

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

WILLIAM RHODES, )  
 )  
 Employee, )  
 )  
 )  
 v. )  
 )  
 )  
 STATE OF DELAWARE, )  
 )  
 )  
 Employer. )

Hearing No. 1309294

*Asbestos Case:  
Bd finds lung  
disease more  
likely due to  
Smoking*

**DECISION ON PETITION TO  
DETERMINE COMPENSATION DUE**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on September 8, 2008, in the Hearing Room of the Board, in New Castle County, Delaware.

**PRESENT:**

TERRENCE M. SHANNON

ALICE M. MITCHELL

Natalie L. Palladino,  
Workers' Compensation Hearing Officer

**APPEARANCES:**

Richard T. Wilson, Attorney for the Employee

Francis X. D. Nardo, Attorney for Employer

## NATURE AND STAGE OF THE PROCEEDINGS

On October 1, 2007, William Rhódes (“Claimant”), by and through his widow, Linda Peterson-Rhodes, filed a Petition to Determine Compensation Due seeking acknowledgement that Mr. Rhodes developed lung cancer as a result of asbestos exposure while working for the State of Delaware (“Employer”) at the Port of Wilmington.<sup>1</sup> Claimant’s Petition alleges a date of injury of May 17, 2007. Mr. Rhodes died on December 21, 2006. Claimant is seeking total disability benefits for the closed period of October 19, 2006 through December 21, 2006, spousal benefits ongoing from December 22, 2006, reimbursement of funeral expenses and medical witness and attorney’s fees. Mr. Rhodes’ average weekly wage when he last worked for the State of Delaware on October 19, 2006 was \$724.80. Employer disputes that Claimant’s lung cancer is causally related to his employment with the State of Delaware at the Port of Wilmington. A hearing was held on Claimant’s Petition on September 8, 2008. This is the decision on the merits.

## SUMMARY OF THE EVIDENCE

Trever Knight testified on behalf of Claimant. From 1987 to 1994, Mr. Knight was the Assistant Port Engineer for the Port of Wilmington. At that time, the Port was owned by the City of Wilmington. According to Mr. Knight, several of the warehouses at the Port of Wilmington contained asbestos. The warehouses were generally used for storage of materials coming into and going out of the Port. Employees, such as laborers who cleaned the warehouses and forklift operators who moved the stored materials, generally spent about 90% of their work days in the warehouses. Most of the warehouses and buildings at the Port were eventually demolished. Mr.

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<sup>1</sup> Strictly speaking, Claimant’s estate filed the petition rather than Claimant himself. For purposes of this decision, however, it is simpler to treat the issue as if Claimant himself filed the petition, rather than to continually distinguish between Claimant as patient and Claimant’s estate as petitioner.

Knight was responsible for hiring licensed contractors to remove asbestos from several of the buildings before the demolitions took place. He explained that asbestos sampling and testing had to be performed because the buildings could not be demolished until the asbestos was removed.

Mr. Knight does not know if any asbestos abatement was performed before he started working at the Port in 1987. The NASCO ("North American Smelting Company") Building was demolished in 1997. He was not involved in the asbestos abatement process for that building.

From 1987 to 1994 no effort was made to keep Port employees out of areas that contained asbestos or were suspected to contain asbestos. The employees did not wear respirators, they just wore dust masks. There were no warning signs posted in the buildings about asbestos.

Mr. Knight recalled one occasion when he saw Port of Wilmington employees cutting asbestos siding with a saw to create a garage door sized opening in one of the buildings. Claimant was not involved in that process. Most of the siding was unscrewed and removed, but there was some dust created when the laborers were cutting through it with the saw. Lab analysis performed on the siding once it was removed confirmed that it contained asbestos. There was also some piping that was covered with insulation removed from one of the warehouses, possibly Warehouse D, to be repaired. The pipes were not water lines and they were not heated because the buildings had dry sprinkler systems.

During the actual abatement process the buildings were sealed off and the asbestos was professionally removed by the contractor. Mr. Knight personally oversaw the abatement work performed by the contractor in Warehouse D and Warehouse E that occurred prior to 1994.

