

[Cite as *State ex rel. Roger Bacon High School v. Indus. Comm.*, 2011-Ohio-1383.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Roger Bacon High School, :
Relator, :
v. : No. 10AP-277
Industrial Commission of Ohio and : (REGULAR CALENDAR)
Patrick J. Mullaney, Deceased[,]
Maria C. Carlevale-Mullaney, Spouse, :
Respondents. :

D E C I S I O N

Rendered on March 24, 2011

Taft Stettinius & Hollister LLP, Samuel M. Duran, and Andrew R. Thaler, for relator.

Michael DeWine, Attorney General, and Charissa D. Payer, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Roger Bacon High School ("Roger Bacon"), filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio, to vacate its order awarding death benefits

to Maria C. Carlevale-Mullaney, spouse of respondent Patrick J. Mullaney ("Mullaney"), now deceased, because the evidence demonstrates that Mullaney was exposed to asbestos after his employment at Roger Bacon, and a subsequent employer is responsible for Mullaney's last injurious exposure.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this opinion, recommending that this court deny the requested writ.

{¶3} Roger Bacon has not articulated any basis for objecting to the magistrate's findings of fact, and we adopt them as our own. Mullaney died of mesothelioma in 2007. Mullaney's widow filed a first report of injury form and asserted that Mullaney may have been exposed to asbestos while employed at Roger Bacon. The Ohio Bureau of Workers' Compensation ("BWC") allowed the death claim.

{¶4} As detailed in the magistrate's decision, Mullaney had an extensive work history that included multiple potential exposures to asbestos. From 1947 (at age 10) until 1953, Mullaney performed construction and renovation work. From 1953 to 1955, he worked on cars as a hobby. In the summer of 1954, he worked for about one month as a maintenance worker at Roger Bacon. In the summer of 1955, he worked as a painter at Carlisle Chemical. Mullaney received his medical degree in 1963 and practiced medicine thereafter. From 1964 until 1966, he served as a Marine combat physician and, during that time, served for about five weeks aboard a Navy vessel.

From 1967 to 1982, he worked at numerous hospitals. From 1976 to 1977, he performed home remodeling.

{¶5} John W. Cunningham, M.D., M.S., concluded that Mullaney's exposure while working at Roger Bacon caused his eventual mesothelioma and that his subsequent exposures were not significant factors in its development. Joseph E. Thorpe, M.D., concluded that Mullaney's exposure while serving aboard a Navy vessel was his last injurious exposure.

{¶6} Roger Bacon appealed BWC's allowance of a death claim. After a hearing, a district hearing officer ("DHO") affirmed the BWC order. On further appeal, a staff hearing officer ("SHO") affirmed the DHO order. The SHO addressed Mullaney's exposure while working at Roger Bacon in 1954 and found that claimant was exposed to asbestos dust during that time. The SHO awarded death benefits to Mullaney's widow.

{¶7} As noted, Roger Bacon filed a mandamus action and asked this court to vacate the commission's order. The magistrate concluded that the commission did not abuse its discretion by finding that Mullaney's last injurious exposure was during his employment at Roger Bacon in 1954.

{¶8} Roger Bacon has filed two objections to the magistrate's decision. In its first objection, Roger Bacon contends that the magistrate erred by concluding that the commission did not abuse its discretion because there is evidence of an injurious exposure after Mullaney's employment with Roger Bacon. As Roger Bacon explains, the rule of last injurious exposure assigns responsibility to the employer last providing

hazardous exposure to the claimant. See *State ex rel. Pilkington N. Am., Inc. v. Indus. Comm.*, 118 Ohio St.3d 161, 2008-Ohio-1506, ¶¶6-7. Although this rule eliminates the need to quantify a claimant's exposure, Roger Bacon contends that the magistrate did quantify Mullaney's exposure in allowing the commission's conclusion to stand. We disagree.

