IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JM Manufacturing/Formosa Plastics Corporation and Zurich America Insurance Company,	:	
Petitioners	:	No. 2373 C.D. 2009
	:	Submitted: April 30, 2010
v.	:	
	:	
Workers' Compensation Appeal Board (Barrett),	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: September 9, 2010**

Petitioner JM Manufacturing/Formosa Plastics Corporation (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board), dated November 2, 2009. The Board affirmed the order of a Workers' Compensation Judge (WCJ), granting the claim petition of Bruce Barrett (Claimant) based upon the finding that Claimant developed mesothelioma[1] as a direct result of his employment with Employer. We reverse the Board's order.

[1] Mesothelioma is a specifically enumerated occupational disease under Section 108(l) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, added by the Act of October 17, 1972, P.L. 930, 77 P.S. § 27.1(l), which provides:

(Footnote continued on next page…)

Claimant began working for Employer in 1977 at Employer's site in Franklin, Pennsylvania (the Franklin facility). Claimant worked at the Franklin facility for one year before moving to Employer's site in Torrance, California (the Torrance facility), where he worked from 1978 to 1982. In 1982, Claimant returned to Pennsylvania and again worked at the Franklin facility until it closed on April 8, 2001. Following a six-month lay-off, Claimant worked at Employer's site in Meadville, Pennsylvania (the Meadville facility) from October 2001 to October 2003. Claimant then worked for a different employer until he was diagnosed with mesothelioma[2] on September 12, 2006.

Claimant filed a claim petition against Employer on November 15, 2006, alleging that he suffered mesothelioma due to long term and continuous exposure to deleterious materials in the workplace, including asbestos. On December 4, 2006, Claimant filed a second claim petition, reiterating his allegation that he developed mesothelioma due to workplace exposure to deleterious materials.

At the hearing before the WCJ, Claimant testified that he was exposed to asbestos while working as a pipe cutter at the Torrance facility. Claimant testified that the Torrance facility manufactured transite drainage pipe—used for storm drains and sewer lines—which was made from a mixture of cement and

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> The term "occupational disease," as used in the act, shall mean only the following diseases.
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> > (l) Asbestosis and cancer resulting from direct contact with, handling of, or exposure to the dust of asbestos in any occupation involving such contact, handling or exposure.

[2] According to Employer's brief, Claimant passed away on April 26, 2009. (Employer's Brief at 2.)

asbestos. Claimant testified that there was a considerable amount of dust in the facility from cutting the transite pipe, as well as loose fibrous material in plastic containers, labeled as asbestos.[3] Claimant also testified that he was exposed to asbestos at the Franklin facility while working as an extruder operator. Claimant testified that he regularly wore heavy gloves to handle hot PVC pipe as it came off the production line and that he believed the gloves contained asbestos because his co-workers referred to the gloves as "asbestos gloves." Claimant testified that the "asbestos gloves" were never replaced and were in use at the Franklin facility from the time he arrived in 1982 until the Franklin facility closed in April 2001. Finally, Claimant testified that he was not exposed to asbestos at the Meadville facility.

Claimant also offered the deposition testimony of David Laman, M.D. Dr. Laman examined Claimant and reviewed Claimant's medical records and opined that Claimant suffered from malignant mesothelioma. Dr. Laman testified that most patients diagnosed with malignant mesothelioma have an identifiable history of exposure to asbestos and opined that Claimant's asbestos exposure caused the development of his malignant mesothelioma. Finally, Dr. Laman opined that Claimant's most significant asbestos exposure occurred at the Torrance facility, but that Claimant's exposure to asbestos at the Franklin facility also contributed to the development of his malignant mesothelioma.

In opposition, Employer presented a medical report authored by Mitchell Patti, M.D. Dr. Patti examined Claimant and reviewed Claimant's medical file and agreed that Claimant suffered from malignant mesothelioma. Dr. Patti opined that the time of Claimant's exposure to asbestos at the Torrance facility was consistent with the known lag time between asbestos exposure and the

[3] It is undisputed that Claimant was exposed to asbestos at the Torrance facility.

development of mesothelioma. Dr. Patti believed that there was a very low risk of exposure to asbestos through the use of asbestos-containing gloves.

Employer also offered the deposition testimony of David Slawson, who worked at the Franklin facility as an extruder operator between 1965 and 1979 and served as plant manager between 1987 and 2001. Mr. Slawson testified that he was not aware of using asbestos-containing gloves during his time as an extruder operator and that he had no recollection of the gloves being referred to as "asbestos gloves." Mr. Slawson also testified that, in his capacity as plant manager, his job duties included signing purchase orders for supplies and equipment for the plant. Mr. Slawson indicated that he did not sign any purchase orders for gloves containing asbestos. Finally, Mr. Slawson testified that it was very unlikely that a pair of gloves containing asbestos would have been kept around the plant since the mid-1980s, because the gloves generally do not last more than one year.

