

P. B. REIF

JAN 22 1985
CASE NO. 84 VN 133071

04208406

PLAINTIFF'S
EXHIBIT
WRG-792GEORGE DUPLANTIER aka
LLOYD G. MC CLENNON

-v-

CALIFORNIA ZONOLITE CO.
and W.R. GRACE & CO.;
Permissibly self-insuredJudge: SHELDON C. ST. CLAIR
Date: January 14, 1986

Injury: 9/50-9/51

REPORT ON EMPLOYER'S PETITION FOR RECONSIDERATION

Defendant permissibly self-insured employer, as corporate successor to applicant's employer during the years 1950 and 1951, seeks reconsideration of the December 6, 1985 Findings, Award and Order, by which applicant, a warehouseman, born August 21, 1924, was found to have sustained a cumulative injury to his lungs from said employment exposure resulting in, among other things, permanent and total disability and a need for further medical treatment. Defendant, raising statutory grounds, contends that the finding of a compensable injury is not supported by a preponderance of the evidence, and that in any event applicant's claim is barred by the statute of limitations. It will be demonstrated that both contentions are without merit.

1. THE EVIDENCE PREPONDERATES IN FAVOR OF A FINDING OF A COMPENSABLE CUMULATIVE INJURY TO THE LUNGS RESULTING IN ASBESTOSIS.

The medical and lay record fully supports, if not compels, a finding that applicant was exposed to asbestos or asbestos-like materials in the course of his employment with petitioner and that said exposure indeed contributed to his totally disabling lung condition. Petitioner, through adroit cross-examination, established that applicant had no exposure to any asbestos or asbestos-like materials during the course of any employment, with the significant exception of petitioner itself. (See Summary of Evidence 7/17/85, l. 21 of p. 7 through l. 1 of p. 9.)

The suspicion that applicant might have had some exposure to asbestos in the course of employment with Douglas Aircraft which followed the Zonolite employment was specifically dispelled by the testimony of the witnesses called by the successor of Douglas Aircraft, to wit: McDonnell Douglas Corporation at hearing on November 27, 1985. It was established virtually without contradiction that applicant had no asbestos exposure in the course of his employment from 1956 through 1957 with the Douglas Aircraft firm.

Defendant does not really dispute the fact that applicant established exposure at least to vermiculite while employed with Zonolite Company in 1950 and 1951. His testimony indicated that he would bag the finished product, vermiculite. This was used for lightening a concrete mix, for fertilizer and for a fire retardant. He would bag the material after it was processed by subjection to extreme heat. They would fill about one bag every two minutes without screens or filters on top of the furnace. He also emptied boxcars.

Apparently there was a lot of dust. At first they did not wear face masks but after applicant and others complained they started using them. "There were layers of dust in the plant. It was a fine, fine material. Like little hair fibers, real small. It was closer to cotton candy than talc. It was fibrous material. It felt like real fine sawdust. Everything was covered with it. There were no rafters in the warehouse. He wore no special clothing. His clothing was always covered with this dust. . . ." (7/16/85 Summary of Evidence, pp. 4-5.)

He would also unload boxcars involving substantial exposure to the vermiculite ore. The material would be dumped down a chute right

next to applicant.

The usual activity would be bagging the vermiculite which would be done sometimes four hours a day. (Id., p. 6).

Talking about the dust, applicant stated it was all over the plant. "It came out of the vermiculite. As the finished product, vermiculite, gushed out into the bags after you pulled the lever, the dust would swish up and [you] would get it all over yourself. The finished product was color beige or light brown." (Summary of Evidence 7/17/85, p. 9, 11. 17-18).

It was further established on this record that the heavy exposure to vermiculite dust did indeed involve an exposure to asbestos, or asbestos-like materials. The evidence is discussed in the Opinion on Decision as follows:

"Vermiculite dust is established on this record, and in the case of Donald Kaufman, 83 VN 127779, of which the Board has taken judicial notice, to contain asbestos. Dr. Sills in the Kaufman case, in his report of September 4, 1984, indicates that vermiculite contains approximately 1% asbestos materials. Likewise, it was indicated in the report of Dr. Brian Dolan dated December 13, 1983 that the percentage of asbestos in vermiculite was more substantial, that is to 8 or 9% prior to 1975. In any event, it is indicated in Dr. Sills' report and the attachment consisting of an article "Pulmonary Changes After Exposure to Vermiculite Contaminated with Fibrous Tremolite" from the American Review of Respiratory Diseases, June 1984 (Vol. 129, pp. 952-58), that exposure to vermiculite itself and the fibrous tremolite contained in vermiculite likely has a deleterious effect similar to, if not identical with, asbestos exposure. In any event, Dr. Sills concludes that exposure to materials containing only 1% of asbestos would indeed be injurious and harmful.

"Accordingly, it has been established to the satisfaction of the undersigned that applicant's

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employment with California Zonolite in 1950 and 1951 did involve a period of harmful exposure to asbestos and other harmful substances."

