

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
South Carolina Workers' Compensation )  
Commission, )  
Plaintiff, )  
vs. )  
WestPoint Home, LLC, )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Docket No. 2014-CP-40-2496

ORDER

RECEIVED

Oct 23 2023

SC Court of Appeals

This matter came before this Court on Defendant WestPoint Home, LLC's ("WestPoint Home") Counterclaim for an accounting and award of excess cash collateral with interest. A bench trial was held on August 31, 2022. Appearing at the trial on behalf of the Plaintiff South Carolina Workers' Compensation Commission ("the Commission") were Carly Davis, Esq., Harley Kirkland, Esq., David Leggett, Esq., and Jared Libet, Esq. all from the South Carolina Attorney General's Office. Appearing on behalf of WestPoint Home were Todd Carroll, Esq. of Womble Bond Dickinson and Herbert Biegel, Esq. admitted *pro hac vice*. Based on the testimony and evidence presented during trial, and considering the law governing this dispute, the Court finds and orders as follows:

**BACKGROUND**

This case involves a dispute about entitlement to funds that WestPoint Home deposited in conjunction with its purchase of certain assets of the former WestPoint Stevens, Inc. ("WestPoint Stevens") out of bankruptcy proceedings in the Southern District of New York. WestPoint Stevens was a self-insured employer for purposes of workers' compensation liabilities in South Carolina. At the time WestPoint Home purchased the assets out of bankruptcy in 2005, it deposited \$1.8 million with Bank of America to fund a letter of credit to secure payment of potential workers' compensation liabilities of WestPoint Stevens in South Carolina. The Commission withdrew the entirety of the \$1.8 million deposit and transferred it to an account with the South Carolina Treasurer's Office.

**HISTORICAL BACKGROUND**

The interactions between the parties regarding WestPoint Home's deposit began with contact by WestPoint Home's then-General Counsel to the Commission seeking certain

information as part of an overall goal for “a reduction in the Security Amount held by the State.” Ex. 20, Letter from Funder to Commission (Feb. 22, 2013).<sup>1</sup> The Commission responded that it was “unable to release the information you have requested.” Ex. 21.

WestPoint Home, in turn, responded by explaining that the money was being used to pay claims for former WestPoint Stevens employees, it has a reversionary interest in the remainder of its deposit pursuant to an order of the bankruptcy court, and the repose period for any additional claims has closed. Ex. 22. The Commission responded that it still would not provide any of the requested information to WestPoint Home. Ex. 23.

To resolve the impasse, the Commission filed this Declaratory Judgment on April 17, 2014, seeking adjudication regarding whether WestPoint Home was entitled to receive the information it requested, arguing that the information was strictly confidential and could not be disclosed outside of the agency. WestPoint Home filed a counterclaim seeking a declaration that it is entitled to receive both the requested information and “all monies owed and improperly retained by the State.” WestPoint Homes also seeks pre- and post-judgment interest.

The parties jointly moved to have this case referred to the Business Court, and agreed to bifurcate the case into two issues: (1) is Defendant entitled to access certain records and information maintained by Plaintiff, and (2) is Defendant entitled to recover certain monies that are currently in the custody of the State Treasurer. The parties briefed Issue 1, and the Court initially granted summary judgment in the Commission’s favor on that issue. WestPoint Home sought reconsideration of that ruling. The Court issued an order requiring the Commission to disclose two pieces of information to WestPoint Home: (1) the number of open health care claims currently asserted against the funds being held by the Treasurer; and (2) the balance of the funds that remain on deposit. Order (July 3, 2019). The Commission complied and disclosed the information. The Commission still holds the bulk of WestPoint Home’s deposit, and currently, there are no open claims.

WestPoint Home then sought additional information from the Commission, which it opposed. The Commission ultimately revealed that the data sought by WestPoint Home was in the custody of Key Risk, a third-party administrator that handled and adjusted claims for the Commission. Following that disclosure, WestPoint Home subpoenaed records from Key Risk,

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<sup>1</sup> All references are to the exhibits the parties jointly admitted at trial.

without objection by the Commission. Key Risk produced records showing that the last payment made on any workers' compensation claim from a former WestPoint Stevens employee was May 7, 2008. Thereafter, discovery was conducted by the parties regarding any claims and payment as well as actuarial information calculating the amount of surety required of self-insured employers to pay claims.

