State of New Jersey
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
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JON S. CORZINE
Governor

DAVID J. SOCOLOW
Commissioner

MEMORANDUM

December 23, 2008

To: All Judges and Attorneys

From: Peter J. Calderone, Director and Chief Judge

Subject: Natale v. Celanese et als.
Appellate Division (Unpublished)

Enclosed please find the above Appellate Division opinion affirming Judge Mark Litowitz's decision assessing liability against several insurers of respondent in an occupational total disability case. While we do not ordinarily provide a copy of unpublished decisions on the Division's general website, this decision presents an excellent background discussion and interesting application of the Bond decision which may be of interest.

Enclosure

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0840-07T1

MARIA R. NATALE,

Petitioner-Respondent,

v.

CELANESE, INC., a/k/a CNA HOLDINGS, INC. and AGFA CORPORATION,[1]

Respondent-Appellant,

and

SECOND INJURY FUND,

Respondent.

Argued November 5, 2008 - Decided December 19, 2008

Before Judges Winkelstein and Gilroy.

On appeal from the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Docket Nos. 2002-4357, 2004-21705, and 2004-23033.

Hal H. Neeman argued the cause for appellant AGFA Corporation, by its insurance carrier ACE USA (Emmi and Emmi, attorneys; Mr. Neeman, on the brief).

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[1] Celanese, Inc., a/k/a CNA Holdings, Inc., and AGFA are the same company. During petitioner's term of employment, the company changed its corporate name several times. For the purpose of this opinion, we shall refer to the company as AGFA.

James Passantino argued the cause for appellant AGFA Corporation, by its insurance carrier Reliance Insurance Company (Biancamano & DiStefano, attorneys; Frederic Pepe, on the brief).

Gerard P. DeVeaux argued the cause for respondent AGFA Corporation, by its insurance carrier Travelers Indemnity Company (Gerard P. DeVeaux; attorney; Mr. DeVeaux and Steven J. Currenti, on the brief).

Respondent Maria R. Natale has not filed a brief.

Respondent The Second Injury Fund has not filed a brief.

PER CURIAM

This is a workers' compensation case. Petitioner Maria R. Natale worked for AGFA from August 19, 1978, through April 8, 2001. During the course of her employment, petitioner performed repetitive tasks that caused erosive osteoarthritic conditions in her hands, neck and shoulders, rendering her permanently and totally disabled.

Petitioner filed three claim petitions with the Division of Workers' Compensation (Division) against AGFA and six separate workers' compensation insurance carriers that insured AGFA throughout petitioner's employment. The six insurance carriers were: Chubb Insurance Company (Chubb) from January 1, 1980 through January 1, 1989; AIG Insurance Company (AIG) from January 1, 1989 through April 30, 1989; Reliance Insurance

Company (Reliance) from May 1, 1989 through May 1, 1997; Lumbermen's Mutual Insurance Company (Lumbermen's) from July 1, 1989 through July 1, 1991; ACE USA Insurance Company (ACE) from October 22, 1989 through October 22, 2000; and Travelers Indemnity Company (f/k/a St. Paul Travelers Insurance Company) (Travelers) from October 1, 2000 through April 8, 2001.[2]

The matter was tried on diverse dates between May 15, 2006 and January 22, 2007. On May 7, 2007, Compensation Judge Litowitz issued a written decision, determining that: 1) petitioner is 100% totally and permanently disabled as a result of her employment with AGFA; 2) petitioner demonstrated three separate physical manifestations of disability during the coverage periods of Reliance, ACE and Travelers; 3) each of those three carriers are to pay one-third (150 weeks) of petitioner's total disability; 4) the same three carriers are equally responsible for any future medical treatment resulting from petitioner's disability; and 5) petitioner is entitled to receive Second Injury Fund benefits. Lastly, the judge dismissed the complaints as to Chubb, AIG, and Lumbermen's.

[2] The Compensation Judge determined that there were "some lapses in coverage and some overlapping [in coverages]." Although the appeal appendix does not contain copies of the answers filed by each of the six insurance companies on behalf of AGFA, none of the insurance companies dispute that they provided workers' compensation insurance coverage for AGFA during the time periods found by the Compensation Judge.

