

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA CIVIL TRIAL DIVISION**

WILLIAM H. BRENDLEY, JR., Ph.D.	:	COURT OF COMMON PLEAS
2450 Exton Road	:	OF PHILADELPHIA COUNTY
Hatboro, PA 19040	:	
	:	
On behalf of himself and all others	:	
similarly situated,	:	CLASS ACTION COMPLAINT
	:	
Plaintiffs	:	
	:	
v.	:	
	:	AUGUST TERM, 2005
	:	
ROHM & HAAS CO.	:	NO. 1918
Independence Mall West	:	
5 th and Market Streets	:	
Philadelphia, PA 19106	:	JURY TRIAL DEMANDED
Defendants	:	

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S
DEMURRER TO PLAINTIFFS' COMPLAINT**

Plaintiff William H. Brendley, Jr., Ph.D., on behalf of himself and others similarly situated, by and through his attorneys Laysen & Freiwald, P.C. responds to the Preliminary Objection of Defendant Rohm and Haas Company in the Nature of a Demurrer to Plaintiffs' Complaint as follows:

1. Denied as stated. To the extent that the averments of this paragraph purport to summarize the allegations of Plaintiffs' Class Action Complaint, whose terms as a writing speak for themselves, the averments are denied. By way of further answer, however, the cause of action is for medical monitoring.
2. Denied as a conclusion of law.

3. Denied as stated. It is admitted only that the quoted language is contained within 77 P.S. §481. To the extent that by quoting this portion of the Workers' Compensation Act, defendant argues that the Act bars plaintiffs' action, the averments are denied for the reasons set forth in Plaintiffs' Memorandum of Law, the arguments of which are incorporated herein.

4. Denied as a conclusion of law.

5. Denied as a conclusion of law. Moreover, defendant misconstrues the holding of *Jackson Township Volunteer Fire Company v. WCAB (Wallet)*, 140 Pa. Cmwlth. 620, 594 A.2d 826 (1991), and so the averments are denied for the reasons set forth in Plaintiffs' Memorandum of Law, the arguments of which are incorporated herein.

6-7. Denied as conclusions of law. Moreover, defendant misconstrues the holdings of the cases cited, and so the averments are denied for the reasons set forth in Plaintiffs' Memorandum of Law, the arguments of which are incorporated herein.

8. Denied as a conclusion of law for the reasons set forth in Plaintiffs' Memorandum of Law, the arguments of which are incorporated herein.

WHEREFORE, plaintiff William H. Brendley, Jr., Ph.D., on behalf of himself and others similarly situated, respectfully requests that this Honorable Court overrule the preliminary objection of defendant Rohm and Haas Company.

LAYSER & FREIWALD, P.C.

BY: _____
AARON J. FREIWALD, ESQUIRE
PATRICIA M. GIORDANO, ESQUIRE
Counsel for Plaintiffs

DATED: _____

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**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
DEMURRER TO PLAINTIFFS' COMPLAINT**

I. INTRODUCTION

This is a claim for medical monitoring. Plaintiff is not alleging that he nor any other proposed class member has suffered a physical injury or occupational disease. Rather, the claim seeks to establish a fund to cover the costs of long-term diagnostic testing and clinical examination to detect brain cancers that may develop as a result of the class members' tortious exposure to chemicals or other noxious agents at the Rohm and Haas Spring House facility. Defendant has demurred to the Complaint claiming that the action is barred by the Workers' Compensation Act ("Act"). Because neither plaintiff nor any proposed class member has suffered a physical injury or occupational disease, the Act does not apply. Consequently, the demurrer should be overruled.

II. ARGUMENT

A. The Workers' Compensation Act Does Not Apply

With the exception of fraud, the Workers' Compensation Act is the exclusive remedy for employees injured during the course of their employment. 77 Pa. C.S.A. §§ 481, 411 and 27.1. Significantly, eligibility for workers' compensation is dependent on an employees suffering a compensable injury. Absent an injury, the Act does not apply.

