COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS.**	**023823-97** **023822-97** **000613-98**

Paul G. Reddy (Decedent)	Employee
Margaret R. Reddy	Claimant
Charles P. Blouin	Employer
American Mutual Insurance Company/Massachusetts Insolvency Fund	Insurers
Workers' Compensation Trust Fund	

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll and Levine)

APPEARANCES
Gerard B. Carney, Esq., for the Claimant at hearing and on brief
Timothy F. Nevils, Esq., for American Mutual/Insolvency Fund at hearing and on brief
Donna Sullivan Andronico, Esq., for the Workers' Compensation Trust Fund at hearing

MAZE-ROTHSTEIN, J. The claimant appeals a decision, which dismissed her claim for widow benefits and burial expenses pursuant to G. L. c. 152, §§ 31 and 33.[1] After a review of the evidentiary record, we affirm the decision.

Paul Reddy, the employee, died on June 28, 1996 at the age of seventy-two. (Dec. 1.) The decedent had numerous employers from 1942 to 1990.[2] The case before us concerns the decedent's exposure to asbestos while employed as a sheet metal mechanic

[1] In her original claim, the claimant also sought benefits pursuant to G. L. c. 152, § 35C. Prior to the issuance of the administrative judge's hearing decision, the claimant withdrew the portion of her claim that sought § 35C benefits. (Dec. 2.)

[2] Among the various employers were Bethlehem Steel Company (1942 – 1946), Charles P. Blouin Company (1950-1960, 1966-1975), Limbach Company (1960-1966), and Dedham Showcase Cinemas (1979-1990). The administrative judge's decision indicates that the decedent also worked with various other contractors as a member of the Local 17 Sheet Metal Workers' Union. (Dec. 4.)

and as a construction superintendent for the Charles P. Blouin Company (hereinafter "Blouin") with claimed injury dates of October 1, 1960 and January 31, 1975.[3] (Dec. 9.) While employed at Blouin, as a sheet metal mechanic, the decedent would come home with asbestos on his clothes and while employed as a construction superintendent, he was exposed to airborne asbestos particles.[4] He had always been a heavy smoker and drinker.[5] Over time Mr. Reddy became quite ill. Among the many ailments he suffered were lung cancer, pancreatic cancer, prostate cancer, basal cell cancer of the skin and diabetes mellitus. (Claimant's Ex. 2; Dec. 6.) In 1975, the decedent retired from Blouin due to pancreatitis. (Dec. 4.)

In March 1983, the decedent received a notice, from the union, to report to the Norfolk County Hospital for an examination. The examination was conducted due to employment-related asbestos exposure. (Dec. 5.) Thereafter, in 1993, Mr. Reddy treated with the West Roxbury VA Hospital and underwent a surgical procedure to address cancer of the right lung. (Claimant's Ex. 2; Dec. 5, 6.) He returned for treatment in May 1996, due to adenocarcinoma of the pancreas, and subsequently died. (Claimant's Ex. 2; Dec. 5, 7.)

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[3] As the administrative judge properly determined, given that the claimed injury dates (1960 and 1975) pre-date the 1991 amendments to G.L. c. 152, § 1(7A), the claim in this case is reviewed under an "as is" standard. (Dec. 9.) Therefore, the claimant need only prove that the employment was one of the contributing causes of injury. Dooley v. City of Lynn, 11 Mass. Workers' Comp. Rep. 347, 350 (1997).

[4] The claimant testified that the decedent would return home covered with white material/dust when he was employed by Blouin. (Tr. 33-35, dated Sept. 28, 1998; Dec. 4.) Robert Spinney, a member of Local 17 and former sheet metal mechanic for Blouin in 1966, testified that the decedent was exposed to airborne particles of asbestos while employed at Blouin as an outside superintendent. (Tr. 9-28, dated Apr. 30, 1999; Dec. 4-5.) The administrative judge credited the testimony of both witnesses. (Dec. 9.)

[5] The decedent would smoke up to two packs of cigarettes and consume up to four alcoholic beverages per day. (Claimant's Ex. 2; Dec. 9.)

The claimant filed for benefits, pursuant to §§ 31, 33 and 35C, which the insurer resisted.[6] On January 5, 1998, pursuant to § 10A, the matter was conferenced before an administrative judge. The claim was denied and the claimant appealed to a hearing de novo.[7] The administrative judge allowed the insurer's motion to join the Workers' Compensation Trust Fund. (Dec. 2.)

