

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Diana Moretti and John Moretti, dec'd,	:	
	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1452 C.D. 2013
	:	
Workers' Compensation Appeal Board (Kimberly Clark Corporation),	:	Submitted: January 31, 2014
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: March 13, 2014

Diana Moretti (Claimant) and John Moretti, dec'd (Decedent), petition for review of an Order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ) Decision denying Claimant's Claim Petition and Fatal Claim Petition (Petitions). On appeal, Claimant argues that the WCJ erred by applying an incorrect burden of proof and that the WCJ's findings of fact are not supported by competent evidence. Discerning no error, we affirm.

Claimant is Decedent's widow. (WCJ Decision, Findings of Fact (FOF) ¶ 1.) Decedent was employed by Kimberly Clark Corporation (Employer) as a mechanic responsible for, *inter alia*, repairing paper machines at Employer's paper mill facility. (FOF ¶ 4c.) From at least 1995 to 2005, Decedent "was exposed to asbestos while performing his duties as a mechanic" for Employer. (FOF ¶ 9c.) On July 14, 2007, Claimant was admitted to the emergency room with severe pain which resulted in a diagnosis of colon cancer. (FOF ¶ 3a.) Decedent was 60 years old at the time. (FOF ¶ 3a.) Decedent began chemotherapy treatment, but he succumbed to colon cancer on May 18, 2009, at the age of 62. (FOF ¶¶ 3a, 5f.)

Claimant filed a Claim Petition seeking lifetime workers' compensation benefits and a Fatal Claim Petition seeking widow's benefits alleging that Decedent suffered an injury on July 14, 2007 in the nature of "metastatic colon cancer with metastases to the liver." (FOF ¶ 1.) Claimant alleged in the Claim Petition that the last date of exposure for an occupational disease was July 14, 2007. (FOF ¶ 1.) Employer filed answers denying the material allegations in both Petitions. (FOF ¶ 2.) Hearings before a WCJ ensued.

In support of the Petitions, Claimant presented the deposition testimony of Decedent's former co-worker, Charles Howell, and the deposition testimony of Barry L. Singer, M.D. In opposition to the Petitions, Employer presented the deposition testimony of: (1) Claimant; (2) Employer's environmental manager, Gary Baker; and (3) Alan Lippman, M.D.

Claimant testified, in relevant part, as follows. Although Decedent had been a smoker, he stopped smoking approximately 20 years before his death. Decedent rarely drank alcohol. Decedent altered his diet in 1999 after he was diagnosed with diabetes to reduce his consumption of fried foods and to include more vegetables. Decedent walked every night and exercised for several years. Claimant and Decedent rode bicycles frequently and swam in the family pool. Decedent did not have a family history of cancer. (FOF ¶ 3.)

Howell testified, in relevant part, as follows. Howell retired from his employment with Employer after 43 years. For the last 10 to 15 years of his career, he worked as a machine tender of one of the 11 machines operating in the paper mill. Howell worked with Decedent for 25 years and knew Decedent as one of the mechanics responsible for maintaining the machines. Decedent worked on the machine that Howell operated from 1995 to 2005. Prior to 1995, Decedent would have performed his duties as a mechanic throughout the paper mill, including working on the main floor and in the basement. (FOF ¶ 4.)

With regard to Decedent's exposure to asbestos, Howell stated as follows. Decedent's "work environment contained asbestos" and Decedent "routinely came in contact with asbestos dryer felts on the machines." (FOF ¶ 4d.) Asbestos was present in all areas of the plant where Decedent worked during his entire career and the machines that Decedent worked on were covered in asbestos. "All of the pipes and wires were wrapped with asbestos" and "holes were often punched in the material" covering the pipes. (FOF ¶ 4d.) Employer began removing asbestos in 1994; however, asbestos still remained in the plant. (FOF ¶ 4d.)

Baker, who is the manager of Employer's environmental and industrial hygiene program, testified, in relevant part, as follows. Employer's plant contains asbestos, but an outside contractor conducts onsite remediation of the asbestos. Employer does not routinely perform air quality testing and such testing is performed only after remediation has started. Although Baker knew Decedent, he did not supervise Decedent or know what his job duties entailed. Asbestos was present in Decedent's work area, but Baker could not estimate the amount of asbestos present. (FOF ¶ 6.)

