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**IN THE
COURT OF APPEALS OF INDIANA**

CAROL NASH, as Surviving Spouse of)
GREG L. NASH, Deceased,)

Appellant-Plaintiff,)

vs.)

NEW ENERGY CORPORATION,)

Appellee-Defendant.)

No. 93A02-0609-EX-733

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
The Honorable Linda Hamilton, Chairman
Application No. C-157146

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Carol Nash (“Carol”), as Surviving Spouse of Greg L. Nash (“Greg”), appeals from the decision of the Worker’s Compensation Board of Indiana (“the Board”) to deny her claim under the Occupational Disease Act, alleging Greg’s death from complications of chronic myelogenous leukemia arose out of and in the course of Greg’s employment with Appellee-Defendant New Energy Corporation (“New Energy”). We affirm.

Issue

Carol presents a single issue for review that we restate as whether the Board erred in denying her claim under the Occupational Disease Act.

Facts and Procedural History

Greg was employed as a lab technician for New Energy from 1984 to 1998. During this time, Greg married Carol. In October of 1998, Greg was diagnosed with chronic myelogenous leukemia (“CML”). He died on July 28, 1999, as a result of complications of a bone marrow transplant undertaken to treat his CML.

New Energy produces ethanol, a fuel product produced through the milling of corn through fermentation into a “beer” that is distilled into a 190 proof alcohol. Benzene is added as a drying agent to remove water, resulting in a fuel additive for gasoline consisting of ninety-nine percent pure alcohol.

As a lab technician, Greg tested 250-milliliter samples of the distilled alcohol for purity. These samples are delivered to the lab technicians by a “B” operator that prior to delivery removes the samples from columns and then places the samples in a screw-top

container. Greg worked staggered twelve-hour shifts resulting in his working fourteen shifts out of every 28-day cycle, seven on day shift and seven on night shift with fourteen days off during each cycle.

On April 9, 2001, Carol filed her application for Adjustment of Claim benefits under the Occupational Disease Act claiming that Greg developed CML due to his work-related exposure to benzene. The case was submitted to an individual member of the Board for review. The parties stipulated to the basic facts relating to Greg's employment at New Energy, wages, diagnosis, date of death, and the waiver of oral testimony. Additionally, the parties stipulated to the admission of various medical records and exhibits including reports by each party's expert on benzene, affidavits of other employees at New Energy, Industrial Hygiene Surveys conducted at New Energy, and scientific studies on the correlation between exposure to benzene and the occurrence of leukemia.

On December 7, 2005, Judge Sarkisian issued the single hearing member decision of the Board that included in part:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Said Hearing Judge, having reviewed all of the evidence in said cause, the stipulation of the parties, and having reviewed the entire file and being duly advised in the premises therein, now adopts the stipulation as the Board's findings and further finds as follows:

....

23. That Dr. Furbee, an M.D. and toxicologist, opines that there is no established increase in risk developing CML from benzene exposure, while benzene exposure increases the risk of developing Acute Myelogenous Leukemia (AML).

24. That the decedent's development of CML was not caused from exposure to

benzene, and proximate cause of decedent's CML is of unknown etiology, as the vast majority of diagnosed leukemias do not have a demonstrable etiology.

25. That decedent's CML was not proven to be causally related to exposure to benzene in performance of his job duties while employed at his work.

26. That decedent, Greg L. Nash, suffered from CML which was of unknown etiology.

27. That in review of all of the evidence in this cause, there is no causal relationship between the claimed fatality and an injury by accident arising out of and in the course of decedent's employment with Defendant, New Energy Corporation.

AWARD

IT IS THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Worker's Compensation Board of Indiana that the Award is in favor of the Defendant and against the Plaintiff, and that Carol Nash, Plaintiff, shall take nothing by virtue of her Application for Adjustment of Claim filed herein.

Appellant's Appendix at 7-8.

Carol requested review of the decision by the Full Board. Having heard oral argument, the Full Board affirmed the Single Hearing Member's decision. Carol now appeals.

Discussion and Decision

I. Standard of Review

In challenging the Board's decision, Carol confronts a stringent standard of review. When we review a decision of the Full Worker's Compensation Board, "we are bound by the factual determinations of the Board and will not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion." Conway ex rel. Conway v. School City of East Chicago, 734 N.E.2d 594, 597 (Ind. Ct. App. 2000), trans. denied. We

must disregard all evidence unfavorable to the decision and examine only the evidence and the reasonable inferences therefrom that support the Board's findings. Id. We will not reweigh the evidence nor judge the credibility of the witnesses. Id. "Whether an injury arises out of and in the course of employment is a question of fact to be determined by the Board." Id. When we review the Board's decision, we examine the record to determine if there is any competent evidence of probative value to support the Board's findings. Id. We then examine the findings to ensure that they are sufficient to support the decision. Id. at 597-98.

Introduced more than twenty years after the Worker's Compensation Act, the Occupational Diseases Act, Indiana Code Chapter 22-3-7, was enacted by our General Assembly in order to protect employees by providing compensation, without regard to fault, for those who contracted occupational diseases not covered under the Worker's Compensation Act. Gray v. Daimler Chrysler, 821 N.E.2d 431, 435 (Ind. Ct. App. 2005), reh'g denied. Therefore, as with provisions of the Worker's Compensation Act, provisions of the Occupational Diseases Act should be liberally construed in favor of the employee to effectuate the act's humanitarian purpose to provide injured workers with an expeditious and adequate remedy. Id.