Upon review of the full record and the relevant law, the Court finds as follows:

### **FINDINGS OF FACT<sup>2</sup>**

1. WestPoint Stevens was a textile manufacturer with facilities in South Carolina, initially known as WestPoint Pepperell. On May 6, 1988, WestPoint Pepperell acquired four plants from J.P. Stevens, the merger of which became WestPoint Stevens: Abbeville, Calhoun Falls, Clemson, and Seneca.

2. Prior to that acquisition, the employees at the J.P. Stevens plants were insured for workers' compensation claims through private insurance, and injuries to J.P. Stevens employees that occurred prior to the acquisition continued to be covered by insurance. WestPoint Pepperell, on the other hand, was self-insured for purposes of workers' compensation claims. The combined company, WestPoint Stevens, was a self-insured employer for workers' compensation purposes.

3. The Commission requires companies that self-insure for workers' compensation claims to provide sufficient surety for potential claims. The Commission does not have any actuaries on staff and therefore, uses the following actuarial formula for calculating the surety requirement: The average annual claims paid for the last three years, multiplied by a factor of 1.5, and then rounded to the next highest \$50,000.

4. According to Gary Cannon, the Commission's Executive Director, the actuarial formula for calculating the surety amount is the same for bankrupt and non-bankrupt companies. The Commission's actuarial formula is specifically designed to set a surety "at a level sufficient to pay all claims in the event of an insolvency." Ex. 9.

5. In 1997, the Commission's actuarial formula yielded a surety requirement of \$1.4 million for WestPoint Stevens. Ex. 9. WestPoint Stevens and the Commission entered into a

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<sup>2</sup> To the extent any finding of fact listed herein indicates it is a conclusion of law, it shall be treated as such. And to the extent any conclusion of law indicates it is a finding of fact, it shall be treated as such.

“Memorandum of Understanding” that allowed WestPoint Stevens to post a letter of credit with NationsBank to secure payment for potential workers’ compensation claims. See Ex. 13.

6. The Memorandum of Understanding provided, in pertinent part:

...

3. If the Commission is notified that the Letter of Credit is being cancelled or will not be renewed and a new letter of credit or surety bond acceptable to the Commission is not filed with the Commission, the Commission may, at its discretion, draw on the Letter of Credit.

4. The Commission may, at any time, draw on the Letter of Credit if needed to pay any workers’ compensation claim and claims administration expenses which are the responsibility of the Employer.

5. All proceeds drawn on the Letter of Credit shall be deposited with the State Treasurer.

...

Ex. 13.

7. The letter of credit was issued by NationsBank (now Bank of America) in the amount of \$1.4 million. Ex. 12.

8. In 2003, WestPoint Stevens filed for Chapter 11 bankruptcy, Case No. 03-13532 (RDD) (Bankr. S.D.N.Y.). Following that filing, the Commission sent a letter to WestPoint Stevens indicating that its surety for workers’ compensation claims would increase to \$1.8 million. WestPoint Stevens amended its existing letter of credit to increase the amount to \$1.8 million. Exs. 14, 15.

9. WestPoint Stevens was unable to confirm a reorganization plan and liquidated its assets instead of reorganizing. *See generally In re WestPoint Stevens, Inc.*, 600 F.3d 231, 236–37 (2d Cir. 2010) (describing the history of WestPoint Stevens’s bankruptcy proceedings).

10. WestPoint Home was the successful bidder during the bankruptcy sale. The parties entered into an Asset Purchase Agreement in which WestPoint Home purchased only the assets of WestPoint Stevens’s out of the bankruptcy process. Ex. 17. In South Carolina, WestPoint Home purchased the Calhoun Falls, Clemson, and Seneca plants, all of which were former J.P. Stevens facilities.

11. WestPoint Stevens ceased business on August 8, 2005.<sup>3</sup>

12. As a condition of its purchase of assets out of bankruptcy, WestPoint Home agreed to deposit up to \$35 million to collateralize WestPoint Stevens's various existing letters of credit which included the \$1.8 million letter of credit WestPoint Stevens provided to the Commission to cover potential workers' compensation claims in South Carolina.

