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***Issue Date: 30 July 2012In the Matter of*:**

MIGUEL CRUZ PIMENTEL
Claimant

v.

Case No. 2012-LDA-000302
OWCP No. 02-135832

TEKSTAR INC
Employer

and

ALASKA NATIONAL INSURANCE CO.
Carrier.

ORDER

GRANTING SUMMARY DECISION as to TOXIC CONTAMINATION CLAIM

This case was assigned to me under the Defense Base Act extension to the Longshore and Harbor Workers' Compensation Act for hearing on June 15, 2012. The claim previously bore the case number: 2010-LDA-00400, and was remanded by Administrative Law Judge Daniel Sarno on February 4, 2011, at the request of the parties. By letter dated May 19, 2011, Claimant's counsel advised that the parties had settled the matter.

However, on June 5, 2012, Employer/Carrier filed a Motion for Summary Decision. The procedure is as follows: 20 C.F.R. § 18.40, Motion for summary decision:

> (a) Any party may, at least twenty (20) days before the date fixed for any hearing, move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within ten (10) days after service of the motion, serve opposing affidavits or countermove for summary decision. The administrative law judge may set the matter for argument and/or call for submission of briefs.
> (b) Filing of any documents under paragraph (a) of this section shall be with the administrative law judge, and copies of such documents shall be served on all parties.
> (c) Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.
> (d) The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The administrative law judge may deny the motion

whenever the moving party denies access to information by means of discovery to a party opposing the motion.

Summary decision may be granted based on the following: 20 C.F.R. § 18.41, Summary decision:

(a) No genuine issue of material fact. (1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. Any final decision issued as a summary decision shall conform to the requirements for all final decisions.

(2) An initial decision and a final decision made under this paragraph shall include a statement of:

(i) Findings of fact and conclusions of law, and the reasons therefore, on all issues presented; and

(ii) Any terms and conditions of the rule or order.

(3) A copy of any initial decision and final decision under this paragraph shall be served on each party.

(b) Hearings on issue of fact. Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

Claimant filed a response in Opposition on July 2, 2012 and Employer responded to Claimant on July 6.

I am advised by Employer that this is a claim for "Toxic Contamination" under the Defense Base Act. EX-1. Support for the instant claim comes from:

1) "Elemental Hair Analysis" performed by the Great Smokies Diagnostic Lab on April 23, 2004 (hair sample collected on April 15, 2004) which disclosed elevated levels of Aluminum, Antimony, Arsenic, Cadmium, Lead, Nickel, Thallium, and Tin;

2) the May 4, 2004, narrative report of Dr. Jaime Claudio which discussed the potential health effects of elevated toxins; and

3) the office notes of Dr. Claudio from December 2007 wherein he mentions complaints of and diagnoses fatigue, insomnia, nervousness, diabetes, hypertension, and COPD. EX-2.

I am advised that contrary medical evidence has been accumulated during the claim process which refutes the existence of elevated toxins (other than a modest increase in Aluminum) and which disassociates Claimant's general medical conditions from said increase. EX-3.

Moreover, Claimant's discovery responses allege in excess of 18 years of exposure to the toxins underlying this claim (start date of 1992 with continued exposure through September 13, 2010). EX-4. Claimant's discovery responses of September 13, 2010, also state that he has not lost any measurable work time due to the "toxic contamination." EX-4 at Interrogatory 37. Claimant also alleges that he has been diagnosed with COPD. Employer states that the claim was never amended to include COPD.

The record shows that Alaska National covered the Employer, TekStar, Inc. for risks arising under the Defense Base Act from the inception of TekStar's presence at the Roosevelt Roads Naval Base, Ceiba, Puerto Rico (February 1, 2004), to April 1, 2010. EX-5. Claimant alleges that TekStar remained Claimant's employer after April 1, 2010, with insurance coverage

provided by Zurich North America. It alleges further that TekStar was replaced by a different and completely separate corporate entity at some point in late 2010 or early 2011 (Power Cooling, Inc.). In its Opposition filed July 2, Claimant did not dispute these facts.

The record shows further that Claimant's job duties with all employers have remained unchanged over the course of his 18 years at the location in question, as have his alleged exposures to the toxic elements herein. EX-4 at Interrogatory 2.

DISCUSSION

Employer/Carrier maintains that Alaska National is not the carrier liable to pay compensation or medical benefits for two critical reasons:

- First, Alaska National is not the "last carrier" on the risk during exposure to injurious stimuli; and
- Second, the assignment of liability in occupational disease claims, of which this is one, flows from the date of disability not the date of awareness.

Given the allegation regarding COPD, I will address only the last carrier doctrine.

Employer bears the burden of demonstrating it is not the responsible employer, which it can do by establishing that Claimant was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. ***Maes v. Barrett & Hilp***, 27 BRBS 128, 131 (1993).

COPD

Claimant alleges that on May 17, 2004, Mr. Cruz filed a Claim for Compensation (LS 203) against Tekstar, Inc. which was controverted. "While the Employer/Carrier was controverting the case, the Claimant went for a follow up physician's visit on December of 2007. At that time, he was diagnosed with Chronic Obstructive Pulmonary Disease (COPD).' A pulmonary specialist, Carlos Alcalá, rendered the same conclusion regarding the COPD diagnosis.

A review of this file discloses that the allegations of COPD are not contained in the LS 10 filed February 15, 2012, and the parties have not submitted the LS 203 in question.

Therefore, I find that I do not have jurisdiction regarding the COPD allegation.

LAST CARRIER

The responsible carrier or employer is the last carrier or employer during whose employment the Claimant was exposed to injurious stimuli, prior to his awareness that he was suffering from an occupational disease. ***Travelers Ins. Co. v. Cardillo***, 225 F.2d 137 (2d Cir.), cert.denied, 350 U.S. 913 (1955).

Accepting, *arguendo*, that Claimant's allegations of toxic exposures are accurate, i.e., that he has been exposed to various toxins from 1992 to at least September 13, 2010 (the date he answered discovery propounded by Alaska National), Employer maintains that any resulting "disease" is not the liability of Alaska National because they are not the "…last carrier" and because "…disability" has not yet occurred.

A review of Claimant's Opposition discloses that no evidence or argument has been submitted on this issue. Apparently, Claimant has been employed by Power Cooling, Inc. after TekStar. This fact is admitted in Claimant's Opposition.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, 29 C.F.R. § 18.40; Fed, R. Civ. P. 56. In

deciding a motion for summary judgment, the fact-finder must view the facts in the light most favorable to the non-moving party. The moving party bears the burden of proof, though the opposing party "may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." ***Anderson v. Liberty Lobby***, 447 U.S. 242 (1986).

I find that there is no issue of fact in dispute: Claimant alleges ongoing exposure to toxic elements after Alaska National's coverage ended. Therefore, I accept that this Employer cannot be charged with the obligation to pay benefits.

ORDER

AFTER HAVING BEEN FULLY ADVISED in these premises, as to the claim for occupational exposure, I find that there is no issue of material fact outstanding and Employer TekStar is not liable as last employer.

THEREFORE, the Employer, TekStar, is **ENTITLED TO SUMMARY DECISION.**

SO ORDERED

A

DANIEL F. SOLOMON
Administrative Law Judge

Washington, D.C.