IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ALBERT DELPIZZO	)	
	)	
Employee Below-Appellant,	)	
	)	C.A. No. 03A-07-005 RRC
v.	)	
	)	
AGILENT TECHNOLOGIES	)	
	)	
and	)	
	)	
HEWLETT-PACKARD COMPANY	)	
	)	
Employers Below-Appellees,	)	

Submitted: August 16, 2004
Decided: November 16, 2004

MEMORANDUM OPINION

UPON APPEAL FROM A DECISION OF
THE INDUSTRIAL ACCIDENT BOARD.

REVERSED AND REMANDED.

Richard T. Wilson, Esquire, Law Offices of Peter G. Angelos, P.C., Wilmington, Delaware, Attorney for Appellant.

Scott A. Simpson, Esquire and Scott R. Mondell, Esquire, Elzufon, Austin, Reardon, Tarlov and Mondell, P.A., Wilmington, Delaware, Attorneys for Appellee Agilent Technologies.

R. Stokes Nolte, Esquire, Nolte, Brodoway & Saltz, P.A., Wilmington, Delaware Attorney for Appellee Hewlett Packard Company.

COOCH, J.

I. INTRODUCTION

This is an appeal of a decision of the Industrial Accident Board ("Board") that had granted a motion to dismiss of Appellees Agilent Technologies[1] and Hewlett-Packard (collectively "Employers") of a "Petition for Compensation Due" filed by Appellant Albert DelPizzo ("Employee") on jurisdictional grounds. The issue on appeal is whether on the undisputed facts the Board had jurisdiction to hear Employee's claim. Employee had been exposed to a harmful substance while working in Delaware and was later exposed to the same substance while working in another state. His action before the Board was against the successors-in-interest to his previous Delaware employer.

Because the Board found that it was statutorily barred from exercising jurisdiction, it dismissed Employee's claim. The Board held that under 19 *Del. C.* § 2303(a) it did not have jurisdiction to hear Employee's petition because Employee did not meet any of the "four scenarios [in § 2303(a)] under which the [Workers' Compensation] Act may envelop[] industrial accidents or exposures occurring outside the borders of this State as though they occurred within Delaware's borders."[2] Alternatively, the Board held in effect that the "last

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[1] The exact name of this business entity is unclear from the record.

[2] The Industrial Accident Board's Decision at 3 (hereinafter "Board's Decision at _.").

injurious exposure" rule (but without specifically referring to that rule by name) acted as a jurisdictional bar to an award of workers' compensation benefits by divesting the Board of jurisdiction to hear a claim brought by an employee who had been exposed to a harmful substance while working in Delaware but who later was exposed to the same substance while working in another state. The Board found that "[e]ven assuming Claimant had any possible exposure to asbestos in [Delaware], it is clear any remaining or final exposures occurred in Pennsylvania."[3]

The Board's finding that Employee was not exposed to asbestos while working in Delaware is not supported by the record. No evidence was presented in the stipulated facts regarding possible exposure to asbestos by Employee while he was working in Delaware. The Board went beyond the stipulated facts and the petition when it found that Employee was not exposed to asbestos while employed in Delaware from 1959 to 1961.

The "last injurious exposure" rule, recognized in Delaware, is not a jurisdictional rule to bar recovery but is rather a way for the Board to determine which employer (among more than one previous employer) or insurance carrier was "on risk." The rule facilitates a claimant's ability to receive workers'

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[3] Board's Decision at 5.

compensation benefits due to an occupational disease. Unlike the typical physical injury suffered by an employee in the course of employment, it may be difficult, if not impossible, to determine when an occupational disease injury occurred or to apportion liability to several employers. The rule, in general, puts the last employer (or its insurance carrier) "on risk" to absorb the entire liability for the employee's illness, regardless of the length of time that the employee was employed or covered by the employer's workers' compensation carrier. A "problem" can arise, as in the instant case, when an employee who is potentially eligible for workers' compensation benefits in one state is later exposed to a harmful substance while working for an employer in another state.

This Court holds that 1) the Board committed legal error when it reached the apparently disputed factual issue of whether or not Employee was exposed to asbestos while working in Delaware, and 2) the Board committed legal error when it misapplied the "last injurious exposure" rule in that it applied the rule as a jurisdictional determinant and not as a rule to facilitate the recovery of workers' compensation benefits for employees suffering from an occupational disease. The decision of the Board is reversed and the case is remanded to the Board for further proceedings.

