[Cite as *Link v. Consol. Rail Corp.*, 2009-Ohio-6216.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92503

DANIEL D. LINK

PLAINTIFF-APPELLEE

vs.

CONSOLIDATED RAIL CORP., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-539566

BEFORE: Cooney, A.J., Stewart, J., and Dyke, J.

RELEASED: November 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, Consolidated Rail Corporation ("CRC"), appeals the trial court's order finding that plaintiff-appellee, Daniel Link ("Link") substantially complied with the prima facie requirements of R.C. 2307.92. Finding some merit to the appeal, we affirm in part and reverse in part, with instructions for the court to administratively dismiss only Link's asbestos-related claims.

{¶ 2} In 2004, Link brought an occupational disease action against CRC, CSX Transportation, and Norfolk Southern Railway Co. Link alleged that these defendants violated the Federal Employers' Liability Act by negligently allowing him to be exposed to various substances, including asbestos and asbestos dust.

{¶ 3} Link asserted six causes of action in his complaint. The first cause of action related to the alleged exposure to asbestos. The second through fourth causes of action related to the alleged exposure to diesel locomotive exhaust, sand and silica dusts, and solvents and other toxic substances. The fifth cause of action related to an alleged aggravation of a pre-existing condition. The sixth cause of action related to an alleged claim of negligent assignment. Link's injuries included pneumoconiosis,

asbestosis, pleural disease, restrictive lung disease, obstructive lung disease, emphysema, asthma, reactive airway disease, "fear of cancer," and lost wages.

{¶ 4} CRC moved to administratively dismiss the matter in January 2008. The trial court held a hearing and subsequently ordered that Link substantially complied with the prima facie filing requirements of R.C. 2307.92.[1]

{¶ 5} It is from this order that CRC appeals, raising two assignments of error for our review. We will discuss the second assignment of error first because it is dispositive. In this assignment of error, CRC argues that the trial court erred in determining that Link had satisfied the requirements of H.B. 292 because he failed to establish a prima facie showing that his alleged

[1] At the time the trial court entered its order, CRC was in the process of responding to Link's submission of additional medical information from Timothy Taylor, D.O. on February 7, 2008.

In addition, CRC filed a motion for reconsideration, arguing that the supplemental medical records submitted by Link failed to establish prima facie evidence of physical impairment as required by R.C. 2307.92, which the court denied without a hearing. In its decision, the trial court cited R.C. 2307.93(A) (savings clause) and *Olson v. Consol. Rail Corp.*, Cuyahoga App. No. 90790, 2008-Ohio-6641. CRC appealed this decision in Appeal No. 91901, but we dismissed the appeal per R.C. 2505.02. Thus, in this appeal, we are not reviewing the savings clause because the trial court did not invoke it.

exposure to asbestos was a substantial contributing factor in causing his injuries.

{¶ 6} The key provisions of H.B. 292 are codified in R.C. 2307.91 through 2307.98 and require plaintiffs who file an asbestos action based on allegations of nonmalignant conditions to present a prima facie showing that the exposed person has a physical impairment resulting from a medical condition, and that the person's exposure to asbestos was a substantial contributing factor to the medical condition. See R.C. 2307.92(B)-(D) and 2307.93(A)(1).

{¶ 7} Specifically, R.C. 2307.92(B) provides in pertinent part that:

> "No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:
>
> "(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:
>
> "(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;
>
> "(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and,

if that type of exposure is involved, the general nature, duration, and general level of the exposure.

"(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

"(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

"(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

"(b) Either of the following:

"(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening described in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has any of the following:

"(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

"(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

"(III) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

"(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis,

> rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:
>
> "(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;
>
> "(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal."

{¶ 8} "Substantial contributing factor" is defined as "[e]xposure to asbestos [that] is the predominate cause of the physical impairment alleged in the asbestos claim" and that "[a] competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred."[2] R.C. 2307.91(FF)(1) and (2).

{¶ 9} "Competent medical authority" is defined as: a medical doctor who provides a diagnosis for purposes of constituting prima facie evidence of an exposed person's physical impairment that meets the requirements specified in R.C. 2307.92. The doctor must also be a "board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist," who "is

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[2]The legislature also defined "bodily injury caused by exposure to asbestos" as a "physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor." R.C. 2307.92.

actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person." R.C. 2307.91(Z)(1)-(2).

{¶ 10} If the plaintiff fails to make such a showing, then the trial court is required to administratively dismiss the action, without prejudice, until the claimant can satisfy the new prima facie requirements. R.C. 2307.93(C).

{¶ 11} CRC argues that Link's treating physician, Dr. Taylor, is not a competent medical authority as defined by R.C. 2307.91(Z). It also argues that Link failed to demonstrate that his forced vital capacity is below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal and that his total lung capacity, by plethysmography or timed gas dilution, is below the predicted lower limit of normal (as required by R.C. 2307.92(B)). Third, CRC argues that Link failed to demonstrate that a competent medical authority took a detailed medical and smoking history.