13. On August 15, 2005, WestPoint Stevens sent a letter to the Commission indicating that its assets had been purchased by "an entity owned and controlled by American Real Estate Holding Limited Partnership (the 'Purchaser')," that "workers' compensation liabilities asserted against [WestPoint Stevens] were not liabilities assumed by the Purchaser," and "no further payments will be made with respect to workers' compensation claims asserted against WestPoint Stevens Inc." Ex. 25.

14. The Asset Purchase Agreement provided that WestPoint Home was depositing its cash with the understanding that it retained the "right to receive back any portion" of that money that was not used. Ex. 17, p. 22. On August 17, 2005, the Commission withdrew the entire \$1.8 million deposit to cover any potential claims because WestPoint Stevens was a self-insured entity with no ability to pay any claims made by its employees after the bankruptcy. See Ex. 37.

15. At the time the Commission withdrew the letter of credit, approximately 45 claims against WestPoint Stevens were open and pending. Exs. 36, 37. WestPoint Home had disclaimed liability for workers' compensation claims brought by the former employees of WestPoint Stevens. The funds withdrawn by the Commission are the only funds available to the Commission for the ongoing claims and any future claims.

16. The Commission hired Key Risk to adjust and administer workers' compensation claims by former WestPoint Stevens employees. The Commission followed the same procedure utilized when bankruptcies occurred with other employers. The Commission transferred \$500,000 to Key Risk to pay claims of former WestPoint Stevens employees in September 2005 and an additional \$500,000 in April 2006.

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<sup>3</sup> From the record, it does not appear that WestPoint Home retained a list of employees of WestPoint Stevens.

17. Key Risk did not need all of the funds sent in the April 2006 transfer. Once it completed administering claims by former WestPoint Stevens employees, Key Risk returned \$364,512.49 to the Commission.

18. The principal remaining from WestPoint Home's deposit is \$1,164,512.39 which has not changed since 2008.

19. Since the last ongoing claims against WestPoint Stevens were closed by Key Risk, no additional funds have been spent. Four claims of asbestosis were brought by former WestPoint Stevens workers in 2011; however, these workers all alleged exposure from working at a manufacturing plant in Whitmire, and this plant was not covered by these self-insured funds. Exs. 32-35.

20. At least three lawsuits were filed against WestPoint Home seeking compensation for asbestos-related illnesses, but none of these plaintiffs asserted claims for workers' compensation. Exs. 41, 42, 44. WestPoint Home was dismissed without prejudice from two of these lawsuits. Exs. 43, 45. The Commission continues to hold the money because it is concerned that claims for asbestos-related illnesses may be asserted in the future.

21. There has not been a new claim since June 21, 2006. The last payment from the money deposited was May 7, 2008, in the amount of \$45.41.

22. As of August 12, 2022, the balance on the account was \$1,711,617.08, which includes the principal remaining from the letter of credit deposited by WestPoint Home as well as earnings accumulated while held by the State Treasurer. There are no open claims.

23. Christopher Burkhalter, testified on behalf of the Commission, and opined that the likelihood that a former WestPoint Stevens employee may contract an illness due to asbestos exposure "will not be known for many years to come" because of the latency period associated with asbestos-related illnesses. Ex. 50.

24. Brian Johnson, an actuary retained by WestPoint Home, prepared a report that applied the Commission's own actuarial formula to the historical data associated with claims from former WestPoint Stevens employees. Utilizing the Commission's actuarial formula, Johnson's opinion is no surety had been needed since 2012, because there has been no payment on a claim since 2008. Ex. 51.

25. The last year in which the Commission's actuarial formula reflects that any surety is needed for potential claims by former WestPoint Stevens employees was 2011. Using the

Commission's actuarial formula for calculating any surety based upon the historical claims data, the surety needed for potential claims was \$50,000. See Ex. 31. Beginning in 2012, the surety amount decreased to \$0.00, as there were no claims paid in the previous three years, and thus, a three-year average is zero. The actuarial calculations are undisputed by both parties.