II. FACTUAL AND PROCEDURAL HISTORY

All pertinent facts for purposes of this appeal are undisputed. The parties stipulated that the following facts applied to the jurisdictional issue presented to the Board:

1.	6/29/59	Albert DelPizzo was hired by F&M Scientific Corporation at New Castle County Airbase;
2.	6/61-9/61	F&M Scientific Corporation relocated from New Castle County Airbase to Route 41 and Starr Road, Avondale, Pennsylvania;
3.	8/9/65	Hewlett-Packard Corporation acquired F&M Scientific and Mr. DelPizzo becomes an employee of Hewlett-Packard;
4.	1973	By early 1973, cutting of insulation sheets containing asbestos used in the manufacturing process was no longer performed at Hewlett-Packard's Avondale, Pennsylvania site. In addition to sheets of insulation, insulated wires were also used in the manufacturing process, some of which may have contained asbestos;
5.	1977	No asbestos containing wires were used in the manufacturing process after 1977, eliminating all use of potentially asbestos containing products from Hewlett-Packard's manufacturing Process;
6.	10/92	Hewlett-Packard Corporation moved to the Little Falls Corporate Center, 2850 Centerville Road, Wilmington, DE 19808. The Little Falls site was designed in 1988, and no asbestos whatsoever was used in construction of the Little Falls site. The construction of the Little Falls site was substantially complete by September 1992 and by October 1992, all of the Avondale, Pennsylvania operations had transferred to Little Falls, including the employment of Mr. DelPizzo. By this time, no asbestos containing products had been used in Hewlett-Packard's manufacturing process since, at the very latest, 1977 and no asbestos containing products or materials were used in the construction of the Little Falls site in Wilmington Delaware;

7.	1/30/99	Albert DelPizzo took retirement/voluntary severance under a voluntary severance incentive plan offered by Hewlett-Packard. His employment with Hewlett-Packard ended on January 30, 1999.
8.	2001	Agilent Technologies acquired Hewlett-Packard's Little Falls site operations.[4]

Notably, the parties did not stipulate as to whether Employee was, or could have been, exposed to asbestos while working in Delaware.[5]

On August 20, 2002 Employee filed a petition seeking compensation due from Agilent with the Board. A petition was also filed against Hewlett-Packard on January 30, 2003. Agilent is the successor-in-interest to Hewlett-Packard. The two petitions were consolidated and a hearing was heard before the Board on June 3, 2003. The Board issued its decision on June 30, 2003 granting Appellees' motion to dismiss because of lack of jurisdiction and an application of the "last injurious exposure" rule. This appeal followed.

III. STANDARD OF REVIEW

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[4] Agilent's Answering Brief at 10 (hereinafter "Agilent's Ans. Br. at _.").

[5] "It was also stipulated by the parties that by agreeing to the above facts . . . the parties in no way waive any arguments or defenses on any other issues relating to the merits of the Claimant's petition, including . . . statute of limitations, nature and extent of exposure to asbestos or any other disease causing elements, causation of any alleged injuries and/or any occupational diseases, the reasonableness and necessity of any medical treatment Claimant may have received as a result of any alleged occupational injuries and/or diseases, or any other claims or defenses associated with the petition." Agilent's Ans. Br. at n.1.

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. On appeal from a decision of an administrative agency, the reviewing court must determine whether the agency ruling is supported by substantial evidence and is free from legal error.[6] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[7] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[8] If the decision is supported by substantial evidence, the Court must affirm the decision of an agency even if the Court might have, in the first instance, reached an opposite conclusion.[9] When the issue raised on appeal is exclusively a question of the proper application of the law, the review by this Court of such legal determination is *de novo*.[10]

IV. THE BOARD'S DECISION

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[6] *Jackson v. Ametek, Inc./Haveg Division*, 2003 Del. Super. LEXIS 346 *4-5.

[7] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp*., 517 A.2d 295, 297 (Del. Super. Ct. 1986), *appeal dismissed,* 515 A.2d 397 (1986).

[8] *Johnson v. Chrysler Corp.*, 213 A.2d 59, 66 (Del. 1965).

[9] *Brogan v. Value City Furniture*, 2002 Del. Super. LEXIS 88 at 6 (Del. Super. Ct.)

[10] *Darling v. Sara Lee Corp.*, 2004 Del. Super. LEXIS 219 *4.

The only issue before the Board in its consideration of Employers' motion to dismiss was the legal question on undisputed facts of whether or not the Board had jurisdiction to hear Employee's petition.[11] The Board was presented with the basic facts as stipulated to by the parties, which the Board accepted, and no witnesses were called.[12] The Board dismissed Employee's petition on two grounds. The Board found that it did not have jurisdiction to hear the petition because Employee had not been exposed to asbestos while employed in Delaware nor did Employee meet any of the "four [exceptions found in 19 *Del. C.* 2303(a),] under which the [Workers' Compensation] Act may envelop[] industrial accidents or exposures occurring outside the borders of this State as though they occurred within Delaware's borders."[13] The Board explained the four exceptions as follows:

> the first of these exceptions allows for Delaware's Workers' Compensation Act to apply if an employee is injured outside this State but his employment is principally located in Delaware. The second exception permits applicability if the employee was hired, by contract, in Delaware for employment not principally located in any other state. The third exception . . . allows for the employee to be hired in Delaware [for employment] principally located in another state . . . [where] that state's workers' compensation law is

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[11] Transcript of 6/3/03 IAB Hearing at 2, 26 (hereinafter "Hearing at _"); Appellant's Op. Br. at 4.

[12] The Industrial Accident Board's Decision at 2 (hereinafter "Board's Decision at _."; Hearing at 2.

[13] Board's Decision at 3.