The Act "defines" injury in Section 411 to include a physical injury or an occupational disease arising in the course of employment. The Pennsylvania Supreme Court has acknowledged, however, that the word "injury" as used in the Act is not itself actually defined. *Pawlosky v. WCAB (Latrobe Brewing Co.)*, 514 Pa. 450, 459, 525 A.2d 1204, 1209 (1987). As the *Pawlosky* Court stated:

[The Act] does no more than state that an injury is an injury. Although the 1972 amendment effectively characterizes certain circumstances under which an injury is compensable, the word "injury" itself is given no express statutory meaning, as it had prior to the 1972 revision. Thus, just as under the original 1915 Act, the courts had to give meaning to the undefined terms "accident," [citation omitted] so must the courts now define the meaning of the term "injury" in section [411]. And, since the latter term no longer has a technical meaning, It must be interpreted according to its common and approved usage [citations omitted].

Pawlosky, 514 Pa. at 459, 525 A.2d at 1209.

In reviewing prior decisions of the Pennsylvania Supreme Court, the *Pawlosky* Court noted that "in common speech the word injury, as applied to personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain, or a lessened facility of the natural use of any body activity or capability (citations omitted) (emphasis in original)." 514 Pa. at 459; 525 A.2d at 1209. The *Pawlosky* court further stated that "the word injury, in ordinary

modern usage, is one of very broad designation, and that its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by anyone” (citations omitted)(emphasis in original).” 514 Pa. at 460, 525 A.2d at 1209.

Medical monitoring was initially acknowledged as an independent cause of action in Pennsylvania in *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (1996), which held that pre-symptomatic conditions do not qualify as a compensable injury within the meaning of the Act. The Court rejected the claims because they represented claims for anticipated physical harms only and thus they were not compensable under the Workers’ Compensation Act. Although the *Simmons* plaintiffs were not seeking medical monitoring, the Court suggested that such a recourse was available against an employer. In so concluding, the *Simmons* Court distinguished between what constitutes an injury in a claim for an enhanced risk of injury (for which the plaintiffs’ were seeking relief) and an injury in a claim for medical monitoring. The Simmons Court concluded that in a claim for increased risk of harm, the injury is an anticipated physical harm, while in the latter, the injury is the cost of medical care that will detect a latent injury or disease. *Simmons*, 543 at 680, n. 11, 674 A.2d 240, n. 11. Thus, a claim for medical monitoring seeks redress not for a physical injury but rather for equitable relief, which does not fall within the Act’s definition of injury.

In 1997, the Pennsylvania Supreme Court revisited the medical monitoring issue in *Redland Soccer Club, Inc. v. Department of Army*, 548 Pa. 178, 696 A.2d 137 (1997), which established the elements of a medical monitoring cause of action. The Court reiterated that a claim for medical monitoring is a claim to recover the costs of medical care brought by “plaintiffs at risk for contracting a serious, latent disease who are presently unable to demonstrate an actual physical injury.” 548 Pa. at 191, 696 A.2d at 143 (emphasis added) (*citing Habitants Against Landfill Toxicants v. City of York*, No. 84-S-3820 (Pa. York Cty. May 20, 1985).

The terms “injury,” “personal injury,” and “occupational disease” as used in the Act require a present, physical, discernable injury. The Pennsylvania Supreme Court has stated that a claim for medical monitoring seeks compensation for the costs of medical care aimed at detecting latent physical injury or diseases caused by another’s negligence. The injury is the cost of the medical care. It is neither a physical injury nor an occupational disease and therefore, it is not an injury as defined by the Act. Accordingly, the Act is inapplicable and this action is not barred by the exclusivity provision of the Act. See 77 P.S. §481 (“the liability of an employer under the act shall be exclusive. . . to . . . employees . . . on account of injury or death as defined . . . in the Act”).¹

Moreover, even if this Court were to conclude that a claim for medical monitoring is one for personal injuries, here, neither plaintiff nor any other proposed class member is alleging an existing injury or disease. Rather plaintiffs’ seek to establish a fund to cover the costs of detection of a latent disease, to wit, brain cancer, that may arise as a result of tortious exposure to chemicals or other noxious agents. By its very terms, a latent disease is one that has not yet manifested itself; therefore, it has not yet changed any part of the system, produced any discernable harm or pain or lessened facility of the natural use of any body activity or capability as required by *Pawlosky, supra*. Consequently, no plaintiff has suffered a compensable injury as that term is defined under the Act and the Act is inapplicable.

