

IN THE COURT OF COMMON PLEAS  
OF  
PHILADELPHIA COUNTY  
CIVIL TRIAL DIVISION

RECEIVED

06 JUN 29 PM 2: 09

PRO PROTHY

**Brendley** : **August Term, 2005**  
:   
:   
**v.** : **No. 1918**  
:   
:   
**Rohm & Haas** :   
:   
:

**MEMORANDUM OPINION**

On August 15, 2005, Plaintiffs filed this Class Action lawsuit against Defendant Rohm & Hass. In their complaint, Plaintiffs allege the class, consisting of present and former employees, had been exposed to toxic agents while employed at Defendant's Spring House research facility. Plaintiffs claim that such exposure causes an increased risk of glioblastoma, a malignant form of brain cancer. Plaintiffs seek compensation for future medical monitoring.

On September 26, 2005, Defendant filed Preliminary Objections. In their Preliminary Objections, Defendant claimed that Plaintiffs' medical monitoring action is barred by the Workers' Compensation Act, which dictates that the Act must be the sole means through which employees can sue their employer for personal injuries sustained as part of their employment. On April 3, 2006, this court sustained defendant's Preliminary Objections with leave to file a Workers' Compensation Claim in the appropriate forum, and dismissed the Plaintiffs' case in the Court of Common Pleas. On May 4, 2006, Plaintiffs appealed this court's April 3, 2006 order. On May 15, 2006, this court vacated

its April 3, 2006 order and placed this case in deferred status so that it may be preserved until Plaintiffs fully exhaust their remedies under the Workers' Compensation Act.<sup>1</sup>

The Workers' Compensation Act is the exclusive remedy for employees who seek to sue their employer for personal injuries.<sup>2</sup> The Workers' Compensation Act defines the term "injury":

"Injury and personal injury, as used in this act, shall be construed to mean an injury to an employe[e], regardless of his previous physical condition, arising in the course of his employment and related thereto, and such disease or infection as naturally results from the injury or is aggravated, reactivated or accelerated by the injury."<sup>3</sup>

Although the Pennsylvania Supreme Court has never adopted a standard definition of the term in the context of the Workers' Compensation Act, there are cases that are helpful in interpreting what constitutes an "injury." In Creighan v. Firemen's Relief and Pension Fund Board,<sup>4</sup> a fireman contracted tuberculosis as a result of work-related duties that rendered him completely disabled. He filed an action in mandamus for pension benefits. The Pennsylvania Supreme Court said "'injury,' in ordinary modern usage, is one of *very broad designation*" and interpreted the term "injury" as contained in § 411 of the Workers' Compensation Act as "Whatever lesion or change in any part of the system produces harm or pain, or a lessened facility of the natural use of any bodily activity or capability." The Court explained that "common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by anyone." Our

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<sup>1</sup> This decision is based on the mandate of the Supreme Court of Pennsylvania in Lord Corporation v. Diana G. Pollard, Administratrix of the Estate of Thomas C. Pollard, deceased, 695 A.2d 767 (Pa. 1997), Footnote 5, which mandates that "... the employee's common law cause of action should be preserved until the employee's claim has been fully litigated and the appellate process exhausted."

<sup>2</sup> "The liability of an employer under this Act shall be exclusive and in place of any and all other liability to such employe[e]s." 77 P.S. § 481.

<sup>3</sup> 77 P.S. § 411.

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Supreme Court reaffirmed this broad definition in 1987,<sup>5</sup> quoting the precise language of Creighan in Pawlosky v. Workers' Compensation Appeal Board.

