

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

LOUISE SPENCER, individually and as)	
executrix of the estate of)	
HOWARD SPENCER, deceased,)	
)	
Claimant Below-)	
Appellant,)	
)	
v.)	C. A. No. 03A-10-003-JEB
)	
E. I. DUPONT DE NEMOURS & CO.,)	
)	
Appellee.)	

Submitted: January 10, 2005

Decided: February 11, 2005

*Appeal from a Decision of the Industrial Accident Board.
Decision Affirmed.*

OPINION

Appearances:

Thomas C. Crumplar, Esquire, Wilmington, Delaware.
Attorney for Louise Spencer.

Robert W. Ralston, Esquire, Wilmington, Delaware.
Attorney for E. I. du Pont de Nemours & Co.

JOHN E. BABIARZ, JR., JUDGE

This is the Court's decision on an appeal of a decision of the Industrial Accident Board ("Board") denying a Petition to Determine Compensation Due filed by the estate of Howard Spencer ("Claimant") against E. I. DuPont de Nemours & Co. ("Employer"). For the reasons explained below, the Board's decision is Affirmed.

FACTS

Claimant worked for Du Pont at its plant in Seaford, Delaware, from 1949 to 1985. During this time, he was exposed to asbestos in the course of installing and removing asbestos-containing insulation throughout the plant. Claimant was a heavy cigarette smoker until he quit in 1997. He was never diagnosed with either an asbestos-related condition or a tobacco-related condition until 2002, when he was found to have lung cancer. Claimant was hospitalized in December 2002 and died in January 2003.

In March 2003, a petition to determine workers' compensation benefits was filed on behalf of Claimant's widow, alleging that Claimant developed and died of lung cancer as a result of asbestos exposure during his work at DuPont. At the hearing conducted by the Board, Employer conceded that Claimant had died from lung cancer and that he was exposed to asbestos at work. Thus the issue to be decided by the Board was causation.

Employer's medical expert was Michael D. Walkenstein, M.D., who is board-certified to practice internal medicine, pulmonary medicine and critical care medicine. Dr. Walkenstein testified by deposition and stated only those opinions which he could attest to in terms of reasonable medical probabilities. In preparation for the hearing, Dr. Walkenstein stated that he had reviewed Claimant's medical records of office visits and medical tests over a 22-year period. He found documentation of years of heavy cigarette smoking, as well as exposure to asbestos during Claimant's work.

As a Du Pont employee, Claimant participated in the company's asbestos surveillance program, which included annual chest x-rays. Claimant's chest-rays from 1968 through 1990 showed no evidence of problems associated with asbestos exposure. Dr. Walkenstein found that Claimant had had prostate cancer but that this was unrelated to the lung cancer. Dr. Walkenstein observed that Claimant's complaint in the summer of 2002 of back and bone pain led to the ultimate diagnosis of lung cancer as the primary malignancy. Dr. Walkenstein stated that by the time cancer was diagnosed in the fall of 2002, the disease had metastasized from Claimant's lungs to his back bones, kidneys and adrenal glands. Dr. Walkenstein's expert opinion was that Claimant never suffered from asbestosis and that heavy cigarette smoking was the primary cause of the lung cancer.

Gerald L. Abraham, M.D., testified on behalf of Claimant's estate. Dr.

Abraham is a board-certified pathologist who specializes in occupational medicine and asbestos-related diseases. Dr. Abraham testified that the sample drawn by the needle biopsy of Claimant's lungs in 2002 was not sufficient to determine whether or not he had asbestosis. Dr. Abraham also stated that the chest x-rays were indeterminative as to whether Claimant suffered from asbestosis. In Dr. Abraham's opinion, the thickening in the lungs noted in the November 2002 x-ray could have been as a result of exposure to asbestos but may also have resulted from Claimant's congestive heart failure.

When asked if the 2003 chest x-ray was consistent with asbestos, Dr. Abraham stated, "It could be, I mean, in this case, I think it was related to his lung cancer."¹ Dr. Abraham concluded that both the asbestos exposure and the cigarette smoking were "substantial causes of [Claimant's] lung cancer."²

The Board found the testimony of Dr. Walkenstein to be more convincing than that of Dr. Abraham. As noted by Dr. Walkenstein, Claimant's 22 years of clinical examinations and radiographic studies showed no sign of any lung disease or condition. The Board accepted Dr. Walkenstein's expert opinion that if Claimant had actually had asbestosis, it could have contributed to the development of lung cancer,

¹Transcript of IAB Proceedings at 71.

²*Id.* at 91.

but the record did not support a finding that Claimant ever had asbestosis. The Board found that Dr. Abraham's testimony, although impressive, did not establish a causal relationship between asbestos exposure and Claimant's lung cancer. Based on the medical records spanning 22 years, as well as the expert medical testimony of Dr. Walkenstein and specific concessions made by Dr. Abraham, the Board concluded that Claimant had not carried the burden of showing that his work conditions caused his lung cancer. The petition for workers' compensation benefits was therefore denied. Claimant filed a timely appeal to this Court.

STANDARD OF REVIEW

This Court's function on appeal of an administrative decision is to determine whether the decision is supported by substantial evidence and is free from legal error.³ Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.⁴ When parties present testimony from expert witnesses, the Board is free to choose between conflicting opinions, and either opinion will constitute substantial evidence for purposes of appeal.⁵ This Court does not weigh the evidence, determine questions of credibility or make its own factual

³*Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del. Super. Ct. 1979).

⁴*Breeding v. Contractor-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1998).

