



David P. Weisner
Chairman

LEGAL APPEALS UNIT
WORKERS' COMPENSATION BOARD
20 PARK ST
ALBANY, NY 12207
www.wcb.state.ny.us

095285-01
JPB

State of New York - Workers' Compensation Board
In regard to Ray Labow, (Est. of), WCB Case #6970 97K2 APR 26 2006

MEMORANDUM OF BOARD PANEL DECISION

Opinion By: Mona A. Bergqvist
Kari A. Henry
Michael T. Berns

In an application filed October 26, 2005, the Special Funds Conservation Committee ("Special Funds") requests review of the Workers' Compensation Law Judge ("WCLJ") reserve decision filed October 17, 2005. This matter involves the converted death claim based on a previously established case involving an occupational disease of the decedent's lungs (WCB file #60511044). In the October 17, 2005 reserve decision, the WCLJ, *inter alia*, amended occupational disease, notice and causal relationship to include mesothelioma; resolved from C-K 1 issues in favor of the medical providers; and found that WCLJ § 15-k(2) applies. Special Funds objects to the finding that § 15-k(2) applies, contending that the section cannot apply because the case is not established for a pneumoconiosis type disease. Special Funds cites *Smith v. Certain Trend Products, Corp., et al.*, 85 A.D.2d 820, for the precedent that mesothelioma is not a dust disease within the meaning of § 15-k(2).

By its own application filed November 16, 2005, the carrier objects to the decision in its entirety, maintaining that the record does not show that the decedent was exposed to asbestos while working for the employer or that there was any contamination of the dust at the employer's site, name with asbestos trouble. The carrier argues that the testimony from the decedent's treating physician, Dr. Inhaber, was not that of an authority on the subject matter. The carrier argues that Dr. Inhaber did not have any actual knowledge about the site's composition and did not cite any medical analysis of the employer's material to show that the site contained either asbestos or asbestiform tremolite. The carrier adds testimony showed that Dr. Inhaber did not obtain any history of the decedent's jobs prior to the employer in this file, and expressed that he did not know whether the claimant had been exposed to asbestos or talc prior to working for the employer.

By rebuttal filed December 16, 2005, the claimant's attorney highlights that a pulmonologist, a specialist in occupational medicine and an oncologist all testified that the decedent's disease process related to his exposure through the thirty-three years of employment with the employer talc mining establishment, and only the carrier's paid consultant opined otherwise. The claimant's attorney argues that the record well supports the WCLJ's findings.

*** Continued on next page ***
Claimant - Ray Labow, (Est. of)
Social Security No. - 6970 97K2
WCB Case No. - 05107 20K2
Date of Accident - Syracuse
Employer - Governor Talic
Carrier - Zurich American Insurance Co.
Carrier ID No. - W22M001
Carrier Case No. - 2673801212
Date of Filing of this Decision - 04 25 2006

ATTENTION:

Plaque Identifier: El sistema de la Junta de Compensación Obrera, en su sitio electrónico, cuya función de identificar y registrar el procedimiento de la página y toda información acerca de su reclutamiento.

ERRB-1 (4/99)

Lose - Appeal

EXHIBIT

9

C-1000501

The Board Panel does not accept the carrier's argument that the decedent's treating doctors did not reference in their testimony their respective sources for the premise that the employer's talc contained either asbestos or asbestiform tremolite. If the carrier desired to challenge the doctor's authority, the opportunity for cross-examination was amply available in the course of the deposition. Without such challenge, the opportunity for cross-examination was not exercised, and the testimony of the subject matters at issue. See, *Matter of Billings v. Dine Savings Bank of New York, FSC*, 206 A.D.2d 649, 650, 653 N.Y.S.2d 190, 191 (4th Dept. 1997). It is well settled that questions of credibility, reasonableness, and weight of medical evidence are for the Workers' Compensation Board to decide, and it is within the province of the Board to resolve conflicts in the medical testimony as well as to determine the reasonableness of weight and credibility to be given to that testimony. *Furter v. Grossman's Lumber*, 175 A.D.2d 458, 572 N.Y.S.2d 774 (4th Dept. 1991). *Conzelius v. Quaid Corporation* 215 A.D.2d 859, 652 N.Y.S.2d 425, 426 (3rd Dept. 1997). The Board Panel has reviewed the entire record and has considered the testimony of the claimant's medical witnesses and the carrier's consultant. The Board Panel has also reviewed the reports of the doctors. With the exception of the opinion of the WCLJ that § 15-k(2) applies, the record fully supports the findings of fact and the opinion of the WCLJ that are noted in the reserve decision filed October 17, 2005. No error of fact or law have been made. Aside from the § 15-k(2) issue, the Board Panel adopts the findings of fact and the opinion of the WCLJ as the findings of fact and the opinion of the Board Panel. With respect to the application of § 15-k(2), the Board Panel concurs with Special Funds that § 15-k(2) only applies to silicosis and other dust diseases, and the record amply documents that mesothelioma is not such a disease.

Accordingly, the reserved decision filed October 17, 2005 is MODIFIED. To the extent the WCLJ found that WCLJ § 15-k(2) applied, the decision is rescinded. The reserve decision filed October 17, 2005 is in all other respects affirmed. The case is returned to the trial calendar for further development of the record on applicable benefits available to the claimant by virtue of the decedent's work related demise.

AB CONCUR:

Mona A. Bergqvist
Kari A. Henry
Michael T. Berns



Claimant - Ray Labow, (Est. of)
Social Security No. - 6970 97K2
WCB Case No. - 05107 20K2
Date of Accident - Syracuse
Employer - Governor Talic
Carrier - Zurich American Insurance Co.
Carrier ID No. - W22M001
Carrier Case No. - 2673801212
Date of Filing of this Decision - 04 25 2006

ATTENTION:

Plaque Identifier: El sistema de la Junta de Compensación Obrera, en su sitio electrónico, cuya función de identificar y registrar el procedimiento de la página y toda información acerca de su reclutamiento.

ERRB-1 (4/99)