

[Cite as *Hoover v. Norfolk S. Ry. Co.*, 2010-Ohio-2894.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93479 and 93689

DAVID F. HOOVER

PLAINTIFF-APPELLEE

vs.

NORFOLK SOUTHERN RAILWAY CO.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-665569

BEFORE: Jones, J., Kilbane, P.J., and McMonagle, J.

RELEASED: June 24, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Norfolk Southern Railway Co. (“Norfolk”), appeals the trial court’s denial of its motion to dismiss. For the reasons that follow, we affirm.

{¶ 2} In 1970, David Hoover (“Hoover”) began working for Norfolk, initially as a brakeman. He was eventually promoted to conductor. He held that position until he retired in 2002. For 51 years and until 2004, Hoover smoked two to four packs of cigarettes a day.

{¶ 3} In 2008, Hoover filed suit against Norfolk alleging asbestos-related injuries under the Locomotive Boilers Inspection Act (“LBIA”), seeking relief pursuant to the Federal Employers’ Liability Act (“FELA”). Hoover alleged that during his career with the railroad, he was continuously exposed to various toxic substances, including diesel exhaust and asbestos, in violation of federal law and that those exposures caused and/or aggravated his continuing respiratory problems, including lung cancer.

{¶ 4} In 2009, Norfolk moved to dismiss Hoover’s claims, alleging he had failed to comply with the prima facie filing requirements of R.C. 2307.92(C). That statute requires a smoker bringing a tort action alleging an asbestos claim to provide certain medical documentation before a prima facie claim may be made.

{¶ 5} The case proceeded to a hearing and the trial court denied the motion to dismiss. The trial court found that Hoover submitted evidence to create a genuine issue of material fact to go to a jury to determine, “including records and

reports which, when read together, allow this court to procedurally prioritize this case to receive a trial date.”¹

{¶ 6} Norfolk appealed and raises the following assignments of error for our review:

- “I. The trial court erred by denying [Norfolk’s] motion to administratively dismiss when [Hoover] failed to present prima facie evidence from ‘competent medical authority’ as required under R.C. 2307.92(C)(1) that exposure to asbestos is a ‘substantial contributing factor’ to the development of lung cancer.
- “II. The trial court erred by denying [Norfolk’s] motion to administratively dismiss when [Hoover] failed to present prima facie evidence of ‘substantial occupational exposure to asbestos’ as required under R.C. 2307.92(C)(1).
- “III. The trial court erred by denying [Norfolk’s] motion to administratively dismiss when [Hoover] failed to present prima facie case for lung cancer as required under R.C. 2307.92(C)(1).”

Relevant Statutes and Standard of Review

{¶ 7} The General Assembly enacted H.B. No. 292 in 2004 in response to the large number of asbestos cases filed in Ohio. See Section 3(A)(3)(e), 150 Ohio Laws, Part III, 3970, 3989. H.B. 292 is codified at R.C. 2307.91 through R.C. 2307.98 and establishes various criteria for asbestos claims. As it pertains to this case, R.C. 2307.92(B), (C), and (D), respectively, prohibit plaintiffs from maintaining asbestos actions based upon: (1) nonmalignant conditions; (2) smoker lung-cancer claims; and (3) wrongful death, unless the plaintiff in one of

¹ Hoover passed away in November 2009. His wife, Lona Hoover, has been substituted as the party in this case, in accordance with App.R. 29.

these situations can establish a prima facie showing in the manner described in R.C. 2307.93(A). Any plaintiff who bases his claim on any of the three circumstances listed in R.C. 2307.92(B), (C), or (D), must file “a written report and supporting test results constituting prima facie evidence of the exposed person’s physical impairment” meeting the requirements specified in those sections. R.C. 2307.92(A)(1).