Linda V. Peterson-Rhodes testified on behalf of Claimant. Mrs. Rhodes married Claimant on November 10, 2001. They lived together since 1983. Claimant worked at the Port

of Wilmington the entire time she knew him. Although Claimant's Social Security records (Claimant's Exhibit 2) indicate that Claimant began working for the City of Wilmington in 1987, she believes he worked at the Port earlier than 1987. The Social Security records also reflect that Claimant worked for North American Smelting Company, Inc. from 1968 to 1983. Mrs. Rhodes worked at the Port, off-and-on, from 1993 to 1998.

Mrs. Rhodes visited Claimant while he was working at the Port to take him meals, pick him up, etc. Mrs. Rhodes saw Claimant working at the NASCO Building when she took him meals. She does not know what the building was used for, but Claimant operated a forklift while he was working there. Mrs. Rhodes also saw Claimant working in Warehouse D and Warehouse E. She believes that he worked in all of the warehouses at the Port. However, he primarily worked in Warehouse A and Warehouse F. Claimant used the forklift to move materials and also to clean up dirt by attaching a mop to the forklift.

Claimant stopped working at the Port on October 19, 2006 because he was too sick to continue working. In June 2006, Claimant started complaining of back pain, spitting up blood, he was losing weight and he was fatigued. Claimant also had a severe cough and some blood in his urine. Claimant was referred by Dr. Sobel (his family doctor) to Dr. Taranova (a urologist) who performed prostate surgery. However, Claimant's condition kept getting worse. Claimant returned to see Dr. Sobel who continued treating him for arthritis and a broken rib from a fall by giving him pain medications. Mrs. Rhodes suspected that something more serious was wrong with Claimant so she took Claimant to see Dr. Cottrey (an oncologist). Mrs. Rhodes explained that she previously worked as a CNA and she suspected that Claimant had cancer based on his symptoms.

Claimant initially saw Dr. Cottrey in October or November 2006. Dr. Cottrey referred Claimant to Dr. O'Brien (a pulmonologist). On December 14, 2006, Claimant underwent a bronchoscopy at Christiana Hospital and lung cancer was diagnosed by Dr. O'Brien. Claimant died on December 21, 2006, just a few days after he was released from the hospital after the bronchoscopy.

Mrs. Rhodes attended most of Claimant's doctor's appointments. She witnessed Claimant telling a doctor, on one occasion, that he believed he was exposed to asbestos at the Port. She could not recall which doctor Claimant told, but it was not Dr. Cottrey or Dr. O'Brien. Claimant's lung problems started in 2000 and he suspected, even at that time, that the problems were related to asbestos exposure. Claimant had friends at the Port who died of lung cancer.

In December 2006, both Dr. Cottrey and Dr. O'Brien told Mrs. Rhodes that they thought Claimant's lung cancer was probably work-related. However, they both also mentioned smoking as a cause of the cancer. The physicians did not suspect that Claimant had lung cancer until December 2006. None of Claimant's doctors stated that his lung disease or cancer was asbestos related until December 2006, Claimant just thought that was the case. Mrs. Rhodes has reviewed Claimant's medical records from Dr. O'Brien and she agrees that they do not state that Claimant's lung cancer was asbestos related.

Mrs. Rhodes testified that Claimant had HIV, diabetes, high blood pressure and he was a smoker. His diabetes was not controlled because he did not take his medications or adjust his diet. According to Mrs. Rhodes, the HIV was under good control. However, she agreed that in 2001, 2003 and 2004, Claimant was diagnosed with lung infections common to individuals with HIV. There was also a notation in his infectious disease doctor's records that Claimant was non-

compliant in taking his medication to treat the lung infections. Mrs. Rhodes also learned in 1995 that Claimant had previously had a heart attack.

Mrs. Rhodes does not believe that Claimant smoked two packs a day for 40 plus years. She considered him to be a "moderate" smoker. She did not let Claimant smoke in the house or the car. However, she does not know how much Claimant smoked at work. Claimant was told in 2000 by Pulmonary Associates that he needed to stop smoking. He quit smoking at times, but ultimately never stopped.

Claimant planned to work at the Port indefinitely. He did not even want to stop working in October 2006. Claimant did not apply for or receive any short term disability benefits when he stopped working for the Port. Mrs. Rhodes was dependent upon Claimant's income from the Port. She stopped working at the Port in 1998 due to a work accident. She is not receiving any workers' compensation benefits at this time. She received \$20,000 when Claimant died from a life insurance policy he had through the Port.

