J. M. v. Luzenac America (November 23, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR

John E. Murray	)	Opinion No. 66-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Luzenac America	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. R-02095 (2nd)

Pretrial conference held on January 31, 2005
Hearing held on Montpelier on August 3 and 4, 2005
Record closed on September 13, 2005

APPEARANCES:

J. Christopher Callahan, Esq. and Brendan P. Donahue, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUES:

1. Was claimant's talcosis caused by his work-related exposure?

2. If so, is claimant permanently and totally disabled as a result?

EXHIBITS:

Joint I:	Medical Records including curriculum vitae of Jerrold Abraham, M.D.
Claimant 1:	Photograph on mill (alpha)
Claimant 2:	Photograph on mill (beta)
Claimant 4:	Curriculum vitae of Donald Mahler, M.D.
Claimant 5:	Dr. Mahler's 6/10/05 letter
Defendant A:	Curriculum vitae of John Craighead, M.D.
Defendant B:	Curriculum vitae of William Graham, M.D.
Defendant C:	Curriculum vitae of John May

STIPULATION:

1. On September 15, 1994 claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act (Act).

2. On September 15, 1994 defendant was the employer of claimant within the meaning of the Act.

3. September 15, 1994 was the claimant's last day of work for defendant.

4. On or about June 1, 2000, claimant was diagnosed with silicosis and a First Report of Injury was filed on October 12, 2000. Defendant denied the claim on October 27, 2000.

5. On October 14, 2000, claimant left work at his subsequent employer Dartmouth Printing alleging a work-related lung condition arising out of and in the course of his employment with defendant. At the time claimant left Dartmouth Printing he had an average weekly wage of $876.95, which resulted in an initial compensation rate of $584.63 and a current compensation rate of $703.01. At all times relevant to this dispute, claimant has had no dependents within the meaning of the Act.

6. Defendant, Luzenac Corp., owned the mines and mills where claimant worked since June 1992. Prior to 1992 the mills and mines were owned by Cyprus Mineral beginning in 1989, Johnson and Johnson in 1965 and Eastern Magnesia Talc when claimant began working there in 1965.

7. On March 2, 2005, the hearing officer issued an interim order requiring defendant to begin paying indemnity benefits as of the date of the order.

8. On or about April 4, 2005, claimant was diagnosed with talcosis allegedly arising out of and in the course of his employment with defendant and other predecessors in interest at the claimant's former work site. Prior to this date, claimant had alleged he had silicosis as a result of his work at the mill and mines as diagnosed by Dr. Mahler, but now agrees that he does not have silicosis.

9. The parties agree that claimant was exposed to respirable talc dust arising out of and in the course of his employment for defendant and the prior owners of the mill and mine in which claimant was employed.

10. Claimant alleges the he has developed talcosis arising out of and in the course of his employment with defendant and that as a result he is permanently and totally disabled from gainful employment.

11. Claimant seeks a determination that he has suffered a compensable injury of talcosis as a result of his employment for defendant; that his compensable work-related injury renders him permanently and totally disabled' medical benefits pursuant to WC Rule 40 for the treatment of talcosis, and, if successful, and award of attorney fees and costs of the litigation process.

FINDINGS OF FACT:

1. Claimant, 66 years old at the time of the hearing, began working in the talc mills and mines in 1964 at the age of 25, first as a general laborer and then as a mechanic.

2. In 1975, Johnson and Johnson, owner at that time, opened a new mill in Ludlow, Vermont, to process talc ore being extracted from the Ludlow mines. Soon after the opening, claimant accepted the job of mechanics supervisor. He worked approximately 40 to 60 hours a week until a lay off in September 1994.

3. Photographs entered into evidence depict visible talc covering the machinery and the structure of the enclosed mill.

4. Claimant's work clothes contained a daily accumulation of talc dust and were washed separately from other clothes in the family.

5. Claimant was laid off when he was 55 years old. At that time, his hourly wage was approximately $25 per hour. Other benefits included medical insurance, paid vacation and life insurance.

6. Within a few weeks of the lay off, claimant began working as an electrician and then, a year later, began working at Dartmouth Printing in Hanover, New Hampshire for $12.50 and hour.

7. Beginning sometime in the early to mid 1990s claimant started noticing minor breathing difficulties. By early 2000 he was having trouble keeping up with coworkers.

8. Claimant reported his respiratory problems to his primary care doctor who referred him to Dr. Donald Mahler at Dartmouth. Breathing tests showed a decrease in claimant's lung capacity. Dr. Mahler diagnosed interstitial lung disease.

9. Pathology tests from a lung biopsy resulted in a diagnosis of silicosis.

10. Claimant's breathlessness has continued to worsen and his lung disease has progressed.

11. Dr. Mahler took claimant out of work in October 2000. He later opined that claimant could not work at his previous occupation, but could do sedentary work for an unspecified period of time.

