IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Russell Bartley, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Mine Safety Appliances Company and ESIS/CIGNA/ACE), Respondents	:	No. 236 C.D. 2010
	:	Submitted: July 9, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: August 5, 2010

Russell Bartley (Claimant) petitions for review of a Workers' Compensation Appeal Board's (Board) order affirming the decision of the Workers' Compensation Judge (WCJ) denying his claim petition because he failed to show that his carcinoid tumor was caused by exposure to chemicals during the course and scope of his employment with Mine Safety Appliances Company (Employer). Finding no error in the Board's decision, we affirm.

Claimant worked for Employer at two different rubber-producing plants from September 16, 1974, until December 5, 2004. On January 16, 2005, Claimant underwent surgery and was diagnosed with cancer, specifically a

malignant gastrointestinal carcinoid tumor. Claimant then filed a claim petition alleging that he suffered an occupational disease while in the course and scope of his employment and was exposed to noxious chemicals and substances, including carbon black, with the last date of exposure and employment on January 12, 2005.[1] Employer filed an answer denying the allegations.

Before the WCJ, Claimant testified that he began working for Employer as a janitor/material handler in September of 1974. He then worked in the manufacturing department and as a truck driver/warehouse worker before taking the position of rubber compounder at Employer's Rhode Island plant in May of 1997. Claimant transferred to the Evans City facility as a rubber compounder in September of 1997. The position of rubber compounder required Claimant to follow certain "recipes" and add chemicals and coloring to a two-story mixer in order to produce various rubber products. He remembered using the following chemicals in these recipes – carbon black, hysil, naprol, corax, agerite stalite, agerite geltrol, neoprene and 20 different types of oils. Claimant testified that the Rhode Island facility was in "very bad condition" – the floor was very oily, the railing leading up to the mixer was covered with goo and carbon black, the wooden beams were covered with a thick layer of powder, the air was dirty and dusty, and the mixer malfunctioned several times with the trap door opening without warning and spilling chemicals all over the floor. According to Claimant, employees at the facility would get oil and carbon black on their shoes and clothes from working in the plant and they often had to get rid of their work clothing because it was so soiled it could not be salvaged. Claimant testified that employees requested protective clothing and respirators, but Employer refused to

[1] This date was later amended to December 5, 2004.

provide them. Claimant stated that the Evans City facility was new and, therefore, much cleaner than the Rhode Island plant. The same mixer was utilized at the Evans City facility and while it had been refurbished, it still malfunctioned several times causing major spills. According to Claimant, his face and clothes would be covered with oil and carbon black after working at the Evans City facility.

Claimant testified that in December 2004, he started experiencing sharp pains in his stomach and was referred by his primary care physician to a gastroenterologist who performed an endoscopy and colonoscopy which revealed a tumor inside his stomach. He was then referred to Dr. Zeh at the Hillman Cancer Center who removed part of a malignant carcinoid tumor and told him that exposure to chemicals in his workplace could have caused the tumor.

On cross-examination, Claimant admitted that he treated with several other doctors, including Dr. Ramanathan, Dr. Richard Warner, and Dr. Bahary. He or his attorney asked all of his treating physicians for an opinion as to whether his carcinoid tumor was connected to his workplace exposure but none of them provided such an answer in writing. Claimant admitted that when asked, all of his treating physicians "had a question mark" when it came to the chemicals to which he was exposed. (Reproduced Record (R.R.) at 50a). Claimant also admitted that he was a former cigarette smoker, his mother died of a gynecological malignancy and his father had polyps removed from his colon. He denied the medical histories of several of his doctors which stated that his father died of colon cancer.

Jack Fraser, a former co-worker of Claimant's who worked as a rubber compounder at Employer's Rhode Island and Evans City plants, also testified as to the conditions of those facilities. Mr. Fraser stated that the Rhode

Island plant was black and greasy, everything was oily, and that his skin and clothes would be black and oily after work each day, but the conditions at the Evans City facility were not quite as bad. George A. Power, another former co-worker of Claimant's, testified that the Rhode Island plant was very dirty, very dark, and carbon black was prevalent throughout the plant.