The medical report of Dr. David Christiani and the medical records from the West Roxbury VA Hospital were submitted on behalf of the claimant. (Dec. 1.) The insurer submitted the medical reports of Dr. John A. Davis and another doctor. (Dec. 2.)[8] After a review of the VA records, Dr. Christiani opined that the decedent contracted lung cancer as a result of the combination of his smoking habit and asbestos exposure. He further opined that although the predominant cause of death was pancreatic cancer, the lung cancer was a major contributing factor.[9] (Rep. of Dr. Christiani, 2; Dec. 6.)

Dr. Davis opined that several features of the decedent's available clinical history were not typical for the recognized synergistic effect of smoking history and asbestos exposure as it relates to lung cancer. He reached this conclusion based on a three-prong approach. First, the doctor stated that there was an absence of pulmonary asbestosis. Second, the doctor stated that the combination of smoking history and asbestos exposure

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[6] See footnote 1.

[7] The original hearing was held before the judge on September 28, 1998. During the proceedings, the parties argued the applicability of G.L. c. 152, § 7A. (Tr. 4, 9, 10, dated Sept. 28, 1998.) In reliance upon our decision in Costa v. Colonial Gas Co., 12 Mass. Workers' Comp. Rep. 483 (1998)(claimant has the burden to show causal relationship of death to work-activity where death does not occur at place of employment), rendered after the hearing date in this case and which impacted the application of § 7A, the hearing was reopened for additional testimony. The evidentiary record closed on May 15, 1999. (Dec. 2.)

[8] The medical examiner process outlined in G.L. c. 152, § 11(A), is not applicable to this case as the employee was deceased prior to the presentment of the claim. See 452 Code Mass. Regs. § 1.10(5).

[9] Although the claimant's medical expert expressed his causal relation opinion pursuant to the December 23, 1991 amendments higher standard, the claim here is reviewed under an "as is" standard. Therefore, the claimant need only prove that the employment was one of the contributing causes of injury. See footnote 3.

results in a higher prevalence of adenocarcinoma as the histological cell type as opposed to the squamous cell carcinoma form of lung cancer found in the decedent.[10] Finally, the doctor stated that there is a predilection for asbestos-related tumors to be located in the lower lobes of the lung as opposed to those found in the decedent's upper lobes. (Rep. of Dr. Davis, 2; Dec. 8.) Based on these factors, the doctor opined that the decedent's lung cancer did not contribute to his death. The proximate cause of death, according to Dr. Davis, was the decedent's independent and unrelated carcinoma of the pancreas. (Rep. of Dr. Davis, 2-3; Dec. 9.)

The administrative judge credited the testimony of both the claimant and an employer witness that the decedent was exposed to asbestos at work. (Dec. 9.) She further acknowledged that G.L. c. 152, § 7A, was applicable, as the employee was deceased and unable to testify.[11] The judge adopted the medical opinion of Dr. Davis and relied on pertinent aspects of the medical records from the VA medical center over the balance of the other medical evidence offered. (Dec. 9.) The judge concluded that although the decedent "was exposed to asbestos and that he had lung cancer, there was no persuasive evidence that his death was causally related to his asbestos-exposure . . . ." (Dec. 9.)

To support this conclusion, the judge stated that the decedent never filed a claim for disability or incapacity due to asbestos-exposure nor did he indicate, via the claimant's testimony, that he felt affected by the asbestos exposure. The judge also noted that "there was no conclusive indication . . . that Mr. Reddy's death was caused by anything other than pancreatic cancer. Nor was it indicated in the extensive VA Medical Center records that the lung cancer . . . [was] related to the asbestos exposure although

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[10] The doctor opined that squamous cell carcinoma has a high association with smoking. (Rep. of Dr. Davis, 2; Dec. 8.)

[11]The effect of G.L. c. 152, § 7A, in this case, was previously dealt with when the evidentiary record was reopened and is not an issue on appeal. See footnote 7.

there were references to asbestos exposure."[12] Accordingly, the claim was dismissed. (Dec. 10.) We have the case on appeal by the claimant.