12. Claimant has not sought vocational rehabilitation (VR) assistance or looked for any work since going out of work in October 2000. Defendant was not under an obligation to offer VR services because it had denied the claim and was not under an order for VR.

Medical Expert Evidence

For the claimant:

13. Dr. Jerrold Abraham is a Professor of Medicine and Director of Environmental and Occupational Pathology at the State University of New York Upstate Medical Center in Syracuse. He specializes in the identification of occupational disease in human tissue. Dr. Abraham examined transbronchial biopsy samples sent to him from Dartmouth by light microscopy and electron microscopic examination.

14. The light microscopy revealed abundant macrophages with particles that had the appearance of talc. Of 370 particles analyzed, 315 were talc. Based on this evidence, Dr. Abraham concluded that claimant has talcosis, not the earlier diagnosed silicosis. The presence of multinucleated giant cells further confirmed the diagnosis. Dr. Abraham testified that if he wanted to report a case of talcosis in the literature he could use this case. There is only one cause of talcosis: exposure to talc.

15. Based on Dr. Abraham's analysis, Dr. Mahler changed his diagnosis to talcosis. Both conditions fall into the category of interstitial lung disease. No treatment exists for either.

16. Dr. Abraham and Dr. Mahler both testified to the opinion that claimant has talcosis. They ruled out the alternative diagnosis offered by defendant, idiopathic pulmonary fibrosis, with reliance on an authoritative article and emphasized the years of occupational exposure claimant had to talc.

17. At hearing Dr. Mahler opined that claimant is physically unable to perform gainful employment due to his shortness of breath, muscle weakness, and fatigue. Earlier at his deposition he had limited his opinion to work claimant had previously done, not to all employment.

For the defendant:

18. Richard Blume, M.D., MPH, who consulted with the defense, is board certified in occupational medicine. He found that the 1997 x-rays were positive for occupational lung disease, although one from 1991 was not. He noted that a diagnosis of occupational lung disease could have been made in July of 1997 and that had x-rays been done between 1991 and 1997, they likely would have shown have been positive.

19. Dr. Craighead is an expert who has testified for the defense in the granite industry for the past 23 years. He has never treated a patient with talcosis, although he has published in that area.

20. Dr. Craighead agreed that the presence of multinucleated giant cells in conjunction with talc fibers on biopsy is consistent with a diagnosis of talcosis.

21. The sample of tissue Dr. Craighead examined, from the bronchial wall rather than from the lung, was not an adequate sample in his judgment.

22. Dr. Craighead opined that the evolution of claimant's condition was not indicative of talcosis. He interpreted claimant's downward deterioration in lung function as dramatic, whereas he would expect a more gradual decline in the lung function with one with talcosis. In addition, Dr. Craighead found it atypical to find talcosis years after one's exposure to talc. Furthermore, he opined that it is not typical to see honeycombing on lung CT in talcosis patients, although it was seen with this claimant.

23. In Dr. Craighead's opinion, claimant's long history of smoking accounted for the greater fibre retention in claimant's lungs. He found it unsurprising that claimant had talc in his lungs given the work he had done, but does not agree with the diagnosis of talcosis. He diagnosed fibrosis of some type, but not talcosis or silicosis.

24. Dr. Graham is a "B-reader" of x-rays, a designation given to those expert at assessing pneumoconiosis. After reviewing the films in this case, he observed that claimant's 1991 x-rays were negative and the upper lobe involvement seen in 1997 resolved with treatment. X-rays in 1999 showed diffuse abnormality and a 2004 CT showed extensive honeycombing. Dr. Graham, therefore, concluded that claimant has idiopathic pulmonary fibrosis, a diagnosis common in people claimant's age and those with his x-ray findings. If claimant had talcosis, he would expect to see small rounded opacities in the macrophages, not the linear opacities found in this case. However, at hearing, Dr. Graham conceded that his opinion was speculation and that "enough dust" of anything will cause lung disease. He agreed that claimant had occupational exposure.

Work Capacity

25. Dr. Mahler opined that, due to his shortness of breath, claimant is permanently and totally disabled from work, all work. Yet he had testified earlier that claimant was unable to do his previous work.

26. At the defendant's request, Kenneth Sutton of Vermont Vocational Services, Inc. performed a vocational assessment of the claimant on April 27, 2005. Prior to the test, Mr. Sutton asked the claimant if he could perform bench work to which claimant answered, "not sure, perhaps up to 4 hours." During the four-hour test, claimant was unable to sit uninterruptedly. He needed and was given a break for lunch. After lunch, his test scores were lower than they had been earlier. Mr. Sutton concluded that claimant would be able to do light to sedentary jobs.