{¶ 12} Link claims that he submitted medical evidence from his treating physician, Taylor, which substantially complies with the statute. He refers to Taylor as his treating pulmonary specialist and relies on his report to establish his prima facie case that his exposure to asbestos was a substantial contributing factor to his medical condition. However, Taylor is neither a competent medical authority nor a pulmonary specialist as defined by R.C. 2307.92(B) and 2307.91(I). A competent medical authority is a "board-certified pulmonary

specialist," which is defined as "a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of pulmonary medicine." A review of Taylor's credentials reveals that he is a D.O., not a medical doctor, and not certified in any specialty. As such, his opinion relating Link's breathing problems to asbestos cannot be used as the basis for making a prima facie showing.

{¶ 13} Link argues that even without Taylor's report, he has provided the medical opinion of Dr. L. Rao ("Rao"), a board-certified pulmonary specialist. Link further argues that because he suffers from both obstructive and restrictive lung disease, the prima facie filing requirements were met.

{¶ 14} CRC does not dispute that Rao is board-certified, but argues that Link failed to demonstrate that his forced vital capacity is below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal and that his total lung capacity, by plethysmography or timed gas dilution, is below the predicted lower limit of normal (as required by R.C. 2307.92(B)).

{¶ 15} A review of the record demonstrates that the tests performed by Rao revealed that Link's lung capacity was within the normal range. Thus, we find that Link failed to demonstrate that his exposure to asbestos is a substantial contributing factor to his physical impairment.

{¶ 16} Based on the foregoing, we find that the trial court erred in determining that Link established a prima facie case demonstrating that his alleged exposure to asbestos was a substantial contributing factor in causing his injuries.

{¶ 17} Accordingly, the second assignment of error is sustained.

{¶ 18} In the first assignment of error, CRC argues that the trial court erred in ruling that Link satisfied the prima facie requirements contained in H.B. 292 when it issued it ruling without giving CRC the opportunity to contest Link's medical documentation in violation of R.C. 2307.93(A)(1). However, based on our disposition of the second assignment of error, we find the first assignment of error moot.

{¶ 19} We note, however, that Link cites *Riedel v. Consol. Rail Corp.*, Cuyahoga App. Nos. 91237, 91238, and 91239, 2009-Ohio-1242, discretionary appeal allowed, 2009-1070, for the proposition that the administrative dismissal function of R.C. 2307.93(C) applies only to asbestos-related claims. In *Riedel*, the plaintiffs filed a multi-count complaint alleging various pulmonary injuries, which occurred as a result of their occupational exposure to various toxic substances. Plaintiffs offered evidence to establish their prima facie case, which evidence was challenged by CRC. The trial court granted CRC's motion for administrative dismissal as to the asbestos-related

claims only and severed the remaining claims relating to substances other than asbestos.

{¶ 20} On appeal, this court found that "the administrative dismissal provision in H.B. 292 is limited to the asbestos-related claims that are specified in R.C. 2307.92. The legislature could have allowed the court to administratively dismiss the entire tort action, but chose to limit R.C. 2307.93(C) to asbestos-related nonmalignancy claims, lung cancer claims in a smoker, and wrongful death claims." *Riedel.*

{¶ 21} In the instant case, Link's second through fourth causes of action relate to the alleged exposure to diesel locomotive exhaust, sand and silica dusts, and solvents and other toxic substances. The fifth cause of action relates to an alleged aggravation of a pre-existing condition. The sixth cause of action relates to an alleged claim of negligent assignment. Just as in *Riedel*, Link joined his asbestos-related claims with his nonasbestos-related claims. Under Civ.R. 18, a trial court may dismiss one, some, or none of a party's claims without dismissing the entire case.

{¶ 22} Therefore, judgment is affirmed in part and reversed in part, with instructions for the trial court to administratively dismiss only Link's asbestos-related claims.

It is ordered that appellants and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., CONCURS;
ANN DYKE, J., DISSENTS (WITH SEPARATE OPINION).

ANN DYKE, J., DISSENTING:

{¶ 23} I respectfully dissent. I would conclude that plaintiff Daniel Link established a prima-facie showing of asbestos-related injury through a competent medical authority, as required pursuant to R.C. 2307.91, et seq. I would therefore conclude that the second assignment of error is without merit and would affirm.

{¶ 24} In this matter, plaintiff submitted the report of Dr. L.C. Rao who, according to plaintiff's evidence, treated plaintiff and devotes about 10 per cent of his practice to medical-legal work, and is therefore a competent medical authority. In relevant part, Dr. Rao wrote:

{¶ 25} "* * * Overall pulmonary function studies are consistent with a mild obstructive pattern with a component hyperactive airways associated with severe diffusion capacity abnormality."

