

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

**Supreme Court of Kentucky**

**FINAL**

2007-SC-000023-WC

DATE 12-13-07 ELLAGFOWHDC.

GARNETT LISTER

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
2006-CA-001426-WC  
WORKERS' COMPENSATION BOARD NO. 02-66259

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
HON. LAWRENCE SMITH,  
ADMINISTRATIVE LAW JUDGE,  
AND WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

An Administrative Law Judge (ALJ) determined that the claimant failed to prove a work-related exposure to Agent Orange or to prove that an exposure to another chemical caused him to develop non-Hodgkin's lymphoma. The Workers' Compensation Board and the Court of Appeals affirmed, rejecting assertions that the ALJ misinterpreted the evidence and imposed an inappropriate burden of proof and risk of non-persuasion. We affirm.

The claimant was born in 1949 and had an eleventh-grade education and GED but no specialized or vocational training. After working for about three years as an order boy for a paint company, he served in the U. S. Army as a field wireman, setting up field telephones. In 1973 he began working for the defendant-employer. From 1974

to 1996, he worked primarily as a heavy equipment operator. During the months of May through August, he worked in the spray department, applying chemicals to help control roadside vegetation.

The claimant was diagnosed with non-Hodgkin's lymphoma in July, 2000, and retired shortly thereafter. He alleged that the work-related exposure to chemicals, particularly Agent Orange, caused him to develop the disease. He had worked for the employer for 27 years and testified subsequently that he received both retirement and social security disability benefits. He also testified that the disease went into remission after chemotherapy and remained in that state when the claim was heard.

The claimant described his work in the spray department, stating that he would put chemicals in a tank on the back of a truck, spray them on the side of the road with a hand nozzle, and get into the tank to clean it. He also used a three-gallon back pack to spray areas that could only be reached on foot. He stated that he used Agent Orange, which was 2, 4, 5-T, until the 1980s; later, he used 2, 4-D. He stated that he did not begin to use breathing protection devices until about 1994.

The claimant submitted reports from Dr. Dannaher, who is a specialist in blood disorders and his treating oncologist. Dr. Dannaher received a history of exposure to Agent Orange from the claimant's wife. He reported that if the claimant was actually exposed to Agent Orange, a causal relationship between the exposure and the development of the disease was highly probable.

Dr. Herzig is a board certified hematologist/oncologist. He evaluated the claimant on referral from Dr. Auerbach, to determine the cause of his condition. Dr. Herzig received a history of 28 years' exposure to insecticides and herbicides, including

three years' exposure to Agent Orange in the 1970s. He thought that there was sufficient evidence of an association between Agent Orange exposure and the development of malignant lymphoma. He noted that most studies have shown no increase in malignant lymphoma in Vietnam veterans. Several studies have found an association between phenoxy herbicide exposure and lymphoma, and the Institute of Medicine found sufficient evidence of an association. Thus, although he acknowledged that some uncertainty as to definite causality remained, he thought that there was "reasonable evidence" of a causal relationship between the claimant's work exposure and the development of his malignant lymphoma.

Dr. Auerbach, a board-certified orthopedic surgeon and independent medical examiner, stated that he had spoken with Dr. Herzig after the evaluation. According to Dr. Auerbach, Dr. Herzig considered "probable" to be a better word to describe the evidence of causation than "reasonable;" however, he also indicated that an exposure to Agent Orange when the claimant was in service could be significant.

Dr. Kraman, a specialist in internal medicine, performed the university evaluation required by KRS 342.315. He received a history of exposure to herbicides, including an exposure to Agent Orange from 1974 to 1978. He noted that the claimant's cancer had been in remission since 2001 and that his breathing problems began in 2003. Although pulmonary function studies revealed a mild restrictive impairment, Dr. Kraman attributed no portion of it to exposure to herbicides. He also stated that the claimant retained the physical capacity for the work he performed at the time of injury but that he should not be exposed to herbicides. He did not address the cause of the lymphoma.

The employer submitted evidence from Dr. Nichols, who is board-certified in

forensic pathology; Dr. Wolens, who is board-certified in occupational and environmental medicine; and Dr. Samkoff, who is a physician and epidemiologist. Their testimonies indicate that Agent Orange is a mixture of 2, 4-D; 2, 4, 5-T; and 2, 3, 7, 8 tetrachlorodibenzo-p-dioxin (TCDD), which is a known contaminant of 2, 4, 5-T. They also indicate that the manufacture of 2, 4, 5-T ceased in 1969.