27. John May has been a vocational rehabilitation counselor for more than a decade and has experience returning seriously injured people back to work. He prepared a forensic vocational assessment based on Mr. Sutton's report, some medical records and claimant's deposition. Mr. May concluded that claimant could be gainfully employed in regular employment in a number of jobs at the sedentary level. This is based on claimant's ability to walk a couple hundred feet over hilly ground and his abilities to read, use the phone and use a computer. Furthermore, Mr. May noted that claimant's move to North Carolina should increase his chances of successfully returning to work.

Attorney fees and costs

28. Claimant's attorney worked 387.80 hours on this case and incurred costs in the amount of $5,650.00.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc*., 137 Vt. 393 (1979).

4. In considering conflicting expert opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (Aug. 4, 1997); *Gardner v. Grand Union* Op. No. 24-97WC (Aug. 22, 1997).

5. Claimant's treating physician certainly has the advantage with the first criterion because he has worked with claimant overtime and has observed his progress. On the second criterion, all have strong qualifications. However, Dr. Craighead has never treated a patient with talcosis and his bias for the defense is clear, although he has published in the area. The strongest credentials are those from Dr. Graham, Dr. Abraham and Dr. Mahler with active practices and proven expertise relevant to the issue at hand. The experts all performed comprehensive examinations, therefore, the issue of causation turns on the objective bases for the opinions.

6. Dr. Graham objectively evaluated x-rays skillfully. He could state that what he saw was not typical with talcosis. But the issue here is not what is typical. It is what happened with this claimant. Dr. Craighead ruled out talcosis, but the article on which he based his opinion was successfully used by Dr. Abraham to show that the alternative diagnosis, idiopathic fibrosis, did not apply to this claimant. On balance, the opinion of Dr. Abraham is the most persuasive. He considered the histology, saw clear evidence of talc and logically correlated that to the long exposure claimant had to the dust. The only alternative offered is essentially that the cause of claimant's pulmonary condition is unknown. How can an unknown cause be a more credible finding than that of talcosis given this claimant's long exposure to talc? The more probable hypothesis is that claimant's years of working with talc caused his talcosis. See *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

Permanent total disability

7. The injury at issue here occurred before the adoption of the odd lot amendment, which directed the commissioner to consider "specific characteristics of the claimant, including the claimant's age, experience, training, education and mental capacity." 21 V.S.A. § 644(b) (1999 adj. session, eff. July 1, 2000).

8. Therefore, this claimant is entitled to permanent total disability if he meets the criteria that were required before the amendment to § 644, that is whether his injury is among those enumerated in 21 V.S.A. § 644, or if, without considering individual employability factors such as education and experience, the medical evidence indicates that he is totally disabled from gainful employment. *Fleury v. Kessel/Duff Constr. Co*., 148 Vt. 415 (1987); *Pelkey v. Chittenden County Sheriffs Dept*., Opinion No. 24-02WC (2002). The standard is further articulated in § 645 (a), which specifies that one must have "no reasonable prospect of finding regular employment."

9. Despite a finding of causation, I cannot conclude that claimant is permanently and totally disabled at this time. He is an intelligent man whose work history reveals a strong work ethic and flexibility. His current activities demonstrate that he is capable of sustaining regular gainful employment at the sedentary level. And his history demonstrates that he can learn new skills if necessary. Even his treating physician, while stating that he was permanently disabled, described that disability in terms of work he had done, not sedentary work. Vocational rehabilitation evaluations together with the medical evidence supports the defense position that claimant is not permanently and totally disabled. A vocational assessment must be done and work options explored. Both parties must realize, however, that claimant's work related condition in all likelihood is progressive. Although the evidence now does not support permanent total disability, further deterioration in claimant's condition could.

10. Claimant is now under an obligation to look for work within his physical capacities, with the assistance of V.R. Defendant argues that claimant reached medical end result in 2000, but no medical opinion supports that assertion. Temporary total disability benefits may be discontinued once claimant reaches medical end result, successfully returns to work or fails to make a good faith effort to look for work. See 21 V.S.A. § 643a; WC Rule 18.000.

Attorney fees, costs and interest

11. Pursuant to 21 V.S.A. § 678(a), a prevailing claimant is entitled to a mandatory award of necessary costs and discretionary award of reasonable attorney fees. Because claimant has prevailed on one of the two contested issues (causation but not permanent total disability), he is awarded fees of $17,451 ($193.9 hours x $90). All costs are awarded because all were necessary to prove causation.

12. Finally, claimant is entitled to interest on all unpaid compensation from the date payments were due until paid. This includes interest on unpaid temporary total disability benefits from the date of discontinuance on October 12, 2000 until payment was resumed under the interim order in March 2005.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law:

1. Defendant is ORDERED to adjust this claim for work-related talcosis and pay for fees and costs as specified above.
2. Claimant's claim for permanent total disability is DENIED at this time.

Dated at Montpelier, Vermont this 23rd day of November 2005.

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Patricia A. McDonald
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.