{¶9} The magistrate correctly articulated the rule of last injurious exposure. She discussed the quantity of Mullaney's exposure while working at Roger Bacon in response to Roger Bacon's contention that the exposure was not significant enough to have caused injury. She did not, however, weigh the various exposures to determine which was most injurious. In this respect, we, like the magistrate, will not consider or analyze what Mullaney might have believed about the cause of his mesothelioma or his reasons for filing a lawsuit against asbestos manufacturers. On these grounds, we overrule Roger Bacon's first objection.

{¶10} In its second objection, Roger Bacon contends that the magistrate erred by concluding that Dr. Cunningham's report was some evidence upon which the commission could rely. Roger Bacon contends that Dr. Cunningham improperly considered which employment exposure caused the mesothelioma, not which exposure was the last injurious one.

{¶11} In his report, Dr. Cunningham responded to specific questions posed by BWC, including the question whether the condition was "causally related to employment at a specific employer." BWC also asked, "when was the most significant exposure (year or job) for this individual that may have contributed to this condition?" In his

narrative, Dr. Cunningham first reviewed Mullaney's work history and his exposures to asbestos over that history. He distinguished the causes of mesothelioma, at issue here, from the causes of asbestosis. He noted that "[i]ndividuals who develop mesothelioma do not require a large dose exposure for prolonged periods of time." Rather, "[a] short duration exposure followed by an extended latency period of greater than 30 years is a frequent scenario in mesothelioma cases." He concluded that the weight of the medical evidence supported the diagnosis of mesothelioma "as being the direct and proximate result of his physical work activity while at Roger Bacon High School." He further concluded that any subsequent exposures "are not significant factors in causing this individual's mesothelioma condition."

{¶12} While Roger Bacon contends that Dr. Cunningham "misapplied the last injurious exposure rule," we conclude that Dr. Cunningham's report was not improper. The commission is responsible for weighing the evidence and determining the last injurious exposure. Dr. Cunningham's report, which concluded that Mullaney's exposure at Roger Bacon caused the mesothelioma and that his subsequent exposures "are not significant factors," was some evidence on which the commission could rely to grant the claim. The SHO expressly acknowledged Mullaney's exposures at Carlisle Chemical and in the military, but found that these exposures were not "to airborne asbestos particles that would have been of an injurious nature. Therefore, the last injurious exposure was at Roger Bacon High School." In addition to Dr. Cunningham's report, the SHO also relied on the testimony of the parties and the testimony contained in prior depositions. While contrary evidence could have supported a different

conclusion, the commission did not abuse its discretion by relying on Dr. Cunningham's report. Therefore, we overrule Roger Bacon's second objection.

{¶13} Following our independent review, and having overruled Roger Bacon's objections, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ.

Writ of mandamus denied.

BROWN and DORRIAN, JJ., concur.

death benefits to Maria C. Carlevale-Mullaney, spouse of respondent Patrick J. Mullaney ("claimant") (now deceased) because the evidence demonstrates that claimant was exposed to asbestos subsequent to his employment with relator and one of those other employers is responsible for decedent's last injurious exposure.

Findings of Fact:

{¶15} 1. Claimant was diagnosed with mesothelioma in 2005 and, as a result, died on January 13, 2007.

{¶16} 2. In March 2008, claimant's spouse filed a first report of injury or occupational disease form asserting that claimant "may have been exposed to asbestos while he was employed" at Roger Bacon.

{¶17} 3. In an order mailed November 26, 2008, the Ohio Bureau of Workers' Compensation ("BWC") allowed the claim as a death claim. The BWC relied on the November 6, 2008 report of John W. Cunningham, M.D., M.S.

{¶18} 4. In his November 6, 2008 report, Dr. Cunningham gave the following description of claimant's possible work exposures to asbestos:

* * * This individual was born in 1937 and from the period of 1947 until approximately 1953 he helped his father on weekends doing construction and remodeling work, and also helped his father in cabinet making and furniture repair and refinishing tasks, both in commercial and residential environments. This individual was also involved in hanging drywall on approximately twenty occasions during this period and using joint compound containing asbestos during this period. This individual also worked on cars, including brakes, from 1953 to 1955, as a hobby, both for himself and friends. He worked at Carlisle Chemical for one summer as a painter in 1955 and at Roger Bacon High School he worked in maintenance for the summer of 1954. According to Mr.