The only Pennsylvania appellate decision addressing medical monitoring claims pursuant to the Workers' Compensation Act is Jackson Township Volunteer Fire Company v. Workers' Compensation Appeal Board<sup>6</sup>. The plaintiff, an ambulance attendant, was exposed to the HIV and hepatitis B viruses during an emergency to which he responded. At a physician's direction, the plaintiff had tests to detect the presence of HIV and hepatitis B, and received prophylactic injections to prevent him from contracting hepatitis. The fire department and its insurer denied plaintiff's claim for these prophylactic expenses. The Workers' Compensation referee found that plaintiff should be reimbursed for these costs. The Commonwealth Court affirmed the referee's decision, holding that the fire company must pay for the tests and immunizations, reasoning that "persons exposed to a serious risk of contracting a disease which is commonly known to be highly contagious/infectious and potentially deadly, have been 'injured' for the purpose of receiving compensation under the Act." The Court did, however, note that "only those persons exposed to a real and serious risk of contracting highly contagious/infectious and potential diseases are entitled to compensation."

Although the Plaintiffs herein were not exposed to a contagious or infectious disease, the Plaintiffs' medical monitoring claim can be analyzed in accord with the Commonwealth Court's reasoning and decision in Jackson. The Class members in this case claim that exposure to toxic agents in the workplace has caused them to be "at risk for developing brain cancer" and the specific medical regimen they term "medical

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<sup>5</sup> 525 A.2d 1204 (Pa. 1987)

<sup>6</sup> 594 A.2d 826 (Pa. Commw. 1991)

monitoring” is medically required. Plaintiffs allege that an elevated rate of toxic exposure at the Spring House Research Facility has resulted in twelve employees being diagnosed with malignant brain cancer and has increased the risk of harm to all class members. The Plaintiffs’ claims are analogous to the claims in Jackson, in which occupational exposure to toxic blood made the plaintiff at risk for contracting HIV and hepatitis B. The proactive medical testing and precautionary preventative emergency room care provided to the plaintiff in Jackson were covered by Workers’ Compensation because they were necessitated by his occupational exposure to diseased blood and bodily fluids. Likewise, the medical monitoring and preventative tests that plaintiffs seek herein are exclusively the result of their occupational exposure to toxic agents at the Spring House Research Facility. The Commonwealth Court in Jackson held that preventative testing, as is claimed by the plaintiffs here, is an injury under the Workers’ Compensation Act. The Workers Compensation Act is the exclusive remedy for employees who seek to sue their employees for injuries sustained at work.

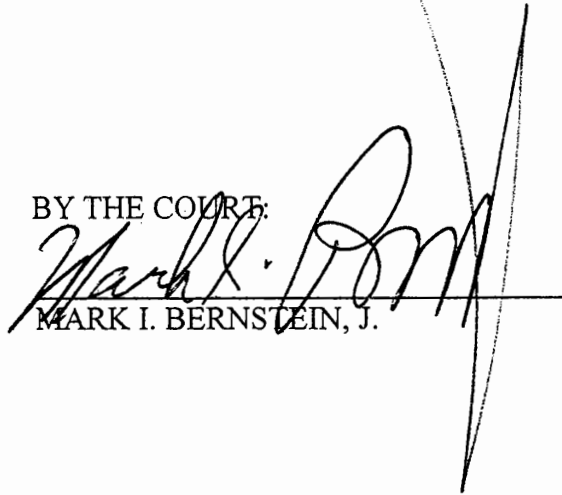
Thus, as to all former employees, medical monitoring costs to detect and prevent the spread of brain cancer is an injury which is compensable under the Workers’ Compensation Act.<sup>7</sup>

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<sup>7</sup> The Court notes that there may be a distinction between present employees, who continue to be exposed to the toxic agents, and former employees who are presumably no longer exposed to any substances in the workplace. However, since the two representative plaintiffs are both former employees, this potential distinction is irrelevant. A class action may not proceed without a named plaintiff whose claims are representative of the class claims. See Pa. R.C.P. 1702(3).

Accordingly, this court's decision to sustain defendant's Preliminary Objections with leave for plaintiffs to file a Workers' Compensation Claim and defer this case pending that determination should be affirmed.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Mark I. Bernstein, J.", written over a horizontal line. The signature is stylized and cursive.

MARK I. BERNSTEIN, J.

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DATE