



## **SPECULATIVE MEDICAL OPINION DID NOT SUPPORT FINDING CLAIMANT'S PRIOR EMPLOYER LIABLE FOR ASBESTOS-RELATED MESOTHELIOMA, DESPITE EVIDENCE OF EXPOSURE AT THE PRIOR EMPLOYER (THIRD DEPT).**

The Third Department determined the Workers' Compensation Board properly found that claimant's mesothelioma was due to asbestos exposure at Kodak, even though claimant was exposed to asbestos in his prior employment at International Paper. Kodak unsuccessfully sought apportionment of the liability with International Paper. Claimant's employment at International Paper ended in 1967 and claimant worked at Kodak from 1967 to 1985. He was diagnosed in 2013:

... Workers' Compensation Law § 44 states that, when a worker's disability due to an occupational disease is established and benefits are awarded, "[t]he total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If, however, such disease . . . was contracted while such employee was in the employment of a prior employer, the employer who is made liable for the total compensation . . . may appeal to the [B]oard for an apportionment of such compensation among the several employers who since the contraction of such disease shall have employed such employee in the employment to the nature of which the disease was due" ... . "Importantly, liability under this provision is premised upon employment at the time of or following the contraction of the compensable occupational disease, not upon the disablement that ensues" ... The determination of when an employee contracted the disease, which refers to "when the disease process begins, as evidenced by symptoms, diagnosis or other medical evidence that shows [that the] disease process must have existed" ... , is a question of fact to be determined by the Board, which will be upheld if supported by substantial evidence ... . \* \* \*

While the Board recognized that there may be a delay of up to 50 years between exposure to asbestos and a mesothelioma diagnosis, it correctly found that the medical opinions that decedent's prior employment contributed to his condition were speculative and insufficient ... . [Matter of Gimber v Eastman Kodak Co., 2020 NY Slip Op 01875, Third Dept 3-16-20](#)