Orn Eliasson, M.D., testified by deposition on behalf of Claimant (Claimant's Exhibit 1). Dr. Eliasson specializes in pulmonary medicine, internal medicine, occupational medicine and public health. He is also a certified B-reader. Dr. Eliasson did not have a chance to examine Claimant before he died.

Dr. Eliasson reviewed Claimant's x-rays from December 1, 2006 and December 11, 2006. The first x-ray showed bilateral interstitial fibrosis, an enlarged heart, a calcified nodule in the right upper-lobe and right hilar calcification. The x-ray was grade 2 or mid-grade quality. Dr. Eliasson believes that the interstitial fibrosis was asbestos related. The December 11, 2006 x-ray also showed bilateral interstitial fibrosis and some small calcified plaques, bilaterally, which he felt were asbestos-related. The second x-ray was grade 1, or of a higher quality.

Dr. Eliasson also reviewed Claimant's medical records from Dr. Edward Sobel, Pulmonary Associates, Helen F. Graham Cancer Center, Brandywine Urology Consultants, Christiana Care Health Center, St. Francis Hospital, Infectious Disease Consultants, Gastroenterology Associates, Eye Physician Surgeons, and Regional Hematology and Oncology. He reviewed Claimant's death certificate which indicated that Claimant died from a neoplasm of the lung and diabetes. Specifically, Claimant had non-small cell carcinoma.

Dr. Eliasson testified that there is no safe level of asbestos exposure. Even when a building has undergone asbestos abatement, an individual could be exposed to asbestos in the building. He explained that all of the asbestos-containing materials may not have been removed during the abatement process. Further, since a significant amount of dust or residue (i.e., friable asbestos) is generated during the abatement process, it always remains in place.

The latency period for lung cancer caused by asbestos exposure is ten to twenty years. Lung cancer can be caused by asbestos exposure or smoking. However, there is a multiplicative effect on the cancer risk when the individual is a smoker and is exposed to asbestos. In Claimant's case, Dr. Eliasson opined that his lung cancer was caused by asbestos exposure and his smoking was a contributing factor. The interstitial fibrosis and pleural thickening are evidence of asbestos exposure. When an individual has asbestosis and lung cancer, there is a dose-response relationship to the asbestos exposure. In other words, the greater the asbestos exposure the more likely the individual is to have asbestosis and the more likely the individual is to have lung cancer.

According to Dr. Eliasson, "Mr. Rhodes was relatively healthy except for some diabetes...other than the asbestosis, and the lung cancer, he was doing okay." In 2000 or 2001, when Claimant was treated at Pulmonary Associates, a CT scan of the lungs revealed a left lower

lobe nodule, a subpleural nodule and a calcified granuloma. Dr. Eliasson opined that it is more likely than not that the subpleural nodule was an asbestos-related plaque. He could not say whether the left lower lobe nodule was asbestos-related. The granuloma was not asbestos-related.

Dr. Eliasson reviewed some documents that revealed the existence of friable asbestos at the NASCO site at the Port of Wilmington from about 1991 to 1998. Specifically, he reviewed a document entitled "Asbestos Scope of Work, NASCO site, Port of Wilmington" prepared by Harvard Environmental, Inc., that identified samples of asbestos-containing materials obtained from the NASCO site on April 18, 1996.<sup>2</sup> In Dr. Eliasson's opinion, the materials listed were hazardous to anyone working at that site. Further, Dr. Eliasson opined that an individual working at that site would have been at risk for asbestos exposure even if abatement efforts were made prior to April 1996. Dr. Eliasson testified that if Claimant worked at the NASCO site in 1995 and 1996, he would have been exposed to significant levels of asbestos and that exposure would have played a role in development of his lung cancer that was diagnosed in 2006. Specifically, Dr. Eliasson opined that Claimant's lung cancer was caused by his asbestos exposure at the NASCO site and his smoking habit, which was two packs a day for forty years.

On cross-examination, Dr. Eliasson agreed that Claimant's treating doctors did not diagnose Claimant with asbestosis or bilateral interstitial fibrosis. None of Claimant's treating physicians opined that asbestos exposure was a substantial factor in causing Claimant's lung cancer. However, it appears that Dr. O'Brien noted in Claimant's "social history" that he worked in a port and had significant asbestos exposure.