> not applicable to the employee. The last exception deals with foreign, non-continental employment where a contract for hire was made in Delaware.

The Board further explained why Employee did not meet the exceptions of § 2303:

> [t]he stipulation of facts makes clear that Claimant was an employee of F&M Scientific in Delaware from 1959 until 1961. [Citation omitted]. From 1961 until 1992, Claimant was employed in Pennsylvania by F&M and HP. At all pertinent times of exposure, which is agreed to have ended in 1977, [Employee] was employed in the State of Pennsylvania . . . [and] [n]o evidence was presented to demonstrate that [Employee] had any possibility of asbestos exposure for the two year period during which he worked in Delaware from 1959 to 1961 . . . As [employee] was employed in Pennsylvania during the relevant periods of potential exposure and Pennsylvania law covers [Employee's] exposure, the Board ends its inquiry at this point. Claimant admitted he was not employed principally in Delaware. He has failed to establish that he was contracted in Delaware to work in Pennsylvania. The evidence supports that [Employee's] company simply transferred its site to Pennsylvania. [Employee] is clearly covered for any occupational exposure in Pennsylvania by that state's Workers' Compensation Act. As such, there exists no basis upon which that Board can find jurisdiction to hear [Employee's] case.[14]

Alternatively, the Board found that it did not have jurisdiction to hear Employee's claim even if he had been exposed to asbestos in Delaware because Employee was "[last] employed in Pennsylvania during the relevant periods of potential exposure," and Pennsylvania law covers his injury.[15] Without explicitly

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[14] Board's Decision at 5.

[15] Board's Decision at 5.

stating so, the Board applied the "last injurious exposure" rule to place the locus for Employee's injury in Pennsylvania. The Board found that "[a]t all pertinent times of exposure, which is agreed to have ended in 1977, [Employee] was employed in the State of Pennsylvania."[16] Under the Board's analysis it found the last aggregate exposure occurred in Pennsylvania and that there was no evidence of exposure in Delaware; therefore, the "last injurious exposure" occurred in Pennsylvania. The Board dismissed Employee's claim and agreed with Employers that the "last injurious exposure" rule divested the Board of jurisdiction to hear Employee's claim.

V. CONTENTIONS OF THE PARTIES

A. Employee's Argument

Employee argues that the Board erred as a matter of law in finding that it lacked jurisdiction over his workers' compensation claim. Employee asserts that the Board committed two errors: 1) the Board impermissibly based its decision on an unstipulated factual finding (that Employee was not exposed to asbestos in Delaware) without hearing any evidence to support or refute that finding and 2) that the Board misapplied the "last injurious exposure" rule when it used the rule as

a jurisdictional barrier to his claim for workers' compensation benefits due to exposure to asbestos. Employee argues that "the Board stepped beyond the limits of the hearing and made a critical factual conclusion that greatly affected the decision" when the Board held that Employee had not been exposed to asbestos while working in Delaware.[17] Employee contends that the result of this erroneous conclusion was for the Board to conclude as a matter of law that 19 *Del. C.* § 2303(a) controlled the dispute and to erroneously dismiss his claim as being jurisdictionally barred.

Employee also asserts that "[t]he last injurious exposure rule cannot be used as a bar to the [Board's] jurisdiction when [Employee] was always employed by only one employer."[18] Employee argues that "[the Board's] reliance on the 'last injurious exposure' rule results from its misinterpretation of the purpose of the rule, [asserting that] the 'last injurious exposure' rule was developed to deal with the 'successive carrier problem' . . . and was actually adopted initially in Delaware

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[16] *Id.*

[17] Employee's Opening Brief at 7 (hereinafter "Employee's Op. Br. at _.").

[18] Employee's Op. Br. at 7.

as the 'last carrier' or the 'last insurer' rule."[19] Employee contends that "the 'last injurious exposure' rule provides, generally, that where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the most recent in-state employer where the worker was exposed is liable for the whole award."[20] Employee argues that the Board should not have dismissed his claim on jurisdictional grounds because part of his employment and possible exposure occurred in Delaware.

B. Employers' Argument

Employers contend that the Board was correct as a matter of law in granting their joint motion to dismiss for lack of jurisdiction pursuant to 19 *Del. C.* § 2303(a). Employers agree with the Board's analysis that Employee did not meet any of the scenarios under § 2303(a) in which the Board can extend its jurisdiction to hear workers' compensation claims for injuries to Delaware workers injured while working out of state.

Employers also assert that the "last injurious exposure" rule bars the Board from hearing the claim because, on the stipulated facts, the last exposure occurred

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[19] Employee's Op. Br. at 6-7.

[20] *Id*. at 7.

in Pennsylvania. Employers argue that the "last injurious exposure" rule established the jurisdiction for Employee's claim for workers' compensation in Pennsylvania because "worker[s]' compensation benefits arises from an injury, not just employment."[21] Employers contend that the "last injurious exposure" rule sets liability with the last employer where the worker was exposed to a harmful substance.[22] Employers' liability does not attach in Delaware, they argue, because Employee worked for Employers in Pennsylvania in 1977, the time stipulated to by the parties as Employee's last exposure to asbestos[23] and because it follows that since the last exposure to asbestos was indisputably in Pennsylvania and not in Delaware, the Board did not have jurisdiction.