On September 10, 2007, the Compensation Judge entered a confirming order as to ACE, Reliance, Travelers, and the Second Injury Fund. On the same day, the judge also entered three separate orders dismissing the petitions as to Chubb, AIG, and Lumbermen's. On September 15, 2007, and December 3, 2007, the judge entered amended orders as to ACE, Reliance, Travelers, and the Second Injury Fund, clarifying the dates the three carriers and the Fund are to pay petitioner's permanent disability benefits.

Reliance and ACE appeal from the September 10, 2007 order determining that they are equally responsible with Travelers for petitioner's future medical expenses.[3] We affirm.

Because appellants do not contest the Compensation Judge's determination that petitioner was rendered totally and permanently disabled as a result of her employment or that they are equally responsible with Travelers to pay one-third of her permanent disability benefits based on the judge's determinations of when petitioner's medical condition manifested itself during the term of her employment, we do not need to address the medical evidence in detail. Suffice it to say that

[3] Because this appeal only concerns the apportionment of liability among three of AGFA's insurance carriers, and although AGFA is the named respondent in this matter, the appealing insurance carriers, Reliance and ACE, are hereinafter collectively referred to as appellants.

as a result of the evidence presented by the parties, the judge determined that petitioner's medical condition manifested itself only during the periods when appellants and Travelers insured AGFA. The judge found that the medical condition first manifested itself in December 1994 when AGFA was insured by Reliance; the condition next manifested itself in 2000 when AGFA was insured by ACE; and lastly, the condition manifested itself in 2001 when AGFA was insured by Travelers.

Relying on Bond v. Rose Ribbon, 42 N.J. 308, 324 (1964), "which imposes liability on the last employer in occupational disease cases unless there is a manifestation of the condition during a prior period of employment", the Compensation Judge reasoned that, because petitioner's condition manifested itself during three periods of employment, only "those three entities through their respective carriers will be responsible".

On appeal, appellants argue:

> POINT I.
>
> THE WORKERS' COMPENSATION COURT IMPROPERLY APPLIED LEGAL PRINCIPLES TO THE FACTS OF THE CASE.
>
> POINT II.
>
> THE PAYMENT OF TREATMENT BY ALL THREE (3) CARRIERS AS SUGGESTED BY JUDGE LITOWITZ WOULD NOT BE FEASIBLE AND WILL CREATE SIGNIFICANT LOGISTICAL PROBLEMS.

I.

Appellants argue that in holding each carrier liable for one-third of petitioner's current benefits, the court "clearly found" her condition measurable at 33-1/3% as of the time Reliance's coverage ended; at 66-2/3% at the time ACE's coverage ended, and at a level of permanent disability during Travelers' coverage. Appellants contend petitioner's condition was aggravated by an additional four years of employment ending April 8, 2001, and that that aggravation caused her permanent disability, resulting in possible need of future medical treatment. They assert that by apportioning liability for future medical treatment in the same proportions as they are to pay petitioner's permanent disability benefits, the Compensation Judge "speculat[ed] that petitioner would have required future medical treatment even if [she] ended employment during each of the coverage periods of [Reliance] and [ACE]." Accordingly, appellants argue that only Travelers should be responsible for any future medical treatment as an aggravation of the preexisting compensable condition. We disagree.

Appellate review of a trial court's fact-finding is limited. Generally, "findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). However, a "trial court's interpretation of the law and the

legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Therefore, an appellate court will "'not disturb the factual findings and legal conclusions of the trial judge unless they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. (App. Div.), certif. denied, 40 N.J. 221 (1963)).

This case concerns what is termed the successive carrier problem, or the problem of "when a worker suffers two or more episodes of disability with an intervening change of employers or change of insurance carriers by the same employer." 9 Larson's Workers' Compensation Law § 153.01[1] (2008). There are two primary solutions to the issue: apportionment and applying the "last injurious exposure" rule. Id. at § 153.01[2]. Generally, the latter subsection "hold[s] liable the last insurer whose time at risk coincides with the time of causation, i.e., the carrier at the time of the 'last injurious exposure.'" Ibid.