The claimant asserts that the medical opinions, as adopted by the administrative judge, are not supported by the medical evidence. (Claimant's brief, 1.) More specifically, the claimant proffers, in pertinent part, that the adopted medical opinion of Dr. Davis was based on mistaken medical findings, which were inconsistent with the other pivotal medical evidence introduced at hearing. (Claimant's brief, 3.) The claimant asserts that "[i]n part, Dr. Davis found a lack of causal relationship between Mr. Reddy's known asbestos exposure and his lung cancer on the mistaken premise that the cell type of the lung cancer was squamous cell carcinoma, rather than adenocarcinoma . . . [t]herefore, the medical opinion . . . is based on the mistaken belief that the employee's lung cancer involved only squamous cell carcinoma more commonly associated with cigarette smoking." (Claimant's brief, 5.) This, the claimant posits, is in direct conflict with the supplementary pathology report dated June 3, 1993 that, in fact, indicates the presence of both adenocarcinoma and squamous cell carcinoma in the lung. (Claimant's brief, 5.) Therefore, the foundation upon which Dr. Davis based his medical opinion is incorrect and it was improper for the judge to rely on that medical opinion to deny the claim. The claimant concludes that the case must be recommitted for further findings consistent with the medical evidence contained in the hearing record. (Claimant's brief, 6.) While we agree the adopted doctor's opinion has this foundational defect, we disagree that the defect warrants a reversal or recommital for the following reasons.

The claimant aptly points out that the medical opinion rendered by Dr. Davis is inadequate as it is based upon an erroneous medical history. See Department of Youth Servs. v. A Juvenile, 398 Mass. 516 (1986)(absent proper foundation, expert's opinion is vitiated). Two of the three-prongs in Dr. Davis' assessment, the first and third, are not

[12] The judge quoted Prendergast v. Bay State Volkswagon, 11 Mass. Workers' Comp. Rep. 141, 144 (1997), for the proposition that she had to " 'view the circumstances with . . . tunnel vision and to narrowly focus on and determine the extent of physical injury or harm to the body that is causally related solely to the work injury.' " (Dec. 10.)

fatal to the claimant's position. The absence of pulmonary asbestosis (first prong) and the location of tumors in the decedent's upper lobes (third prong), were questions of prevalence in asbestos-related lung cancer, and were not opined as absolutely ruling out that condition. More significant, however, is the second prong utilized by Dr. Davis. Apparently, the doctor was under the mistaken belief that the lung histological cell type was limited to squamous cell carcinoma as opposed to the presence of both adenocarcinoma and squamous cell carcinoma types as indicated in the VA record dated June 3, 1993.

A careful read of Dr. Davis' report reveals that his medical opinion was based solely on the review of Dr. Christiani's medical report. (Rep. of Dr. Davis, 1.) The mistaken belief, as to the cell type, resulted from reliance upon an error in Dr. Christiani's report. There, Dr. Christiani stated that the decedent had squamous cell carcinoma of the lung. (Rep. of Dr. Christiani, 1.) Nowhere in his report did Dr. Christiani indicate the presence of adenocarcinoma in the decedent's lung. It was this oversight, on the part of Dr. Christiani, that resulted in Dr. Davis' mistaken belief as to the lung cancer cell type, which tainted his medical opinion. See Buck's Case, 342 Mass. 766, 770-771 (1966)(expert causality opinion based on misstatements or omissions of material facts entitled to no weight).

It appears that the judge may have recognized this deficiency in Dr. Davis' medical opinion by quoting the relevant portion of the unaddressed June 3, 1993 medical record in her decision. (Dec. 6-7.) Nevertheless, it was indeed error to adopt his medical opinion as the deficiency goes to its very foundation. See Buck's Case, supra, at 770-771.

However, all the medical experts in this case apparently missed the fact that the decedent had both squamous and adenocarcinoma cell types in his lung. We can not say how any of the opinions might have been affected had the claimant, who took no depositions in this medically complex case, brought this to the experts' attention at hearing. Because the foundational flaw was uniform throughout the opinions, the finding that "there was no persuasive evidence that the employee's death was causally related to

[the employee's] asbestos exposure" is ultimately sound. (Dec. 9.) The error does not affect the final result and is therefore, harmless. See LaPlante v. Maguire, 325 Mass. 96, 98 (1949); Bendett v. Bendett, 315 Mass. 59, 65-66 (1943). The failure here, was not the judge's but the claimant's who had the burden of proof.

The decision is affirmed.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: November 17, 2000