VI. DISCUSSION

There are two questions before this Court: 1) whether the Board impermissibly considered a "fact" that was not in evidence before it such that the Board found that Employee had no potential exposure to asbestos while working in Delaware, and 2) the question, apparently of first impression in Delaware, whether

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[21] HP's Answering Brief at 4 (hereinafter "HP's Ans. Br. at _.").

[22] HP's Ans. Br. at 4.

[23] Agilent's Ans. Br. at 10.

the "last injurious exposure" rule acts as a jurisdictional bar to a potential award of workers' compensation benefits by divesting the Board of jurisdiction to hear a claim brought by an employee who had been exposed to a harmful substance while working in Delaware but who later was exposed to the same substance while working in another state. This Court now holds that 1) the Board impermissibly undertook to determine that Employee had not been exposed to asbestos while working in Delaware since the parties had not stipulated to that fact, and 2) an employee who has acquired an occupational disease through his or her work may be potentially awarded workers' compensation benefits based upon the "last injurious exposure" rule which places liability upon the last Delaware employer/insurance carrier "on risk" when an employee was exposed to a harmful substance while working in Delaware as well as in another state. This creates a "last in-state employer" corollary to the "last injurious exposure" rule.[24]

A. The Board made a factual finding, unsupported by the stipulated facts, that Employee was not exposed to asbestos while employed in Delaware.[25]

The Board decided the Employers' motion to dismiss based in part on its

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[24] Corollary- **2.** A natural consequence or effect; result. American Heritage Dictionary, 3rd ed., (1994).

[25] Industrial Accident Board Rule No. 8- Motions Concerning Legal Issues.

unsupported factual finding that Employee did not have "any possibility of asbestos exposure for the two-year period during which he worked in Delaware." The Employers' motion to dismiss was based on lack of jurisdiction. The Board's jurisdiction is established by 19 *Del. C.* §2306(a), which requires all Delaware employers to participate in the workers' compensation process,[26] and 19 *Del. C.* 2303, which establishes when the Board has jurisdiction to hear claims for injuries sustained while the employee was working outside the territorial limits of the state.

The factual question of whether Employee had been exposed to asbestos while working in Delaware was not before the Board. The Board correctly stated that "[n]o evidence was presented to demonstrate that claimant had any possibility of asbestos exposure for the [time] during which he worked in Delaware."[27] However, the parties had stipulated to certain facts, and the exposure or non-exposure to asbestos by Employee while working in Delaware was not part of the stipulation. Counsel for Hewlett-Packard noted at the hearing that "no witnesses will be called" and that "[the Board will] be presented with some basic facts, which

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[26] *Farrall v. Armstrong Cork Co.*, 457 A.2d 763 (Del. Super. 1983).

[27] Board's Decision at 5.

the parties have agreed are relevant to the issue of jurisdiction."[28] There was no evidence from which the Board could have found that Employee had or had not been exposed to asbestos while working in Delaware. Because the Board's decision that Employee had not been exposed to asbestos while working in Delaware was based on facts not stipulated to by the parties, the Board's finding that 19 *Del. C.* 2303(a) was controlling and that the Board did not have jurisdiction to hear Employee's claim is reversed and remanded. However, the Court does not end its analysis at this point but instead will address the Board's misapplication of the "last injurious exposure" rule since the matter is being remanded to the Board for further proceedings.

B. The Board misapplied the "last injurious exposure" rule.

1. Overview of the "last injurious exposure" rule.

Delaware has adopted a legal analysis for determining who among successive employers may be held liable for an occupational disease contracted by an employee in the course of his or her employment, which is often referred to in Delaware case law as the "last carrier" rule.[29] The "last carrier," "last insurer," or

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[28] Hearing Tr. at 2.

[29] *Alloy Surfaces Co., et. al. v. Cicamore, et. al.*, 221 A.2d 480, 487 (Del. 1966) (holding that the Court was "accepting as the law of this State" the "last carrier" rule); *see generally* Arthur

"last injurious exposure" rule provide, generally, that where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the most recent employer where the worker was exposed is liable for the entire award.[30] This Court in *Lake Forest School District v. DeLong* noted that:

> [t]he Delaware Supreme Court has adopted the "last insurer" or "last carrier" rule, which is based on the same principle[] as the last injurious exposure rule. The last carrier [or "last injurious exposure"] rule provides that, in the case of an occupational disease resulting from exposure over a lengthy period, the last insurer must pay the compensation if the employment was of a kind contributing to the disease.[31]

Larson & Lex A. Larson, 4 Larson's Workers' Compensation Law § 153.02 (stating that "the 'last injurious exposure' rule in successive-injury cases [that] places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability . . . is also utilized in occupational disease cases including those involving asbestosis").