26. The funds held by the Commission have earned interest every year since 2005, and continue to earn interest. These funds may only be used to pay future workers' compensation claims by former employees of WestPoint Stevens, and not any administrative uses by the Commission. If these funds are exhausted, no other funds are available to pay eligible workers' compensation claims.

### **CONCLUSIONS OF LAW**

WestPoint Home has advanced two primary arguments in support of its request that this Court order the Commission to return the remaining funds. First, WestPoint Home argues that the Commission improperly withdrew the entire amount secured by the letter of credit, as opposed to only those funds needed to pay actual, ongoing claims. Second, WestPoint Home argues that the statute of repose has run on any future claims for asbestos-related illnesses by former WestPoint Stevens workers; and therefore, the Commission has no justification to continue to hold these funds.

#### **1. DRAW DOWN OF THE LETTER OF CREDIT**

The Commission did not act improperly when it drew down the entire letter of credit in 2005. The Commission's actions were consistent with the Memorandum of Understanding between the Commission and WestPoint Stevens as well as its governing regulations. Irrevocable letters of credit are one way in which a prospective self-insured may comply with the Commission's requirements. Regulation 67-1507 governs such letters of credit. This regulation states: "When the self-insurer fails to replace the letter of credit with another accepted proof of compliance, the Commission may demand payment of the letter of credit and deposit the proceeds in the South Carolina State Treasurer's Office to guarantee payment of any claim occurring during the self-insured period." S.C. Code Regs. § 67-1507(D)(4). Further, "[t]he Commission may exercise the letter of credit at any time if the proceeds are needed for payment of a claim that occurred during the self-insured period." S.C. Code Regs. § 67-1507(D)(5). "Regulations authored by the legislature have the force of law." *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995)(citing *Faile v. S.C. Employment Security Commission*, 267 S.C.

536, 230 S.E.2d 219 (1976)). As noted above, the Memorandum of Understanding between WestPoint Stevens and the Commission contains similar language and permits the Commission to draw down the letter of credit in response to a cancellation or a non-renewal or if needed to pay workers' compensation claims. *See Ex. 13.*

In this case, provisions in the Memorandum of Understanding and state regulations were triggered. In August 2005, WestPoint Stevens informed the Commission that no further payments would be made with regard to workers' compensation claims asserted against it. At that time, there were several dozen active claims. The Commission was unquestionably entitled to draw down funds to pay those claims. While WestPoint Home takes issue with the Commission's decision to draw down the entirety of the letter of credit, WestPoint Home provided no evidence that the Commission knew how much money was needed to satisfy these claims. In fact, the evidence demonstrated that the Commission's initial estimate of \$500,000 was insufficient.

Furthermore, WestPoint Home lodged no contemporaneous objection to the Commission's decision to draw down the entire amount, even though by that point WestPoint Home had taken ownership of the assets of WestPoint Stevens. WestPoint Home did not contact the Commission regarding this issue for several years. As noted earlier, even after the pending claims were fully paid, the Commission exercised reasonable judgment in retaining the balance of the funds. The Commission reasonably believed that future claims for asbestos-related illnesses were quite possible and such claims have an exceptionally long latency period. Further, these funds were the only remaining money from which to pay workers' compensation claims once the Commission was notified that no further payments would be forthcoming.

Additionally, the Commission appropriately drew down the full amount of the letter of credit because it was entitled to treat the August 2005 letter as a cancellation or revocation of the letter of credit. While the August 2005 letter did not specifically cancel the letter of credit, it likewise did not specify that the letter of credit would remain in force. The pronouncement in the last sentence that "no further payments will be made with respect to workers' compensation claims asserted against WestPoint Stevens Inc." certainly indicated to the Commission that the letter of credit was ending. The testimony at trial also reiterated and supported the action. *See Tr. Trans. p. 57-58* ("... [W]e were notified that they were not going to be responsible for their payment of Workers' Compensation claims anymore, and they were not going to renew the letter of credit; and so, therefore, we drew down on the letter of credit.") WestPoint Home offered no

evidence to contradict the Commission’s interpretation of this language. Because both the Memorandum of Understanding and Regulation 67-1507(D)(4) authorized the Commission to draw down the entire letter of credit upon notice of non-renewal, this action was fully justified.