Petitioner attempts to refute the evidence as obtained from the Donald Kaufman case by attempting to show that in Kaufman vermiculite was somehow judicially established not to have been a causative factor in Mr. Kaufman's disabling lung condition. Petitioner misstates the Kaufman case. As the Board will recall, and as noted in this trier-of-fact's Report on Carrier's Petition for Reconsideration (adopted by the Board in its summary denial of reconsideration of January 14, 1985), Kaufman's entire period of employment from 1963 through 1982 was with W. R. Grace and its predecessor, Zonolite Corporation. The big question to be decided was what years of that employment should be implicated in light of different insurers on the risk, and in light of the fact that in later years, from 1969 through 1983, applicant Kaufman was working for the same corporation out of state in Oregon. It is true that there was some minimal exposure to vermiculite on a very limited basis while Kaufman was in Oregon. One of the distinguishing facts implicating not the Oregon employment but the California employment from 1963 to 1969, was the fact that during the Oregon employment Kaufman was not a laborer dealing directly with these products, but rather was in a managerial position, not having much direct exposure to the products themselves. Further, it was established on the record in the Kaufman case that in years prior to 1969 the corporate predecessor of W. R. Grace did indeed use products containing pure asbestos which Kaufman, in fact, handled and

was exposed to from 1963 through 1969. Thus, a substantial asbestos exposure was established from 1963 through 1969, which the medical record, almost without contradiction, implicated in Kaufman's asbestosis condition.

In the present case, there is no other period of asbestos exposure which has been established on this record except that exposure during the two years with Zonolite. In the Kaufman case, Dr. Sills, in fact, implicates vermiculite as containing asbestos and states that even the small amount contained in vermiculite could indeed lead to asbestosis. In any event, it is concluded by Dr. Sills and the article attached to his report concerning "Pulmonary Changes after Exposure to Vermiculite Contaminated with Fibrous Tremolite" that exposure to vermiculite will have a deleterious effect similar to, or identical with, asbestos exposure. Defendant does not challenge these findings.

Finally, defendant cannot seriously complain about the diagnosis of asbestosis as contained in this record. Dr. Merliss explicitly concludes in his report of February 6, 1984 that "This man's major problem is asbestosis." Dr. Weissman in a report dated February 23, 1985 concedes "It is certainly possible that his problems are the result of asbestosis. His progressive course is certainly consistent with a problem of progressive pulmonary fibrosis that may have been initiated by asbestos exposure." He does go on to say that the findings are not absolutely diagnostic of the disease. He goes on to note the possibility that applicant's problems have resulted from prior exposure to

asbestos. Dr. Weissman would seem to be striving for an absolute diagnosis based on absolute certainty. However, as the Board well knows, the medical profession has not come so far as to provide triers-of-fact with opinions based upon mathematical certainty and absolute precision. (See, e.g., Foremost Dairies, Inc. v. IAC (McDannald), 237 C.A.2d 560, 30 CCC 320.)

Finally, we have the discharge diagnosis of applicant of May 27, 1983 provided by the Veterans Administration which lists simply "1. Probable asbestosis." This diagnosis was provided even after the negative biopsy obtained by the Veterans Administration about which defendant makes such a big issue.

In light of the fact that the only evidence of any asbestos exposure was the heavy exposure which applicant had to vermiculite dust in the course of his employment with petitioner and in light of the fact that the medical evidence as outlined above supports, if not compels, a diagnosis of asbestosis, it is submitted that the evidence not only supports and justifies but preponderates and compels a finding of a compensable injury with this employer.

2. APPLICANT'S CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Defendant in one breath urges that there is insufficient evidence to support a diagnosis of asbestosis, and that this trier-of-fact should have relied upon Dr. Richard M. Shaw in his report of August 13, 1985, which implicates cigarette smoking only in the development of applicant's lung disease. In the next breath, defendant urges that applicant should have known with absolute certainty, as of

March 18, 1983, that he had asbestosis related to his employment with this employer. A statement of the proposition refutes the argument. There is no way that applicant knew or had reason to know that his asbestosis condition, as of March 18, 1983, was caused by his period of employment with this employer in 1950 and 1951. This employer continues to deny that there was sufficient asbestos on the job to have caused the asbestosis. How is applicant to know of the relationship with sufficient certainty to be charged with knowledge of disability and causal relationship to start the statute of limitations running?

In any event, defendant failed in its burden of proof on the statute of limitations. It did not establish that applicant knew or had reason to know that his disability after July of 1982 was caused by his prior employment with Zonolite. No questions were asked applicant about when he first suspected that the Zonolite employment might have been contributory to his disability following July of 1982. There is nothing in the record to show that applicant had any knowledge whatsoever of the causal connection between his disability and the Zonolite employment at any time prior to the filing of the application on August 2, 1983. It should be noted that the application was not filed against defendant Zonolite, but rather was filed against applicant's last employer. This was understandable, as Dr. Merliss himself implicated applicant's last employment, rather than any other employment, as contributory to applicant's lung condition. The inference is that applicant did not know or have reason to know of the connection until after these proceedings were instituted. Accordingly,

as a matter of fact and law applicant's claim simply is not barred by the statute of limitations.

For all the above reasons, it is my

RECOMMENDATION: That defendant's Petition for Reconsideration be DENIED.


SHELDON C. ST. CLAIR
Workers' Compensation Judge

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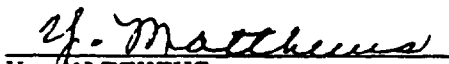
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