N.J.S.A. 34:15-12(d) governs apportionment of liability in workers' compensation disputes when an employee experiences a

progressive injury or disease over employment periods insured by successive insurance carriers:

> If previous loss of function to the body, head, a member or an organ is established by competent evidence, and subsequently an injury or occupational disease arising out of and in the course of an employment occurs to that part of the body, head, member or organ, where there was a previous loss of function, then and in such case, the employer or the employer's insurance carrier at the time of the subsequent injury or occupational disease shall not be liable for any such loss and credit shall be given the employer or the employer's insurance carrier for the previous loss of function[.]
>
> [(emphasis added).]

The statute presumes that the onset date of the prior injury or disease is a known factor. However, as here, the issue of successive carrier liability often arises when the exact onset date of the latent injury or disease cannot be determined. In those latter cases, the statute provides no guidance as to liability among various carriers.

Because of the statute's ambiguity when applied to cases where the exact onset date of the latent injury or disease cannot be determined, courts have attempted to clarify the statute by providing when apportionment is proper and when it is appropriate to utilize the "last injurious exposure" rule. The first of these cases is Bond, supra, 42 N.J. at 311.

In Bond, industrial fumes at his employer's factory aggravated the petitioner's tuberculosis, which was not discovered until after a second insurance carrier took over the employer's coverage. Id. at 310. Because it was "impossible . . . to pinpoint in retrospect[] the triggering date of such activation or inception" of the tuberculosis, the Supreme Court found that "any apportionment of compensation liability between the successive employments or insurance coverages . . . [would be] speculative and arbitrary." Id. at 311. Accordingly, the Court held:

> [t]o avoid the morass into which litigation would be pitched were apportionment required, and to eliminate the recognized unsatisfactory nature of any such attempted ascertainment, we conceive that the most workable rule and that most consistent with the philosophy and public policy of the Workmen's Compensation Act is to hold liable that employer or carrier during whose employment or coverage the disease was disclosed . . . by medical examination, work incapacity, or manifest loss of physical function.
>
> [Ibid. (emphasis added).]

Although it has been argued that Bond was a "last injurious exposure" case, the Court in Giagnacovo v. Beggs Bros., 64 N.J. 32 (1973), explained that the two Bond criteria, "(a) disclosure by medical examination, and (b) disclosure by manifest loss of physical function, represent in substance two methods of revelation of a specific degree of physiological pathology --

one which is fixed, arrested and definitely measurable." Id. at 37-38. In reconciling Bond and Giagnacovo, we stated: "if it is possible to determine in retrospect prior data of a disability by medical examination, working capacity, or manifest loss of physical function, then apportionment between employers and insurance carriers may be applied." Calabro v. Campbell Soup Co., 244 N.J. Super. 149, 164 (App. Div. 1990), aff'd, 126 N.J. 278 (1991) (internal citation and quotations omitted).

Therefore, to utilize the apportionment approach, "[t]he prior condition need not constitute total and permanent disability[;] it need only be 'fixed, arrested and definitely measurable' or 'obvious, diagnosable and capable of measurement." Levas v. Midway Sheet Metal, 317 N.J. Super. 160, 172 (App. Div. 1998) ("Levas I"). However, "[o]nly those employers whose employment contributed to a degree 'substantially greater than de minimis' should be considered for allocation of their respective share of petitioner's total disability." Id. at 174. Accordingly, "[w]here the evidence warrants, apportionment among two or more of the causally contributing employers or carriers then on the risk may be appropriate." Levas v. Midway Sheet Metal, 337 N.J. Super. 341, 356 (App. Div. 2001) ("Levas II").

We are satisfied that the Compensation Judge correctly utilized the apportionment approach in determining appellants

equally responsible with Travelers, both for petitioner's permanent disability benefits, and for any future medical expenses she may incur as a result of her condition. Petitioner performed physical activities involving her hands and wrists over a twenty-three year period. It was the nature of these activities that caused her disabling condition, the extent of which was only discovered after its effects became irreversible.