Dr. Singer is board certified in internal medicine and "one third of his practice involves colon cancer." (FOF ¶ 5a.) Dr. Singer testified that he reviewed Decedent's medical records, Decedent's death certificate, journal articles, MSDS sheets, exposure information from OSHA and NIOSH, and Howell's testimony. Based upon this review, Dr. Singer opined that Decedent's "exposure to asbestos at work was a substantial contributing factor in the development of his colon cancer and death at age 62." (FOF ¶ 5f.) Dr. Singer offered the following explanation for his opinion. Decedent's only risk factors for developing colon cancer were his regular exposure to asbestos at work and his brief history of smoking. The fact that Decedent stopped smoking several years before his death significantly reduced the potential risk smoking had in the development of Decedent's colon cancer. There is no minimum amount of asbestos exposure necessary to cause cancer, "[t]here are no tests to show asbestos fiber in the colon"; and colon cancer is asymptomatic until the cancer develops. (FOF ¶ 5d.) "Journal articles provide varied results on the connection between colon cancer and asbestos exposure." (FOF ¶ 5e.)

Dr. Lippman is board certified in the area of medical oncology and his practice is concentrated in this area. Dr. Lippman did not believe that the materials he reviewed or Howell's testimony was sufficient to show that Decedent was exposed to asbestos. Dr. Lippman opined that Decedent's risk factors for developing colon cancer were obesity, diabetes, smoking, consumption of fatty foods, and lack of exercise, but Decedent's colon cancer was most likely related to his obesity and diabetes. Dr. Lippman testified that he was "not aware of any studies, reports, or peer review articles definitively linking colon cancer with asbestos exposure" and that "[t]here [was] no proof that one causes the other." (FOF ¶ 7e.) Dr. Lippman stated that he was not familiar with the journal articles relied upon by Dr. Singer that allegedly indicated that asbestos exposure "is a significant contributing factor to the development of colon cancer." (FOF ¶ 7f.) Dr. Lippman opined that "[a]sbestos is not a cause of colon cancer," and that Decedent's alleged exposure "was not a significant contributing factor" to the development of his colon cancer because Decedent's "death was caused by metastatic cancer of the colon." (FOF ¶ 7i.)

The WCJ found the testimony of Claimant, Howell, and Baker credible. (FOF ¶¶ 8, 9, 10.) The WCJ rejected Dr. Singer's testimony as not credible, especially his testimony that Decedent's exposure to asbestos at Employer's paper mill was a substantial contributing factor in the development of Decedent's colon cancer, which led to his death. (FOF ¶ 11.) Specifically, the WCJ rejected Dr. Singer's testimony as not credible for the following reasons:

- a. Although Dr. Singer claims that there are many articles to support his opinion concerning the relationship between [Decedent's] colon cancer/death and his exposure to asbestos at [Employer's]

company, he neither specifically identified those articles nor did he provide a copy of such articles.

- b. Dr. Singer admitted that he has not seen any diagnostic studies which would show that [Decedent] has asbestos fibers in his lungs or the walls of his bowels.
- c. Dr. Singer failed to explain to the satisfaction of this Judge the mechanism by which [Decedent's] exposure to asbestos substantially contributed to the development of [Decedent's] colon cancer which [led] to his death.

(FOF ¶¶ 11a-c.)

With regard to Dr. Lippman's testimony, the WCJ found, as credible, the doctor's testimony that Decedent's exposure to asbestos at Employer's paper mill neither caused Decedent's colon cancer nor his death, "nor was it a substantial contributing factor in the development of [Decedent's] colon cancer which led to his death." (FOF ¶ 12.) The WCJ determined that Decedent's medical records and the medical articles Dr. Lippman reviewed, which were attached to his deposition, corroborated Dr. Lippman's credible testimony. (FOF ¶ 12.) The WCJ also cited Dr. Lippman's "expertise as a physician holding board certification in internal medicine with a subspecialty in medical oncology" as another reason the WCJ found him credible. (FOF ¶ 12.) The WCJ rejected Dr. Lippman's testimony that Decedent was not exposed to asbestos during his employment because Dr. Lippman's testimony was not consistent with Howell's credible testimony. (FOF ¶ 12.)

Accordingly, the WCJ concluded that Claimant failed to meet her burden of proof and dismissed her Petitions. Claimant appealed the WCJ's Decision to the

Board, which affirmed because Claimant failed to establish that Decedent's colon cancer was work related. Claimant now petitions this Court for review.¹

On appeal, Claimant raises the following issues: (1) whether the WCJ and the Board misapplied the burden of proof after finding that Decedent was exposed to asbestos while employed by Employer and died due to colon cancer; and (2) whether the WCJ's findings of fact regarding the connection between colon cancer and asbestos exposure are supported by competent evidence and consistent with relevant authority.