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<sup>2</sup> The document is attached as an exhibit to Dr. Eliasson's deposition transcript. Claimant submitted additional documents regarding asbestos abatement work at the NASCO site from 1991 through 2000 (Claimant's Exhibit 3). However, it is not clear whether Dr. Eliasson reviewed those documents and it does not appear that Dr. Eliasson relied on the documents in arriving at his causation opinion.

Dr. Eliasson also agreed that interstitial fibrosis has “a good number” of causes, approximately 120 causes, besides asbestos exposure. However, he explained that in Claimant’s case you have “very significant asbestos exposure” and typical asbestosis findings on his chest x-rays. Dr. Eliasson agreed, however, that he had no information regarding asbestos contamination outside of the NASCO building. Further, he does not know whether Claimant worked at the NASCO site or somewhere else at the Port of Wilmington in 1996.

Albert A. Rizzo, M.D., testified by deposition on behalf of Employer (Employer’s Exhibit 1). Dr. Rizzo is board certified in pulmonary, critical care and sleep medicine. He is not a certified B-reader. Dr. Rizzo reviewed Claimant’s treatment records, diagnostic studies, death certificate and Dr. Eliasson’s report.

Claimant was treated by Dr. Rizzo’s colleagues at Pulmonary Associates as early as 2000 for suspected lung disease. Claimant underwent x-rays of the chest and CAT scans, none of which suggested that Claimant suffered from bilateral interstitial fibrosis, pleural plaques or pleural thickening. Further, the radiologists and treating doctors did not indicate that asbestos exposure was a contributing factor to Claimant’s lung disease and/or cancer. Dr. Eliasson is the only physician who has stated that Claimant has bilateral interstitial fibrosis and pleural plaques.

Dr. Rizzo reviewed the December 1, 2006 and December 11, 2006 x-rays that Dr. Eliasson relied upon and testified that he would not have read those studies as showing interstitial fibrosis. He also reviewed an August 14, 2006 x-ray report in which the radiologist specifically stated that there was no pleural thickening. Dr. Rizzo reviewed Claimant’s prior CAT scans and testified that the radiologists and treating doctors did not note any findings consistent with asbestos-related disease. He agreed, however, that a 2000 or 2001 CAT scan performed while Claimant was under the care of Dr. Guy, found a subpleural nodule that is

possibly an asbestos-related change. Dr. Rizzo also agreed that a December 5, 2006 CT scan showed some mild pleural plaquing that could possibly be caused by, among other things, exposure to asbestos.

Dr. Rizzo opined that Claimant had two potential risk factors for lung cancer, cigarette smoking and occupational exposures to asbestos. Based on his review of the treating physicians' reports, the x-ray reports and his own review of the x-rays, Dr. Rizzo opined that the cigarette smoking was the cause of Claimant's lung cancer. Claimant had a 40-year history of smoking two packs a day. The type of lung cancer that Claimant developed is consistent with smoking. Further, if Claimant's lung cancer was asbestos-related, he would have expected Claimant's treating physicians and radiologists to note interstitial fibrosis and/or pleural plaques as part of their diagnoses. To Dr. Rizzo's knowledge, none of Claimant's treating physicians ever causally related Claimant's lung cancer to asbestos exposure.

Dr. Rizzo also testified that pleural thickening, even if it was present, can result from trauma to the chest, infections, pleurisy, excessive fat tissue, etc. Interstitial fibrosis is most commonly idiopathic, but it can also be caused by medications, fungal infections, tuberculosis, bacterial pneumonia, or occupational exposures. Because Claimant was HIV positive, his immuno-compromised status put him at greater risk for tuberculosis and fungal infections. In fact, Claimant was treated by Pulmonary Associates for several *Candida Glabrata* infections, i.e., fungal infections. Claimant's diabetic condition, and the poor circulation related to that condition, may also have increased his risk of infection. Finally, Claimant did not have mesothelioma, the type of malignant tumor that forms in the pleural space and is almost certainly related to asbestos exposure. Dr. Rizzo has not seen the type of findings that indicate, to a

reasonable degree of medical probability, that asbestos exposure was a contributing factor to Claimant's condition.