Hatfield and other records, this individual worked for one month while at Roger Bacon High School, in the summer of 1954, both inside and outside the boiler, and helped repair the exterior pipe insulation leading to the boiler, and he observed insulation and insulating mud while performing these job tasks. This individual received his medical degree in 1963 and practiced medicine ever since. He was a combat physician during the Vietnam conflict and his exposure to a ship was for 3 1/2 weeks as a passenger while in the Navy. Consequently, his possible shipboard exposure to asbestos was minimal, if any. * * *

{¶19} 5. Dr. Cunningham concluded that claimant had "an adequate exposure history to asbestos in 1954 while working for a summer at Roger Bacon High School to ascribe a direct causal relationship between his employment activities at Roger Bacon High School in 1954 and development of his mesothelioma in 2005 with his ultimate demise in 2007." Concerning claimant's other exposures to asbestos, Dr. Cunningham stated: "This individual's other possible asbestos related exposures, including in childhood when working with his father, and his employment and military activity subsequent to 1954 are not significant factors in causing this individual's mesothelioma condition."

{¶20} 6. The record also contains two reports prepared by Joseph E. Thorpe, M.D. In the first report, dated July 14, 2008, Dr. Thorpe provided the following description of claimant's work history and possible exposure to asbestos:

Dr. Patrick Mullaney, M D had an extensive employment and work exposure history[.] From 1937 to 1947 the patient had frequent asbestos exposure by remodeling homes with his father to include demolition as well as utilization of asbestos shingles, tile and drywall[.] From 1947 to 1953, Dr. Mullaney did further remodeling of residences and furniture stores with his father and was exposed to floor tiles and asbestos siding as well as asbestos joint compounds[.] In 1954, Dr. Mullaney

worked a summer job at Roger Bacon High School doing maintenance and repair and he stated in his transcript that he was exposed to floor tiles and also was involved in extensive repair of insulation on boiler pipes that contained asbestos[.] In 1955 he worked at a summer job at Carlisle Chemicals (Cincinnati Milacron) and worked 45 hours per week, mainly as a painter[.] He stated in his testimony, while working at Cincinnati Milacron that he had exposure to piping and insulation that he assumed had asbestos components although he was not involved in the active tearing or drilling of said materials. He stated that crews would wrap pipes, mud them and then later he would paint the pipes[.] In 1959 to 1963 he was at the University of Cincinnati Medical School and had some exposure to talc gloves[.] From 1964 to 1966 Dr. Mullaney was in the United States Navy on board the USS Navarro at which point he was confined to the ship and spent approximately 5-6 weeks aboard ship with exposure to unkept piping and suspected asbestos materials[.] From 1967 to 1982 he worked at several hospitals and claimed asbestos exposure to gloves containing talc[.] From 1976 to 1977 he again did some home remodeling and was exposed to joint compound and roof coating materials that contained asbestos. He also stated that he had exposure to brake repair at least twelve times during his lifetime in which he was repairing brake pads.

{¶21} With regard to the significance of claimant's exposures, Dr. Thorpe explained:

Based on my expert opinion and within the realm of reasonable medical certainty, I feel this patient had multiple exposures throughout his lifetime from 1937 through 1977 to asbestos products[.] It clearly is stated by the timeline, however, that this patient's significant exposures mostly occurred from 1937 through 1953[.] I think that there may have been some exposure to asbestos with boiler work being done at Roger Bacon High School in 1954, but the evidence of significant exposure to asbestos in 1955 at Cincinnati Milacron in a summer job is somewhat limited[.] It is obvious at that time that the patient performed work as a painter and although he was painting areas that had "supposed asbestos" applied to pipes, this was after the

material had been mudded, wrapped and presumably dried[.] This tends to limit the amount of aerosolized material that the patient is exposed to[.] More importantly, I think it is obvious that the patient had significant exposure while in the United States Navy aboard ship on the USS Navarro[.] It is commonly known that the amount of asbestos aboard ship during that time was quite extensive and the occurrence of asbestos related disease as well as asbestosis, or asbestos related malignancies was not uncommon[.] * * * It should also be noted that the patient had some exposure to remodeling joint compounds (asbestos) and roofing materials (asbestos) in 1976 through 1977 although the history of this exposure is somewhat sketchy[.] Therefore, based on the above reasoning, there is no evidence to suggest that the patient's last injurious exposure to asbestos was at Carlisle Chemical but actually was secondary to his exposure in the United States Navy (aboard ship) and from 1976-77 with exposure to asbestos roofing material[.]

