997, as they were instructed to use the leftover raw asbestos in the mixing room until it ran out. Mills, Engle, Partin, and Mays also addressed the presence of asbestos in the building long after TruSeal ceased using raw asbestos. At the hearing, Mills testified he used a hose to wash the mixing room walls after TruSeal took over. Engle testified that after 1997, the ceiling of the mixing room had three inches of powder most likely consisting of asbestos. Similarly, Partin testified that when TruSeal purchased the building the old insulation in the pipe joints

containing asbestos remained. Finally, Mays testified that the presence of asbestos in the building after 1997 was common knowledge.

The above-cited evidence comprises substantial evidence supporting the ALJ's determination Mills' last injurious exposure to asbestos was in 2012 when the TruSeal factory was torn down. As held by the Supreme Court in both Miller v. Tema Isenmann, Inc., *supra*, and Letcher County Board of Education, *supra*, in order to constitute "injurious exposure" pursuant to KRS 342.316(4), the exposure does not need to cause the disease, only that it *could* independently cause the disease. In Dr. Moldoveanu's February 20, 2020, report, he opined that the dust to which Mills was exposed from 1997 through 2012, which, pursuant to the lay witnesses cited herein, included asbestos, was a "significant contributor" to the asbestosis. Consequently, we affirm the ALJ's determination that Mills' last injurious exposure to asbestos was in 2012, and the filing of Mills' Form 102 on December 12, 2019, complies with the 20-year statute of repose for asbestos-related diseases as set forth in KRS 342.316(4).

Accordingly, the April 16, 2021, Opinion, Award, and Order and the May 17, 2021, Order are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
MAYO-UNDERWOOD BUILDING
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LMS