B. The cases cited by defendant are not applicable.

¹In a remarkably similar case, a West Virginia trial court recently denied a motion to dismiss a complaint holding that claim for medical monitoring arising out of workplace exposure to organic solvents was not barred by the exclusivity provision of the West Virginia Workers’ Compensation Act because plaintiffs were not presently suffering from a physical injury as required by the Act. *Bradley v. SWVA*, Circuit Court of Cabell County, W.Va., Civil Action No. 02-0587 (March 30, 2005), which is attached as Exhibit “A.”

Defendant cites two cases applying Pennsylvania law purportedly in support of its proposition that Pennsylvania Courts have held that medical monitoring claims based on work place exposure are compensable only under the Workers' Compensation Act. To the contrary, no Pennsylvania state case has ever held such. Moreover, the two cases cited by the defendant, *Fried v. Sunguard Recovery Services, Inc.*, 900 F.Supp. 758 (E.D. Pa. 1995) and *Jackson Township Volunteer Fire Company v. WCAB (Wallet)*, 140 Pa. Cmwlth. 620, 594 A.2d 826 (1991) pre-date, by several years, *Redland* (1997) and *Simmons* (1996). These two cases could not have taken account of medical monitoring cases, such as the one now before the Court, because a cause of action for medical monitoring did not even exist yet. Also, as noted above, the *Simmons* Court expressly held that claims for anticipatory injuries allegedly caused by an employer's negligence, as was the case in *Fried*, are not compensable injuries. Additionally, as the *Simmons* Court recognized, the injury to be compensated in an employee's claim for medical monitoring is not a physical injury, which would fall within the Act, but rather the injury is the medical costs associated with detecting a latent disease, which costs do not and can not fall within the Act as they constitute neither a physical injury nor a disease as required by the Act.

1. *Fried*

The *Fried* plaintiffs were renovation contractors who were exposed to undisclosed sources of asbestos. The plaintiffs sought recovery against their employer for the hazard pay they would have demanded had they been aware of the presence of asbestos in the work place. Additionally, the plaintiffs alleged that they would incur future medical monitoring costs due to the exposure to the asbestos. The *Fried* Court rejected the claims holding that they constituted claims for personal injuries and not for financial losses (as argued by the plaintiffs) and thus were barred under the Workers' Compensation Act. Specifically, the Fried court rejected plaintiffs' contention that the

claims were for economic relief in the manner of hazard pay and expenses of medical monitoring holding that the claims were “for personal injury because they seek extra payment to compensate [plaintiffs] for the fear of catching a disease.” *Fried*, 900 F.Supp. at 768.

In light of *Simmons*, which would have permitted employees to recover the costs of medical care aimed at detecting a latent disease had it been requested, the reasoning and applicability of *Fried* is inapplicable. Moreover, *Fried* is a federal court case that is not binding on this Court nor any other court of the Commonwealth and defendant’s reliance on it is inapplicable here.

2. *Jackson Township Volunteer Fire Company*

Jackson Township Volunteer Fire Company is inapplicable for a number of reasons. First, it addressed a very specific question: whether the Act should cover the expenses of medical care incurred by a 16 year old volunteer firefighter exposed to AIDS and hepatitis B, “two highly contagious and deadly diseases.” *Jackson Township Volunteer Fire Company*, 140 Pa. Cmwlth. at 624, 594 A.2d 826.

The facts were that a 16 year old volunteer firefighter responded to an emergency call involving a fatal auto accident. The victim was pronounced dead at the scene and the firefighter helped remove the victim from his car and transport him to a funeral home. The firefighter got some of the victim’s blood and bodily fluids on his hands and shirt. Later, the victim was found to have had AIDS and was actively infected with the hepatitis B virus. Thereafter, the firefighter was instructed by the medical examiner and a physician that he needed to be tested for AIDS and hepatitis. The fire company refused to pay for the cost of the medical services. The firefighter brought a workers’ compensation claim, which was granted. The fire company appealed arguing that the occupational exposure did not qualify as an injury under the Act and therefore, it should not be required to pay for any medical costs incurred.