## 2. RETENTION OF THE BALANCE OF THE LETTER OF CREDIT

WestPoint Home also argues that the Commission has no justification to keep these funds, as any claims for asbestos-related illnesses brought by a former WestPoint Stevens worker would be barred now by the statute of repose found in the South Carolina Workers’ Compensation law:

Neither an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease, except that due to exposure to ionizing radiation, unless such disease was contracted within one year after the last exposure to the hazard peculiar to his employment which caused the disease, save that in the case of a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years.

S.C. Code Ann. § 42-11-70. The term “contracted” has been defined in occupational diseases cases as “disablement or death.” *Vespers v. Springs Mills, Inc.*, 276 S.C. 94, 97, 275 S.E.2d 882, 884 (1981) (citing *Glenn v. Columbia Silica Sand Co.*, 236 S.C. 13, 112 S.E.2d 711 (1960)). To accept WestPoint Home’s argument would render this statute meaningless, as any occupational disease claims would already be excluded by the statute of repose. WestPoint Home’s argument misapprehends the difference between the statute of repose and the statute of limitations. The relevant statute of limitations provides:

The right to compensation under this title is barred unless a claim is filed with the commission within two years after an accident, or if death resulted from the accident, within two years of the date of death. However, *for occupational disease claims the two-year period does not begin to run until the employee concerned has been diagnosed definitively as having an occupational disease and has been notified of the diagnosis.*

S.C. Code Ann. § 42-15-40. Emphasis added.

“[T]he purpose of ... statutes of repose ‘is to protect the employer against claims which, due to the passing of time, can no longer properly be investigated and defended.’” *Matthews v. E.I. du Pont de Nemours & Co.*, 2018 WL 5978111 (D.S.C. Nov. 13, 2018). However, “Workers’ Compensation laws were intended by the legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault. To

give effect to this legislative intent, workers' compensation statutes are construed liberally in favor of coverage." *Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) (internal citations omitted). "Code provisions relating to occupational diseases should be construed together and in relation to the other provisions of this title." *Vespers*, 276 S.C. at 97, 275 S.E.2d at 884. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. . . . What a legislature says in the text of the statute is considered the best evidence of the legislative intent or will." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (internal citations omitted).

In addition to the aforementioned legal authority, the Commission itself has interpreted, in a number of cases, the application of both Sections 42-11-70 (statute of repose) and 42-15-40 (statute of limitation). In *Truax v. Daniel Construction*, the Appellate Panel reversed the Single Commissioner's determination that Claimant met his burden to prove that he sustained a compensable occupational disease. The Single Commissioner determined that Claimant "contracted" the occupational disease within two years of his last exposure in 1972 pursuant to Section 42-11-70. On appeal, the Appellate Panel determined there was no medical evidence to support that Claimant, pursuant to the statute, "contracted" the disease within two years. The evidence demonstrated that Claimant contracted the disease 32 years after his last exposure not within the two years as required by Section 42-11-70. The Appellate Panel held that in the absence of medical evidence supporting the Single Commissioner's conclusion that Claimant contracted the occupational disease within two years of his last exposure in 1972, the occupational disease claim was not compensable. *Truax v. Daniel Construction, et. al*, 2009 WL 1433538 (S.C. Work. Comp. Comm., Mar. 27, 2009); *see also Bishop v. Westinghouse Elec. Corp.*, 2007 WL 904837 (S.C. Work. Comp. Comm., Jan. 24, 2007) (finding that Claimant's lung disease was not caused by exposure during his tenure at Westinghouse and that he contracted the disease outside the statutory two-year period in Section 42-11-70); *Gibson v. Westinghouse Elec. Corp.*, 2007 WL 869985 (S.C. Work. Comp. Comm., Jan. 24, 2007) (companion case to *Bishop*); *Bethea v. City of Myrtle Beach*, 2019 WL 7424839 (S.C. Work. Comp. Comm., Dec. 13, 2019) (finding that Claimant did not contract lung cancer within two years of his last exposure because of a lack of supporting medical evidence). In these cases, the determination was based on when the disease was contracted, not when the claimant became aware of the diagnosis.

