

PHILADELPHIA COURT OF COMMON PLEAS
PETITION/MOTION COVER SHEET

CONTROL NUMBER:

092053

(RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

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ASSIGNED TO JUDGE:

ANSWER/RESPONSE DATE:

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August Term, 2005
 Month Year
 No. 1918

William H. Brendley, Jr., Ph.D.

Name of Filing Party:

vs.

Rohm and Haas Company

Rohm & Haas Co.

(Check one) Plaintiff Defendant
 (Check one) Movant Respondent

INDICATE NATURE OF DOCUMENT FILED:

Has another petition/motion been decided in this case? Yes No

Is another petition/motion pending? Yes No

If the answer to either question is yes, you must identify the judge(s):

- Petition (Attach Rule to Show Cause) Motion
 Answer to Petition Response to Motion

Hon. Mark Bernstein

TYPE OF PETITION/MOTION (see list on reverse side)

PETITION/MOTION CODE
 (see list on reverse side)

Preliminary Objections

DPROB

I. CASE PROGRAM

Is this case in the (answer all questions):

A. COMMERCE PROGRAM

Name of Judicial Team Leader: _____

Applicable Petition/Motion Deadline: _____

Has deadline been previously extended by the Court?

Yes No

B. DAY FORWARD/MAJOR JURY PROGRAM — Year _____

Name of Judicial Team Leader: _____

Applicable Petition/Motion Deadline: _____

Has deadline been previously extended by the Court?

Yes No

C. NON JURY PROGRAM

Date Listed: _____

D. ARBITRATION PROGRAM

Arbitration Date: _____

E. ARBITRATION APPEAL PROGRAM

Date Listed: _____

F. OTHER PROGRAM: Class Action

Date Listed: _____

II. PARTIES

(Name, address and telephone number of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.)

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III. OTHER

By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.


 (Attorney Signature/Unrepresented Party)

October 21, 2005
 (Date)

Jennifer A. L. Battle 86765
 (Print Name) (Attorney I.D. No.)

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date.
 No extension of the Answer/Response Date will be granted even if the parties so stipulate.

SCHNADER HARRISON SEGAL & LEWIS LLP

By: Ralph G. Wellington (I.D. No. 10068)

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Attorneys for Defendant

Rohm and Haas Company

WILLIAM H. BRENDLEY, JR., Ph.D.,
On behalf of himself and all others similarly
situated,

Plaintiff,

v.

ROHM & HAAS CO.,

Defendant.

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CLASS ACTION

AUGUST TERM, 2005
NO. 001918

MOTION CONTROL NO. 092053

**REPLY MEMORANDUM IN SUPPORT OF THE
PRELIMINARY OBJECTION OF DEFENDANT
ROHM AND HAAS COMPANY IN THE NATURE OF
A DEMURRER TO PLAINTIFF'S COMPLAINT**

In opposing Rohm and Haas Company's preliminary objection, plaintiff mistakenly conflates two issues – whether a claim for medical monitoring is recognized in Pennsylvania generally, and whether this Court is the appropriate tribunal to handle such a claim when it is brought by an employee against his employer. The parties agree that medical monitoring costs are typically a compensable injury under Pennsylvania law. The parties also agree that the Workmen's Compensation Act provides the exclusive remedy for an employee against his or her employer for a workplace-related injury. Yet, plaintiff refuses to recognize that, because the harm plaintiff alleges is a workplace-related "injury," his claim against his

employer for damages is barred by the Act's exclusivity provisions. Rohm and Haas's preliminary objection should therefore be sustained and the Complaint dismissed with prejudice.

ARGUMENT

In his opposition, plaintiff miscites *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (1996), claiming that case held that pre-symptomatic conditions “were not compensable under the Workers’ Compensation Act.” Plaintiff’s Memorandum of Law in Opposition to Defendant’s Demurrer to Plaintiffs’ Complaint (“Plaintiff’s Opposition”) at 6. In fact, *Simmons* was *not* a Workmen’s Compensation case, did not involve claims against an employer, and thus did not directly address the issue of whether a cause of action for medical monitoring would be barred by the Act. Yet, even the *Simmons* court recognized that “[t]he *injury* in a medical monitoring claim is the cost of the medical care that will, one hopes, detect that injury.” *Simmons*, 543 Pa. at 680 n.11 (emphasis added) (quoting *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990)) that. Thus, in recognizing a claim for medical monitoring, the *Simmons* court clearly contemplated that such a claim would constitute a compensable “injury.”

Plaintiff concedes that the Workmen’s Compensation Act bars claims against an employer for workplace-related injuries, but that the Act does not define “injury.” Plaintiff further concedes that “injury” has been broadly construed by the Pennsylvania courts as “any work-related injury.” *Poyser v. Newman and Co.*, 514 Pa. 32, 36, 522 A.2d 548, 550 (1987). Indeed, the *Pawlosky* case, cited by plaintiff, broadly defined “injury” as encompassing “all work-related harm to an employee,” including “any hurtful or damaging effect which may be

suffered by anyone.” *Pawlosky v. Workmen’s Compensation Board*, 514 Pa. 450, 458–60, 525 A.2d 1204,1209 (1987).