In support of the first issue, Claimant argues that, while her Claim Petition was filed pursuant to Section 301(c)(1) of the Workers' Compensation Act² (Act),

¹ "This Court's scope of review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether errors of law were made, or whether constitutional rights were violated." Peters Township School District v. Workers' Compensation Appeal Board (Anthony), 945 A.2d 805, 810 n.8 (Pa. Cmwlth. 2008). "Substantial evidence has been defined as such relevant evidence as a reasonable person might accept as adequate to support the conclusion." Wells-Moore v. Workmen's Compensation Appeal Board (McNeil Consumer Products Co.), 601 A.2d 879, 881 (Pa. Cmwlth. 1992). The appellate role is not to reweigh the evidence or review the credibility of witnesses, but to "determine whether, upon consideration of the evidence as a whole, the [WCJ's] findings have the requisite measure of support in the record." Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 293, 612 A.2d 434, 437 (1992).

² Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 411(1). Section 301(c)(1) provides, in pertinent part, as follows:

The terms "injury" and "personal injury," as used in this act, shall be construed to mean an injury to an employe, regardless of his previous physical condition, except as provided under subsection (f), arising in the course of his employment and related thereto, and such disease or infection as naturally results from the injury or is aggravated, reactivated or accelerated by the injury; and wherever death is mentioned as a cause for compensation under this act, it shall mean only

(Continued...)

the WCJ's finding that Decedent was exposed to asbestos and suffered from cancer entitles Claimant to benefits pursuant to Section 301(c)(2) of the Act.³ Claimant asserts that she is pursuing benefits for an occupational disease as set forth in Section 108(l) of the Act⁴ and, therefore, entitled to the presumption found in Section 301(e) of the Act⁵ if colon cancer is caused by asbestos exposure. Claimant argues that once the WCJ accepted her evidence that Decedent was exposed to asbestos at work, she became entitled to a presumption of causal relationship between the asbestos exposure and Decedent's colon cancer, and the burden should have shifted to Employer to rebut the presumption.

death resulting from such injury and its resultant effects, and occurring within three hundred weeks after the injury.

Id.

³ 77 P.S. § 411(2). Section 301(c)(2) of the Act provides, in pertinent part, as follows:

The terms "injury," "personal injury," and "injury arising in the course of his employment," as used in this act, shall include, unless the context clearly requires otherwise, occupational disease as defined in section 108 of this act.

Id.

⁴ Added by Section 1 of the Act of October 17, 1972, P.L. 930, as amended, 77 P.S. § 27.1(l).

⁵ Added by Section 3 of the Act of October 17, 1972, P.L. 930, as amended, 77 P.S. § 413. Section 301(e) provides as follows:

If it be shown that the employee, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employee's occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive.

Id.

Claimant argues further that notwithstanding that both medical experts agreed that there are studies that indicate that colon cancer can be connected to asbestos exposure as well as studies that find no connection, the connection between colon cancer and asbestos has been definitely established by the Pennsylvania Courts and Federal legislation. As support for this argument, Claimant cites to Today's Express, Inc. v. Barkan, 626 A.2d 187 (Pa. Super. 1993), and contends that the Pennsylvania Superior Court acknowledged in this case that a 1985 Environmental Protection Agency paper confirms that colon cancer is a disease associated with exposure to asbestos. Claimant cites further to the Code of Federal Regulations and the Federal Register and contends that, due to its relation to asbestos, colon cancer is considered by the United States Congress to be a covered disease under the World Trade Center Health Plan (WTC Health Plan). Given this authority, Claimant argues there is no plausible dispute that colon cancer is an asbestos-related cancer; therefore, she was entitled to the presumption found in Section 301(e) of the Act.

In a claim petition proceeding, the claimant bears the burden of establishing the right to compensation and all necessary elements to support an award. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 141, 634 A.2d 592, 595 (1993). In a fatal claim petition, the claimant must establish a work-related injury or occupational disease and that this injury or occupational disease was a substantial contributing cause in bringing about the decedent's death. City of Philadelphia v. Workers' Compensation Appeal Board (Kriebel), 612 Pa. 6, 16, 29 A.3d 762, 769 (2011). Once the claimant establishes that the decedent suffered from an enumerated occupational disease, the claimant is entitled to the

presumption under Section 301(e) of the Act that the disease arose during the course of the decedent's employment. Id. at 17, 29 A.3d at 769; Sun Home Health Visiting Nurses v. Workers' Compensation Appeal Board (Noguchi), 815 A.2d 1156, 1160 (Pa. Cmwlth. 2003). "The presumption under Section 301(e) is an evidentiary advantage for the claimant who has contracted an occupational disease in an occupation or industry, in which such disease is a hazard." Sun Home Health, 815 A.2d at 1160. "The burden then shifts to the employer to rebut the presumption with substantial, competent evidence." Kriebel, 612 Pa. at 17, 29 A.3d at 769.