On cross-examination, Dr. Rizzo agreed that he did not review any data regarding possible asbestos contamination at the Port of Wilmington. He agreed that Dr. Guy and Dr. O'Brien (from Pulmonology Associates) noted that Claimant thought he had been exposed to asbestos during the course of his occupation. Dr. Rizzo agreed that he would have expected that information to prompt Claimant's treating doctors to look for signs of lung disease associated with asbestos exposure. Dr. Rizzo also agreed that smoking and asbestos exposure, when combined, greatly increase an individual's risk of developing lung cancer. As far as Dr. Rizzo knows, Dr. Eliasson is the only physician who read Claimant's films that is a certified B-reader.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Compensability/Causation**

The Delaware Workers' Compensation Act provides that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment."<sup>3</sup> Because Claimant filed the current Petition, he has the burden of proof.<sup>4</sup>

Claimant is alleging that his lung cancer was an occupational disease that resulted from his work for the State of Delaware at the Port of Wilmington. Employer is not disputing that Claimant suffered from lung cancer. However, Employer disputes that Claimant developed lung cancer as a result of his employment with the State of Delaware. Thus, the primary issue before

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<sup>3</sup> 19 *Del. C.* § 2304.

<sup>4</sup> 29 *Del. C.* § 10125(c).

the Board at this time is causation, which Claimant has the burden of proving by a preponderance of the evidence.<sup>5</sup>

Since Claimant is alleging an occupational disease, compensability is predicated on a showing 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.” *Anderson v. General Motors Corp.*, Del. Supr., 442 A.2d 1359, 1361 (1982); *Air Mod Corporation v. Newton*, Del. Supr., 215 A.2d 434, 442 (1965). Medical testimony must establish “a causal nexus” between Claimant’s work for the State of Delaware at the Port of Wilmington and his lung cancer. *See Lee v. A. C. & S., Inc.*, Del. Super., 542 A.2d 352, 354 (1987). For the following reasons, the Board holds that Claimant has not established to a reasonable degree of medical probability that he developed lung cancer as a natural incident of his job duties as a forklift operator at the Port of Wilmington while working for the State of Delaware.

In this case, the parties presented conflicting opinions regarding causation from their respective medical witnesses.<sup>6</sup> Dr. Eliasson opined that Claimant’s lung cancer was caused by his asbestos exposure at the NASCO site in 1995 and 1996 and his smoking habit. In support of that opinion, Dr. Eliasson pointed to a report prepared by Harvard Environmental which identified samples of asbestos-containing materials obtained from the NASCO site on April 18, 1996 that were “hazardous to anyone working at that site.” He also opined that the interstitial

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<sup>5</sup> *See Goicuria v. Kauffman's Furniture*, Del. Super. Ct., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at \* 2 (October 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). Since the burden of proof is on the Claimant, Employer is under no burden to prove that an accident did not occur. Employer can raise no affirmative defenses, proffer no evidence as to how the alleged injury occurred and the Board can still rule in Employer’s favor if Claimant does not meet his burden of proof. *See Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985).

<sup>6</sup> The Board may properly accept the testimony of one medical expert over another. *Reese*, 619 A.2d at 910 (“The Board, of course, was free to choose between the conflicting diagnoses [of two doctors] and either opinion would

fibrosis and pleural thickening demonstrated on Claimant's December 2006 x-rays are evidence of asbestos exposure. In addition, a 2000 or 2001 CT scan of Claimant's lungs revealed a subpleural nodule that was more likely than not an asbestos-related plaque. Finally, Dr. Eliasson testified that Claimant was "relatively healthy except for some diabetes...other than the asbestosis, and the lung cancer, he was doing okay."

Dr. Rizzo, on the other hand, opined that Claimant's lung cancer was caused by smoking. Although Dr. Rizzo acknowledged that asbestos exposure was one of Claimant's potential risk factors for developing lung cancer, he did not see the type of findings that indicate to a reasonable degree of medical probability that asbestos exposure was a contributing factor to Claimant's condition. Dr. Rizzo explained that Claimant underwent x-rays and CAT scans of his lungs as early as 2000, yet none of the treating physicians or radiologists noted interstitial fibrosis, pleural plaques or pleural thickening. Further, none of Claimant's treating physicians opined that asbestos exposure was a contributing factor to Claimant's lung disease or cancer, even though Claimant reported to Dr. Guy and Dr. O'Brien that he thought he was exposed to asbestos while working.