The record reflects that petitioner's condition first manifested itself during Reliance's coverage in December 1994, at which time Dr. Albert Johnson informed petitioner that her erosive osteoarthritis was degenerative and incurable. At trial, Dr. David Weiss testified to "repetitive and cumulative trauma being the culprit in aggravating and accelerating degenerative joint disease in the hands and wrists." He opined that, although petitioner's "occupational exposure" accelerated her disease, it would be "a leap of faith" to try to conclude exactly when over the years, her disability incrementally worsened to the point of permanent disability.

Thereafter, her condition manifested again during ACE's coverage in 2000, when Johnson classified petitioner's condition as "very disabling". Lastly, the condition manifested itself in 2001 when AGFA was insured by Travelers. Under Bond and Levas II, these manifestations are sufficient to utilize the apportionment approach not only to hold appellants liable for a

share of petitioner's disability benefits, but also for a share of any future medical expenses. Bond, supra, 42 N.J. at 324; Levas II, supra, 337 N.J. Super. at 356.

Moreover, there is ample evidence in the record to support the judge's conclusion that petitioner's "total disability [wa]s cumulative and stem[med] from her entire period of employment" and that her employment during each of the three carrier's coverage "contributed equally to [her] disability" (emphasis added). It is impossible to determine whether petitioner's degenerative osteoarthritis would have required future medical treatment had she stopped working at the time appellants' coverage ended. Degeneration is defined as "progressive deterioration of physical characters from a level representing the norm of earlier generations or forms." Webster's Third New Int'l Dictionary 593 (Philip Babcock Gove, ed. 1971). Thus, even if petitioner had abstained from working after being diagnosed during Reliance's coverage, her condition would have more than likely worsened over time.

As previously stated, appellants do not contest that they are partially responsible for injury or disease sustained by petitioner during and as a result of her employment. The erosive osteoarthritis that she suffers is just that. The fact that she may not have been fully disabled on appellants' termination of coverage is not indicative of their

responsibility under accepted case law. Petitioner was diagnosed with a degenerative disease, which by its nature would progress to a point of full disability. It is not shocking that, although working another four years, she is left in that exact condition. Therefore, the court's decision to hold appellants equally liable with Travelers for petitioner's future medical expenses does not "offend the interests of justice." Rova Farms Resort, supra, 65 N.J. at 484.

II.

Appellants argue next that "the apportionment of future medical treatment amongst the three carriers . . . would create significant logistical problems . . . with regard to which medical provider would ultimately be authorized to provide the necessary medical treatment and payment of medical bills arising out of that medical treatment." Specifically, appellants contend that the Compensation Judge's decision is unreasonable because he did not set forth a plan to choose a treating physician for plaintiff's future medical treatment and that "even if all three carriers could agree on one physician . . . , the payment of medical bills arising out of that treatment could also become complicated."

Appellants' argument is meritless. No authority supports their assertion that when apportionment is inefficient, the Division should follow the "last injurious exposure" rule and

hold the last insurer solely liable. N.J.S.A. 34:15-15 provides that "[t]he employer shall furnish to the injured worker such medical, surgical and other treatment, and hospital service as shall be necessary to cure and relieve the worker of the effects of the injury and to restore the functions of the injured member or organ where such restoration is possible". Under that statute, the employer and its insurance carrier or carriers have the statutory right to chose petitioner's treating physician. Shapiro v. Middlesex County Mun. Joint Ins. Fund, 307 N.J. Super. 453, 457 (App. Div. 1998).

If appellants cannot agree among themselves and Travelers as to which carrier should assume the primary responsibility for providing petitioner with future medical treatment, with the remaining carriers reimbursing the primary carrier, appellants are not foreclosed from applying to the Division to designate an authorized treating physician. Nor are appellants foreclosed from seeking a supplemental order addressing the payment terms for any future treatment that petitioner may incur.

Affirmed.