

U.S. Department of Labor

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Issue Date: 04 February 2008

CASE NO.: 2007-LHC-933

OWCP NO.:07-166896

IN THE MATTER OF

**D.B.¹,
Claimant**

v.

**NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
Self-Insured Employer**

APPEARANCES:

**COLIN SHERMAN, ESQ.
On behalf of Claimant**

**PAUL B. HOWELL, ESQ.
On behalf of Employer/Carrier**

**BEFORE: C. RICHARD AVERY
Administrative Law Judge**

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Claimant against Northrop Grumman. The formal hearing was conducted in Mobile, Alabama on November 5, 2007. Each party was represented by counsel, and each presented

¹ Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet.

documentary evidence, examined and cross examined the witnesses, and made oral and written arguments. The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-10 and Employer's Exhibits 1-29. This decision is based on the entire record.²

Preface

This is a claim only for medical expenses since May 16, 2003, the date upon which Claimant first came to believe his cancer was work-related and so notified Employer. For other reasons, Claimant was not employed at the time and therefore seeks no compensation award.

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of the alleged injury/accident was February 11, 2003;
2. Claimant was an employee of Employer at the time of the accident; and
3. Employer was advised of the alleged injury on May 16, 2003.

Issues

The unresolved issues in this proceeding are:

1. Whether the alleged injury occurred within the course and scope of Claimant's employment with Employer; and
2. Compensability of medical treatment since May 16, 2003.

² The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- (Tr. __); Joint Exhibit- (JX __, pg.__); Employer's Exhibit- (EX __, pg.__); and Claimant's Exhibit- (CX __, pg.__).

Statement of the Evidence

Claimant

Claimant was born September 19, 1956 and left school in the 10th grade. Since that time he worked in various shipyards as a ship fitter, but the majority of his working career was with Employer where he stayed from 1980 until March 2001. On November 29, 1999, Claimant injured his back, shoulder and arm in the course of his employment. When he returned in July of 2000 with work restrictions, he failed a series of drug screenings and in March of 2001 was finally terminated. He has been on social security disability since that time.

While working in the shipyards, Claimant said he was constantly exposed to various types of welding smoke and gases.³ Classified as a ship fitter, Claimant described his work on the ships being built as well as in the layout and plate departments and fabrication shops. At first, safety masks and ear plugs were all that was required while welding, however some time later respirators were also required. Despite these safety precautions, Claimant testified that he was exposed to welding dust and gases even when he himself was not welding in the fabrication shop where the smoke was most dense.

Claimant has not worked since leaving employment with Employer. In 2002, he developed what was thought to be an ear infection and was treated by Dr. Charles Wilson, an ENT. Treatment was unsuccessful and after a CT scan in 2003, on February 11, 2003, Claimant's condition was diagnosed as nasopharyngeal cancer in his left nasal passage. Following an MRI and biopsy, Claimant underwent both chemo and radiation therapies. After 38 treatments and six hospitalizations, the tumor shrank, but because of the treatments Claimant has lost his teeth and has a percentage of kidney failure.

Claimant acknowledged that he has smoked cigarettes for 33 years, but denied that any doctor had suggested smoking was a cause of his cancer. Claimant also denied any history of cancer in his family and testified that both Drs. Wilson and Wynn had told him that exposures during welding might have contributed to the disease.⁴

³ Claimant used his Exhibit 9 to describe the various types of welding with which he was involved.

⁴ On cross-examination, Claimant agreed that both doctors have stated otherwise in their written reports and that he himself did not know the cause of his tumor.

The only physician to opine in writing that the cancer was related to exposure to welding smoke is Dr. David Caletri. A visit with Dr. Caletri was arranged by Claimant's attorney and was some 170 miles from Claimant's home. Claimant agreed he had seen Dr. Caletri only once and that the doctor did not review all of his medical records.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides a Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BR BS 98 (1984).

Once the Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might

accept to support a conclusion. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). If there has been a subsequent non-work-related event, employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's condition was not caused by the work-related event. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Where the second injury is the result of an intervening cause, employer is relieved of liability for that portion of disability attributable to the second injury. *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In the present case, Employer concedes that Claimant has invoked the Section 20(a) presumption of compensability. However, Employer asserts that the overwhelming medical evidence rebuts this presumption and that when the evidence is weighed as a whole, Claimant's nasopharyngeal cancer was not shown to be related to his employment with Employer.

Employer points out that an overwhelming number of experts involved in the case concluded that Claimant's cancer and his employment with Employer are unrelated. Three of Claimant's treating physicians, Drs. Hull, Wynn and Dennis, claimed to be unable to link Claimant's nasopharyngeal carcinoma to his exposure to welding fumes at his employment.