[30] *Lake Forest School District v. DeLong*, 1988 Del. Super. LEXIS 265 *8-9 (holding that "[i]t has been recognized that the last insurer rule was adopted to meet the ultimate aims of the [Workers' Compensation] Act, likewise the last injurious exposure rule would also assure that compensation be swift"); Russell G. Donaldson, Annotation, *Workers Compensation: Liability of Successive Employers for Disease or Condition Allegedly Attributable to Successive Employments*, 34 A.L.R 4th 958 *2[a] (1984) (stating that "[m]any jurisdictions . . . have adopted a proposition widely known as the 'last injurious exposure' or 'last exposing employer' rule, whereby sole liability, as among successive employers, in the course of employment for whom a worker has developed an occupational disease or condition leading to a compensable disability, should be placed upon the last of such employers, work for whom bears the requisite nexus of causality or contribution to the disease.").

[31] *Lake Forest*, 1988 Del. Super. LEXIS 265 *9-10; *see generally* 4 Larson, Workers' Compensation Law § 95.20 et. seq. (1988) (using the terms "insurer" and "employer" interchangeably).

The *Lake Forest* court explained that "[t]he purpose of each of these [identical but differently named] rules is to set a definite time for liability to attach with an occupational disease developing over a long period of time thus avoiding the difficult, if not impossible, task of determining which, in a series of exposures, caused the disease."[32]

In Delaware, the legislature and the courts have continually shaped the contours of workers' compensation benefits. The Delaware Supreme Court has stated that "at the time of its enactment in 1917 [the Workers' Compensation Statute] defined 'personal injury' as involving 'violence to the physical structure of the body and such disease or infection as naturally results directly therefrom when reasonably treated'. [Citation omitted]. Diseases not entailing direct physical damage to a bodily structure were not covered under the statute."[33] The Supreme Court has further noted that:

> [i]n 1937, however, the definition of "personal injury" was expanded so as to include twelve designated occupational diseases if "the exposure . . . has occurred during the employment, and the disability has commenced within five months after the termination of such exposure." The amendment specifically provided that no

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[32] *Id.* at 10-11.

[33] *Champlain Cable v. Employers Mut. Liab. Insu.*, 479 A.2d 835, 839 (Del. 1984).

> other occupational disease would be compensable under the Act. By amendment in 1949, the General Assembly again broadened employee coverage by deleting all reference to the specified diseases: "compensable occupational diseases shall include all occupational diseases arising out of and in the course of employment." The amendatory paragraph retained the five-month date-of-disability constraint.[34]

In 1966 the Delaware Supreme Court decided *Alloy Surfaces Inc. v. Cicamore*, which adopted the "last carrier" ("last injurious exposure") rule in Delaware. The *Cicamore* court adopted the "last carrier" rule in occupational disease cases, which places total liability upon the last insurer by stating that "[i]f the majority rule placing responsibility upon the last carrier, which we are now accepting as the law of this State, be deemed unjust, the remedy lies with the General Assembly."[35] The Supreme Court explained that it rejected the insurance carrier's "exposure" argument (that liability is based on the time of injury and not the time of disability) and that it "adopted the general rule of coverage in occupational disease cases: [l]iability falls to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease."[36] By adopting the majority rule and not one of

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[34] *Champlain Cable Corp,* 479 A.2d at 839.

[35] *Cicamore*, 221 A.2d at 486.

[36] *Champlain Cable Corp,* 479 A.2d at 840.

the minority rules, such as an "exposure" rule or an "apportionment" rule (in which liability is apportioned among all employers who exposed the employee to a harmful substance), the Delaware Supreme Court affirmed its intention to "follow[], and continue[] to follow, the general evolution of occupational disease legislation."[37]

In 1974, the legislature amended the Workers' Compensation Act by omitting the five-month "after-exposure language" and permitting recovery on claims that were previously time-barred.[38] This Court in the *Lake Forest* case noted that "[i]n light of the 1974 amendments to the Workmen's Compensation Statute, [*Alloy Surfaces Co. v*] *Cicamore* was reevaluated in *Champlain Cable*" to determine if the "last injurious exposure" rule was still valid; the *Champlain Cable* court held that "the amendments did not overrule the 'last insurer' rule but rather extended [workers'] compensation coverage to all occupational diseases without regard to date of manifestation.[39]

2. The "problem" of the "last injurious exposure" rule and the out-of-

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[37] *Id.* at 839.

[38] *See Champlain Cable Corp,* 479 A.2d at 841.

[39] *Lake Forest*, 1988 Del. Super. LEXIS 265 *n3.

state employer.

Larson's states that a problem that frequently arises in using the "last injurious exposure" rule in occupational disease cases is that of determining who was the "last" insurer or employer "on risk" during a claimant's exposure when part of the exposure occurred out of state.[40] In the instant case, the Board eliminated the coverage potentially available to Employee when it determined that the "last" employer "on risk" was an out-of-state employer and that the Board therefore did not have jurisdiction.