To prove his chemical exposure was medically related to his cancer, Claimant presented the deposition testimony of Kenneth S. McCarty, M.D. (Dr. McCarty), a board certified pathologist and internist whose practice is concentrated in the area of endocrine responsive cancers. Dr. McCarty never treated or examined Claimant, but did review his medical records and reports, surgical slides, a transcript of the testimony provided in his case, and the material safety data sheets which listed the chemicals used at Employer's facilities. Dr. McCarty stated that he considered Claimant's exposure to carbon black, agerite geltrol, agerite stalite, neoprene, and nipol to be significant as all of these compounds "have potential relevance to . . . the development of a gastrointestinal carcinoma" and have effects upon such tumors. (R.R. at 271a). When asked if he arrived at an opinion within a reasonable degree of medical certainty as to the substantial contributing cause of Claimant's cancer, Dr. McCarty stated that "[t]o a reasonable degree of medical certainty, I think it is likely that this relatively rare tumor is a result of prolonged exposures to a number of potential and actual carcinogens." (R.R. at 271a).

On cross-examination, Dr. McCarty admitted that Dr. Warner treated Claimant and afterwards issued a letter stating that he had not seen any report in the medical literature indicating any case of carcinoid that related to exposure to environmental factors. Dr. McCarty also admitted that carbon black material is not

expected to be absorbed through the skin and that Employer's material safety data sheets state that "[e]pidemiological studies . . . show no evidence of clinically significant adverse health effects due to occupational exposure to carbon black." (R.R. at 302a). Dr. McCarty acknowledged that studies show there is inadequate evidence in humans as to whether carbon black is carcinogenic; that agerite stalite and agerite geltrol by themselves are not carcinogens; and that testing indicates the levels of butadiene and acrylonitrile in Employer's facilities were well below the acceptable threshold. (R.R. at 315a-316a).

James Fix, Employer's safety director of U.S. operations, testified that he oversaw the manufacturing operations and was familiar with both the Rhode Island and Evans City facilities. He stated he oversaw Occupational Safety and Health Administration (OSHA) recordkeeping for Employer and that OSHA required Employer to report industrial illnesses, what type of medical treatment was provided to employees, and if they were restricted from work or lost time due to these illnesses. He also testified that Employer for the past 25 never had an OSHA reportable illness in the nature of an occupationally-caused cancer at either the Rhode Island or Evans City facility.

Employer also presented the deposition testimony of Howard E. Reidbord, M.D. (Dr. Reidbord), a board certified pathologist. He did not treat Claimant but did review his medical records, transcript of testimony, office records of his treating physicians, the material safety data sheets, and Dr. McCarty's deposition and letter. When asked his opinion as to the causal effect of Claimant's exposure to chemicals in the workplace and his carcinoid tumor, he stated that he agreed with Dr. Warner's conclusion that no causal relationship existed and stated with a reasonable degree of medical certainty that he had "no information to

indicate that a neuroendocrine tumor of the small bowel is related to any environmental agent." (R.R. at 388a). He stated that exposure did not cause Claimant's tumor, there was nothing to support the relationship between Claimant's exposure to certain chemical substances in the workplace and his tumor, and that Dr. McCarty's conclusion was based on speculation. (R.R. at 390a). Dr. Reidbord indicated that rubber workers have been studied medically, a lot of literature has been written about them, and that if a relationship existed between this type of work and carcinoid tumors, an epidemiologic study should have uncovered this connection. (R.R. at 397a).

Finding Dr. Reidbord's testimony to be more credible and persuasive than that of Dr. McCarty, the WCJ held that Claimant failed to establish that the carcinoid tumor was caused by his exposure to various chemicals in the workplace. She specifically noted Dr. Reidbord's statement that there was no medical literature indicating any type of relationship or causal connection between carcinoid tumors and the exposure that rubber workers encountered and that Dr. Warner, one of Claimant's treating physicians, also supported this statement. The WCJ found Dr. McCarty's testimony on this issue speculative given the lack of any supporting scientific literature. She found the testimony of Mr. Fix to be credible and persuasive, in particular the fact that in over 25 years and more than 2,000 employees, Employer has never had another claim of cancer. This supported the opinions of Dr. Reidbord and Dr. Warner that there was no causal connection between the exposure to chemicals in the rubber compounding process and the development of carcinoid tumors. The WCJ found the testimony of Claimant and his two witnesses credible, but only to the extent that they were exposed to black powder substances while working for Employer.

