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National Guard Vet's Asbestos Suit Revived In Wash. Court

By **Juan Carlos Rodriguez**

Law360, New York (July 23, 2014, 4:45 PM ET) -- A Washington state appeals court on Tuesday revived a former National Guardsman's lawsuit alleging the successor to an asbestos company is liable for damages stemming from his lung cancer diagnosis, holding there is sufficient evidence linking the illness to exposure to the company's products.

Plaintiff Jack Kennedy had appealed a trial court's grant of summary judgment for Saberhagen Holdings Inc., arguing sufficient circumstantial evidence exists to create a genuine issue of material fact as to whether he was exposed to asbestos supplied by Saberhagen. The appeals panel said that asbestos plaintiffs in Washington may establish exposure to a defendant's product through circumstantial evidence.

"We hold sufficient circumstantial evidence exists based on the Kennedy, Elmore, Legas and Hansen (his co-workers) depositions from which a reasonable fact-finder could infer that Kennedy's worksite used Saberhagen's product between 1964 and 1968 and that Kennedy suffered exposure to Saberhagen's product," the panel said.

According to the order remanding the case for further review, Kennedy and Richard Elmore provided evidence that Tacoma Boat Building overhauled a Navy ship in 1966, which included asbestos insulation repair and installation, and that Kennedy was occasionally on board the ship while the company did the repair.

Kennedy and Elmore also stated that Kennedy worked directly with asbestos insulation he retrieved from Tacoma Boat Building on the ship's boiler and a tug boat. Additionally, Kennedy presented evidence that Saberhagen performed insulation work for Tacoma Boat using insulation containing asbestos.

"Two former Tacoma Boat employees testified that they remember Saberhagen as the only insulation contractor working with Tacoma Boat in the 1960s and one testified that he saw his brother-in-law, who worked for Saberhagen, deliver products to Tacoma Boat. Further, Saberhagen could not offer any evidence to either refute or confirm the claims of the witnesses," the panel said.

Saberhagen argued the evidence leads to "impermissible speculation" that Kennedy's exposure came from its insulation materials, but the panel disagreed, pointing out that testimony from two former Tacoma Boat employees shows that Saberhagen worked extensively with Tacoma Boat in the 1960s.

Kennedy was a bystander while the Navy ship had asbestos insulation work performed on it, the panel said, and there is evidence that Kennedy worked directly with asbestos.

"Kennedy's summary judgment evidence is sufficient to raise an inference that Saberhagen's

products were used by Tacoma Boat and at their worksites during the 1960s when Kennedy worked for the Washington Army National Guard," the panel said. "Further, the evidence is sufficient to raise an inference that Kennedy had exposure to those products."

In November 2011, a doctor diagnosed Kennedy with mesothelioma, a cancer in the lining of the lung usually caused by asbestos exposure, the panel said. He filed a lawsuit in 2012 against Saberhagen, alleging that asbestos supplied by Saberhagen proximately caused his mesothelioma. He alleged the exposure occurred between 1964 and 1968 during his employment with the Washington Army National Guard.

Judges Rich Melnick, Lisa Worswick and Jill Johanson sat on the panel.

Counsel information for both parties was not available Wednesday.

The case is Jack Don Kennedy et al. v. Saberhagen Holdings Inc., numbers 439417 and 453819 in the Court of Appeals of the State of Washington, Division II.

--Editing by Jeremy Barker.

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