The problem of determining who was the "last" insurer or self-insured employer "on risk" can be complicated "where such exposure has been shown to have occurred outside the jurisdiction in which compensation is sought by an employee otherwise entitled."[41] A majority rule has developed among jurisdictions that have faced this issue:

> Most courts have solved [the] problem [of the out-of-state employer] by construing the statutory terms to mean the last exposure with an employer subject to the jurisdiction of the compensation act in question, thus removing from consideration the issue of the "last," unreachable employer, and providing the disabled employee with an enforceable award."[42]

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[40] 4 Larson's § 153.

[41] 34 A.L.R 4th 958 *2[a].

[42] 34 A.L.R 4th 958 *2[a].

Larson's cites two leading cases that support the majority rule that the "concept of the 'last employer' should be interpreted to mean the last in-state employer."[43] According to *Larson's,* courts that have followed the "last in-state employer" corollary

> [have] uniformly held compensation to be recoverable from the last employer in the jurisdiction, mostly on the basis that a 'last injurious exposure' provision must be construed as meaning only injurious exposure within the forum jurisdiction, the last exposing employer subject to which will be held liable notwithstanding 'exposing' employment outside the jurisdiction subsequent to the last domestic exposure."[44]

It is true, as Employers point out, that many courts that have interpreted the "last employer" language to mean last in-state employer were interpreting statutes that had, unlike Delaware, codified the "last injurious exposure" rule. However, at least one jurisdiction that has adopted the "last injurious exposure" rule judicially has held that the rule only applied to in-state employers.

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[43] 4 Larson's, § 153.02[5][d] citing *Smith v Lawrence Baking Co.*, 121 N.W.2d 684 (Mich. 1963) (holding that that liability could be found to accrue to the last Michigan employer even when the employee, subsequent to his Michigan employment, worked out of state and sustained an injury while working out of state); *Hamilton v. S.A. Healy Co.,* 221 N.Y.S.2d 325 (N.Y. App. Div. 1961) (holding that "[i]t seems too clear to require discussion that the term "employer", as used in [the applicable statute], does not include an out-of-State employer not liable for payment of compensation under the Workmen's Compensation Law of New York, but refers only to an employer subject to that act."

[44] 34 A.L.R 4th 958 *[8].

Oregon has judicially adopted the "last injurious exposure" rule and the "last in-state employer" corollary.[45] The Oregon Court of Appeals in *Mathis v. State Acci. Ins. Fund* adopted the "last injurious exposure' rule holding that "[the merit of] specif[ing] the date of disability rather than the date the disease was actually contracted for fixing the relative rights and liabilities of the work[ers] and employer lies in its definiteness."[46] In *Progress Quarries v. Vaandering*, the Court of Appeals held that the "last injurious exposure" rule applies only to Oregon employers. The Court held that:

> [a]s the Supreme Court noted in [*Matter of the Compensation of Sharon Bracke*] the rule, which is for claimants' benefit, can operate fairly for employers if applied consistently. The basic overall fairness can be achieved only if application of the rule remains under control of the Oregon workers' compensation system. If out-of-state employment is considered, the systematic application of the rule breaks down.[47]

In *Silveira v. Larch Enterprises*, the Court of Appeals held that "an Oregon employer cannot proffer as a defense a subsequent potentially causal employment

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[45] *In the Matter of the Compensation of Sharon Bracke***,** 646 P.2d 1330 (Ore. 1982) (holding that "[t]he [Oregon] Court of Appeals adopted the ["last injurious exposure"] rule tacitly in the accidental injury case of *Cutright v. Amer. Ship Dismantler,* [and] [b]oth the Court of Appeals and this court subsequently adopted the rule expressly in the occupational disease context").

[46] *Mathis v. State Acci. Ins. Fund*, 499 P.2d 1331, 1335 (Or. Ct. App. 1972).

[47] *Progress Quarries v. Vaandering,* 722 P.2d 19, 22 (Or. Ct. App. 1986).

not covered by the *Oregon Workers' Compensation Act*."[48]

The applicable Delaware statute, 19 *Del. C.* § 2342, addresses only time of notice to the employer and the affect of noncompliance. The statute does not provide which employer as among several successive employers may be liable for compensation. Section 2342 provides in part:

> **Notice of occupational disease; time of; failure to give**
> Unless the employer during the continuance of the employment has actual knowledge that the employee has contracted a compensable occupational disease or unless the employee . . . gives the employer written notice or claim that the employee has contracted one of the compensable occupational diseases . . . no compensation shall be payable on account of the death or disability by occupational disease of such employee.

Section 2342 refers only to "employer" without explicitly stating whether the section applies to in-state or out-of-state employers. However, the term "employer" can only reasonably mean in-state employer because the applicable section is part of the Workers' Compensation Act, which only binds in-state employers.

The "last in-state employer" corollary to the "last injurious exposure" rule is not, however, a unanimous rule:

> [t]here is authority for the proposition that, under the 'last injurious exposure' rule imposing liability solely upon that employer who

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[48] *Silveira v. Larch Enterprises*, 891 P.2d 697, 699 (Or. Ct. App 1995).

