IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES & MAUREEN PHILLIPS,	:	Consolidated Under
	:	MDL DOCKET NO. 875
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	00-6359
A.W. CHESTERTON, INC., et al.,	:	
	:	
Defendants.	:	

O R D E R

AND NOW, this **22nd** day of **December**, **2009**, it is hereby **ORDERED** that Defendant Atlas Asbestos Co.'s Motion for Summary Judgment (doc. no. 17) is **GRANTED**.[1]

[1] Plaintiffs Charles and Maureen Phillips filed this asbestos personal injury action in the Pennsylvania Court of Common Pleas for Bucks County on Nov. 21, 1994. The case was placed in suspense on June 26, 1996, as Plaintiffs had alleged that the disease process underlying the action was "pleural disease/adv. restrictive impairment." Plaintiffs filed an amended complaint on May 18, 1998. Defendants filed a notice of removal on Dec. 15, 2000 and the case was placed in suspense on the E.D. Pa. docket on Jan. 23, 2001. Under the procedures adopted by the Court on Jan. 1, 2009, this case was set for a status and scheduling conference on Mar. 25, 2009. The parties were afforded 120 days to complete discovery, and then 120 days to prepare expert reports, file motions for summary judgment and prepare for trial. On Oct. 7, 2009, Defendant filed the instant motion for summary judgment. For the reasons that follow, the motion for summary judgment will be granted.

(A)

The claim at issue in this case is non-malignant asbestosis. Mr. Phillips, who smoked one pack per day of cigarettes from 1950-1965, claims that his asbestosis is symptomatically manifested by: shortness of breath which has led to weight gain, a dry cough, swelling of his feet and joints, and hypertension.

Plaintiffs allege that Charles Phillips was exposed to

asbestos-containing products manufactured or distributed by Atlas Turner (f/k/a/ Atlas Asbestos Co.) ("Atlas"), during his employment at Philadelphia Gas Works (PGW) from 1967-1995.

Atlas moves for summary judgment on two grounds. First, they allege that Plaintiff cannot establish an actionable injury under Pennsylvania substantive law. Second, as to Atlas products specifically, Defendant argues that Plaintiff cannot meet the standard of Eckenrod v. GAF Corp., 544 A.2d 50, 52-53 (Pa. Super. 1988). In order to withstand summary judgment in an asbestos products liability claim, Eckenrod requires that a plaintiff establish that he worked with a specific asbestos-containing product with frequency and regularity. Furthermore, the plaintiff must show that he worked in close enough proximity to the object that he would have breathed any respirable asbestos fibers that were present. Id.

(1)

In an asbestos products liability case, under Pennsylvania law, "damages may only be awarded for a compensable injury where a plaintiff is diagnosed with an asbestos-related condition and has suffered a discernible physical symptom, a functional impairment or disability resulting from said asbestos exposure." Ryan v. Asbestos Corp. Ltd., 829 A.2d 686, 688 (Pa.Super. 2003) (citing Giffear v. Johns-Manville Corp., 632 A.2d 880 (Pa.Super 1993)). Furthermore, a plaintiff must produce evidence that the alleged symptoms are caused by the specific asbestos-related injury that plaintiff has been diagnosed with.

Defendant argues that the symptoms that Mr. Phillips manifests are insufficient to sustain an asbestos products liability cause of action. The diagnosing physician, Dr. Jonathan L. Gelfand, diagnosed Mr. Phillips with pleural thickening which is a "contributing factor . . . to his dyspnea [shortness of breath] on exertion." (Pls.' Resp. in Opp'n to Mot. Summ. J. Ex. B at 2.) Additionally, Dr. Gelfand states, in his diagnosis, that:

> The accumulated burden of asbestos exposure has been a substantial contributing factor to the asbestos related abnormalities noted. Notwithstanding his history of heart disease, coronary bypass surgery, hypercholesterolemia and hypertension, it is the exposure to asbestos which has cause the asbestos related abnormalities noted.

Id.

Defendant cites case law in which courts have held that shortness of breath is not compensable because it is "not a discernible physical symptom, a functional impairment or a disability" in the asbestos context. Quate v. American Standard, Inc., et al., 818 A.2d 510, 513 (Pa.Super 2002). Defendant points out that the line of cases beginning with Giffear required a plaintiff to exhibit some symptomatic consequences of asbestos exposure before a compensable injury arises. 632 A.2d at 888. Defendant argues that, based on the diagnosis of Mr. Phillips above, there is no compensable physical injury in this case.

