

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEARL LEWIS, claiming as widow of WALTER H. LEWIS and
U.S. POSTAL SERVICE, BISCAYNE ANNEX, Miami, FL

Docket No. 99-818; Submitted on the Record;
Issued June 9, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the employee's death on June 11, 1995 was causally related to exposure to asbestos in his employment.

On April 15, 1997 appellant, the employee's widow, filed a claim for death benefits under the Federal Employees' Compensation Act for the employee's death on June 11, 1997 due to lung cancer. By decision dated September 10, 1997, the Office of Workers' Compensation Programs found that fact of an injury was not established, as appellant had not identified any specific factors to which the employee's death was attributed and as appellant had failed to furnish medical opinion evidence to establish that the employee suffered any condition as a result of his employment.

By letter dated September 24, 1997, appellant requested reconsideration and submitted additional evidence. By decision dated December 19, 1997, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision. The Office found that the employee's exposure to asbestos had still not been established and that the medical report appellant submitted contained a speculative opinion.

By letter dated June 1, 1998, appellant requested reconsideration and submitted additional evidence. By decision dated August 21, 1998, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions, as exposure to industrial asbestos was not confirmed.

The Board finds that the evidence establishes that the employee was exposed to asbestos in his employment at the employing establishment. The employing establishment, in which appellant worked, was razed in 1977 and the employing establishment was unable to provide much information on the asbestos hazard in this building. The employing establishment acknowledged that the employing establishment had an "asbestos problem," but contended this problem was "isolated to the second floor of that building." In response to the Office's inquiry, an employing establishment senior injury compensation specialist stated in a December 5, 1997 letter that it was "unable to ascertain any records confirming whether or not [the employee's]

work area/station was located on the first floor of the employing establishment as well [as] information on the location of the cafeteria and rest rooms.” In this letter, the employing establishment did provide further information on the employing establishment, stating that parcel post was performed on the first floor and mail distribution, manually and later by letter sorting machines, was done on the second floor and that the area of main concern for asbestos exposure was the sack shake-out area on the second floor. The employing establishment’s letter continued that in 1980 over 1800 past or present employees whose primary tour of duty was on the second floor of the employing establishment for more than 30 days between November 1975 and November 1977 were contacted by certified mail, that 1209 persons responded, that 979 were given medical screenings for asbestos-related lung damage and that 16 had abnormalities which could have been related to asbestos exposure. In this letter and in its June 10, 1996 letter, the employing establishment reported that the employee was not contacted for the medical screening, as he worked on the first floor. The employing establishment’s December 5, 1997 letter also stated: **“The shake-out area (the area affected with asbestos) is not a part of a letter carrier’s job description as it is in the clerk craft. There would be no reason why a letter carrier would be exposed to this area as it would not be in the performance of his/her duties.”** (Emphasis in the original.)

Appellant submitted a letter dated June 19, 1998 from the president from 1965 to 1967 of Local 1071 of the National Association of Letter Carriers, stating that the employee was a member of the local and that the parcel post section was on the first floor of the Biscayne Annex. This letter then stated:

“Parcel post letter carriers also collected raw mail as part of their daily assignments. They were also required to patronize the second floor since they had to clear their register mail and other items to be cleared in the ‘Red Room’ as we used to call it. They were also required to patronize the cafeteria and main bathrooms which were also located on the second floor. To my knowledge, they were constantly exposed to the area contaminated with asbestos material.... I cannot determine the daily exposure letter carriers may have had to the asbestos material area since I visited the unit for short periods daily.”

The evidence indicates that the employee worked as a letter carrier or parcel post carrier and, in this capacity, worked on the first floor of the employing establishment, not on the second floor containing the asbestos hazard. However, the June 19, 1998 letter from the former president of the union local is sufficient to establish that the employee also frequented the second floor both to perform his duties and to visit the cafeteria and rest rooms. The statement that letter carriers would have no reason to be exposed to the area of the asbestos hazard, the shake-out area, was made by the employing establishment’s senior injury compensation specialist, who did not profess to have any personal knowledge of the employing establishment. That employees who worked on the first floor also frequented the second floor in the performance of their duties is also corroborated by a November 18, 1979 letter from the president of the local mailhandlers union to the Occupational Safety and Health Administration requesting that all employees who worked at the employing establishment be notified of possible exposure to asbestos. This letter stated: “It is no secret, that employees of the [employing establishment] work a variety of duty assignments, depending on the work load. At the employing establishment, employees who were assigned work on the first floor, from time to time were required to work on the second floor and vice versa.” The employing establishment also was

unable to report the location of the cafeteria and the rest rooms, while the former union local president stated that these facilities were located on the second floor. Although the extent of the employee's asbestos exposure cannot be ascertained, the evidence is sufficient to establish that he visited the second floor and thus was subjected to some exposure to asbestos.

The Board finds, however, that the medical evidence does not establish that the employee's death on June 11, 1997 was causally related to his exposure to asbestos at the employing establishment.

In a report dated July 31, 1997 Dr. Piero Mustacchi, a Board-certified internist, concluded:

"In the current climate of medical opinion, I believe it is very probable that exposure to respirable asbestos, while working on the second floor of the [employing establishment], contributed to [the employee's] untimely demise.

"In support of the answer presented in an earlier paragraph are the following observations:

1. [The employee] had accumulated a substantial smoking history ('100 pack/years') by the time he had stopped smoking (eight years prior to his death).

"Smoking markedly intensified the carcinogenic potential of occupational asbestos exposure.

(2) I realize that the CT [computerized tomography scans] of [the employee's] chest did not disclose clear-cut radiological signs of asbestosis. However, the question of whether asbestos workers with and without asbestosis share the same risk of lung cancer has been inadequately addressed.

"I believe that a chest x-ray study unrevealing in terms of radiological markers for asbestos, does not necessarily exclude exposure to that respirable hazard. In fact, radiologic signs of asbestosis may be absent even in the presence of histologic evidence of fibrosis.

(3) Lung cancer risks can increase as early as 12.5 years following first exposure with an average latency of 37 to 39.6 years.

"In [the employee's] case, his latency period from first exposure to death lies somewhere between 38 and 18 years.

"These figures are in keeping with what the literature describes as an appropriate latency period for asbestos-related lung cancer."

Dr. Mustacchi then concluded: "[The employee] succumbed to a poorly differentiated adenocarcinoma of the lung. This type of tumor is recognized as occurring in response to

asbestos carcinogenesis in men. No study has unequivocally demonstrated a specific lung cancer cell uniquely associated with a specific physical or chemical exposure.”

This report is not sufficient to meet appellant’s burden of proof.¹ Although it contains an accurate history of the employee’s smoking and rationale for Dr. Mustacchi’s opinion on causal relation, it is based on an inaccurate history that the employee worked on the second floor of the employing establishment. As noted above, the evidence establishes that the employee worked on the first floor with visits to the second floor. As the history cited by Dr. Mustacchi would indicate the employee was on the second floor eight hours per day, it grossly overestimates the amount of time that the employee may have been exposed to asbestos. For this reason, Dr. Mustacchi’s July 31, 1997 report, which is the only medical report in the record that addresses causal relation, is not sufficient to meet appellant’s burden of proof.

The decisions of the Office of Workers’ Compensation Programs dated June 1, 1998 and December 19, 1997 are affirmed, as modified.

Dated, Washington, D.C.

June 9, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹ An appellant has the burden of proving by the weight of the reliable, probative and substantial evidence that the employee’s death was causally related to the federal employment. This burden includes the necessity of furnishing medical opinion evidence of a cause and effect relationship based on a proper factual and medical background. *Kathy Marshall (Dennis Marshall)*, 45 ECAB 827 (1994).