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February 27, 1976

Thorley C. Mills, Jr., Esquire
Assistant Counsel
The Firestone Tire and Rubber Company
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Re: Workmen's Compensation and
Occupational Disease
Compensation Questions

Dear Thorley:

This is in response to your letter of December 16, 1975, regarding OSHA-mandated PVC screening procedures. The question you raised was whether an employee's refusal to undergo medical examination to determine his continued suitability for vinyl chloride exposure might be the basis for a defense to a Workmen's Compensation or Occupational Disease Compensation claim in Pennsylvania or Maryland. We do not render formal opinions on the law of states other than Pennsylvania but we have undertaken an analysis of the applicable Maryland law which we hope you will find to be useful.

Our research leads us to conclude that a defense of the sort you mention, similar to common law "assumption of risk," is probably available both in Pennsylvania and Maryland. However, these compensation statutes are typically construed in favor of the employee and in such a way as to limit defenses to claims. Consequently, it is difficult to express any more positive judgment with much confidence.

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The medical pathologies resulting from PVC exposure appear to be covered by the Pennsylvania Occupational Disease Compensation Act [O.D.C.A.] [77 P.S. §1201, et seq.], rather than the Workmen's Compensation Act, which covers only physical injuries. Section 1208(n) of the O.D.C.A., after listing certain specific covered diseases, extends coverage to:

"...all other occupational diseases
(1) to which the claimant is exposed by reason of his employment, and (2) which are peculiar to the industry or occupation, and (3) which are not common to the general population."

No provisions of this Act, or of the Workmen's Compensation Act discussed here for purposes of analogy, appear directly applicable to the present question. 77 P.S. §1406 and §531 are provisions of the respective Acts which deal with the refusal by the employee of post-illness or post-injury services offered by the employer. Sections 1414 and 651 respectively deal with physical examinations during the same post-trauma period. Each of the above sections provides for a reduction or cessation of benefits where the employee refuses services or refuses to undergo a physical examination. However, each appears clearly to refer only to the post-illness or post-injury time period. Similarly, no cases dealing with the sort of risk involved in this question were found.

The defense you seek to raise seems analogous to contributory negligence or assumption of risk as a defense to an action for damages. It is quite clear, initially, that the negligence of an employee does not affect his right to benefits. Section 1401(a) provides that "when employer and employee shall by agreement, . . . accept the provisions of article three of this act, compensation for disability . . . shall be paid by the employer, without regard for negligence"

Section 1401 does not, however, mention assumption of risk. Clearly, however, one could not argue that the mere fact of accepting a job involving possible exposure to disease-causing elements constitutes assumption of the risk of contracting the relevant disease, as this would totally negate the effect of the O.D.C.A. The Third Circuit made just this point in Boal v. Electric Storage Battery Company, 98 F.2d 815 (3d Cir. 1938), a case not involving the O.D.C.A., holding that an employee has not assumed the risk of contracting an occupational disease just because he accepts certain employment. Section 1301 (which applies to employers choosing not to be covered by the Act proper and precludes certain defenses in any action by an employee based on

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a disability normally covered by the O.D.C.A.) does not preclude assumption of risk as a defense. This may be due to recognition of the Boal rationale, as the pre-Boal predecessor of Section 1301 [Laws of 1937, P.L. 552 §8(b)] and the present Workmen's Compensation Act equivalent [77 P.S. §41(b)] specifically exclude assumption of risk as a defense. Thus, by analogy, these sections indicate that assumption of general risks of employment is not a defense to a compensation claim.

In the present case, however, what is being assumed is not the risk of exposure to vinyl chloride per se but, rather, the risk of excessive exposure as a result of a willing refusal to undergo screening procedures. Since this would be a knowing rather than negligent failure, the elimination of contributory negligence as a defense to a claim for compensation should not affect the force of the argument that when the employee voluntarily refuses to undergo the kind of examination contemplated, he has assumed a specific risk beyond that inherent in the nature of his employment. By analogy, Section 41(b) [of the W.C.A.] provides a defense of "reckless indifference to danger." This would appear to be a fair and reasonable reading of the O.D.C.A. However, as noted above, it is important to keep in mind that Pennsylvania courts have traditionally viewed both the Workmen's Compensation Act and the Occupational Disease Compensation Act liberally in favor of the employee. Thus, in the absence of decided cases dealing with this question, one cannot be certain that the suggested interpretation would be accepted.

Maryland law in its relevant aspects is similar to that of Pennsylvania. Occupational diseases are within the scope of the Workmen's Compensation Act, 101 Md. S. Ann. §1, et seq. Once again, no sections deal specifically with the refusal of services or a physical examination prior to the occurrence of an illness; Sections 15 and 37 have been construed to bar refusal of reasonable post-injury or post-illness care as a defense and Section 42 requires post-injury or post-illness submission to physical examination. Section 15 makes it clear that compensation is provided "without regard to fault." Section 15 also restricts defenses in lawsuits against non-covered employers (equivalent to Sections 41(b) and 1301):

"...in such an action the defendant may not plead as a defense that the injury was caused by the negligence of the fellow servants or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee."

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Once again, it should be noted that the statute only bars assumption of the risks of employment as a defense. Where the employee has knowingly assumed a risk beyond the threshold risk of his employment, in that he refuses to avail himself of screening procedures to protect him from occupational hazards, a defense would appear to exist. However, Maryland courts have the same tendency toward liberal interpretations as those of Pennsylvania.

I am sorry that our conclusions cannot be more definitive. Given the tendencies of the courts regarding defenses to these kinds of claims, and the absence of decisional law on the particular question, the most one can say at this point is that refusal would probably give rise to a defense.

Sincerely yours,

Marty Hall
Martin Wald

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