> last employed the victim of an occupational disease in conditions exposing him or her to the hazard of the disease in question, compensation may not be obtained under a jurisdiction's own workers' compensation provisions where the 'last injurious exposure' in question is shown to have occurred outside that jurisdiction.[49]

Thus in *State Compensation Fund v. Joe*, the Arizona State Compensation Fund sought appellate review of awards from the Industrial Commission of Arizona which had allowed two widows to recover workers' compensation for the deaths of their husbands from lung cancer. The Arizona Court of Appeals set the awards aside holding that:

> [t]he Colorado employer hired these men knowing that they had worked in the Arizona uranium mines for years. The last working environment that injuriously exposed these men to the hazards of lung cancer was in Colorado. [The Arizona Occupational Disease Act now] precludes these widows from now receiving [workers'] compensation.[50]

However, the Arizona approach is a minority rule, not favored by the commentators. The "last in-state employer" corollary is in line with the general legislative intent of Workers' Compensation Acts to provide prompt payment to employees.

Employers urge this Court not to adopt the "last in-state employer"

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[49] 34 A.L.R 4th 958 *[8].
[50] *State Compensation Fund v. Joe*, 543 P.2d 790, 795 (Az. Ct. App. 1975).

corollary, arguing that cases from jurisdictions that have adopted the corollary, such as Michigan, Colorado and New York, are distinguishable from the instant case because those courts interpreted statutes that had codified the "last injurious exposure" rule; Delaware has not legislatively codified any such rule. Employers argue that, because the "last injurious exposure" rule has not been legislatively codified in Delaware, this Court should not judicially extend the rule.

Delaware has not adopted the "last injurious exposure" rule by statute but instead has adopted the rule judicially. The rule, apparently first adopted by the Supreme Court in *Cicamore*, and restated by this Court in *Lake Forest*, states that the "last insurer" or "last carrier" rule is based on the same principle as the "last injurious exposure" rule, which provides that "where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the most recent employer where the worker was exposed is liable for the entire award." The "last injurious exposure" rule as codified by other jurisdictions such as Colorado, Michigan and New York is substantially the same as the Delaware rule.

In *Claimants in the Matter of Death of Garner v Vanadium Corp. of*

America, the Colorado Supreme Court found that the last in-state employer was liable for the entire award of workers' compensation benefits even when there was out-of-state exposure that happened over many years.[51] The Colorado Court of Appeals had held that the dependents of the claimant could not recover in Colorado because the last injurious employment was outside that state. However, the Colorado Supreme Court reversed the Court of Appeals and held that the Colorado Workers' Compensation Act imposed liability on the last employer in the state of Colorado, without regard to whether the last injurious employment occurred inside or outside Colorado. The Colorado statute, stated in part:

> Last employer liable – exception: 2) In any case where an employee of an employer becomes disabled from . . . asbestosis . . . or in the event death results from . . . asbestosis . . . and, if such employee has been injuriously exposed to such diseases while in the employ of another employer during the employee's lifetime, the last employer or that employer's insurance carrier, if any, shall be liable for compensation and medical benefits.[52]

The Colorado Supreme Court held that "[i]t would have been futile for the Colorado General Assembly to have provided that the last employer in time, no matter in what state located, 'shall alone be liable,' if it intended to refer to out-of-

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[51] *Claimants in the Matter of Death of Garner v Vanadium Corp. of America*, 572 P.2d 1205, (1977).

[52] *C.R.S.* 8-41-304 (2004).

state employers over which it had no jurisdiction."[53] Therefore, a reasonable interpretation of the act led to the conclusion that "employer," as used in the statute, meant the last Colorado employer.

In *Smith v. Lawrence Baking Co.*, the Michigan Supreme Court held that liability could be found to accrue to the last Michigan employer even when the employee, subsequent to his Michigan employment, worked out of state and sustained an injury while working there. The Michigan Supreme Court held that "[t]he act under consideration is a Michigan act. [Citation omitted]. It deals with Michigan workers and Michigan working conditions and Michigan problems. [Citation omitted]. Clearly, the legislature did not have in mind employers outside the State over whom it would have no jurisdiction."[54] In Michigan, the applicable statute stated:

> **Apportionment of compensation liability**. The 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 any dispute or controversy arises as to the payment of compensation or as to liability for the compensation, the employee shall make claim upon the last employer only and apply for a hearing against the last employer only.[55]

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[53] *Claimants in the Matter of Death of Garner*, 572 P.2d at 1206.

[54] *Smith*, 121 N.W.2d at 689.

[55] *MCLS* § 418.435 (2004).

The Michigan Supreme Court held that "[t]he workmen's compensation act is interpreted to read as the legislature intended – 'The total compensation due shall be recoverable from the Michigan employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted'."[56]

In *Matter of the Claim of James McKee, Jr. v. Armstrong Contracting & Supply,* the Supreme Court of New York, Appellate Division, held that "[t]he employer in whose employment an employee was last exposed refers to the last employer over whom the board has jurisdiction."[57] The employee, a New York resident who had been an asbestos worker for 30 years (having worked in several states including New York), became totally disabled because of lung disease and thereafter filed claims against several former employers for benefits. The employee had worked for Armstrong Contracting & Supply Company, a New York corporation. The New York statute provided:

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[56] *Smith*, 121 N.W.2d at 689.