Next, Employer offered the deposition testimony of Phyllis Umstead, who testified that she performed purchase ordering at the Franklin facility between 1986 and 1990. Ms. Umstead testified that she could neither recall ordering gloves containing asbestos nor reading the word "asbestos" in the description of any of the products that she ordered.

Finally, Employer presented the deposition testimony of David Thomas. Mr. Thomas testified that he worked as a purchasing agent at the Franklin facility between 1993 and 1997 and subsequently worked in the same capacity at the Meadville facility, where he continued to do some purchasing for the Franklin facility. Mr. Thomas testified that, to his knowledge, he never purchased any products containing asbestos for the Franklin facility.

The WCJ accepted the testimony of Claimant and Dr. Laman as credible and convincing, and granted Claimant's claim petition, finding that "Claimant was exposed to asbestos while employed at [Employer]'s facility in Franklin, PA, using asbestos gloves to handle hot plastic pipe and dies from the early 1980's through April of 2001." (WCJ Decision, 13.) The WCJ also determined the testimony of Mr. Slawson, Ms. Umstead, and Mr. Thomas to be credible, but concluded that their testimony established at best that, to their knowledge, Employer did not acquire any work gloves containing asbestos from 1965 to 1979 and from 1984 to 2001 for the Franklin facility. The WCJ went on to explain:

> There is of course a gap in time between 1979 and 1984 which corresponds with the Claimant's testimony . . . that the asbestos gloves were not in use when he first worked at the Franklin plant but then were in use when he came back from his work at the Torrance, California facility around 1982.

(WCJ Decision, 13.) The WCJ awarded total disability benefits beginning September 12, 2006.

Employer appealed to the Board. The Board affirmed, finding that the WCJ's decision was supported by substantial competent evidence. Employer then filed the subject petition for review with this Court.

On appeal,[4] Employer argues that the Board erred in finding that Claimant met his burden of establishing exposure to asbestos at the Franklin

[4] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704.

facility. Employer also contends that the Board erred in finding that Claimant's disability occurred within three hundred weeks of his last exposure to asbestos.

Pursuant to Section 301(c)(2) of the Act,[5] disability or death resulting from an occupational disease must occur within three hundred weeks of the employee's last exposure to the workplace hazard causing the occupational disease in order to be compensable. Here, it is undisputed that Claimant suffered from malignant mesothelioma. It is also undisputed that Claimant was not exposed to asbestos at the Meadville facility. To be eligible for benefits, therefore, Claimant was required to establish that (1) he was exposed to asbestos at the Franklin facility, and (2) the exposure occurred within three hundred weeks of September 12, 2006—Claimant's date of disability.

Employer argues, first, that the Board erred in finding that Claimant met his burden of establishing exposure to asbestos at the Franklin facility. Specifically, Employer contends that the Board misapplied our Supreme Court's holding in *Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Products)*, 580 Pa. 470, 861 A.2d 938 (2004), in finding that Claimant established exposure to asbestos through his own testimony.

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[5] Section 301(c)(2) of the Act provides, in pertinent part:

> [W]henever occupational disease is the basis for compensation, for disability or death under this act, it shall only apply to disability or death resulting from such disease and *occurring within three hundred weeks after the last date of employment* in an occupation or industry to which [the claimant] was exposed to hazards of such disease.

77 P.S. § 411(2) (emphasis added).

In *Gibson*, the Supreme Court established standards for the admission of lay opinion testimony concerning technical matters. Importantly, the Supreme Court determined that Rules 602, 701, and 702 of the Pennsylvania Rules of Evidence[6] are applicable to workers' compensation proceedings, notwithstanding the fact that the Act provides for a relaxation of the rules of evidence.[7] *Id.* at 486,

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[6] Those rules provide as follows:

Rule 602. Lack of Personal Knowledge.

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This Rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Pa. R.E. 602.

Rule 701. Opinion Testimony by Lay Witnesses.

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Pa. R.E. 701.

Rule 702. Testimony of Experts.

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pa. R.E. 702.

[7] Section 428 of the Act provides, in pertinent part:

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861 A.2d at 947. In *Gibson*, the claimant sought to prove the decedent's exposure to asbestos through the testimony of the decedent's co-worker. The co-worker testified that he observed a dark gray, cottony material at the employer's premises that he believed to be asbestos. The co-worker further testified, however, that "he did not have training or education concerning asbestos, that he would not be able to identify asbestos from other similar materials, and that he could not state with certainty that what he saw . . . was asbestos." *Id.* at 475, 861 A.2d at 941. The Supreme Court held that the co-worker's testimony was not competent:

> Rule 701 contemplates admission of lay opinions rationally based on personal knowledge that are helpful to the trier of fact. . . . This Court, from very early in Commonwealth history, interpreted the rules of evidence to permit individuals not qualified as experts, but possessing experience or specialized knowledge, to testify about technical matters that might have been thought to be within the exclusive province of experts. Where, however, a party proffers a witness expressing an opinion on matters such as the presence of asbestos in the workplace, the trial court must be rigorous in assuring that the lay witness satisfies the strictures of Rule 701.
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> . . .
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> [I]n order to satisfy the "rationally derived" and helpfulness standards of Rule 701, Claimant needed to demonstrate that the witness possessed sufficient experience or specialized knowledge that qualified him to offer a technical opinion regarding the presence of

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> Neither the board nor any of its members nor any workers' compensation judge shall be bound by the common law or statutory rules of evidence in conducting any hearing or investigation, but all findings of fact shall be based upon sufficient competent evidence to justify same.

77 P.S. § 834.

> asbestos in the workplace. While a lay witness could acquire this additional insight by either formal education or practical experience, it appears the witness at issue simply possessed neither.

Id. at 481, 486, 861 A.2d at 944-45, 948 (citations omitted).

The Supreme Court's holding was also based on the determination that the co-worker's testimony was not based on personal knowledge. The Supreme Court found that the co-worker's belief that the dark gray, cottony material he observed was asbestos was not premised on the co-worker's first-hand knowledge, but rather, on statements made by others. *Id*. at 484 n.8, 861 A.2d at 946 n.8. Finding that the co-worker was only competent to testify as to the things he personally observed, the Supreme Court accepted the co-worker's testimony only to the extent that "he saw Decedent near a dusty, cottony material that he could not identify." *Id.* at 484, 861 A.2d at 946. Accordingly, the Supreme Court held that there was not substantial evidence to support the WCJ's finding of asbestos exposure because "no witness with first-hand knowledge testified that there was asbestos in the workplace." *Id.* at 483-84, 861 A.2d at 946.[8]

Here, Claimant argues that he was qualified to offer a technical opinion regarding the presence of asbestos in the workplace because of his experience working with asbestos at the Torrance facility. Employer counters that Claimant's experience at the Torrance facility does not qualify him to offer such an

[8] By way of contrast, the Supreme Court cited *Harahan v. AC & S, Inc.*, 816 A.2d 296 (Pa. Super.), *appeal denied*, 573 Pa. 716, 828 A.2d 350 (2003). There, in a products liability action against a manufacturer of pipe sealant, the presence of asbestos in the workplace was established by the lay opinion testimony of two co-workers of the decedent. Contrary to the co-worker in *Gibson*, one of the co-workers in *Harahan* testified—through personal knowledge—that he knew the pipe sealant contained asbestos because "[i]t said asbestos on the cans." *Id*. at 298.

opinion because the transite pipe Claimant worked with at the Torrance facility contained a different form of asbestos than what Claimant alleged was contained in the "asbestos gloves." Regardless of whether Claimant's experience at the Torrance facility qualified him to offer a technical opinion or not, we find that Claimant failed to establish exposure to asbestos at the Franklin facility.

At the hearing before the WCJ, Claimant was asked whether there were any similarities between the appearance of the "asbestos gloves" and the asbestos fibers Claimant worked with at the Torrance facility, to which Claimant replied, "[w]ell, you couldn't see the fibers sticking out." (Reproduced Record (R.R.) at 60.) Furthermore, Claimant admitted that he did not "have any direct, personal knowledge that [the 'asbestos gloves'] actually contained asbestos," other than the fact that everybody referred to them as "asbestos gloves." (R.R. at 80.) Whether Claimant was qualified to offer a technical opinion or not, therefore, is irrelevant, because Claimant's testimony regarding the presence of asbestos at the Franklin facility was not based on any experience or specialized knowledge. Instead, like the co-worker in *Gibson*, Claimant's testimony that the "asbestos gloves" contained asbestos was premised solely upon statements made by others. Thus, no witness with first-hand knowledge testified that Claimant was exposed to asbestos at the Franklin facility. Claimant merely testified that he used gloves that his co-workers referred to as "asbestos gloves."

Having determined that Claimant failed to establish exposure to asbestos at the Franklin facility, we hold that Claimant is ineligible for benefits under Section 301(c)(2) of Act.

Employer also argues that the Board erred in finding that Claimant's disability occurred within three hundred weeks of his last exposure to asbestos

because the evidence demonstrates that no asbestos-containing products were purchased at the Franklin facility within three hundred weeks of September 12, 2006. Because we determined that Claimant is ineligible for benefits because he failed to establish that the "asbestos gloves," in fact, contained asbestos, we need not address Employer's argument regarding the timeliness of Claimant's claim. We note, however, that the relevant inquiry under Section 301(c)(2) of the Act is not whether a product containing an occupational hazard was *purchased* within three hundred weeks of the claimant's disability, but rather, whether the claimant was *exposed* to an occupational hazard within three hundred weeks of his disability.

Accordingly, we reverse the order of the Board.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 9th day of September, 2010, the order of the Workers' Compensation Appeal Board, dated November 2, 2009, is hereby REVERSED.

P. KEVIN BROBSON, Judge