Thus, before the presumption applies, Claimant had to first show that Decedent did suffer from an enumerated occupational disease. Under Section 301(c)(2) of the Act, an injury arising in the course of employment includes an "occupational disease as defined in section 108." 77 P.S. § 411(2). The definition of an occupational disease applicable in this case in Section 108(l) is the following: "[a]sbestosis 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." 77 P.S. § 27.1(l). Accordingly, Claimant had the burden of proving that Decedent's colon cancer resulted from his exposure to asbestos through unequivocal medical evidence. See Taulton v. Workers' Compensation Appeal Board (USX Corporation), 713 A.2d 142, 145 (Pa. Cmwlth. 1998) (holding that "where the immediate cause of a worker's death is noncompensable, the claimant must prove by unequivocal medical evidence that the alleged occupational disease

was a substantial contributing factor . . . in bringing about the death”).⁶ Notwithstanding the fact that the WCJ did not find credible Dr. Singer’s medical opinion that Decedent’s colon cancer was caused by asbestos exposure, Claimant argues that the Superior Court’s decision in Today’s Express and the Federal government’s WTC Health Plan proves, without doubt, that colon cancer is an asbestos-related cancer and thus, an occupational disease. However, Claimant did not raise these arguments before the WCJ or the Board and, even if this Court could review them, the authorities cited do not stand for that proposition.

In Today’s Express, purchasers of an apartment building brought an action against the sellers averring that the sellers knew or had reason to know when they sold the property that it contained asbestos. Today’s Express, 626 A.2d at 188-89. Before the Superior Court was the purchasers’ appeal from an order of the trial court granting a motion for summary judgment in favor of the sellers. Id. The issue before the Superior Court was whether the purchasers’ action was barred by the applicable two-year statute of limitations. Id. In resolving this issue, the Superior Court pointed out that, during discovery, the purchasers produced the 1985 paper captioned “Guidance for Controlling Asbestos-Containing Materials in Buildings,” which contained references to asbestos being considered a problem in buildings by the federal government as early as 1985. Id. at 190. The Superior Court quoted parts of this paper to support its holding that the purchasers did not exercise due diligence in a timely manner to ascertain what problems may have

⁶ In Taulton, 713 A.2d at 145, we upheld the denial of the claimant’s fatal claim petition because the WCJ did not find credible the medical evidence introduced by claimant purporting to prove that the decedent’s laryngeal cancer was caused by asbestos exposure.

existed with the apartment building despite having information in their possession indicating that asbestos was considered a problem in commercial buildings. Id. at 191. Therefore, contrary to Claimant's position, the Superior Court in Today's Express did not hold or recognize, as a matter of law, that colon cancer is an asbestos-related cancer for workers' compensation purposes.

Claimant also cites proposed Federal Regulations from the Federal Register and alleges that this demonstrates that the federal government has recognized colon cancer as an asbestos-related cancer as a matter of law which, would relieve Claimant of her burden of proving that Decedent suffered from an occupational disease as defined by Section 108(l) of the Act, and that the disease was a substantial contributing cause in bringing about Decedent's death. However, these proposed regulations were not reviewed by any medical expert in this case.⁷ This

⁷ Claimant relies upon 77 F.R. 35574 as support for her assertion that the WTC Health Plan added colon cancer as a covered disease solely due to its relation to asbestos. 77 F.R. 35574 was issued on June 13, 2012, wherein it was proposed that certain types of cancer be added to the list of WTC-related health conditions set forth in 42 C.F.R. § 88.1. In proposing that malignant neoplasm of the colon and rectum be added to the list set forth in 42 C.F.R. § 88.1, the WTC Program Administrator noted in 77 F.R. 35574 that "[t]he review of published exposure assessment studies identified asbestos as present in the New York City disaster area has determined that the results of epidemiologic studies of exposure by inhalation provide limited epidemiologic evidence that all forms of asbestos (chrysotile, crocidolite, amosite, tremolite, actinolite, and anthophyllite) cause cancer of the colon and rectum in humans." 42 C.F.R. § 88.1 was amended effective October 12, 2012 to include malignant neoplasm of the colon and rectum as a covered health condition. 77 F.R. 56138-01. However, coverage under the WTC Health Plan for colon cancer is not guaranteed or automatic. As explained in the Federal Register:

In order for an individual enrolled as a WTC responder or survivor to obtain coverage for treatment of any health condition on the List of WTC-Related Health Conditions, including any type of cancer added to the List, a two-step process must be satisfied. First, a physician at a Clinical Center of Excellence (CCE) or

(Continued...)