[57] *In the Matter of the Claim of James McKee Jr., v. Armstrong Contracting & Supply Company et al.*, 63 A.D.2d 791, 791 (N.Y. App. Div. 1978).

> Liability of employer; silicosis or other dust diseases- The employer in whose employment an employee was last exposed to an injurious dust hazard shall be liable for the payments required by this chapter when disability or death of the employee shall be due to silicosis or other dust disease.[58]

The Court found that Armstrong was the last employer who was subject to the jurisdiction of the New York Workers' Compensation Board to have employed the employee and to have exposed him to asbestos.

The "last injurious exposure" rule is substantially the same rule whether or not it has been judicially adopted or legislatively created and the rule should be applied in the same manner whether it is a court adopted rule or a legislatively created rule.

VII. CONCLUSION

The "last injurious exposure" rule does not act as jurisdictional bar to the award of workers' compensation benefits by preventing the Board from hearing a claim brought by an employee who had been exposed to a harmful substance while working in Delaware but who was later exposed to the same substance while working in another state such that the last aggregate exposure occurred after the employee worked in Delaware. An employee who has acquired an occupational

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[58] *NY CLS Work Comp* § 44-a (2004).

disease through his or her work may potentially be awarded workers' compensation benefits based upon the "last in-state employer" corollary to the "last injurious exposure" rule, which places the full liability upon the last employer or insurance carrier "on risk" when the employee was exposed to the disease causing substance while working in Delaware.

Most courts that have addressed the "problem" of the out-of-state employer have done so by "construing the statutory terms to mean the last exposure with an employer subject to the jurisdiction of the compensation act in question, thus removing from consideration the issue of the 'last,' unreachable employer, and providing the disabled employee with an enforceable award."[59] By joining the courts that have addressed the "problem" of the out-of-state employer by construing "last employer" to mean the last exposure with an employer subject to the jurisdiction of the compensation act in question, this Court holds that the term "employer" in 19 *Del. C.* § 2342 means only Delaware employers. The Delaware Supreme Court in *Champlain Cable* held that "the legislative history of . . . the Act reveals that Delaware's Workmen's Compensation Law has followed, and

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[59] 34 A.L.R 4th 958 *2[a].

continues to follow, the general evolution of occupational disease legislation."[60] The "last in-state employer" corollary is a natural outgrowth of the "last injurious exposure" rule by potentially providing compensation for Delaware workers who have been exposed to an occupational disease while working both in and out of the state.

The "last in-state employer" corollary also follows the legislative intent to provide workers' compensation benefits to employees for "all occupational diseases regardless of the length of time for them to develop and become manifest."[61] As stated by the *Champlain Cable* Court, "[there are] two primary purposes of Delaware's Work[ers'] Compensation Law: to provide prompt payment of benefits without regard to fault; and to relieve employers and employees of the burden of civil litigation." Like the 1974 amendment to the Workers' Compensation Act, which omitted the five-month after-exposure language and permitted recovery on claims that were previously time-barred, the "last in-state employer" corollary "is consonant with prior legislative endeavors to expand employee coverage in the area of occupational diseases and fulfills the twin

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[60] *Champlain Cable Corp*, 479 A.2d at 839.

[61] *Id.* at 841.

purposes of the Act."[62]

Even though the jurisdictions cited herein that have adopted the "last in-state employer/insurance carrier" corollary interpreted statutes that had legislatively codified the "last injurious exposure" rule, there is no reason why Delaware should not adopt the rule based solely on the fact that the "last injurious exposure" rule in Delaware has been judicially adopted. The Delaware General Assembly has remained silent on the issue of the "last injurious exposure" rule and has not codified the rule but has, instead, apparently relied upon the courts' pronouncement of the law in this area. Other courts that have adopted the corollary have done so on the basis that "it would have been futile for [their legislatures] to have provided that the last employer in time, no matter in what state located, 'shall alone be liable,' if it intended to refer to out-of-state employers over which it had no jurisdiction."[63] These courts have recognized that because the rule was codified legislatively, that "the legislature did not have in mind employers outside the State over whom it would have no jurisdiction."[64]

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[62] *Champlain Cable Corp,* 479 A.2d at 841.

[63] *Claimants in the Matter of Death of Garner*, 194 Colo at 1206.

[64] *Smith*, 121 N.W.2d at 689.

It logically follows that Delaware courts interpret the "last employer" language in the rule to mean Delaware employers and not out-of-state employers. It would be similarly futile for the courts to adopt a rule to refer to out-of-state employers over which it had no jurisdiction. This Court now adopts the majority rule: in Delaware the "last employer" language of the "last injurious exposure" rule means the last in-state employer subject to the jurisdiction of the Workers' Compensation Act.

For the foregoing reasons, the decision of the Board to dismiss Employee's claim is **REVERSED AND REMANDED** to the Board for further proceedings in accordance with this decision.

IT IS SO ORDERED

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oc: Prothonotary
cc: Industrial Accident Board