

60-4902. Same; claim requirements. (a) Physical impairment of the exposed person shall be an essential element in any civil action alleging a silica or asbestos claim.

(b) No person shall bring or maintain a civil action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima facie showing of physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor. Such a prima facie showing shall include:

(1) Evidence confirming that the diagnosing, competent medical authority has taken, or has directly supervised the taking of, a medically appropriate occupational, exposure, medical and smoking history from the exposed person or, if that person is deceased, from a person who is knowledgeable about the exposures that form the basis for the claim.

(2) Evidence sufficient to demonstrate that at least 10 years have elapsed between the date of first exposure to asbestos and the date of diagnosis.

(3) A determination by a competent medical authority, on the basis of a medical examination and pulmonary function testing, that the exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(4) A diagnosis by a competent medical authority of asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis, or radiological evidence of diffuse pleural thickening.

(5) A determination by a competent medical authority that asbestosis or diffuse pleural thickening, rather than chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has:

(A) Total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

(B) forced vital capacity below the lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal; or

(C) a chest x-ray showing small, irregular opacities of s, t or u, graded at least 2/1 on the ILO scale.

(6) A diagnosis by a competent medical authority that the exposed person's medical findings and impairment were proximately caused by asbestos exposure, as revealed by the exposed person's occupational, exposure, medical and smoking history. A diagnosis which only states that the medical findings and impairment are consistent with or compatible with exposure to asbestos does not meet the requirements of this paragraph.

(c) No person shall bring or maintain a civil action alleging an asbestos claim which is based upon an asbestos-related cancer in the absence of a prima facie showing which shall include all of the following minimum requirements;

(1) A diagnosis by a competent medical authority, who is board certified in pathology, pulmonary medicine, gastroenterology or oncology, of a primary asbestos-related cancer and that exposure to asbestos was a substantial contributing factor to the condition.

(2) Evidence sufficient to demonstrate that at least 10 years have elapsed between the date of first exposure to asbestos and the date of diagnosis of the primary asbestos-related cancer.

(3) A diagnosis by a competent medical authority that the exposed person's asbestos-related cancer was proximately caused by asbestos exposure, as revealed by the exposed person's occupational, exposure, medical, and smoking history. A diagnosis which only states that the lung cancer is consistent with or compatible with exposure to asbestos does not meet the requirements of this subsection.

(d) In a civil action alleging an asbestos claim based upon mesothelioma, no prima facie showing is required.

(e) (1) No person shall bring or maintain a civil action alleging a silica claim based on a nonmalignant condition in the absence of a prima facie showing that the:

(A) Exposed person has a physical impairment;

(B) physical impairment is a result of a medical condition; and

(C) person's exposure is a substantial contributing factor to the medical condition.

(2) The prima facie evidence shall include:

(A) Evidence confirming that a competent medical authority has taken, or has directly supervised the taking of, a medically appropriate occupational, exposure and smoking history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the silica claim for a nonmalignant condition, including the general nature and duration of the exposure, to extent known;

(B) if the claim is based upon a respiratory impairment, a diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person:

(i) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment; and

(ii) the exposed person has silicosis based at a minimum on radiological or pathological evidence of silicosis.

(C) A diagnosis by a competent medical authority that the exposed person's medical findings and impairment were proximately caused by silica as revealed by the exposed person's occupational, exposure, medical and smoking history. A diagnosis which only states that the medical findings and impairment are consistent with or compatible with exposure to silica does not meet the requirements of this paragraph.

(f) (1) No person shall bring or maintain a civil action alleging that silica caused that person to contract lung cancer in the absence of a prima facie evidence showing that the:

(A) Exposed person has lung cancer; and

(B) the person's exposure is a substantial contributing factor to the lung cancer.

(2) The prima facie evidence shall include:

(A) A diagnosis by a competent medical authority that:

(i) The exposed person has primary lung cancer; and

(ii) exposure to silica is a substantial contributing factor to the cancer.

(B) Evidence sufficient to demonstrate that at least 10 years have elapsed between the date of first exposure to silica and the date of diagnosis of the cancer.

(C) Evidence of the exposed person's substantial occupational exposure to silica.

(D) A diagnosis by a competent medical authority that the exposed person's lung cancer was proximately caused by silica exposure, as revealed by the exposed person's occupational, exposure, medical and smoking history. A diagnosis which only states that the lung cancer is consistent with or compatible with exposure to silica does not meet the requirements of this paragraph.

(g) (1) No person shall bring or maintain a civil action alleging a silica or asbestos claim based on wrongful death of an exposed person, in the absence of a prima facie showing that the:

- (A) Death of the exposed person was the result of a physical impairment;
- (B) death and physical impairment were the result of a medical condition; and
- (C) person's exposure to silica or asbestos was a substantial contributing factor to the medical condition.

(2) The prima facie evidence shall include:

(A) A diagnosis by a competent medical authority that exposure to silica or asbestos was a substantial contributing factor to the death of the exposed person;

(B) evidence sufficient to demonstrate that at least 10 years have elapsed between the date of first exposure to asbestos and the date of death of the exposed person; or, in the case of a wrongful death based on silica-related cancer, evidence sufficient to demonstrate that at least 10 years have elapsed between the date of first exposure to silica and the date of diagnosis of the cancer.

(C) Evidence of the exposed person's substantial occupational exposure to silica or exposure to asbestos.

(D) A diagnosis by a competent medical authority that the exposed person's death was proximately caused by silica or asbestos exposure, as revealed by the exposed person's occupational, exposure, medical and smoking history. A diagnosis which only states that the medical findings and impairment are consistent with or compatible with exposure to silica or asbestos does not meet the requirements of this paragraph.

(3) To the extent otherwise permitted by state law, if an heir files a civil action that alleges a silica or asbestos claim based on wrongful death and further alleges in the action that the death was the result of living with an exposed person who, if the civil action had been filed by the exposed person, would have met the requirements specified in subparagraph (C) of paragraph (2) of subsection (g) of this section, and amendments thereto, and that the decedent lived with the exposed person specified in subsection (kk) of K.S.A. 2014 Supp. 60-4901, and amendments thereto, for silica claims, or with the exposed person during the time of the exposed person's exposure to asbestos for asbestos claims, the decedent is considered as having satisfied the requirements specified in subparagraph (C) of paragraph (2) of subsection (g) of this section and amendments thereto.

(4) In a civil action alleging an asbestos claim for wrongful death of an exposed person based on mesothelioma, no prima facie showing is required.

(h) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall be consistent with the technical recommendations for examinations, testing procedures, quality assurance, quality control and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., as in effect on March 1, 2006 and the interpretive standards set forth in the official statement of the American thoracic society entitled, "lung function testing: Selection of reference values and interpretive strategies," as in effect on March 1, 2006.

(i) (1) The court's findings and decision on the prima facie showing that meets the requirements of subsections (b) through (h) of this section shall not:

(A) Result in any presumption at trial that the exposed person has a physical impairment that is caused by a condition related to silica or asbestos exposure.

(B) Be conclusive as to the liability of any defendant in the case.

(C) Be admissible at trial.

(2) If the trier of fact is a jury:

(A) The court shall not instruct the jury with respect to the court's findings or decision on the prima facie showing; and

(B) neither counsel for any party nor a witness shall inform the jury or potential jurors of the prima facie showing.

(j) A court may consolidate for trial any number and type of silica or asbestos claims with the consent of all the parties. In the absence of such consent, the court may consolidate for trial only claims relating to the exposed person and members of such person's past or present household.

History: L. 2006, ch. 196, § 2, July 1.