Dr. Nichols noted that the claimant's potential for exposure to herbicides while working for the defendant-employer extended from 1974 to 2000 and was seasonal. His potential exposure to Agent Orange, if any, was extremely limited because 2, 4, 5-T became unavailable after 1969. Dr. Nichols concluded: 1.) that the claimant received minimal exposure to Agent Orange, itself; 2.) that 2, 4-D was proven not to be a carcinogen; 3.) that TCDD is not carcinogenic at low levels and may not be carcinogenic even at high levels; 4.) that the scientific literature reveals no proven increase in non-Hodgkin's lymphoma with exposure to Agent Orange, TCDD, and, 2, 4-D; and 5.) that there is no scientific proof of a causal relationship between the claimant's work and his lymphoma. In a supplemental report Dr. Nichols stated that an oncologist treats cancer after it is diagnosed and that the proper expert to address the causal significance of an occupational/environmental exposure is an epidemiologist.

Dr. Wolens testified that neither the Environmental Protection Agency nor the International Agency for Research on Cancer (IARC) had concluded that there was a causal relationship between non-Hodgkin's lymphoma and exposure to 2, 4, 5-T and 2, 4-D, which belong to a group of chemicals known as chlorophenoxyacetic acids (CPAs). He noted that the effect of exposure to CPAs remains controversial. In his opinion, the scientific literature does not support a causal relationship to non-Hodgkin's lymphoma,

and epidemiological studies that show a causal association are flawed. He stated in a supplemental report that an epidemiologist is the expert most skilled to address causation.

Dr. Samkoff explained that an epidemiologist has advanced training in epidemiology and biostatistics and, therefore, is the most appropriate health professional to determine the likelihood that a worker's disease resulted from a work-related exposure to particular chemicals. She reviewed the claimant's work history and testimony regarding his chemical exposures. Dr. Samkoff explained that Agent Orange was a defoliant used in the 1960s and best remembered for its military use in the Vietnam War. She stated that according to reports issued by the Institute of Medicine of the National Academy of Sciences, the evidence did not show that exposure to high levels of Agent Orange in wartime conditions increased the risk of cancer in Vietnam veterans; however, the committee had lowered its scientific standards at the direction of the United States Congress in order to classify the substance as a known carcinogen. She explained why various studies that purported to show a causal relationship between exposure to CPAs and cancer were flawed. She stated that 2, 4-D and TCDD have not been shown to be linked to non-Hodgkin's lymphoma and noted, in any event, that the claimant's exposures to 2, 4, 5,-T and 2, 4-D were sequential rather than concurrent. Finally, she stated that no epidemiologic basis existed to conclude that the claimant's exposure to Agent Orange (if indeed there was such exposure); to 2, 4, 5-T; to TCDD; and to 2, 4-D in his work for the defendant caused him to develop non-Hodgkin's lymphoma.

The ALJ noted that the claimant's disease "may or may not have been caused

by a man-made element" and determined that he failed to present credible scientific evidence that the substance to which he was exposed was Agent Orange. Finding the opinions of the defendant's experts to be "much more persuasive evidence," the ALJ stated that they offered "cogent and credible conclusions" that challenged the claimant's theory of causation. Although noting that he "personally may be of the opinion that the plaintiff's condition must have been a result of his exposure to these chemicals since nothing else adequately explains his illness," the ALJ found that the claimant failed to prove that his condition was work-related. After his petition for reconsideration was denied, the claimant appealed.

The claimant points to the statement that he failed to present credible scientific evidence that he was actually exposed to Agent Orange, argues that his exposure was not in controversy, and argues that the ALJ held him to an inappropriate standard of proof on the matter. He also argues that the ultimate finding and statement that the ALJ personally thought his condition resulted from his exposure to chemicals were inconsistent. He asserts that if he is not entitled to prevail as a matter of law, the ALJ must make additional findings to explain the decision adequately.

The burden was on the claimant to prove that his disease was work-related, a matter that the employer has contested from the outset. Although he testified that he was exposed to Agent Orange, he equated it to 2, 4, 5-T and also likened it to 2, 4-D, which he used later. In contrast, the scientific evidence indicated that Agent Orange is a compound that contains both chemicals. Despite Dr. Nichols' statement that the claimant received minimal exposure to Agent Orange, no evidence indicated that he actually used the compound. Thus, the ALJ did not err in stating that there was no

scientific evidence that the substance to which he was exposed was Agent Orange.

The claimant asserts that Dr. Dannaher's opinion supported the ALJ's belief that his disease was work-related and that the ALJ applied an inappropriate standard in rejecting it. What the argument overlooks is that Dr. Dannaher conditioned his opinion of causation on the existence of an actual exposure to Agent Orange. Absent evidence of such an exposure, no expert testimony indicated that the claimant's lymphoma was work-related. In fact, the testimonies of Drs. Nichols, Wolens, and Samkoff indicate that 2, 4-D; 2, 4, 5-T; and TCDD have not been shown to cause non-Hodgkin's lymphoma, either alone or when combined.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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