In *Powell v. Yeargin Construction*, the Appellate Panel affirmed the Single Commissioner's determination that Claimant's mesothelioma was caused by his exposure to asbestos during his employment and that the medical evidence supported the conclusion that he contracted the disease within two years of last exposure. Powell's last exposure to asbestos occurred in 1983; however, he was not notified of his diagnosis until 2006. Medical testimony established that an increase in cell division and other changes occur within weeks of exposure. Therefore, his claim was *not* barred under Section 42-11-70. *Powell v. Yeargin Construction*, 2008 WL 5066354 (S.C. Work. Comp. Comm., Oct. 29, 2008). Under WestPoint Home's theory, Powell would have no right to any workers' compensation benefits.

Similarly, in *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999), the South Carolina Court of Appeals affirmed the Commission's determination that the claimant's hepatitis C and aplastic anemia were compensable occupational diseases holding, *inter alia*, that the claimant satisfied both the statute of repose and the statute of limitations for occupational diseases. In *Muir*, the claimant was diagnosed with Hepatitis C on April 21, 1992 and filed his claim with the Commission less than one year later, on March 30, 1993. He therefore satisfied the two-year statute of limitations under Section 42-15-40. *See* 366 S.C. at 296, 519 S.E.2d at 598. The claimant also satisfied the statute of repose in Section 42-11-70 because his last exposure occurred in August of 1992. *See* 366 S.C. at 294-95, 519 S.E.2d at 597-98. In its analysis, the Court of Appeals utilizes the term "exposure" and seems to equate it with the term "contracted." However, the facts indicate that the claimant tested positive for the hepatitis C antibodies in April 1992. The best reading of the Court's language is that, in its opinion, the laboratory results were sufficient medical evidence indicating that the claimant contracted the disease around the date the test results were available, which was within two years of the claimant's last exposure. *Powell* and *Muir* both demonstrate the flaws in WestPoint Home's argument and demonstrate it is perfectly conceivable that a claimant suffering from a latent injury will satisfy both the statute of repose and the statute of limitations and ultimately recover benefits under the Workers' Compensation Act.

The legislative intent behind both Section 42-15-40 (the statute of limitations) and Section 42-11-70 (the statute of repose) is clear and unambiguous. In order to bring a claim for occupational disease, a claimant must file a claim within two years of a definitive diagnosis and notification of that diagnosis of an occupational disease. Under the statute of repose, a claimant

must also prove that the disease was “contracted” within two years of last exposure to the hazardous condition. While this may narrow the pool of potential successful claims, it does not eliminate it.

The import of cases, like *Truax*, *Bishop*, *Gibson*, and *Powell*, is that a judicial determination must be made by a Workers’ Compensation Commissioner, based upon medical evidence at a hearing, as to whether a claim is brought within the statute of limitations and the statute of repose periods. These cases are evidence that a quasi-judicial body is exercising its authority to determine facts and law as presented in varying individual cases. While the Commission is bound by the decisions made by the courts, it is not bound by its own precedent. Potential future cases may present different outcomes. It is entirely possible that the Commission will be required to utilize the funds held by the State Treasurer to satisfy claims brought by the former workers of WestPoint Stevens.

Neither the trial testimony nor WestPoint Home’s expert report support WestPoint Home’s contention that there is no possibility of *future* claims. WestPoint’s expert, Brian Johnson, ACAS, MAA, ARM with Risk International Actuarial Consulting, provided a report opining that based upon the documents from Key Risk and the actuarial formula calculating the surety requirements for self-insurers, the “required surety for this self-insured entity is \$0.00, and that it has been \$0.00 since 2012.” Ex. 51, p. 5.<sup>4</sup> Mr. Johnson bases his report on documents from Key Risk that show no claims have been made in the past three years and currently there are no open prior claims. Exs. 30, 31. The Commission and WestPoint Home do not dispute that the last payment from the fund occurred in 2008. Ex. 31. Johnson’s report fails to address predictions for the likelihood of future claims, especially potential claims arising from asbestos considering its latency period after exposure.

