

[J-5-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PATRIC GIBSON, C/O KATHY J. GIBSON	:	No. 39 WAP 2003
	:	
	:	Appeal from the Order of the
	:	Commonwealth Court entered on May 8,
	:	2003 at No. 1860CD2002, reversing the
v.	:	Order of the Workers' Compensation
	:	Appeal Board entered July 9, 2002 at No.
	:	A01-2139.
WORKERS' COMPENSATION APPEAL BOARD (ARMCO STAINLESS & ALLOY PRODUCTS)	:	
	:	ARGUED: March 1, 2004
APPEAL OF: ARMCO STAINLESS & ALLOY PRODUCTS	:	

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: November 22, 2004

I agree with the majority that the record in this particular case does not contain substantial evidence to support the WCJ's finding that Decedent had longstanding and continuous exposure to asbestos while working for Employer. I am not averse, however, to the Commonwealth Court's approach of treating the exposure issue as a factual one, or to its flexible application of the substantial evidence standard in this regard. See Gibson v. WCAB (Armco Stainless & Alloy Products, No. 1860 C.D. 2002, slip op. at 8 (Pa. Cmwlth. May 8, 2003) (en banc) (observing that Commonwealth Court precedent holds "that the burden of proof for a claimant attempting to show asbestos exposure is not overly demanding, that scientific evidence to prove the existence of an asbestos hazard is not required under the Act, that a claimant's failure to identify the

dust to which he was exposed as asbestos is not fatal to a claim for benefits and that a claimant's testimony alone can support a finding that asbestos exposure existed"). Such approach is consistent with prevalence of the use of asbestos in certain industries, as well as the inherent difficulties of proving the presence of asbestos, which most industries have long since remediated. Cf. 77 P.S. §413 (permitting a presumption that an occupational disease arose during the course of employment if the disability occurred at or immediately after employment in an industry in which occupational disease is a hazard). That said, in those instances where the Commonwealth Court has accepted lay testimony on the issue of exposure, the evidence has been more positive than that presented here. See, e.g., Gray v. WCAB (Pittsburgh Bd. of Ed.), 657 A.2d 77, 80-81 (Pa. Cmwlth. 1995) (deeming the evidence sufficient where claimant's testimony to chemical exposure was corroborated by a co-worker and an industrial hygienist); Witco-Kendall co. v. WCAB (Adams), 127 Pa. Cmwlth. 509, 511, 518, 562 A.2d 397, 398, 401 (1989) (concluding that claimant's testimony to asbestos exposure was sufficient where he had been diagnosed with asbestosis and the employer admitted that claimant had been exposed).