II. Analysis

In challenging the Board's decision, Carol contends that numerous findings of fact are not supported by the evidence, and therefore, the evidence does not support the conclusion that there is not a causal relationship between Greg's death due to CML and his exposure to benzene. Indiana Code Section 22-3-7-11 provides for an award of weekly compensation to

be paid to dependents or partial dependents of a person whose death was caused by an occupational disease. Section 10 provides:

(a) As used in this chapter, “occupational disease” means a disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident of an occupational disease as defined in this section.

(b) A disease arises out of the employment only if there is apparent to the rational mind, upon consideration of all of the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workers would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Ind. Code § 22-3-7-10.

Large portions of Carol’s arguments attack the findings of fact regarding the extent Greg was exposed to benzene in his work as a lab technician. Although there is some conflict between the record and these challenged findings, we do not address these arguments because the evidence does support the critical findings of fact concerning New Energy’s expert’s opinion that there is no established increase in risk of developing CML from benzene exposure.

To prevail on her claim under the Occupational Disease Act, Carol must show that Greg’s CML arose out of and in the course of his employment at New Energy by demonstrating that there is a direct causal connection between the conditions under which

In one of his reports, Dr. Furbee provided excerpts from several studies dating from the early 1960s to 2001. He first explained that his reliance on these studies is based on their use of control groups which he opined is absolutely essential in determining the increase or decrease in risk of a disease in relation to the exposure of a particular substance. Dr. Furbee discounted the validity of the articles relied upon by Carol's expert, because they were decades old and did not utilize control groups. Furthermore, the studies cited by Dr. Furbee focused specifically on the possibility of a causal relationship between various forms of leukemia and exposure to benzene. The results from many of these studies demonstrated that there is not a causal connection between benzene exposure and the occurrence of CML:

For CML, no significant increase or deficit was observed in the individual cohorts of petroleum workers. The meta-analyses based on the combined cohorts showed that there was no increase of CML. This finding of no increased CML risk was further supported by two case-control studies of CML. In a case-control study of CML in Sweden, no association ($p=0.91$) was found between the disease and occupational exposures to petroleum products (95). Thus, the authors concluded that, unlike the patient with ANLL, occupational exposure to petroleum products was not particularly common among the patients with CML (95). In another case control study of CML conducted by investigators at the University of Leeds and the University of Edinburgh (89), exposure histories of 122 CML cases and 241 controls were examined. This study did not find any association between CML and exposures to benzene or solvents ($p=0.41$). The authors concluded that the

study failed to reveal any risks with chronic exposures to benzene of other aromatic hydrocarbons. This conclusion is consistent with the view expressed in the *Ce(c)il Textbook of Medicine* 19th ed., p. 933: ‘Benzene exposure increases the risk of acute myelogenous leukemia (AML) but not of CML’ (90).

Raabe, G. and O. Wong, Leukemia Mortality by Cell Type in Petroleum Workers with Potential Exposure to Benzene, *Environmental Health Perspectives*, Vol. 104 Supp. 6 at 13811392 (1996).

Among the leukemia subtypes, only acute myelogenous leukemia (AML) incidence was significantly elevated (RR=3.1, 95% CI: 1.2-10.7, although nonsignificant¹ excesses were also noted for chronic myelogenous leukemia (CML) (RR=2.6, 95% CI: 0.7-16.9) and lymphocytic leukemias (RR=2.8, 95% CI: .05-54.4)

Yin, S.N., et al., A Cohort Study of Cancer Among Benzene-Exposed Workers in China: Overall Results, *American Journal of Industrial Medicine*, Vol. 29(3) at 227-35 (1996).

Clinical and epidemiological evidence consistently indicate that acute myeloid leukemia (AML) and its variants (alternatively called acute nonlymphocytic leukemias, or ANLL) can be caused by benzene exposure. While some studies have implicated other types of leukemia or even lymphomas, only AML and its variants² have consistently been seen in excess in groups of workers with excess benzene exposure. . . . It would be inappropriate to extrapolate the risk of AML to all leukemias when the risk appears to be biologically specific to AML.

Lamm, S.H., et al., Consistencies and Inconsistencies Underlying the Quantitative Assessment of Leukemia Risk from Benzene Exposure, *Environmental Health Perspectives*, 1989, Vol. 82 at 289-97.

App. at 345, 347, 348. Dr. Furbee also notes that in Lichtman and Liesveld’s review of CML for the sixth edition of Williams Hematology, they stated:

¹ Dr. Furbee explains in his report that the term non-significant means that the finding could well have been due to chance. He notes that because the confidence interval (CI) spans one, the relative risk cannot be considered valid.

² Variants of AML include: Acute Myeloblastic Leukemia, Acute Promyelocytic Leukemia, Acute Myelomonocytic Leukemia, Acute Monocytic Leukemia, Acute Erythroleukemia, and Acute Megakaryocytic

Chemical leukemogens such as benzene and alkylating agents have not been identified as causative agents of CML, although they are well established to produce a dose-dependent increase in acute myelogenous leukemia.³

App. at 349.

These studies cited by Dr. Furbee support the Board's finding that there is no established increase of risk in developing CML from benzene exposure, while benzene exposure increases the risk of developing Acute Myelogenous Leukemia (AML). This evidence also supports the finding that Greg's CML was not proven to be causally related to exposure to benzene in the performance of his job duties while employed at New Energy. Based on this evidence, we conclude that there is competent evidence of probative value to support the Board's findings. Furthermore, the findings are sufficient to support the decision that Greg's CML did not arise out of and in the course of his employment at New Energy. Accordingly, we affirm the Board's decision to deny Carol's claim under the Occupational Disease Act.

Affirmed.

VAIDIK, J., and BARNES, J., concur.

Leukemia.

³ Lichtman, M. and J. Liesveld, Chronic Myelogenous Leukemia, in Williams Hematology, 1085-1123 (E. Beutler, et al. eds., 6th ed. 2001)