⁵*Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

findings.⁶ It merely determines if the evidence is legally adequate to support the Board's findings.⁷

DISCUSSION

On appeal, Claimant argues that the cause must be remanded to the Board because the Board committed an error of law in applying the wrong standard of causation. Employer argues that the Board's decision must be affirmed because it is supported by substantial evidence and is free from legal error.

The Board heard testimony from two medical experts on the issue of whether or not Claimant's exposure to asbestos while he worked at Du Pont contributed to the development of lung cancer. The Board found that Dr. Walkenstein's testimony was more convincing than that of Dr. Abraham. Dr. Walkenstein testified that there was a complete lack of symptoms or findings of asbestosis between 1968 and the fall of 2002. For this reason, Dr. Walkenstein formed the opinion that Claimant did not suffer from asbestosis and that his cancer was not a result of asbestosis or asbestosis exposure. Instead, Dr. Walkenstein concluded that heavy cigarette smoking was the primary and sole cause of Claimant's lung cancer. Dr. Walkenstein stated unequivocally that in his expert opinion Claimant's lung cancer was caused by

⁶*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1960).

⁷DEL. CODE ANN. tit. 29, ¶ 10142(d).

cigarette smoking and not by exposure to asbestos. The following exchange took place between counsel and Dr. Walkenstein on the question of whether Claimant had asbestosis:

Q: Do you have an opinion, Doctor, based on upon your review of the records, as to whether or not Mr. Spencer's asbestos exposure while he was employed at Du Pont contributed to his lung cancer and ultimate death?

A: I have a strong opinion that given the lack of symptomology, given the lack of radiographic or pathologic evidence of underlying asbestos involvement and given the heavy cigarette history, cigarette smoking history, that **asbestos played no role in this unfortunate gentleman's lung cancer.**⁸

Dr. Walkenstein stated an equally clear opinion that cigarette smoking was the cause of the cancer:

Q: Doctor, if the asbestos exposure played no role, do you have an opinion as to the most likely cause of the lung cancer that developed?

A: I believe with a reasonable degree of medical certainty that smoking tobacco, **cigarette smoking was the primary and sole identified risk factor for lung cancer in this gentleman.**⁹

These excerpts show that Dr. Walkenstein provided his expert opinion that asbestos did not cause Claimant's lung cancer and that heavy cigarette smoking did cause the

⁸Walkenstein Dep. at 20 (emphasis added).

⁹*Id.* at 20-21 (emphasis added).

lung cancer. The Board was well within its discretion when it found Dr. Walkenstein's opinion to be more convincing than that of Dr. Abraham.¹⁰ The Board explained its rationale and resolved the contradictions in the two experts' testimony. The Court concludes that there was substantial evidence to support the Board's decision.

The upshot of Dr. Walkenstein's testimony is that Claimant did not suffer from a compensable occupational disease and that his estate was not entitled to workers' compensation benefits. However, Claimant argues that the Board applied the wrong standard of causation and that the case must be remanded to the Board to correct this error of law. The Court disagrees. Claimant alleged that he had developed a compensable occupational disease during and as a result of his employment. The standard of causation for an occupational disease is different from that applied to an injury allegedly caused by an identifiable industrial accident or an employment-based aggravation of a pre-existing condition.

According to Delaware's Workers' Compensation Act, compensable occupational diseases include "all occupational diseases arising out of and in the course of employment only when the exposure stated in connection therewith has

¹⁰*Reese v. Home Budget Center*, 619 A.2d at 910.

occurred during employment.”¹¹ When seeking workers’ compensation benefits for an occupational disease, an employee’s burden of proof is to present evidence that “the employer’s working conditions produced the ailment as a natural incident of the employee’s occupation in such a manner as to attach to that occupation a hazard distinct from and greater than the hazard attending employment in general.”¹² Evidence showing that the disease was contracted or aggravated on an employer’s premises is legally insufficient to support a finding that the ailment was occupational in nature.¹³ Rather, the evidence must show that the employer’s working conditions produced the ailment as a natural incident of the employee’s occupation in such a manner as to attach to that occupation a hazard distinct from and greater than the hazard attending employment in general.¹⁴

In this case, Claimant attempted to meet this standard by alleging that he contracted asbestosis as a result of his employment and that his lung cancer was a consequence of the asbestosis. As stated previously, the Board rejected this position based on credible expert testimony. In so doing, the Board correctly applied the

¹¹DEL. CODE ANN. tit. 19, ¶ 2301(4).

¹²*Anderson v. General Motors Corp.*, 442 A.2d 1359, 1361 (Del. 1982). *See also Air Mod Corp. v. Newton*, 215 A.2d 434 (Del. 1965); *Diamond Fuel Oil v. O’Neal*, 734 A.2d 1060 (Del. 1999).

¹³*Anderson v. General Motors Corp.*, 442 A.2d at 1360.

¹⁴*Id.* at 1361.

standard of causation for occupational diseases articulated in *Anderson v. General Motors Corp.*¹⁵ and *Air Mod Corp. v. Newton*.¹⁶ Based on the facts of record and on Dr. Walkenstein's expert opinion, the Board found that Claimant failed to show that it was more likely than not that his working conditions caused the lung cancer which ultimately resulted in his death. The Court finds no error of law in the Board's causation analysis.

CONCLUSION

For the foregoing reasons, the decision of the Industrial Accident Board denying Howard Spencer's widow's petition for workers' compensation benefits is hereby *Affirmed*.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,jr./ram/bjw
Original to Prothonotary

¹⁵442 A.2d at 1361.

¹⁶215 A.2d at 434.