Court cannot, on this record, hold that Claimant met her burden based upon these proposed Federal regulations.

Accordingly, because Decedent was exposed to asbestos does not automatically entitle Claimant to the presumption found in Section 301(e) of the Act and Claimant still had the burden to prove that colon cancer was a cancer caused by asbestos exposure. Therefore, the WCJ did not err by applying an incorrect burden of proof.

in the nationwide provider network must make a determination that the particular type of cancer for which the responder or survivor seeks treatment coverage is both on the List of WTC-Related Health Conditions and that exposure to airborne toxins, other hazards, or adverse conditions resulting from the September 11, 2001, terrorist attacks is substantially likely to be a significant factor in aggravating, contributing to, or causing the type of cancer for which the responder or survivor seeks treatment coverage. Pursuant to 42 C.F.R. [§] 88.12(a), the physician's determination must be based on the following: (1) An assessment of the individual's exposure to airborne toxins, any other hazard, or any other adverse condition resulting from the September 11, 2001, attacks; and (2) the type of symptoms reported and the temporal sequence of those symptoms. In addition, the statute requires that all physician determinations are reviewed by the Administrator and are certified for treatment coverage unless the Administrator determines that the condition is not a health condition on the List of WTC-Related Health Conditions or that the exposure resulting from the September 11, 2001, terrorist attacks is not substantially likely to be a significant factor in aggravating, contributing to, or causing the condition. Thus, the inclusion of a condition on the List of WTC-Related Health Conditions, in and of itself, does not guarantee that a particular individual's condition will be certified as eligible for treatment. Responders and survivors denied certification have a right to appeal the denial of certification.

77 F.R. 56138-01 (footnote omitted).

In support of the second issue Claimant raises in this appeal, that the WCJ's findings of fact are not supported by substantial competent evidence, Claimant takes issue with the WCJ's rejection of Dr. Singer's testimony as not credible and the acceptance of Dr. Lippman's causal testimony as credible. Claimant again cites to Today's Express and Federal law governing the WTC Health Plan to argue that the overwhelming authority establishes that colon cancer is an asbestos-related cancer; therefore, the WCJ should have credited Dr. Singer's opinion that Decedent's colon cancer was caused by his exposure to asbestos at work. However, as discussed, Today's Express and the proposed Federal Regulations were not raised before the WCJ and, in any event, do not establish, for workers' compensation purposes, that colon cancer is an asbestos-related cancer; therefore, we further conclude that the WCJ did not err by not crediting Dr. Singer's testimony that Decedent's colon cancer was caused by asbestos exposure.

Claimant additionally asserts that, because the WCJ found that Decedent was exposed to asbestos at work and Dr. Lippman did not agree that Decedent was so exposed, his testimony was not competent. However, the fact that the WCJ did not accept, as credible, Dr. Lippman's opinion that Decedent was not exposed to asbestos does not result in the conclusion that the WCJ's findings are not supported by competent evidence. Independent of his belief that Decedent was not exposed to asbestos in the work place, Dr. Lippman credibly testified that he was "not aware of any studies, reports or peer review articles definitely linking colon cancer with asbestos exposure," there was "no proof that one causes the other," and "[a]sbestos is not a cause of colon cancer." (FOF ¶¶ 7e, 7i.) The only portion of Dr. Lippman's testimony not accepted by the WCJ was the doctor's opinion that

Decedent was not exposed to asbestos during the time he was employed by Employer. (FOF ¶ 12.) Therefore, the WCJ accepted, as credible, Dr. Lippman's testimony that colon cancer is not caused by asbestos exposure and that Decedent's colon cancer was most likely caused by obesity and diabetes. (FOF ¶¶ 7, 12.)

It is axiomatic that “[t]he WCJ, as fact finder, has exclusive province over questions of credibility and a reviewing court is not to reweigh the evidence or review the credibility of witnesses.” City of Philadelphia v. Workers' Compensation Appeal Board (Reed), 785 A.2d 1065, 1068 (Pa. Cmwlth. 2001). As such, given the competing medical opinions, we cannot disturb the WCJ's credibility determinations in this matter. Accordingly, the WCJ's findings are supported by substantial competent evidence.

For the foregoing reasons, the Board's Order is affirmed.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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dec'd,	:	
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Petitioner	:	
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	:	
Workers' Compensation Appeal Board	:	
(Kimberly Clark Corporation),	:	
	:	
Respondent	:	

ORDER

NOW, March 13, 2014, the Order of the Workers' Compensation Appeal Board entered in the above-captioned matter is **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge