Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

W. RUSSELL SIPES
TODD BARNES
George & Sipes, LLP
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

TINA M. BENGS
Hoeppner Wagner & Evans, LLP
Merrillville, Indiana

FILED
Mar 17 2011, 9:43 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

JAMES FREELS,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 93A02-1007-EX-761
	)	
BETHLEHEM STEEL CORPORATION,	)	
	)	
Appellee-Defendant.	)	
	)	

APPEAL FROM THE FULL INDIANA WORKER'S COMPENSATION BOARD
Application Number: 0-184281
Linda P. Hamilton, Chairperson

March 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

James Freels contends that the Indiana Worker's Compensation Board erred in dismissing his Occupational Disease Act claim against his employer Bethlehem Steel Corporation. He argues that the "absolute bar" provision of the Occupational Disease Act should not apply until all of his third-party claims are resolved. Based on the Indiana Supreme Court's opinion in *Smith v. Champion Trucking*, 925 N.E.2d 362 (Ind. 2010), and this Court's recent opinion in *Niegos v. ArcelorMittal Burns Harbor LLC*, 940 N.E.2d 323 (Ind. Ct. App. 2010), *trans. pending*, we conclude that Freels' failure to notify Bethlehem Steel before settling with some, but not all, of the third parties is fatal to his claim and therefore affirm the Board.

Facts and Procedural History

The following facts are either undisputed or stipulated to by the parties in the proceedings before the single hearing member of the Indiana Worker's Compensation Board. In May 2006, Freels was diagnosed with lung cancer allegedly contracted as a result of asbestos exposure while employed by Bethlehem Steel. In December 2006, Freels filed an Application for Adjustment of Claim with the Worker's Compensation Board pursuant to the Occupational Disease Act alleging that exposure to asbestos contributed to his lung cancer. To date, no Occupational Disease Act benefits have been paid to Freels or on behalf of Freels, as this claim has been disputed from the beginning.

Freels also filed a complaint in Marion Superior Court against approximately seventy-eight third-party defendants that manufactured, sold, or used the asbestos products that allegedly caused his cancer. In addition, Freels filed claims with trusts

established by order of United States Bankruptcy courts on behalf of bankrupt companies that manufactured, sold, or used the asbestos products that allegedly caused his cancer. Freels received gross settlement proceeds in the amount of $93,551.14 from some of the third parties, including those that entered into bankruptcy proceedings. Freels did not notify Bethlehem Steel before settling with any of these third parties. Freels still has claims pending against over fifty third parties.

In December 2009, Hearing Member A. James Sarkisian dismissed Freels' claim because, among other reasons, Freels failed to notify Bethlehem Steel before settling with the third parties. In June 2010, the full Board adopted Hearing Member Sarkisian's decision. Freels now appeals the dismissal of his claim.

Discussion and Decision

Freels appeals the Worker's Compensation Board's dismissal of his Occupational Disease Act ("ODA") claim against Bethlehem Steel. Freels contends that the Board erroneously concluded that the "absolute bar" provision of the ODA applied because he had settled some, but not all, of his claims against the third parties. Bethlehem Steel counters, among other arguments, that Freels' failure to notify it before settling with the third parties forfeited his rights under the ODA and therefore his claim was properly dismissed. Based on the Indiana Supreme Court's opinion in *Smith v. Champion Trucking*, 925 N.E.2d 362 (Ind. 2010), and this Court's recent opinion in *Niegos v. ArcelorMittal Burns Harbor LLC*, 940 N.E.2d 323 (Ind. Ct. App. 2010), *trans. pending*, we conclude that Freels' failure to notify Bethlehem Steel before settling with the third parties is fatal to his claim.

In reviewing a worker's compensation decision, an appellate court is bound by the factual determinations of the Worker's Compensation Board and may not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion. *Christopher R. Brown, D.D.S., Inc. v. Decatur Cnty. Mem'l Hosp.*, 892 N.E.2d 642, 646 (Ind. 2008). We examine the record only to determine whether there are any substantial evidence and reasonable inferences that can be drawn therefrom to support the Board's findings and conclusion. *Id.* As to the Board's interpretation of the law, an appellate court employs a deferential standard of review to the interpretation of a statute by an administrative agency charged with its enforcement in light of its expertise in the given area. *Id.* The Board will only be reversed if it incorrectly interpreted the Worker's Compensation Act. *Id.*

The ODA is part of Indiana's worker's compensation scheme. *Roberts v. ACandS, Inc.* (*Roberts II*), 873 N.E.2d 1055, 1058 (Ind. Ct. App. 2007); *Roberts v. ACandS, Inc.* (*Roberts I*), 806 N.E.2d 1, 3 (Ind. Ct. App. 2004). More than twenty years after introduction of the Worker's Compensation Act ("WCA"), the Indiana General Assembly enacted the ODA, Ind. Code ch. 22-3-7, in order to protect employees by providing compensation, without regard to fault, for those who contracted occupational diseases that generally were not covered under the WCA. *Gray v. Daimler Chrysler Corp.*, 821 N.E.2d 431, 435 (Ind. Ct. App. 2005), *reh'g denied*; *Roberts I*, 806 N.E.2d at 3. Therefore, as with provisions of the WCA, provisions of the ODA should be liberally construed in favor of the employee to effectuate the Act's humanitarian purpose of

providing injured workers with an expeditious and adequate remedy. *Gray*, 821 N.E.2d at 435.

The ODA provides the exclusive remedy for an employee against his employer when the employee develops an occupational disease. Ind. Code § 22-3-7-6; *Niegos*, 940 N.E.2d at 326; *Roberts I*, 806 N.E.2d at 3. In enacting the WCA, the legislature never intended to abridge the remedies an employee has in tort against third parties. *Roberts I*, 806 N.E.2d at 3. The same is true for the ODA. *Id.*; *see generally* Ind. Code § 22-3-7-36 (discussing third party actions). While the ODA permits employees to seek worker's compensation benefits as well as seek recovery from third parties, it also contains provisions to further the general policy of prohibiting an employee from obtaining a "double recovery" for his injury. *Niegos*, 940 N.E.2d at 326; *Roberts I*, 806 N.E.2d at 3. Specifically, Indiana Code section 22-3-7-36(a) provides that if an injured employee has received worker's compensation benefits and later settles a claim against a responsible third party, "then from the amount received by [such] employee," the employer or its occupational disease insurance carrier is to be reimbursed for its expenditures, "and the liability of the employer or such employer's occupational disease insurance carrier to pay further compensation or other expenses shall thereupon terminate . . . ." Subsection (b) contains a similar provision applicable to settlements made before any worker's compensation benefits have been paid, which is the scenario in this case. That is, when an employee, "not having received compensation," settles with a third party, "then the employer or such employer's occupational disease insurance carrier shall have no

liability for payment of [compensation or expenses] whatsoever . . . ." I.C. § 22-3-7-36(b).

In *Niegos*, Daniel Niegos died of lung cancer allegedly contracted as a result of asbestos exposure while employed by ArcelorMittal. 940 N.E.2d at 325. Kathy Niegos filed an ODA claim on behalf of her deceased husband. *Id.* In addition, Kathy filed a complaint against thirty-six third-party defendants who manufactured, sold, or used the asbestos products that allegedly caused Daniel's cancer. Kathy settled with several of the third-party defendants and received $122,327.92. *Id.* Kathy, however, did not notify ArcelorMittal before settling with any of the third-party defendants. *Id.* Hearing Member Sarkisian dismissed Kathy's claim because, among other reasons, she failed to notify ArcelorMittal before settling with the third parties. *Id.* The full Board adopted Sarkisian's decision. *Id.*

On appeal, ArcelorMittal argued, among other things, that the Board properly dismissed Kathy's ODA claim "because [Kathy] failed to notify it (as required by section 22-3-7-36(g)) . . . or obtain its consent for any of the third-party settlements she ha[d] entered into." *Id.* We first noted that while notification is required, no provision of Section 22-3-7-36 specifically provides that dismissal of the ODA action is an appropriate remedy. *Id.* Nevertheless, we highlighted that the Indiana Supreme Court had recently interpreted Indiana Code section 22-3-2-13 of the WCA (which is essentially identical to Section 22-3-7-36 of the ODA, which is at issue here) in *Champion Trucking*. In that case, our Supreme Court held that "an employer's worker's compensation liability terminates when the injured employee settles with a third-party tortfeasor without first

obtaining the employer's consent." *Champion Trucking*, 925 N.E.2d at 365. The Court stated:

> Because the settlement with a third party terminates the employer's opportunity to recover its expenses from the party responsible for the employee's injuries, these absolute bar provisions are designed to prevent employees from settling with third parties without the employer's consent. We have previously noted that the twin purposes of Section 13 are protecting the employer by providing it with subrogation rights, and preventing double recovery by the employee. In particular, the purpose of the termination provision is to prevent employees from signing away the rights of employers. Most recently, in *Doerr v. Lancer Transport Services*, 868 N.E.2d 890 (Ind. Ct. App. 2007), *trans. denied*, the Court of Appeals cited this consideration in upholding the absolute bar. Because the worker had not yet received worker's compensation benefits, the absolute bar provision in Paragraph 2 of Section 13 [equivalent to Section 22-3-7-36(b), which is at issue here] applied. However, the court articulated the reasoning behind the absolute bar provisions in both Paragraphs 1 and 2:
>
>> Our interpretation of Section 13 [equivalent to Section 22-3-7-36], as a whole, is the legislature was attempting to protect simultaneously the financial interests of both the employee and employer. Permitting an employee to obtain a "quick and cheap" settlement with the third-party tortfeasor, and then requiring an employer to exchange unlimited benefits for whatever miniscule settlement the employee might enter, does not protect the financial interests of the employer.
>
> *Id.* at 893.

Champion Trucking, 925 N.E.2d at 366 (some citations omitted). The Court also highlighted that "[f]or at least twenty years the Court of Appeals has held that if an employee settles with a third party without first obtaining [the] employer's consent, the employer's sole avenue for reimbursement of worker's compensation payments is through the employee, and the employer may not continue to pursue the third party." *Id.* at 368.

In *Niegos*, we said that "[Kathy] provides us with no reason, and we can think of none, to depart from th[e] rule [that an employer's worker's compensation liability terminates when the injured employee settles with a third-party tortfeasor without first obtaining the employer's consent] in the similar ODA context." 940 N.E.2d at 327. We reasoned that the ODA and WCA are both part of the same overall worker's compensation scheme, and "the language and import of the provisions at issue here and those at issue in *Smith* are, for all intents and purposes, identical. Moreover, it is clear to us that the same policy considerations that informed the *Smith* decision apply with equal force here." *Id.* We therefore concluded:

> These policy considerations are especially compelling in light of long-standing precedent that "if an employee settles with a third party without first obtaining [the] employer's consent, the employer's sole avenue for reimbursement of worker's compensation payments is through the employee, and the employer may not continue to pursue the third party." [*Smith*, 925 N.E.2d] at 368 (citing *State v. Mileff*, 520 N.E.2d 123 (Ind. Ct. App. 1988)). Although this rule does serve the interest of finality from the point of view of the third party, *id.*, it can have the effect of working great injustice on the employer. By settling with third parties, [Kathy] has extinguished any claims ArcelorMittal might have had against those third parties, all without providing notice or the opportunity to participate in the process.
>
> It is undisputed that [Kathy] failed to notify ArcelorMittal of any of the settlements she entered into with [the] third-party defendants. In so doing, [Kathy] signed away ArcelorMittal's rights without its consent or notice, preventing it from protecting its interests during settlement negotiations. As such, [Kathy] has forfeited her right to proceed against ArcelorMittal under the ODA, and the Board properly dismissed her claim.

Id. at 327-28 (footnote and citation omitted).

Likewise, in this case, it is undisputed that Freels failed to notify Bethlehem Steel of any of the settlements he entered into with the third-party defendants. In so doing,

Freels signed away Bethlehem Steel's rights without its notice or consent, thereby preventing Bethlehem Steel from protecting its interests during the settlement negotiations. *See Champion Trucking*, 925 N.E.2d at 367 ("Despite its unfortunate result in this case, we think the language of both Paragraph 1 and Paragraph 2 of Section 13 of the WCA [equivalent to Indiana Code section 22-3-7-36(a), (b)] unequivocally impose[s] a bright line rule that settlement with a third party without the employer's consent bars a worker's compensation claim."), 367 (noting that "notice and consent to settlement will not often be a burdensome requirement"). Freels has forfeited his right to proceed against Bethlehem Steel under the ODA. We therefore affirm the Board's dismissal of Freels' ODA claim.

Affirmed.

BAKER, J., and BARNES, J., concur.