{¶ 26} "* * *

{¶ 27} "[Mr. Link] * * * was exposed to multiple dusts including silica sand, asbestos, shop dust/dirt and diesel fumes. He has symptoms of a pulmonary impairment with evidence of mild obstruction on pulmonary function studies associated with hyperactive airways. In addition he has a severe abnormality with his diffusion capacity probably accounting for his need for oxygen therapy. There is radiological evidence of bilateral interstitial fibrosis and bilateral diaphragmatic plaque consistent with a diagnosis of asbestosis and asbestos associated diaphragmatic plaque. In addition, there is evidence of obstructive pulmonary disease with hyperactive airways. On the basis of his significant occupational exposure to asbestos dust, silica sand, diesel fumes and review of his chest x-ray, physical examination and pulmonary function studies a diagnosis of asbestosis and asbestos associated diaphragmatic plaque is established within a reasonable degree of medical certainty. In addition he has chronic obstructive pulmonary disease with hyperactive airways probably due to exposure to multiple dusts, a remote history of smoking and a history of asthma. The above physical condition is causally related to his occupational exposure to multiple dusts and diesel fumes."

{¶ 28} The trial court determined that plaintiff had "substantially complied with the prima-facie filing requirements of R.C. 2307.92."

{¶ 29} In their assignment of error, defendants assert that since Dr. Rao determined that plaintiff had a chest radiograph consistent with a profusion of 1/0 on the ILO scale,[3] plaintiff is required to demonstrate the forced vital capacity and total lung capacity results set forth in R.C. 2307.92(B).

{¶ 30} In opposition, plaintiff asserts that he need not meet these requirements that pertain to asbestos-related lung disease, since he suffers from both asbestosis and chronic obstructive lung disease.

{¶ 31} R.C. 2307.92(B)(3)(b)(ii) provides that, "in order to establish that plaintiff has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

{¶ 32} "(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

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[3] Pursuant to R.C. 2307.91(Q), the "ILO scale means the system for the classification of chest x-rays set forth in the international labor office's guidelines for the use of ILO international classification of radiographs of pneumoconiosis (2000), as amended."

{¶ 33} "(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal."

{¶ 34} This language has been explained as a codification of the existing common law that "asymptomatic pleural thickening is, by itself," not sufficient to establish a compensable injury for asbestos exposure. *Ackison v. Anchor Packing Co.,* 120 Ohio St.3d 228, 2008-Ohio-5243, citing to and quoting Proposed Final Draft No. 1, Restatement of the Law 3d, Torts (Apr. 6, 2005), Section 4, Comment a. A Reporter's Note, which states:

{¶ 35} "An unfortunate and aberrational exception to the [general tendency] of small or trivial harms [to remain unlitigated] explained in this Comment is asbestos claims by plaintiffs who suffer no clinical symptoms but who have abnormal lung X-rays, a condition known as pleural plaque. These claims exist only because of the massive number of such claimants and the efficiencies of aggregating such claims to make them economically viable for litigation. Some courts have responded by requiring that an asbestos plaintiff prove the existence of clinical symptoms before sufficient bodily injury exists. See, e.g., *In re Haw. Fed. Asbestos Cases,* 734 F.Supp. 1563 (D. Haw. 1990) (pleural plaque does not constitute legally cognizable injury); *Owens-Ill. v. Armstrong,* 87 Md. App. 699, 591 A.2d 544 (1991) (pleural scarring does not entail physical harm that is compensable in tort), aff'd in relevant part, 326 Md. 107, 604 A.2d 47 (1992); *Giffear v. Johns-Manville Corp.,* 429 Pa. Super. 327, 632 A.2d 880 (1993)

(pleural plaque is not a legally cognizable injury). * * * But, see, *Gideon v. Johns-Manville Sales Corp.,* 761 F.2d 1129 (5th Cir.1985) (applying Texas law) (cause of action accrued when plaintiff suffered pleural plaque)."

{¶ 36} Here, the pulmonary function studies dated January 9, 2003, demonstrate that plaintiff had a forced vital capacity that was 81% or in the normal range, and his total lung capacity was 95% or in the normal range. His test results from August 30, 2007, demonstrate a forced vital capacity of 81% and total lung capacity of 91% or in the normal range. However, according to Dr. Rao:

{¶ 37} "* * * Overall pulmonary function studies are consistent with a mild obstructive pattern with a component hyperactive airways associated with severe diffusion capacity abnormality."

{¶ 38} "He has symptoms of a pulmonary impairment with evidence of mild obstruction on pulmonary function studies associated with hyperactive airways. In addition he has a severe abnormality with his diffusion capacity probably accounting for his need for oxygen therapy. There is radiological evidence of bilateral interstitial fibrosis and bilateral diaphragmatic plaque consistent with a diagnosis of asbestosis and asbestos associated diaphragmatic plaque. In addition, there is evidence of obstructive pulmonary disease with hyperactive airways probably due to exposure to multiple dusts, a remote history or smoking and asthma."

{¶ 39} Plaintiff's evidentiary materials also indicated that in 2007, the Railroad Retirement Board granted plaintiff a disability annuity.

{¶ 40} Thus, I would conclude that the evidentiary materials submitted in this matter do not demonstrate that plaintiff was suffering "solely chronic obstructive pulmonary disease." Further, from the evidentiary materials submitted, I cannot say that plaintiff was simply suffering from asymptomatic pleural thickening, which under the common law was not compensable. I am therefore persuaded by plaintiff's argument that the criteria set forth in R.C. 2307.92(B) do not operate to exclude plaintiff herein.