{¶ 8} As it relates to this case, R.C. 2307.92(C)(1) sets forth the requirements a smoker with lung cancer must present to establish a prima facie case, including, evidence from a competent medical authority that the exposed person has primary lung cancer, and that the exposure to asbestos is a substantial contributing factor; evidence that there was a latency period of ten or more years since the exposure and the diagnosis of lung cancer; and evidence of either the exposed person’s substantial occupational exposure or evidence that the exposure to asbestos was at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a certified industrial hygienist or safety professional.

{¶ 9} The Ohio Supreme Court has determined that “[t]he prima facie filing requirements of R.C. 2307.92 are procedural in nature, and their application to claims brought in state court pursuant to the FELA and the LBIA does not violate the Supremacy Clause, because the provisions do not impose an unnecessary burden on a federally created right.” *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d

455, 2007-Ohio-5248, 875 N.E.2d 919. Therefore, the prima facie requirements contained in R.C. 2307.92(C)(1) do apply to this case.

{¶ 10} Under R.C. 2307.93(A)(1), defendants may challenge the adequacy of the plaintiff's prima facie evidence. R.C. 2307.93(B) provides that if the defendant does challenge the adequacy of the plaintiff's prima facie evidence, the court "shall determine from all of the evidence submitted" whether the proffered prima facie evidence meets the minimum requirements for cases involving smoker lung cancer, as specified in R.C. 2307.92(C). The trial court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code by applying the standard for resolving a motion for summary judgment. R.C. 2307.93(B).

{¶ 11} If the court finds, after considering all of the evidence, that the plaintiff failed to make a prima facie showing, then "[t]he court shall administratively dismiss the plaintiff's claim without prejudice." R.C. 2307.93(C).

{¶ 12} Summary judgment is reviewed de novo on appeal. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 586 N.E.2d 1121. Summary judgment is proper only when the movant demonstrates that, viewing the evidence most strongly in favor of the non-movant, reasonable minds must conclude that no genuine issue as to any material fact remains to be litigated, and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

Competent Medical Authority

{¶ 13} In its first assignment of error, Norfolk argues that Hoover failed to present prima facie evidence from a “competent medical authority” that exposure to asbestos was a “substantial contributing factor” to the development of his lung cancer.

{¶ 14} First, Norfolk argues that Hoover failed to offer sufficient evidence that any of his doctors are competent medical authorities. R.C. 2307.91(Z) defines a competent medical authority as a “medical doctor who is providing a diagnosis for purposes of constituting prima facie evidence of an exposed person’s physical impairment that meets the requirements specified in section 2307.92 of the Revised Code and who meets the following requirements:

- “(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.
- “(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.
- “(3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:
 - “(a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant’s medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;
 - “(b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant’s medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;
 - “(c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant’s

medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

“(4) The medical doctor spends not more than twenty-five per cent of the medical doctor’s professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor’s medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.”

{¶ 15} In addition, R.C. 2307.92(C)(1) also requires a claimant to provide prima facie evidence that the claimant’s exposure to asbestos was a “substantial contributing factor” to the claimant’s medical condition. R.C. 2307.91(FF) defines “substantial contributing factor” as including both of the following factors:

“(1) Exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim.

“(2) A competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred.”

{¶ 16} In this case, Hoover submitted the following evidence to comply with the requisite prima facie showing: medical reports from Dr. Michael Mull, Dr. Chris Bahler, and Dr. Laxminarayana Rao; medical records from Dr. Daniel Milton; X-rays, PET scan and CT scan radiology reports; medical records concerning a bronchoscopy procedure; surgical pathology report; and cholecystectomy and pulmonary functions reports.

{¶ 17} The trial court found that the evidence, viewed as a whole, presented a prima facie case. We agree with the trial court that we may look at the evidence in toto to see if Hoover established his prima facie case.

{¶ 18} We will deal with each reporting doctor in turn. Dr. Mull was Hoover's long-time treating physician. In a letter admitted into evidence he opined that Hoover suffered from lung cancer, severe chronic obstructive pulmonary disease ("COPD"), pulmonary fibrosis, and peripheral vascular disease. He further opined that "[t]he causes of this are unknown as [Hoover] did have many chemical exposures that were probably toxic while working on the railroad and also was a long-time smoker. I certainly believe that the toxic chemical exposures which he did have while working did contribute to his problems with his long-term health."

{¶ 19} Dr. Bahler, Hoover's treating pulmonologist, noted Hoover's "exposure to asbestos for many years while working as a brakeman on the railroad" and concluded that "[t]his is a patient with a past asbestos exposure and smoking history with right lower lobe mass that appears to be in the superior segment of the right lower lobe."

{¶ 20} Dr. Rao reviewed Hoover's medical history and records and concluded Hoover suffered from bibasilar interstitial fibrosis due to asbestosis and lung cancer. Dr. Rao opined:

"[A]sbestos dust is a known carcinogen in all types of cancer occurring with increased frequency in the presence of occupational exposure to asbestos

dust. In addition, he had exposure to diesel fumes and other toxic substances as per the information provided. In addition, he was a smoker until 2004 and smoking does increase the risk of lung cancer substantially in the presence of occupational exposure to asbestos dust. Therefore, it is my opinion within a reasonable degree of medical probability that exposure to asbestos dust and diesel fumes substantially contributed in the development of his lung cancer.”

{¶ 21} In addition to his doctors, the hospital records submitted into evidence indicate that Hoover suffered from multiple lung diseases including lung cancer, pulmonary fibrosis, and COPD.

{¶ 22} We are persuaded based on our de novo review of the record that the medical records and reports Hoover submitted did meet the prima facie requirements of R.C. 2307.92–93. The evidence submitted was sufficient to establish a causal link between Hoover’s lung cancer and his asbestos exposure. In addition, as already detailed above, Hoover provided ample evidence demonstrating that his occupational asbestos exposure was a substantial factor in causing his lung cancer.

{¶ 23} Therefore, the first assignment of error is not well-taken and is overruled.

Substantial Occupational Exposure

{¶ 24} In the second assignment of error, Norfolk argues that Hoover failed to present prima facie evidence of “substantial occupational exposure to asbestos” as required under R.C. 2307.92(C)(1).”

{¶ 25} R.C. 2307.91(GG) defines “substantial occupational exposure to asbestos” as “employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

“(1) Handled raw asbestos fibers;

“(2) Fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process;

“(3) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers;

“(4) Worked in close proximity to other workers engaged in any of the activities described in division (GG)(1), (2), or (3) of this section in a manner that exposed the person on a regular basis to asbestos fibers.”

{¶ 26} Norfolk argues that Hoover failed to present any evidence of substantial occupational exposure to asbestos. We disagree and find that the evidence Hoover submitted should withstand administrative dismissal.

{¶ 27} To support his position, Hoover submitted the affidavit of his co-worker, Max Starkey (“Starkey”). Starkey averred that he worked with Hoover for over 25 years and they worked with and around various asbestos-wrapped pipes inside locomotives and buildings. He further described the asbestos-wrapped pipes as “worn and in poor condition.”

{¶ 28} Although appellant now asks this court to consider Starkey's deposition testimony, we decline to do so as his deposition testimony was not part of the trial court record below for summary judgment consideration. That being said, we find that Starkey's affidavit alone sufficient to withstand administrative dismissal.

{¶ 29} Therefore, the second assignment of error is overruled.

Prima Facie Case

{¶ 30} In the third assignment of error, Norfolk argues that Hoover failed to present a prima facie case for lung cancer. But the third assignment of error merely summarizes the first two assignments of error; Norfolk fails to make any new arguments. Therefore, there is nothing further to discuss as it relates to this assignment of error. The third assignment of error is overruled.

{¶ 31} Accordingly, judgment is affirmed. It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, P.J., and
CHRISTINE T. MCMONAGLE, J., CONCUR