Although the court found exposure to a serious risk of contracting a highly contagious/infectious potentially deadly disease to be an injury under the Act, its decision turned not on whether risk of infection was a compensable injury but whether the medical expenses incurred were necessary. See 77 P.S. §531. The court was most persuaded by the chilling effect denial of the claim would have on “volunteering and the willingness of all health professionals to treat AIDS and hepatitis patients.” *Id.* at 624, n. 5, 594 A.2d at 828, n. 5. Ultimately, the court upheld the referee citing the “strong public policy in favor of restricting the spread of such serious and deadly contagious/infectious diseases as AIDS and hepatitis.” *Jackson Township Volunteer Fire Company*, 140 Pa. Cmwlth. 625, 594 A.2d 829.

Here, while the disease at issue, brain cancer, is deadly, we are not speaking of a contagious or infectious disease in the same category as AIDS or hepatitis, the effects of which can be immediate and widespread. Moreover, the types of diseases at issue in *Jackson* are compensable occupational diseases expressly covered under the Workers’ Compensation Act. See 77 P.S. §27.1. Nowhere within the Act is injury or occupational disease defined to include brain cancers.

3. Foreign jurisdictions

Defendant cites two New York cases, *Acevedo v. Consolidated Edison Company of New York, Inc.*, 189 A.2d 497, 596 N.Y.S.2d 68 (1993) and *Jones v. Utilities Painting Corporation*, 198 A.2d 268, 603 N.Y.S.2d 773 (1993) as well as a federal case out of the 10th Circuit Court of Appeals, *Building and Construction Department v. Rockwell International Corporation*, 7 F.3d 1487 (10th Cir. 1993), in support of its proposition that medical monitoring claims against employers are barred by the exclusivity provision of workers’ compensation laws.

First, none of these cases are based on Pennsylvania law and therefore, they have no relevance to the issue here, i.e. whether a claim for medical monitoring is barred by the Pennsylvania

Workers' Compensation Act? Second, all three cases were decided before Pennsylvania recognized medical monitoring as a separate cause of action. For the reasons discussed above, these cases are inapplicable.

As for the New York cases, they define injury to include not just physical injury or occupational disease but also the need for medical care. *Acevedo*, 189 A.D.2d at 503, 596 N.Y.S.2d at 72. As discussed above, in Pennsylvania, workers' compensation does not apply unless there has been a compensable physical injury or disease; the need for medical care without physical impairment is not enough to trigger the Act. As such, *Acevedo* is simply inapplicable.

As for the 10th Circuit case, which is based on Colorado law, medical monitoring is defined as a claim for personal injury. *Building and Construction Department*, 7 F.3d at 1493-1494. Given that Pennsylvania has defined the injury in a claim for medical monitoring as an economic loss, i.e. the cost of medical care, the case is irrelevant.

III. CONCLUSION

Plaintiffs have brought a claim for medical monitoring. In Pennsylvania, the injury in a medical monitoring claim is the cost of medical care designed to detect latent diseases. The injury is not one for physical injury. Under the Pennsylvania Workers' Compensation Act, only physical injuries or occupational diseases are compensable. Because a claim for medical monitoring does not

seek recovery for a physical injury or occupational disease, the Act does not bar the claim.
Consequently, defendant's demurrer should be overruled.

LAYSER & FREIWALD, P.C.

BY: _____
AARON J. FREIWALD, ESQUIRE
Counsel for Plaintiffs

DATED: _____

BY: _____
PATRICIA M. GIORDANO, ESQUIRE
Counsel for Plaintiffs

DATED: _____

CERTIFICATE OF SERVICE

I, PATRICIA M. GIORDANO, ESQUIRE, hereby certify that service of a true and correct copy of the foregoing Plaintiffs' Opposition to Defendant's Preliminary objection in the Nature of a Demurrer to Plaintiffs' Complaint was served on opposing counsel on this date, via Facsimile and United States First Class Mail, Postage Prepaid, as follows:

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DATED: _____