Plaintiffs, in a brief response, state that the diagnosing report of Dr. Gelfand satisfies the requirement that asbestos caused Mr. Phillips's asbestos related condition. As to whether or not shortness of breath is an actionable injury, Plaintiffs simply state that the report "meets the requirements of Simmons v. Pacor, 674 A.2d 232 (1996)." Presumably, this means that the shortness of breath established by Mr. Phillips is, in Plaintiffs' view, sufficient to establish a "physical impairment or a diminution of a bodily function." Id. at 672.

Secondly, Plaintiffs state that Cleveland v. Johns-Manville, 690 A.2d 1146 (Pa. 1997), holds that "the requirement of symptomatology did not apply to cases in suit prior to the decision in Simmons." (Pls.' Resp. in Opp'n Def.'s Mot. Summ J. at 4.) Plaintiffs' argue that the Simmons decision applies only to cases filed after that decision.

Analyzing the Cleveland decision, the court did state that the Simmons holding "is applied to the parties to the case in which the rule is announced and litigation commenced thereafter . . ." Cleveland, 690 A.2d at 1150. This statement is clarified later in the decision, however. The court rules that "requiring new trials in each of the cases on appeal handled pursuant to the pre-Simmons rule would only exacerbate this congestion [of asbestos cases]." Id. at 414.

This prospective application is further clarified by later Pennsylvania court holdings. Even if a plaintiff previously recovered for "risk and fear" of cancer pre-Marinari v. Asbestos Corp., Ltd., 612 A.2d 1021 (Pa. Super. 1992), the plaintiff is permitted to bring a malignancy suit against defendants from whom they have not yet recovered. Abrams v. Pneumo Abex Corp., 981 A.2d 198, 212 (Pa. 2009). Therefore, since Mr. Phillips never recovered from Atlas in this case, he would not be precluded from seeking recovery against Atlas in the future, should he develop a malignancy. Even in the instant

action, should he recover compensation for his current claimed injury, asbestosis, he could later bring a suit for damages, against the same defendants, for damages related to a malignancy. See Abrams, 981 A.2d at 206-07 n.6 (citing Simmons, 674 A.2d at 238) ("The appellant in Simmons conceded that, under Marinari, they were precluded from recovering damages based on increased risk of cancer.")

The "prospective application" articulated in Cleveland, therefore, is meant to apply to cases on direct appeal at the time of the decision, not cases in which no litigation had really begun. Plaintiffs have been aware of the Simmons and Giffear decisions for 12 years, and to apply pre-Simmons law to them would be a distortion of the purpose of the Simmons and Giffear rules.

As to Plaintiff's argument that shortness of breath is a compensable injury, there is little authority in Plaintiff's favor. There are numerous cases which hold that shortness of breath is not a compensable injury in Pennsylvania. See Quate, 818 A.2d at 513; Ryan v. Asbestos Corp. Ltd., 829 A.2d 686 (Pa.Super 2003.); Taylor v. Owens-Corning Fiberglass Corp., 666 A.2d 681, 687 n.2 (Pa.Super 1995); Cauthorn v. Owens-Corning Fiberglass Corp., et al., 840 A.2d 1028, 1035 (Pa.Super 2004) (internal quotations omitted). Plaintiff simply has not put forward enough evidence in this case to create a genuine issue of material fact as to whether the Plaintiff has a compensable physical injury. Even considering Plaintiffs' expert report, which was served on Atlas after Atlas had already filed their motion for summary judgment, the diagnosis is vague and equivocal. It does not assert anything other than that asbestos was a "substantial contributing factor" to Plaintiff's shortness of breath. The report also states that Mr. Phillips has high blood pressure, is overweight, has had double bypass surgery, and has COPD due to smoking that is a substantial contributing factor to his shortness of breath on exertion.

Under Pennsylvania law, this evidence is insufficient to establish a compensable injury. See Quate 818 A.2d at 513. Summary judgment in favor of Atlas is appropriate.

(2)

Evaluating Atlas's second argument, a plaintiff must establish that they worked with a certain defendant's product with the necessary frequency and regularity, and in close enough

proximity to the product, to create a genuine issue of material as to whether that specific product was a substantial factor (and thus the proximate cause) of Plaintiff's asbestos related condition. Eckenrod, 544 A.2d 50, 52-53.

At his deposition, Plaintiff testified that he saw trucks delivering asbestos cement (called firebrick) to PGW, and those trucks said "Atlas" on them. (Def.'s Mot. Summ. J. at Ex. K p.413, Ex. I p.46). Atlas argues that they never supplied the products that Plaintiff identifies as "Atlas" to the United States, and more specifically, never sold or supplied any asbestos containing products to PGW. In addition to asserting that they never sold this product to PGW, Atlas contends that even if they had, they would never have delivered the product by truck, since all sales of Atlas products were made F.O.B. Quebec, Canada. (Def.'s Mot. Summ. J. at 17.) Further, Atlas argues that Mr. Phillip's identification of "Atlas" is insufficient, because there are numerous companies that manufactured or sold asbestos products which could have had trucks labeled "Atlas." (See Def.'s Mot. Summ. J. at 19) (listing thirteen other companies with "Atlas" in their name that sold asbestos, including six located in Pennsylvania).

Atlas next argues, assuming arguendo that the products could be attributable to Atlas, Plaintiffs cannot meet the frequency, regularity and proximity requirements of Eckenrod. (Def.'s Mot. Summ. J. at 17). First, Defendant argues that Mr. Phillips testimony merely establishes that the "Atlas" product came into the facility. Although he testifies that he "worked with" the cement, Mr. Phillips never testifies that he personally mixed the cement or how often the cement was mixed. Second, Defendant claims that Mr. Phillips never establishes that the asbestos dust which he came in contact with emanated from an Atlas product. Mr. Phillips testified that Atlas asbestos boards were used to "shore up aerated areas" around generating houses. Although he says that gas vapors would come out of these generator houses, he does not testify about how often he breathed these vapors, or how he attributes these vapors to Atlas asbestos products. (Def.'s Mot. Summ. J. at 20.) Finally, Mr. Phillips testifies to nothing more specific than that he worked "around" dust created from various products every day. Defendant contends that this general averment is not enough to establish the proximity requirement of Eckenrod. (Id.)

Plaintiffs response argues that Mr. Phillips's testimony establishes a "regular and frequent" exposure to Atlas

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

---

spray asbestos. Plaintiffs then cite four cases and conclude their argument with the statement "[s]uffice it to say plaintiff has created a jury question on exposure to Atlas spray asbestos." (Pls.' Resp. in Opp'n to Def.'s Mot. Summ. J. at 1.)

Despite Plaintiffs' conclusory statement, the cases cited do not create a jury question on exposure to Atlas spray asbestos in the current case. As Atlas points out in their reply, there is no deposition testimony from Mr. Phillips which identifies Atlas as having manufactured the spray asbestos he used. Plaintiffs point to testimony that Mr. Phillips "sprayed concrete asbestos stuff on [the walls}" of the facility that he worked on in the 1970s. Atlas responds that there is no testimony that "(1) Mr. Phillips was within any sort of distance to be exposed to any sprayed asbestos; (2) that Mr. Phillips participated in using the machine that sprayed asbestos; (3) that the 'concrete asbestos stuff' that Mr. Phillips talked about was sprayed Limpet asbestos, the only sprayed asbestos with which Atlas Turner is associated." (Def.'s Reply in Supp. of Mot. Summ. J. at 2.)

Plaintiffs have failed to show that Mr. Phillips came in contact with anything other than sprayed asbestos from an unknown company during the 1970s and that he worked with "Atlas" firebrick and wallboards. They are unable to specifically identify Atlas as the supplier of the firebrick and wallboards, and they are unable to establish how frequently and the proximity to which Mr. Phillips used these products. With regard to the asbestos spray, Mr. Phillips makes no connection to Atlas in his deposition testimony, but Plaintiffs try to draw the connection by citing four cases unrelated to the instant facts. These cases do establish that Atlas supplied spray asbestos, but do not have anything to do with Mr. Phillips' work site or experience. Taken altogether, Plaintiffs have failed to meet the frequency, regularity and proximity requirements of Eckenrod.

(B)

For the reasons stated above, summary judgment in favor of the Defendant is appropriate in this case.