Dr. Hull, Claimant's medical oncologist, testified on June 30, 2004 that he could not say with any degree of medical probability what had caused Claimant's cancer. (EX 22, p. 15). He conceded that when he first treated Claimant on February 17, 2003, he assumed that Claimant's cancer could be attributed to the fact that he had smoked about a pack and a half of cigarettes every day for over 30 years; but at the time Dr. Hull was deposed, he could not say with reasonable medical probability that smoking had caused Claimant's cancer. (EX 22, pp. 12, 14). He was also unable to relate Claimant's cancer to his occupational exposures. (CX 22, p. 29). After reviewing the Material Data Safety Sheets provided by Claimant, which identified compounds, including nickel and cadmium, Claimant was potentially exposed to while working for Employer (*See* CX 9), Dr. Hull stated that there was "nothing in the literature relating to the etiology or epidemiology of nasopharyngeal cancer that I found that supports the carcinogenicity of nickel or cadmium for that particular cancer." (EX 22, p. 20). He went on to say that the interaction between smoking and the inhalation of potentially toxic fumes makes it

difficult to attribute cause in an individual case, and that there is “no compelling medical evidence that would suggest that people in [Claimant’s] circumstance get this disease as a result of either smoking or welding rod exposure.” (EX 22, pp. 26, 28).

Another of Claimant’s treating physicians, Dr. Wynn, a radiation oncologist, stated in a letter dated January 19, 2007 that he was unable to connect Claimant’s cancer to his occupational exposures. Dr. Wynn reviewed his own records from treating Claimant, along with the medical records regarding Claimant’s post-treatment follow-ups, Dr. Hull’s records and deposition, statements from Drs. Moore and Smith, and recent medical literature on nasopharyngeal carcinoma and determined that “the probability of the cause of Claimant’s cancer was not associated with any occupational exposures.” (EX 23, p. 12). While he conceded that it remains a possibility that occupational exposures could have caused Claimant’s cancer based on rare reports in the medical literature which suggest that environmental or occupational exposures to various chemicals can cause nasopharyngeal cancer, he wrote that in Claimant’s case it was highly unlikely that this was the case. (EX 23, p. 12).

Dr. Sam Dennis is the radiation oncologist who took over Claimant’s care when Dr. Wynn moved to a different location. He also submitted a report regarding the cause of Claimant’s cancer. In a letter dated May 7, 2007, Dr. Dennis stated that in his practice, he has had occasion to treat a number of patients suffering from nasopharyngeal carcinoma and is familiar with much of the research regarding the causes of nasopharyngeal cancer. Based on his treatment of Claimant, he opined that based on a reasonable medical probability, Claimant’s prior employment exposures were not the probable cause of his nasopharyngeal cancer. (EX 24, p. 1).

In addition to Claimant’s treating doctors, two independent physicians reviewed Claimant’s records and rendered opinions as to the cause of Claimant’s cancer. Dr. Moore, a medical oncologist, first submitted a report on February 26, 2005. Dr. Moore reviewed the medical records of Dr. Wynn, Dr. Hull, Dr. Winters, and Dr. Wilson, along with Claimant’s deposition and his self-reported information regarding his exposure to dust and metals related to his employment as a ship fitter. Dr. Moore opined that there was no link between dust and paint exposures and cancer. However, he stated that there was evidence that Claimant was exposed to nickel compounds, which he states had been found to be carcinogenic. However, whether Claimant’s level of exposure to nickel related to welding was enough to cause cancer was outside of his expertise. (EX 25, p. 1).

Dr. Moore submitted two more letters, on July 11, 2005 and October 1, 2005. The letters are almost identical, and update Dr. Moore's previous letter. Dr. Moore reviewed the report of Ulises Chavez, which clarified the type and extent of Claimant's nickel exposure. The report indicated to Dr. Moore that Claimant was probably exposed to metallic nickel during his employment with Employer. However, he stated that he was not aware of any data which showed metallic nickel to be clearly carcinogenic in humans. He concluded, "Given the amount and type of Claimant's occupational exposures, I do not think that metallic nickel exposure caused or contributed to the development of his nasopharyngeal cancer." (EX 25, pp. 2-3). According to Dr. Moore, more likely causes of the cancer included the Epstein-Barr virus or sporadic development of the cancer. (EX 25, p. 2).

The other independent evaluation of Claimant's case was done by Dr. Jason V. Smith, an ENT. Dr. Smith reviewed the medical records of Dr. Wilson, Dr. Wynn and Dr. Hull, the medical records concerning Claimant's back condition, the deposition of Claimant, and medical literature regarding nasopharyngeal cancer and occupational exposure. In a letter dated June 29, 2004, Dr. Smith stated, "While there have been some reports suggesting an increased incidence of this tumor due to certain environmental exposures, all studies have been equivocal and found no reproducible definite environmental factors" other than those already identified, such as the Epstein-Barr virus and Asian racial background. He stated he was unable to definitively link Claimant's cancer to his employment as a ship fitter. (EX 26, p. 1).

Employer also relies on a report issued by Ulises Chavez, a senior industrial hygienist who works for Employer. Mr. Chavez reviewed this case and Claimant's work record. He opined that as a result of Claimant's job duties, it was probable that Claimant was exposed to nickel fumes or dust. He stated that the National Institute of Occupational Safety and Health (NIOSH) classifies metallic nickel as a "possible carcinogen," which means that there is not enough evidence that it is actually carcinogenic in humans. He concluded that Claimant's cancer "may have been" caused by another source other than occupational exposures, especially since Claimant's cancer has been associated with smoking and Asian ancestry. (EX 27, p. 1).

In light of the foregoing evidence, I find that Employer has successfully rebutted Claimant's Section 20(a) presumption of compensability; and, weighing the evidence as a whole, and under the guidance of *Director, OWCP v. Greenwich Collieries, supra*, I have true doubt as to whether Claimant's injury is causally related to his exposure to welding fumes during his employment with Employer.

The only doctor who claims to relate Claimant's occupational exposure to his nasopharyngeal cancer is Dr. Caletri, a radiation oncologist who saw Claimant only once on February 23, 2005. Claimant's counsel sent Dr. Caletri a letter on August 21, 2006, asking him if he could say within a reasonable degree of medical probability and certainty that Claimant's exposure to welding fumes caused his cancer. Dr. Caletri's response on November 14, 2006 stated that "welding fumes contain carcinogens that may cause or accelerate malignant growths." (CX 1, p. 3). On June 27, 2007, Dr. Caletri testified that in his opinion, Claimant's exposure to welding was a possible cause of his cancer, and while he was unable to say for certain that Claimant's exposure did cause his cancer, he could say that it was definitely something that could or may cause cancer. (CX 2, p. 30). On cross-examination, however, Dr. Caletri stated that exposure to welding fumes is only one of numerous possibilities in regards to the cause of Claimant's cancer, and in his opinion nobody would be able to say that Claimant's cancer was more likely than not related to his occupational exposure to welding fumes. (CX 2, pp. 49-51). Despite this, Dr. Caletri then said that he thinks "it is more than probable that [Claimant's] occupation was a major arrow in his getting his cancer." (CX 2, p. 52).

Not only does Dr. Caletri seem to contradict himself while giving his opinion on the relatedness of Claimant's occupational exposures and his cancer, but also his examination of Claimant appeared to be cursory and ill-informed. Dr. Caletri only examined Claimant once and admitted on cross-examination that he failed to ask Claimant about any Asian heritage, his diet, any other irritants Claimant might be exposed to either at home or through hobbies, whether Claimant had ever had Epstein-Barr virus, and exactly what chemicals Claimant had been exposed to through his employment with Employer. (CX 2, pp. 38-9). Moreover, he only reviewed a small portion of Claimant's medical records and did not do any independent research concerning possible causes of nasopharyngeal cancer. (CX 2, pp. 36-37, 44).

On the other hand, two of Claimant's treating physicians, Drs. Wynn and Dennis, unequivocally stated that within reasonable probability, Claimant's cancer was not caused by his exposure to welding fumes while employed by Employer.⁵ The reports of Drs. Wynn and Dennis, along with the reports from Dr. Moore, Dr. Smith, and Mr. Chavez, support the conclusion that Claimant's nasopharyngeal cancer is not related to his employment with Employer.

Therefore, based on the foregoing, I find that when the evidence is weighed as a whole, true doubt exists and thus Claimant has failed to carry his burden that his nasopharyngeal carcinoma is related to his exposure to welding fumes while employed by Employer. In sum, Claimant is not entitled to medical benefits from Employer for treatment of his nasopharyngeal carcinoma.

ORDER⁶

Claimant's claim for compensation and medical benefits under the Act is hereby **DENIED**.

Entered this 4th day of February, 2008, at Covington, Louisiana.



C. RICHARD AVERY
Administrative Law Judge

⁵ Dr. Hull, the third of Claimant's treating physicians to give a statement on causation, was more equivocal, stating only that he could not say with any medical probability what caused Claimant's cancer. (EX 22, p. 15).

⁶ Employer did not argue for Section 8(f) relief; however, given the outcome of my Decision and Order, any such argument would be moot.

ARTIFICATE OF FILING AND SERVICE

I certify that the foregoing Compensation Order was filed in the Office of the District Director, Seventh Compensation District, and that a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Claimant:

Mr. Daniel M Bacon, Sr.
11780 Conquistador Dr. S
Grand Bay, AL 36541

Employer:

Northrop Grumman Ship Systems, Inc.
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Carrier:

Northrop Grumman Ship Systems Inc
Ingalls c/o FARA
P.O. Box 1728
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Claimant's Representative:

Michael G. Huey, Esq.
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A copy of this decision was served via regular mail to:

Honorable C. Richard Avery
Office of Administrative Law Judges
U. S. Department of Labor
428 E. Boston Street, 1st Floor
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Mailed:

February 3, 2008



DAVID A. DUHON
District Director
Seventh Compensation District
U. S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the District Director files the decision or order in his office.