Dr. Rizzo also explained that even if Claimant's diagnostic studies demonstrated a subpleural nodule or some mild pleural plaqueing, asbestos exposure is only one of many potential causes of those findings. Pleural thickening can result from trauma to the chest, infections, pleurisy, excessive fat tissue, etc. Interstitial fibrosis is commonly idiopathic, but can also be caused by medications, fungal infections, tuberculosis or bacterial pneumonia. Claimant's HIV disease and diabetes put him at greater risk for infections. In fact, Claimant was treated for several *Candida Glabrata* infections, i.e., fungal lung infections. Finally, Dr. Rizzo

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constitute substantial evidence for purposes of appeal."); *see also, DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

noted that Claimant did not have mesothelioma, the type of malignant tumor that forms in the pleural space and is almost certainly related to asbestos exposure.

For several reasons, the Board found Dr. Rizzo's causation opinion more persuasive than Dr. Eliasson's opinion. First, Dr. Eliasson's causation opinion is based upon the unsubstantiated conclusion that Claimant was exposed to friable asbestos while working at the NASCO site at the Port of Wilmington in 1995 and 1996. Dr. Eliasson went so far as to characterize Claimant's asbestos exposure as "very significant." Yet, upon closer examination of his testimony, it is clear that he did not know when or if Claimant even worked at the NASCO site. Dr. Eliasson qualified his causation opinion by stating that *if* Claimant worked at the NASCO site in 1995 and 1996, he would have been exposed to significant levels of asbestos and that exposure would have played a role in development of his lung cancer. Presumably, Dr. Eliasson is making that presumption based on the April 18, 1996 report from Harvard Environmental regarding samples of asbestos-containing materials obtained from the NASCO site or some other documents he reviewed. However, it is clear from his cross-examination testimony, that Dr. Eliasson did not know whether Claimant worked at the NASCO site and he had no information regarding asbestos contamination at the Port outside of the NASCO Building.

Further, the testimony of Mr. Knight and Mrs. Rhodes provides no support for the conclusion that Claimant was exposed to asbestos at the NASCO site in 1995, 1996 or anytime thereafter, while Claimant was working for the State of Delaware.<sup>7</sup> Mrs. Rhodes vaguely testified that she visited Claimant while he was working as a forklift operator at the NASCO Building and other warehouses at the Port. However, Mrs. Rhodes did not describe any work

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<sup>7</sup> "[M]edical evidence is not the only evidence the Board may rely upon in making its factual determinations with respect to the claimant's injury." *Streeet v. State*, 669 A.2d 9, 11 (Del. 1995). Lay evidence, combined with marginal evidence, can be sufficient to support a finding of causation. *Id.* at 12. *See also, Custom Iron Shop v. Roxbuty*, Del. Super., C.A. No. 99A-03-014, Barron, J., 1999 WL 743307 at \*2 (August 6, 1999).

activities that may have resulted in Claimant's exposure to friable asbestos. Further, Mrs. Rhodes did not indicate *when* she visited Claimant at the NASCO site or any of the other buildings.

Mr. Knight's testimony was similarly unresponsive. Mr. Knight was only employed at the Port from 1987 to 1994, when the Port was owned by the City of Wilmington.<sup>8</sup> Mr. Knight recalled one occasion where some asbestos siding was cut and removed from a building at the Port. However, that event occurred prior to 1994 and he testified that Claimant was not involved in the project. Mr. Knight also vaguely recalled some pipes covered with insulation being removed from Warehouse D. Again, that project occurred prior to 1994 and there is no evidence that Claimant was involved in the pipe removal, that the pipe insulation contained asbestos or that Claimant was even working at Warehouse D during that project. Thus, the testimony of Mrs. Rhodes and Mr. Knight provides no support for Dr. Eliasson's conclusion that Claimant was exposed to asbestos at the NASCO site.<sup>9</sup>

Second, even if the Board assumes without finding, that Claimant was exposed to some asbestos containing materials or dust left over from the abatement work at various Port of Wilmington buildings, it finds Dr. Rizzo's opinion persuasive that Claimant's medical findings do not indicate, to a reasonable degree of probability, that asbestos exposure contributed to his

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<sup>8</sup> Claimant's Social Security earning records confirm that he was employed by the City of Wilmington until sometime in 1995, when he started working for the State of Delaware (Diamond State Port Corporation). See Claimant's Exhibit 2.

<sup>9</sup> The lack of evidence regarding Claimant's exposure to friable asbestos at the NASCO site in 1995 or thereafter is not only problematic to Dr. Eliasson's causation opinion, but it prevents Claimant from demonstrating that his last injurious exposure occurred while he was employed by the State of Delaware. The last injurious exposure rule provides, generally, that when a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the most recent employer where the worker was exposed is liable for the entire award. *Lake Forest School District v. Richard DeLong*, Del. Super., C.A. No. 87A-AU-7; Del Pesco, J. (July 20, 1988). The last injurious exposure rule requires a showing that the exposure at issue was "injurious," i.e., it was of the type that could cause the disease given prolonged exposure. *Id.* At 4. It is the last *known* injurious exposure that is determinative. See *Nai v. Electric Hose and Rubber & Dravo Corp.*, Del. I.A.B., Hearing Numbers 1183362 & 1183363 (June 4, 2002).

cancer.<sup>10</sup> As Dr. Rizzo pointed out, Claimant was treated by Pulmonary Associates for lung disease, such as fungal infections related to HIV, as early as 2000. Further, when he was seeking treatment for his more recent lung problems/cancer in 2006, Claimant reported to Dr. Guy and Dr. O'Brien that he may have been exposed to asbestos through his employment. Yet, Dr. Rizzo and Dr. Eliasson agree that none of Claimant's treating physicians or radiologists ever opined that the x-ray or CT scan findings were consistent with asbestosis or opined that Claimant's lung cancer was related to asbestos exposure.

Further, as Dr. Rizzo explained, even if the diagnostic studies may be read as showing pleural thickening or interstitial fibrosis, which he does not believe is the case, there are several causes of those conditions that are unrelated to asbestos exposure. In Claimant's case, his HIV and diabetes put him at greater risk for infection, as evidenced by the treatment he received for several years for *Candida Glabrata* infections. It is clear from Dr. Eliasson's testimony that Claimant was "relatively healthy" that he did not have a full understanding of Claimant's prior medical history and the other potential risk factors that could have caused the alleged abnormalities demonstrated on Claimant's diagnostic studies.

Finally, both doctors agree that Claimant had a 40 year history of smoking two packs per day. They also agree that the type of lung cancer from which Claimant suffered was not mesothelioma, the type of cancer which is almost certainly caused by asbestos exposure. Rather, he had non-small cell carcinoma, which may be caused by cigarette smoking.

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<sup>10</sup> Under similar circumstances, the Board previously held that when there is no evidence that asbestos exposure had an effect on the claimant, his lung cancer was not caused by the exposure. *See, e.g., Spencer v. E. I. duPont de Nemours & Co.*, Del. IAB, Hearing No. 1228565, at 8 (September 22, 2003)(lung cancer not related when there is lack of symptomatology, no radiographic or pathologic evidence of asbestos problem from 1968 to November of 2002, and a substantial history of smoking), *aff'd*, Del. Super., C.A. No. 03A-10-003, Babiarz, J. (February 11, 2005).

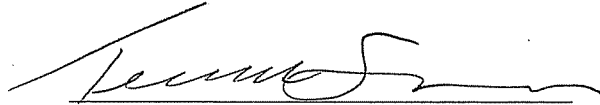
In conclusion, the Board holds that Claimant has not demonstrated that he was exposed to asbestos while working at the Port of Wilmington for the State of Delaware. Further, even if the Board assumes without holding that Claimant was exposed to asbestos while working at the Port, the Board accepts Dr. Rizzo's opinion that, to a reasonable degree of medical probability, Claimant's lung cancer was caused by cigarette smoking. Accordingly, Claimant has not met his burden of demonstrating by a preponderance of the evidence that he developed lung cancer as a natural incident of his job duties as a forklift operator at the Port of Wilmington while working for the State of Delaware.

**STATEMENT OF THE DETERMINATION**

FOR THESE REASONS, the Board DENIES Claimant's October 1, 2007 Petition to Determine Compensation Due.

IT IS SO ORDERED THIS 25<sup>th</sup> day of March 2009.

**INDUSTRIAL ACCIDENT BOARD**

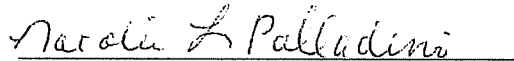


TERRENCE M. SHANNON



ALICE M. MITCHELL

I, Natalie L. Palladino, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.



Mailed Date: 3-26-09



OWC Staff