The report and testimony from the Commission’s expert, Mr. Christopher J. Burkhalter, FCAS, MAA with The Burkhalter Group Consulting Actuaries, addresses these deficiencies. Mr. Burkhalter’s report cites statistical evidence from the American Academy of Actuaries indicating that “asbestos exposure is conclusively linked to several medical conditions.” The average latency periods for these diseases range from 10 to 50 years.” Ex. 50, p. 2. According to his report, six South Carolina WestPoint Stevens locations were “included on a list of jobsites where asbestos

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<sup>4</sup> Mr. Johnson did not testify at trial.

exposure was known to have occurred” and according to Commission records, 24 workers’ compensation claims have been filed citing lung damage or asbestos exposure as the cause of injury. Ex. 50, p. 3. Mr. Burkhalter testified that the average latency period of work exposed mesothelioma is 43.4 years. Trans. p. 102, 107. For example, if a 20-year-old, working for WestPoint Stevens at the time of its bankruptcy in 2005 contracted mesothelioma, “there would only be a 96.8% chance that the disease *would not* have manifested” as of the day of the trial. Trans. p. 108. While Burkhalter was unable to quantify the probability of a claim being filed, his report indicates that many people were exposed and that it “is very, very likely that sitting here today, we wouldn’t know about it.” Trans. p. 109. In his opinion, the lack of claims in recent years has little bearing on the potential for future claims. Trans. p. 109, 110.

The Commission’s expert report and testimony presents the possibility of latent future claims with varying degrees of success depending on when a claimant is found to have contracted the disease, when they were notified of their diagnosis, and when a claim is filed. WestPoint Home does not refute this evidence. Though “[t]he court is not required to accept undisputed evidence as establishing the truth where there is reason for disbelief,” there is little reason to doubt the statistics presented by the Commission’s expert because they are consistent with a general understanding of the latency period for asbestos claims. *See Johnson v. Painter*, 279 S.C. 390, 392, 307 S.E.2d 860, 861 (1983). The testimony regarding the status of latent injury claims filed in the past and the date that the statute of limitations and statute of repose have run is not evidence of the probability of future claims, only evidence that some claims will not qualify for payment. *See* Trans. p. 40, 41, 48, 49. Whether a claim is brought within the statute of limitation and/or the statute of repose period is a determination for the Commission’s hearing officers and the courts.

WestPoint Home has not met its burden to prove that the funds held in trust by the State Treasurer, conclusively, will not be needed to satisfy future claims. At this point, determining there is no possibility of a successful future claim is against the weight of the evidence presented at trial. The inability to determine the identity of the employees at the time of the merger only exacerbates the uncertainty of claims. In the absence of statistical evidence quantifying the likelihood of future claims, it would be improper to speculate or determine whether all or even part of the funds should be returned.

Although the Commission is entitled to retain the funds at issue for workers’ compensation claims involving those employees of WestPoint Stevens, the Court and the parties here recognize

that these funds will not be needed forever. Unfortunately, neither WestPoint Home nor the Commission possess a list of potentially eligible WestPoint Stevens' employees; therefore, there is no certainty regarding when the last possible claim expires.

The issues presented in this case may arise again. Primarily, the worker will have to establish that his or her claim meets the requirements of both the statute of repose and the statute of limitations. The Commission may need to develop and establish policies and procedures to govern the ultimate disposition of the money held in the account. Further, although WestPoint Home only purchased the assets of WestPoint Stevens, it continued to transact business. Thus, the parties collectively must establish some policy or procedure to determine the identity of the former employees of the WestPoint Stevens plants who were employed at the time WestPoint Stevens ceased to exist.

### **ORDER**

Based on the evidence presented at trial, the arguments of the parties, and the applicable law, this Court **DECLARES AND ORDERS** that the Commission is entitled to hold and administer the funds held by the State Treasurer for the purpose of paying any future claims arising out of exposure to asbestos as a result of employment with WestPoint Stevens. Any claims for payment related to such exposure must establish that the disease or medical condition was contracted within two years of last exposure as required by the applicable statute of repose. Further, after such revelation, any claims must also be filed within the statute of limitations as set forth in the South Carolina Code.

To the extent there are any remaining outstanding motions regarding procedural or substantive issues in this case, they are **DENIED**.

**AND IT IS SO ORDERED.**

*Electronic signature to follow*



Richland Common Pleas

**Case Caption:** South Carolina Workers Compensation vs Westpoint Home LLC

**Case Number:** 2014CP4002496

**Type:** Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee