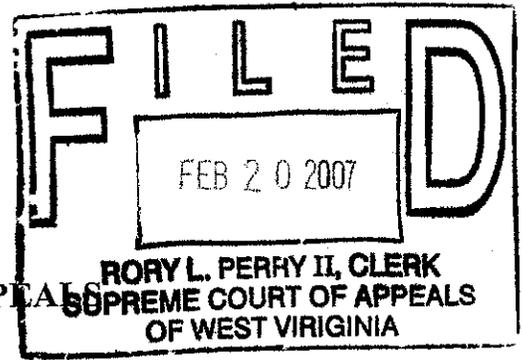


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Supreme Court No. 070229



STATE OF WEST VIRGINIA  
IN THE SUPREME COURT OF APPEALS

ROBERT H. CASDORPH, JR., )  
 Claimant/Petitioner, )  
 )  
 v. )  
 )  
 WEST VIRGINIA STATE POLICE, )  
 Employer/Respondent, )  
 )  
 and )  
 )  
 WEST VIRGINIA OFFICES OF THE )  
 INSURANCE COMMISSIONER, )  
 Party in Interest. )

Appeal No.: 73940  
 Claim No.: 2003 048198 OP  
 D.L.E.: March 26, 2003

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INSURANCE COMMISSIONER'S RESPONSE TO PETITION FOR APPEAL

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## NATURE OF PROCEEDINGS AND RULINGS BELOW

This is an occupational disease claim before this Honorable Court through a Petition for Appeal by the Claimant. The Workers' Compensation Division<sup>1</sup> denied the Claimant's request for benefits for chronic myelogenous leukemia, finding that the condition was an ordinary disease of life and not attributable to the Claimant's employment. The Office of Judges reversed the denial of the claim and found the claim compensable. The Board of Review reversed the *Decision of Administrative Law Judge* and reinstated the Division's finding that the claim was not compensable.

The Division issued a *Protestable Decision* dated June 30, 2003, finding that the Claimant's chronic myelogenous leukemia was not attributable to the Claimant's employment. After the development of evidence, the Office of Judges issued a *Decision of Administrative Law Judge* dated August 4, 2005, which reversed the Division's Order. The Honorable Charles Moredock, Administrative Law Judge, concluded:

The medical issue is extremely complex and has been extremely well developed through battling highly paid, highly qualified medical experts. It is found that the scientific community and medical profession in

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<sup>1</sup> On October 1, 2003, the West Virginia Workers' Compensation Division, which had been a branch of the Bureau of Employment Programs, became the West Virginia Workers' Compensation Commission ("Commission"), a stand-alone cabinet level agency separate from the Bureau of Employment Programs. On January 1, 2006, pursuant to *West Virginia Code* §§ 23-2C *et seq.*, and a proclamation of the Governor, the Workers' Compensation Commission was abolished, and the West Virginia Offices of the Insurance Commissioner assumed the regulatory duties formerly belonging to the Workers' Compensation Commission. West Virginia Employers' Mutual Insurance Company, d/b/a BrickStreet Mutual Insurance Company, a private employer mutual insurance company, is now the sole provider of workers compensation insurance in West Virginia for all claims with a date of injury of July 1, 2005 and thereafter. All earlier claims, such as the cases at bar, remain an obligation of the State of West Virginia in what is statutorily referred to as the "Old Fund."

The Legislature has charged the West Virginia Offices of the Insurance Commissioner with the administration of the Old Fund, so the Insurance Commissioner is the real party-in-interest here. This pleading will refer to the Offices of the Insurance Commissioner as Administrator of the Old Fund as "Commissioner" when referring to events on and after January 1, 2006. All efforts have been made to use the term "Division" to refer to the former Workers' Compensation Division when referring to events before October 1, 2003 and the term "Commission" to refer to the Workers' Compensation Commission when referring to events between October 1, 2003 and January 1, 2006.

general accept that abnormally high exposure to benzene can cause [acute myelogenous leukemia]. The more difficult question is whether or not it can significantly contribute to [chronic myelogenous leukemia]. It is obvious that the medical profession and the scientific community [do] not accept that the relationship between benzene exposure and CML has been proven to the extent that it has with AML. The claimant has quoted numerous case studies primarily from China, France, and Australia that demonstrate that there is a statistical significance between individuals who are exposed to high concentrations of benzene and the disease CML. This record does contain qualified experts that do not believe these case studies are persuasive and also criticize them for methodology and the size of the study.

This is an extremely close case. Dr. Shadduck the treating physician was candid in admitting that until recently he did not believe that CML had a known cause. Based on the research he did specifically due to the claimant's condition he arrived at the opinion that based upon the benzene exposure of the claimant that it was probable that this was a significant factor in his disease. Dr. Shadduck admitted that benzene exposure was not a factor to his knowledge in any other patient that he treated. However, Dr. Shadduck's testimony is found significant in that his testimony was found to be well reasoned and he was also willing to concede that his opinion could not definitively be proven and that the evidence certainly was not overwhelming but that he believed it was a reasonable hypothesis from all the information that he had concerning the disease and the claimant.

*Decision of Administrative Law Judge* at pp. 6-7. The Workers' Compensation Commission appealed. The Board of Review reversed the *Decision of Administrative Law Judge* by Order dated December 20, 2006. The Board of Review concluded:

The Administrative Law Judge noted that the medical issue was complex and [found] that this claim is an extremely close case regarding whether or not the claimant's occupational exposure caused his cancer, chronic myelogenous leukemia, or whether it was an ordinary disease of life. Numerous experts testified in this claim. The Administrative Law Judge relied primarily upon the opinion of the claimant's treating physician, Dr. Richard Shadduck, who completed the claimant's application for benefits. The Administrative Law Judge relied upon the deposition testimony of Dr. Shadduck of May 4, 2004, stating that the claimant's exposure to benzene and other hydrocarbons were "probably causative" in the development of the claimant's disease. After researching all the medical evidence of record, the Board finds that Dr. Shadduck's

opinion is insufficient to establish that the claimant had an occupational disease within the meaning of West Virginia Code § 23-4-1. The Board concludes that the elements of West Virginia Code § 23-4-1(f), which must be satisfied to establish an occupational disease, have not been met in this claim.

Board of Review Order at pp. 3-4. It is from this Order the Claimant appeals.

### STATEMENT OF FACTS

The Commissioner agrees with and adopts the Findings of Fact set out in the *Decision of Administrative Law Judge*, as affirmed by the Board of Review. Additionally, the Commissioner offers the following summary:

Robert H. Casdorff, Jr., the Claimant ("Mr. Casdorff," or "Claimant"), filed this claim on April 10, 2003. Before going to work for the West Virginia State Police, Mr. Casdorff worked as a mechanic's helper at a gas station. His job duties included answering phones, picking up parts, doing oil changes, working on tires, and only occasionally pumping gas. Mr. Casdorff's prior work history included a brief period of welding and then primarily as a gas station attendant pumping gas.

Mr. Casdorff then worked for the West Virginia State Police as a mechanic's assistant, where he assisted the mechanics as needed. His primary responsibilities included changing the oil and changing and aligning tires. Mr. Casdorff testified that approximately three-fourths ( $\frac{3}{4}$ ) of his workday was spent changing oil and greasing vehicles.

On April 10, 2003, Mr. Casdorff signed Section I of a Report of Occupational Injury indicating he had suffered from "chronic" myelogenous leukemia as a result of exposure to benzene during his occupation as a mechanic for the West Virginia State Police Department. Section II of the Report of Occupational Injury was completed and

signed by Dr. Richard Shadduck on March 27, 2003. Dr. Shadduck diagnosed Mr. Casdorff as having "chronic myelogenous leukemia."

The Division's Office of Medical Management reviewed the claim record and recommended the claim be rejected. In a report dated June 23, 2003, Mohammed I. Ranavaya, M.D., M.S., FRCPI, CIME, FAADEP, stated:

In summary, this gentleman has a very serious blood disorder, however, based on the evidence in record and the Peer Reviewed Scientific Literature, it cannot be causally connected to the nebulous claim of exposure to aromatic compounds in this job as a mechanic for the West Virginia Division of Public Safety. To accept this claim as an occupational disease, in my opinion, would simply be cost shifting of a naturally occurring disease process to a Workers' Compensation Insurance claim.

Based on Dr. Ranavaya's report, the Division entered an order on June 30, 2003 rejecting the claim. The Division found that Mr. Casdorff had failed to meet the burden of proof establishing there was disease contracted in the course of or resulting from employment citing for reasons that the condition was an ordinary disease of life and that Mr. Casdorff had been aware of his condition for more than three (3) years prior to filing of his claim. Mr. Casdorff timely protested the Order.

The Division, Commission, and Mr. Casdorff filed several depositions, scientific and medical articles, and medical reports. Mr. Casdorff's evidence generally outlines that there is a general associative relationship between benzene exposure and certain types of leukemia. The Commission's evidence acknowledges a relationship between benzene exposure and *acute* myelogenous leukemia, but shows that there is **no** medical consensus that benzene exposure causes *chronic* myelogenous leukemia, the disease for which Mr. Casdorff has sought workers' compensation benefits.

## RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

Mr. Casdorff argues generally that the Board of Review erred in reversing the *Decision of Administrative Law Judge*. The Commissioner respectfully submits that the Board of Review was correct in reinstating the Division's Order holding that Mr. Casdorff's exposure to benzene did not cause his chronic myelogenous leukemia.

Mr. Casdorff's assertion that the Board of Review was clearly wrong in reversing the *Decision of Administrative Law Judge* does not meet his burden of proving that the Board of Review was clearly wrong in reinstating the Division's determination that his chronic myelogenous leukemia was not caused by his employment.

### STANDARD OF REVIEW

*West Virginia Code* §§ 23-5-15(c) and (d) set out the standard for a review of a decision of the Board of Review by the Supreme Court of Appeals. On questions of fact, the applicable standard of review depends on the pattern of the rulings below. Under any pattern of rulings below, however, the Supreme Court "may not conduct a de novo reweighing of the evidentiary record." *West Virginia Code* §§ 23-5-15(c) and (d) (2003).

If the Board of Review's Order affirmed the rulings of *both* the Office of Judges and the Commissioner, then the standard of review is very limited. The Supreme Court can reverse or modify the Board's decision only if it finds that the Board's decision was based on a material misstatement or mischaracterization of particular components of the evidentiary record. *West Virginia Code* § 23-5-15(c) (2003).

If the Board of Review's Order effectively represents a reversal of the decision of *either* the Commission or the Office of Judges, as in the case at bar, then the standard of review is slightly different, but still limited. In that circumstance, the Court can reverse or modify the decision only if it finds that the Board's findings were so clearly wrong

based on the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. *West Virginia Code* § 23-5-15(d) (2003).

### ARGUMENT AND CITATION OF AUTHORITY

The Commissioner respectfully submits that the evidence of record fully supports the Board of Review's Order, which correctly reversed the *Decision of Administrative Law Judge*. The Board's findings are not so clearly wrong based on the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. To the contrary, the record contains substantial evidence to support the Board's decision. The Board's decision should therefore not be disturbed on appeal.

### APPLICABLE LAW AND REGULATIONS

Occupational disease means a disease incurred in the course of and resulting from employment. No ordinary disease of life to which the general public is exposed outside of the employment is compensable except when it follows as an incident of occupational disease as defined in this chapter. A disease shall be considered to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon consideration of all the circumstances: (1) That there is a direct causal connection between the conditions under which work is performed and the occupational disease; (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment; (3) that it can be fairly traced to the employment as the proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) that it is incidental to the character of the business and not independent of the relation of employer and employee; and, (6) that it appears to have had its origin in a risk

connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction. *West Virginia Code* § 23-4-1 (1999).

“[T]he commissioner shall disburse the workers’ compensation fund to the employees of employers subject to this chapter who have received personal injuries in the course of and resulting from their covered employment ...” *West Virginia Code* § 23-4-1 (1999). There are three elements which must be proved by the claimant in order for a claim to be held compensable. (1) There must be a personal injury, which (2) is received in the course of employment, and (3) resulted from that employment. *Barnett v. State Workmen’s Compensation Commissioner*, 153 W. Va. 796, 172 S.E.2d 698 (1970). There must be a causal connection between the claimant’s injury and the claimant’s employment. *Emmel v. State Compensation Director*, 150 W. Va. 277, 145 S.E.2d 29 (1965). *Deverick v. State Compensation Director*, 150 W. Va. 145, 144 S.E.2d 498 (1965).

“A claimant in a workmen’s compensation proceeding has the burden of proving his claim.” *Staubs v. State Workmen’s Compensation Commissioner*, 153 W. Va. 337, 168 S.E.2d 730 (1969). *Sowder v. State Workmen’s Compensation Commissioner*, 155 W. Va. 889, 189 S.E.2d 674 (1972). “Where proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim.” *Clark v. State Workers’ Compensation Commissioner*, 155 W. Va. 726, 187 S.E.2d 213 (1972).

THE BOARD OF REVIEW WAS CORRECT IN REVERSING THE  
DECISION OF ADMINISTRATIVE LAW JUDGE BECAUSE THE  
OFFICE OF JUDGES COMMITTED ERROR OF LAW.

A workers’ compensation claimant has the burden of proving his or her claim by proper and satisfactory proof. *Sowder v. State Workmen’s Compensation Commissioner*,

155 W. Va. 726, 189 S.E.2d 674 (1972); *Linville v. State Workmen's Compensation Commissioner*, 160 W. Va. 549, 236 S.E.2d 41 (1977). Mr. Casdorff did not carry the burden of proof set out in *West Virginia Code* § 23-4-1g, *Sowder*, and *Linville*, to establish by reliable evidence that his chronic myelogenous leukemia was attributable to his employment.

The Office of Judges cited *Dunlap v. State Workman's Compensation Commissioner*, 232 S.E.2d 343 (1997), as justification for its decision in the case at bar. As the Board of Review correctly found, the Administrative Law Judge's reliance on *Dunlap* was misplaced. *Dunlap* at page 346 states:

In *Sisk v. State Workmen's Compensation Commissioner*, 153 W.Va. 461, 469, 170 S.E.2d 20, 25 (1969), this Court enunciated the following rule with regard to attributing a particular disability to a given injury: 'It has long been held in this jurisdiction that a disability which cannot with some degree of certainty be attributed to a cause other than the subject injury must be presumed to have resulted from such injury.'

....

This rule is not intended to substitute a presumption for proof. The injured employee is still required to supply evidence that his injury did result from the subject industrial accident. The purpose of the rule is to provide an inference that favors the injured employee and, in effect, it requires the employer to prove to some degree of certainty that the injury did not occur from the industrial accident, if the employer is to prevail on the point.

Here, the Administrative Law Judge looked only to see if Mr. Casdorff could make a *prima facie* claim. The Administrative Law Judge ("ALJ"), however, failed to apply the second step in the analysis. He gave no weight to the employer's and Commission's evidence that demonstrated with reasonable medical and scientific certainty that Mr. Casdorff's disease was not attributable to his occupation, but was instead an ordinary disease of life.

The ALJ disregarded his own acknowledgment that "[a]dmittedly there is a large amount of evidence that is contrary to [Mr. Casdorff's] opinion and it is not found that

these opinions are unreliable.” *Decision of Administrative Law Judge* at p. 8. Consequently, because the ALJ made no determination of which opinions were more reliable, credible or had greater weight, the decision to rule this claim compensable merely because Mr. Casdorff had submitted some evidence violated statutory provisions, exceeded the statutory authority or jurisdiction of the ALJ, was made on unlawful procedures, and was clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The Board of Review was correct in reversing the *Decision of Administrative Law Judge*.

A WORKERS’ COMPENSATION CLAIM CANNOT BE ACCEPTED  
BASED ON SPECULATIVE MEDICINE OR GENERALLY NON-  
ACCEPTED MEDICAL OPINION OR SCIENCE.

The issue in this claim is not the question in a vacuum of whether benzene exposure can cause any form of leukemia regardless of type or kind. Nor is the issue in this claim whether or not benzene exposure can cause general health issues. The only question presented here and that is before this body is whether benzene exposure did cause the specific form of cancer known as “chronic myelogenous leukemia (“CML”).

Such a determination may not be based on speculation. In fact, the West Virginia Supreme Court has repeatedly held that a determination of compensability cannot be made in a claim based solely on speculation. *Huff v. State Workmen’s Compensation Commissioner*, 157 W. Va. 530, 202 S.E.2d 383 (1974); *Clark v. State Workmen’s Compensation Commissioner*, 155 W. Va. 726, 187 S.E.2d 213 (1972); *Smith v. State Workmen’s Compensation Commissioner*, 155 W. Va. 883, 189 S.E.2d 838 (1972); *Deverick v. State Compensation Director*, 150 W. Va. 145, 144 S.E.2d 498 (1965).

The general state of the medical literature and science does not support the position that benzene exposure can or, more importantly did, cause Mr. Casdorff’s chronic myelogenous leukemia. Most importantly here the ALJ did not make such a finding but rather the ALJ merely found that Mr. Casdorff had made a *prima facie* case

that some experts were willing to testify that to a reasonable degree of certainty it was possible or even was the cause in this instance. That leukemias<sup>2 3</sup> are ordinary diseases of life to which anyone at any age, regardless of environment or employment, may be subjected, cannot be denied.

Approximately 20,110 combined cases of acute and chronic myelogenous leukemia are diagnosed each year.<sup>4</sup> Of that total number, approximately thirty percent (30%) are chronic myelogenous leukemia. While the majority of chronic myelogenous leukemia cases occur in adults, the disease also occurs in children.<sup>5</sup>

According to the medical and scientific text book, *CANCER: Principles & Practice of Oncology, Sixth Edition*, Published by Lippincott Williams & Wilkins 2001, at page 2434:

The etiology of CML is unknown. There is little evidence for genetic factors linked to CML. Lack of concordance in monozygotic twins and the demonstration of Ph in hematopoietic progenitor cells only, suggest that CML is an acquired disorder. Offspring of parents with CML do not have a higher incidence of CML than the general population. The incidence of CML is higher among survivors of the atomic bomb explosion in Hiroshima and Nagasaki. Effects of therapeutic doses of radiation on the development of CML are disputed. No association has been established with infectious agents.

The applicable statute provides, in pertinent part:

For the purposes of this chapter, occupational disease means a disease incurred in the course of and resulting from employment. No ordinary disease of life to which the general public is exposed outside of the employment shall be compensable except when it follows as an incident of

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<sup>2</sup> See Report of Dr. Raymond B. Weiss dated May 8, 2004 at p. 3.

<sup>3</sup> See Deposition Transcript of Dr. Richard Shaddock dated May 4, 2004 at p. 21.

<sup>4</sup> See The Leukemia & Lymphoma Society at [www.leukemia-lymphoma.org](http://www.leukemia-lymphoma.org).

<sup>5</sup> See Deposition Transcript of Dr. Richard Shaddock dated May 4, 2004 at p. 21.

occupational disease as defined in this chapter. Except in the case of occupational pneumoconiosis, a disease shall be deemed to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon consideration of all the circumstances (1) that there is a direct causal connection between the conditions under which work is performed and the occupational disease, (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, (3) that it can be fairly traced to the employment as the proximate cause, (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment, (5) that it is incidental to the character of the business and not independent of the relation of employer and employee, and (6) that it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

*West Virginia Code* § 23-4-1 (1999). An ordinary disease of life is not compensable unless it is due to an occupational exposure.

It follows, therefore, that in order to hold that death resulting from chronic myelogenous leukemia is compensable, there must be proof that such illness occurred as an incident of an occupational disease as defined in the above quoted statute. Mr. Casdorff must show by a preponderance of the evidence that his particular cancer, chronic myelogenous leukemia, not any other type of cancer, or cancers generally, was caused by his employment. *See Clark* at pp. 216, 713.

Mr. Casdorff's own treating physician and expert Dr. Shaddock testified that he has no idea as to the cause of the chronic myelogenous leukemia in the majority of his patients. Deposition Transcript of Richard Shaddock, M.D. at pp. 34-35. What he does clearly state is that benzene exposure is not the source or cause in the majority of cases he has seen. *Id.* at p. 35.

The opinion expressed by Dr. Weiss<sup>6</sup> in his February 12, 2004 report echoes that portion of Dr. Shaddock's testimony concerning the lack of knowledge as to the cause of most instances of chronic myelogenous leukemia. Dr. Weiss states:

CML is a form of leukemia that has no established etiology, including benzene exposure. It occurs in all age groups, and I have personally treated patients with it who are in their late teens or early 20s who never had exposure to any chemicals including benzene. It is typically associated with the Philadelphia chromosome abnormality and has a well-known natural history of remissions and relapses over several years with ultimate evolution into the so-called blast-crisis phase where it has all the hallmarks of an acute leukemia. In this blast-crisis lymphoblastic morphology in the immature marrow cells (blasts) is common, and so are the multiple chromosome abnormalities this man developed in 03/03.

Report of Raymond B. Weiss, M.D. at p. 4. Dr. Weiss goes on in his same report to offer the following summary:

Although there is much scientific agreement that AML and MDS (and the typical chromosomal abnormalities associated with these conditions) can be related to benzene exposure, and with other marrow toxins such as radiation therapy and chemotherapy used to treat cancer, there is no scientific consensus that CML is also related to such exposure. CML is essentially never seen as a second cancer after high doses of chemotherapy that are toxic to the marrow, and the effects of benzene on the marrow are similar to what cancer chemotherapy can produce. CML remains a disease without a known etiology. It can occur in all age groups (even children), including many people who have never even been near a benzene product. It is my opinion that the CML and its blast phase that occurred in this man cannot be established as being due to his exposure to the benzene in petroleum products at his place of work.

Anecdotal mentioning of supposed isolated instances of linkage between chronic myelogenous leukemia and benzene are insufficient under West Virginia law to draw the conclusion that there exists a consensus in the medical community that benzene exposure causes chronic myelogenous leukemia. A decidedly few studies by individuals who have

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<sup>6</sup> See Report of Dr. Raymond B. Weiss dated February 12, 2004.

not yet been able to get peer reviewed medical textbooks to acknowledge and print their postulate as the common or accepted consensus medical opinion is not sufficient to base an award. Just the opposite is true. The relative dearth of peer reviewed textbooks that even mention such a theory illustrates that the common or accepted consensus medical opinion is like that stated in *CANCER: Principles & Practice of Oncology, Sixth Edition*. "The etiology of CML is unknown. There is little evidence for genetic factors linked to CML. Lack of concordance in monozygotic twins and the demonstration of Ph in hematopoietic progenitor cells only, suggest that CML is an acquired disorder." *Id.* at p. 2434.

Dr. Weiss addressed this very issue in his deposition of May 8, 2004. When asked about a consensus in the medical community that benzene exposure causes chronic myelogenous leukemia, Dr. Weiss testified:

- Q. Hayes, 2001. Let's see if I brought that. Let's look at Hayes' report, found in the American Journal of Industrial Medicine, particularly on page 120.

Would you agree that Hayes says chronic myeloid Leukemia has been linked with Benzene exposure in clinical reports, and then he cites a series of reports. A small case controlled study, and he cites the study from France, the cohort of Chinese workers followed up through 1981 by the Chinese Academy of Preventive Medicine, then he cites Yin, and the expanded cohort of workers found through 1987 by the NCI Chinese Academy of Medicine Collaborators.

Is that what Hayes has indicated?

- A. Yes. I am aware of those articles. And as I said, there have been studies suggesting that there is a relationship but you see right here they are clinical reports, which is case reports, small case-controlled study, really not something you would rely on.

The only study that has more power to support the argument is the one done by the NCI and Chinese collaborators.

However, as I said, before I would accept that as being a fact, I would want the weight of evidence, multiple studies, showing the

same sort of situation, as is the case with acute myelogenous leukemia.

Deposition Transcript of Dr. Weiss at pp. 26-27.

This Honorable Court has also touched on what to look at when determining whether to allow evidence of a scientific nature in *State v. Leep*, 212 W. Va. 57, 569 S.E.2d 133 (2002). There the Court held that “whether the scientific theory is generally accepted within the scientific community” is a factor that must be weighed in determining whether to allow such testimony as evidence. While the Rules of Civil Procedure do not generally apply in a workers compensation claim, both *Leep* and the Rules of Civil Procedure offer guidance as to what weight, if any, to give to clinical reports cited by Mr. Casdorff. According to Dr. Weiss, who makes his living as a consultant for the National Cancer Institute in monitoring and verifying quality assurance of clinical trials around the country, anecdotal case reports and small case-controlled studies, are not something on which one should rely. Weiss deposition at pp. 6, 26-27.

AN OCCUPATIONAL DISEASE CLAIM CANNOT BE ACCEPTED UNLESS IT CAN BE SEEN TO HAVE FOLLOWED AS A NATURAL INCIDENT OF THE WORK AS A RESULT OF THE EXPOSURE OCCASIONED BY THE NATURE OF THE EMPLOYMENT; THAT IT CAN BE FAIRLY TRACED TO THE EMPLOYMENT AS THE PROXIMATE CAUSE; AND, THAT IT DOES NOT COME FROM A HAZARD TO WHICH WORKERS WOULD HAVE BEEN EQUALLY EXPOSED OUTSIDE OF THE EMPLOYMENT.

Although not conceding that benzene exposure can cause chronic myelogenous leukemia, the Commissioner notes that even if this Court were to find contrary to the current medical and scientific consensus opinion presented, the evidence shows that Mr. Casdorff was not exposed to a sufficient quantity or concentration to have caused his chronic myelogenous leukemia. In support of this position the Commissioner cites this

Court to the report of Dr. Francis W. Weir dated February 3, 2004,<sup>7</sup> and his deposition dated May 3, 2004.<sup>8</sup>

Dr. Weir has a Ph. D. in Toxicology and Comparative Pharmacology from the University of California Medical Center; a M.S. in Pharmacology from the University of California Medical Center; and a B.S. in Zoology from the University of Pittsburgh. Dr. Weir's career in toxicological includes over half a century of research and analysis.

Dr. Weir is currently and has been board certified for more than twenty (20) years in the Comprehensive Practice of Industrial Hygiene (C.I.H.) and general toxicology. Additionally, some of the highlights in Dr. Weir's career beginning from 1957 through present are: he was an Adjunct Associate Professor in Pulmonary Medicine Division of Internal Medicine at Baylor College of Medicine in Houston, Texas; he was the Director of Department of Environmental Safety at the University of Texas Health Science Center at Houston in Houston, Texas; he was the Research Associate Professor of Toxicology at The University of Texas School of Public Health in Houston, Texas; he was the Associate Professor of Toxicology at The University of Texas School of Public Health in Houston, Texas; he was the Senior Research Toxicologist in the Biomedical Sciences Department of Research Laboratories, at General Motors Corporation in Warren, Michigan; he was the Assistant Professor of Toxicology in the Department of Preventive Medicine at the College of Medicine, Ohio State University in Columbus, Ohio; he was a Biological Science Technician and Biologist of the Toxicology Division of Medical Research Directorate in Edgewood Arsenal, Maryland; he was a Consulting/Research Toxicologist at The Hine Laboratories, Inc., in San Francisco, California; and, he was a Research Paint Chemist for Pruett-Schaffer Chemical Company in Pittsburgh, Pennsylvania.

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<sup>7</sup> See Report of Dr. Francis W. Weir dated February 3, 2004.

<sup>8</sup> See Deposition Transcript of Dr. Francis W. Weir dated May 3, 2004.

Dr. Weir found that Mr. Casdorff was not exposed to a sufficient quantity or concentration of benzene to have caused his chronic myelogenous leukemia. He summarized his findings as follows:

In summary, it is highly unlikely that Mr. Casdorff would have been exposed to concentrations of naphtha, gasoline and/or industrial solvents sufficient to have contributed in any manner to or caused his disease process of chronic myelogenous leukemia/acute lymphocytic leukemia. Based on the likelihood of trace amounts of benzene in a few components of some of the products that Mr. Casdorff routinely used on the job, Mr. Casdorff's description of his tasks, as well as those of his co-workers, limited duration of exposure, lack of epidemiological evidence, and plausibility of a biological threshold below which the body is able to protect itself from chemical harm, it is not scientifically reasonable to conclude that his claimed exposures while employed with the West Virginia State Police caused his disease process of chronic myelogenous leukemia/acute lymphocytic leukemia.

Report of Dr. Francis W. Weir at p. 12. Dr. Weir set out the bases of his conclusion in the body of his report:

The products that Mr. Casdorff used on a regular basis contained a mixture of various hydrocarbon-containing substances, most of which would not be significantly contaminated with benzene. For example, the carburetor cleaner contained between 20-30% Stoddard solvent. The overall potential for benzene exposure from this product would have been minute (Weir report at p. 9).

....

Mr. Casdorff's use of these products was limited. He indicated in deposition himself that his primary responsibilities included changing the oil and changing out/aligning tires. He noted that three-quarters of his workday was devoted to changing oil and greasing vehicles. For example, Mr. Casdorff stated that while, at times, he worked on carburetors, co-workers reported that his position was more of a helper. Further, Mr. Casdorff stated in deposition that another mechanic was the main person to work on carburetors. Regarding the fuel injection cleaners, Mr. Casdorff indicated that this material was not released into the atmosphere, but injected into a closed system. Regarding Mr. Casdorff's claimed exposure to gasoline while working for the West Virginia State Police, his contact was limited to fuel filter replacements and when assisting the other

mechanics on certain vehicles that required fuel tank removal for replacement of a fuel pump. He noted that the fuel filters contained approximately 4 to 16 ounces of gasoline in them at the time of removal (Weir report at pp. 9-10).

Mr. Casdorff's exposure to the vapors of these products, and therefore, potential for exposure to benzene was limited, as reported in his own deposition due to short duration of exposure. He reported using the carburetor cleaner for a maximum of 30 minutes a day. He used the degreaser for an average of 30 minutes a day while cleaning up the oil that dripped onto the engine when changing the oil. Regarding the fuel injection cleaner, he used this product for approximately 15 to 20 minutes a day. He used the glass cleaner for 10-15 minutes per day, on average. (Weir report at p. 10).

....

Review of workers exposed to benzene where the chemical itself was being used has revealed significantly increased risks for acute myelogenous leukemia and for aplastic anemia. However, these same studies have failed to detect an increased risk for chronic myelogenous leukemia, acute lymphocytic leukemia and other hematopoietic diseases (Yin, 1996a & 1996b) Wong (1995a) reported an increased risk for acute myelogenous leukemia in a cohort of workers at two Goodyear plants involving the manufacturing of Pliofilm. (*Id.* at p. 10).

....

Review of epidemiological studies of persons exposed to gasoline and related petroleum products does not provide evidence to conclude that exposure to gasoline produces benzene exposure sufficient to produce an increased risk of disease to the hematopoietic system. Multiple studies have investigated exposure to benzene, for example, in the petroleum marketing and distribution departments to identify increased risk for the development of leukemias. One outlier, Jakobsson (1993) reported an increased risk for the development of acute myeloid leukemia in petrol station attendants in Sweden, but did not report on other leukemias. They indicated that the petrol utilized in Sweden contained 3-5% benzene for several decades. On the other hand, Rushton (1997) reported no evidence of increased risk for chronic myelogenous leukemia. (Weir report at p. 11).

....

With low concentrations of benzene in the various products discussed in this case, the threshold above which toxicity occurs is not reached, i.e. the body is able to handle the small amount without serious consequences. Benzene concentrations are found in occupationally-unexposed general population. (Brugnone, 1992). While nonsmokers have a detectable concentration of benzene within their blood, the most notable differences were due to cigarette smoking. (Wallace, 1989). Given that the general population is exposed to benzene and has benzene within their systems, very few develop hematopoietic disorders (Weir report at p. 12).

It is unlikely that exposure to toluene would present an exposure hazard due to benzene contamination. Toluene competes for the metabolic pathway and inhibits metabolism of benzene. It is one or another of the metabolites of benzene that cause the toxic effects of benzene to the primary target organs, the liver and hematopoietic system, not benzene itself. (Aksoy, 1988). (Andrews, 1977; Ikeda, 1972; Inoue, 1988; Sato, 1979). (Weir report at p. 12).

Dr. Weir concluded:

In conclusion, there are no reasonable scientific bases to indicate that Mr. Casdorff's alleged exposure to naphtha, gasoline and/or these industrial solvents as described above while working as a mechanic in an automotive garage was sufficient to have caused or contributed to Mr. Casdorff's disease process.

The comments, opinions and conclusions expressed in this matter are based on a continuing review of pertinent scientific literature dealing with the toxicity and any health hazards to be expected from exposure to benzene and other chemicals, such as naphtha, gasoline and industrial solvents; research and professional experience and training in toxicology, pharmacology, industrial hygiene, and other related medical sciences. All opinions are offered to a degree of reasonable scientific certainty (Weir report at p. 13).

Dr. Weir reported unequivocally that CML is a disease of life that does not have its root cause in benzene or radiation exposure.

Mr. Casdorff has not proven the elements of *West Virginia Code* § 23-4-1. The first element is not met because there is no direct causal connection between the conditions under which work was performed and Mr. Casdorff's CML. The second

element is not met because Mr. Casdorff's CML did not follow as a natural incident of the work as a result of the exposure occasioned by the nature of the employment. The third element is not met because Mr. Casdorff's CML cannot be reasonably traced to his employment as the proximate cause. The fourth element is not met because Mr. Casdorff's CML came from a hazard to which workers would have been equally exposed outside of the employment. The fifth element is not met because Mr. Casdorff's CML was not incidental to the character of the business and was fully independent of the relation of employer and employee. Finally, the sixth element is not met because Mr. Casdorff's CML did not have its origin in a risk connected with the employment and did not flow from that source as a natural consequence.

The Commissioner acknowledges that the liberality rule applies in this case. The liberality rule dictates that the claimant be given the benefit of all reasonable inferences the record will admit favorable to her. *Myers v. State Workmen's Compensation Commissioner*, 160 W. Va. 766, 770, 239 S.E.2d 124, 126 (1977). However, the Court also held in *Linville* that, "... the general rule in workman's compensation cases is that the evidence will be construed liberally in favor of the claimant, but the rule *does not* relieve the claimant of the burden of proving his claim by proper and satisfactory proof" (emphasis added).

In the case at bar, the ALJ wrongly assumed that Mr. Casdorff had the same burden that a nonmoving party would have in a summary judgment proceeding. The Board of Review was correct in finding that Mr. Casdorff had not actually proven his case by "proper and satisfactory proof." It did not allow the ALJ to merely assert that there was some genuine issue of material fact and disregard the peer reviewed evidence.

### CONCLUSION

The Board of Review was correct in reversing the *Decision of Administrative Law Judge*. The Office of Judges committed legal error in reversing the Division's rejection

of the claim. The ALJ misapplied the law, and his decision was arbitrary, capricious, characterized by abuse of discretion or clearly an unwarranted exercise of discretion, and is clearly wrong in view of the reliable, probative and substantial evidence.

WHEREFORE, above premises considered, the Insurance Commissioner respectfully submits that the Order of the Workers' Compensation Board of Review dated December 20, 2006, should not be disturbed on appeal. Mr. Casdorph's Petition for Appeal should be REFUSED, and an appropriate Order should issue.

Respectfully submitted,



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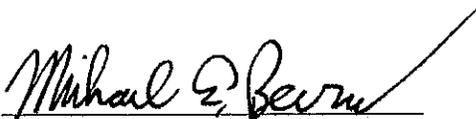
**CERTIFICATE OF SERVICE**

I, Michael E. Bevers, Attorney for the Insurance Commissioner, do hereby certify that this office has filed the original and three (3) copies of the foregoing *Insurance Commissioner's Response to Petition for Appeal* with the Office of the Clerk of the Supreme Court of Appeals of West Virginia on this, the twentieth day of February, 2007, either by hand delivery or by first-class mail, properly addressed and postage prepaid. I further certify that true and correct copies have been served upon all parties of record by depositing same in the United States Mail, properly addressed and first-class postage prepaid, as follows:

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