Claimant appealed to the Board arguing that the WCJ erred in considering his claim an occupational disease and holding him to a higher standard of proof than what was ordinarily required when alleging an injury under Section 301(c)(1) of the Workers' Compensation Act (Act).[2] However, the Board noted that Claimant indicated on his claim petition that his injury was an occupational disease and he specified the last date of exposure. The Board stated that even under a straight injury theory, because his injury was not obvious, he was required to provide unequivocal medical evidence establishing the causal connection between his injury and the work-related exposure. *Lynch v. Workers' Compensation Appeal Board (Teledyne Vasco)*, 545 Pa. 119, 680 A.2d 847 (1996). Because the WCJ rejected Claimant's medical evidence, he was unable to satisfy his burden under an injury claim or an occupational disease. Therefore, the Board affirmed the WCJ's decision, and this appeal followed.[3]

On appeal, Claimant raises several issues, but his main argument is that the Board erred in assessing his case as an occupational disease under Section 301(c)(2) rather than an injury claim under Section 301(c)(1) and, therefore, it held him to a higher burden of proof than what the Act requires. He argues that the Board failed to note his argument that a disease can be pursued as an injury and even though he stated on his claim petition that he suffered an occupational disease, he presented his case from an injury standpoint and it should have been reviewed as such. However, this argument is without merit as the Board explicitly

[2] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §411(1).

[3] Our scope of review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether constitutional rights have been violated or whether an error of law has been committed. *Ward v. Workers' Compensation Appeal Board (City of Philadelphia)*, 966 A.2d 1159 (Pa. Cmwlth. 2009).

analyzed his claim *both* as an occupational disease and an injury, and correctly held that his claim failed under both approaches because his medical evidence was rejected and he could not establish the necessary causal connection.

There are two types of injuries under the Act – an injury arising in the course of employment which is compensable under Section 301(c)(1), and an occupational disease which is compensable under Section 301(c)(2).[4] To prevail on a workers' compensation claim under either theory, a claimant must establish all elements necessary to support an award. *County of Allegheny v. Workers' Compensation Appeal Board (Jernstrom)*, 848 A.2d 165 (Pa. Cmwlth. 2004); *Lebron v. Workers' Compensation Appeal Board (Dominick Serrao General Landscaping)*, 718 A.2d 870 (Pa. Cmwlth. 1998). Both theories require proof of a causal connection between the claimant's disability and his employment as the claimant must prove that the injury or disease arose in the course of employment and was related to that employment. *Lebron*, 718 A.2d at 871; *Pawlosky v. Workmen's Compensation Appeal Board*, 514 Pa. 450, 525 A.2d 1204 (1987). "Where there is no obvious causal relationship between claimant's disability and work-related activity, unequivocal medical testimony is necessary to establish the requisite causal relationship." *Lebron*, 718 A.2d at 871.

In this case, giving specific reasons previously recounted as to why she did so, the WCJ accepted Dr. Reidbord's unequivocal medical opinion, that Claimant's cancer was not caused by his exposure to chemicals in the workplace,

[4] To establish an occupational disease not specifically listed in the Act, a claimant must establish that (1) he was exposed by reason of his employment; (2) [the disease is] causally related to the industry or occupation; and (3) the incidence of which is substantially greater in that industry or occupation than in the general population. Section 108 of the Act, *added by* the Act of October 17, 1972, P.L. 930, 77 P.S. § 27.1(n).

over Dr. McCarty's opinion, which she found speculative. Because he failed to prove a causal relationship between the exposure to chemicals in Employer's workplace and his carcinoid tumor, Claimant's claim petition fails under both the occupational disease and injury theories.

Claimant also argues that the Board erred in requiring him to produce empirical studies supporting a causal connection between his cancer and exposures to chemicals utilized in the rubber compounding process. However, the Board did not require the production of such studies. It merely credited the testimony of both Dr. Reidbord and Dr. Warner regarding the lack of literature documenting a causal connection between such workplace exposure and carcinoid tumors. The Board considered this as further proof that such a causal connection did not exist.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, Judge

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O R D E R

AND NOW, this 5th day of August, 2010, the January 26, 2010 order of the Workers' Compensation Appeal Board at No. A08-2093, is affirmed.

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DAN PELLEGRINI, Judge