Under this expansive definition of “injury,” as the Eastern District of Pennsylvania recognized in *Fried v. Sungard Recovery Servs., Inc.*, a “claim for medical monitoring is a claim for *personal injury* and not a claim of injury to business or property.” 900 F. Supp. 758, 762 (E.D. Pa. 1995) (applying Pennsylvania law). Such claims are “at bottom, claims for personal injury because they seek extra payment to compensate them for the fear of catching a disease.” *Id.* at 768. Thus, even claims for non-physical injuries such as depression or emotional distress are properly compensable under the Workmen’s Compensation Act, if they are brought against an employer. *See, e.g., Archer v. Workmen’s Comp. Appeal Bd.*, 138 Pa. Commw. 309, 587 A.2d 901 (1991) (emotional distress); *Papa v. Franklin Mint Corp.*, 400 Pa. Super. 358, 583 A.2d 826 (1990) (depression).

The fact that *Fried* and *Jackson Township Volunteer Fire Co. v. Workmen’s Compensation Appeal Board*, 140 Pa. Commw. 620, 624-25, 594 A.2d 826, 828 (1991) were decided before *Simmons* established a cause of action for medical monitoring is of no consequence. Indeed, by recognizing medical monitoring as a compensable injury outside the employment context, *Simmons* lends support to the argument that, in the employer/employee context, medical monitoring costs are an injury compensable under Workmen’s Compensation. Although plaintiff contends that *Jackson Township* “could not have taken account of medical monitoring cases,” Plaintiff’s Opposition at 8, the fact remains that the *Jackson Township* court *did* recognize medical monitoring as an injury compensable under the Workmen’s Compensation Act.

Finally, plaintiff unsuccessfully attempts to distinguish *Jackson Township* on its facts, arguing that the court's decision in that case "turned not on whether risk of infection was a compensable injury but whether the medical expenses incurred were necessary," and that "[n]owhere within the Act is injury or occupational disease defined to include brain cancers." Plaintiff's Opposition at 10. Neither of these arguments is persuasive.

First, Rohm and Haas's position in this litigation is that plaintiff will not be able to establish that the medical expenses he seeks are necessary, *regardless* of whether the forum for this matter is this Court or the Workmen's Compensation arena. In order to find that medical monitoring costs were appropriately compensated under the Act, the *Jackson Township* court necessarily found that the exposure to an infectious disease was a compensable injury, and in fact stated that its decision to award such damages under Workmen's Compensation was "based on careful consideration of factors, such as the seriousness and immediacy of the risk created by exposure, as well as the reasonableness of the services sought and rendered." *Id.* at 625, 594 A.2d at 828-29. In other words, the *Jackson Township* court agreed that such an injury was compensable under the Act, and then went on to find that employee's claim had merit. While it is true that AIDS and hepatitis are highly contagious, that fact does not present a meaningful basis on which to distinguish plaintiff's claim here. Brendley contends that he faces a real and serious risk of contracting deadly brain cancer as a result of occupational exposure to carcinogenic chemicals while employed at Rohm and Haas, and that periodic screening in the form of neurologic examinations and MRIs would be a reasonable medical response to such exposure. If both of these contentions were true, Brendley would have a *prima facie* case for medical monitoring costs, even under Workmen's Compensation.

Second, plaintiff's contention that the Act does not define brain cancer as an occupational disease covered by the Act simply makes no sense. Surely plaintiff would not concede that, if he *did* develop brain cancer as a direct result of occupational exposure, he would not be entitled to relief under the Act. Thus, whether the Act specifically references brain cancer is irrelevant here.

Indeed, courts in other jurisdictions have found that, *even where a workers' compensation statute may prove inadequate*, workers' compensation is the only relief available for medical monitoring claims against an employer. Thus, whether plaintiff here is likely to succeed in establishing the merits of his claim for medical monitoring costs before the Workmen's Compensation Board is irrelevant – all this Court need decide is that it is the Board that should decide those issues. *Acevedo v. Consolidated Edison Co.*, 596 N.Y.S.2d 68, 71 (N.Y. App. Div. 1993) (claim for future medical surveillance costs due to workplace asbestos exposure barred by New York Workers' Compensation Law, "irrespective of the adequacy or inadequacy of that law's remedial provisions").

CONCLUSION

Because medical monitoring costs are an "injury" and plaintiff's claim is against his employer, Rohm and Haas requests that this Court enter an Order dismissing plaintiff's Complaint in its entirety.

Respectfully submitted,



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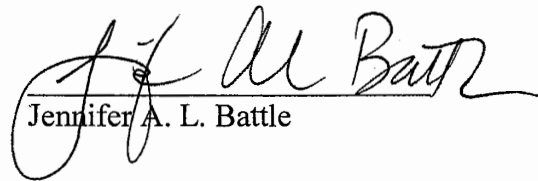
Of Counsel

Dated: October 21, 2005

CERTIFICATE OF SERVICE

I, Jennifer A. L. Battle, hereby certify that I caused to be served a true and correct copy of the foregoing Reply Memorandum in Support of Defendant's Preliminary Objection upon the plaintiff by first class mail addressed as follows:

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Dated: October 21, 2005