* * * I would state that the United States Navel exposure was his last most likely injurious exposure to asbestos[.] However, it should be noted that the medical literature would support that most of the mesotheliomas are secondary to heavy exposure to asbestos often in childhood and then present in the fifth to seventh decade of life with a malignant pleural mesothelioma. * * *

{¶22} 7. Dr. Thorpe's January 21, 2009 report was apparently written in reply to the March 23, 2007 report of Mark A. Roberts, M.D., and an opinion letter from Richard A. Hatfield. With regard to the report of Dr. Roberts, Dr. Thorpe stated: "Dr. Roberts reviewed the patient's history and agreed that much of his exposure certainly could have stemmed from his remodeling work at an early age, but may also have had exposure at Roger Bacon High School and/or at Cincinnati Milacron." Regarding the opinion letter from Hatfield, Dr. Thorpe stated: "Mr. Hatfield * * * claimed no exposure in the United States Navy although it is clearly stated that the patient was aboard ship for at least five weeks." Following the review of those records, Dr. Thorpe concluded:

* * * [T]here is no evidence to suggest that the patient's last injurious exposure to asbestos was at Roger Bacon High School, but actually was secondary to his exposure in the United States Navy (aboard ship) and from 1976-1977 with exposure to asbestos roofing material.

Based on my expert opinion and within the realm of reasonable medical certainty, I do not find that Roger Bacon High School constituted the last injurious exposure to asbestos containing materials and again I would state that the United States Naval exposure was his last most likely injurious exposure to asbestos. * * *

Based on my expert opinion and within the realm of reasonable medical probability, Mr. Mullaney's malignant mesothelioma was not a direct result of his employment with Robert Bacon High School. * * *

* * * I find that Mr. Mullaney's last injurious exposure occurred during his employment in the United States Navy aboard ship on the USS Navarro. His exposure to asbestos materials on the USS Navarro was the last meaningful and significant documented exposure to asbestos materials noted in his records and testimony.

{¶23} 8. The record contains a transcript from a videotaped deposition of claimant taken in 2006. The deposition was taken as part of claimant's common pleas court action in *Mullaney v. A.W. Chesterton, Inc.*, Cuyahoga C.P. No. 577971. That action was filed against numerous defendants.¹ None of claimant's former employers, including Roger Bacon, were included in this lawsuit.

¹ Beazer East, Allen Refractories, Osborne Industries, A.C. Product Liability Trust, Certaineed, Dana and Union Carbide, Owens-Illinois, Riley Stoker Corp., Daimler Chrysler Corp., Garlock Sealing Technologies, LLC, RPM, Inc., RPM International, Inc., Bondex International, Inc., C.P. Hall, Alliedsignal, 3M Company, CBS Corp., General Electric, Georgia-Pacific, Peerless, Fidelity Builders, Supply, Inc., R. E. Kramig & Co., Inc., A. W. Chesterton, McGraw Construction Company, McGraw/Kokosing, Inc., Crown Cork & Seal, F.B. Wright of Cincinnati, Nock Refractories Co., IMC, and Eaton Corporation.

{¶24} 9. Roger Bacon appealed the order of the BWC allowing the death claim. That appeal was heard before a district hearing officer ("DHO") on January 27, 2009. The DHO affirmed the prior BWC's order.

{¶25} 10. Thereafter, Roger Bacon relator appealed the order of the DHO arguing that the DHO did not properly apply the last injurious exposure rule.

{¶26} 11. Roger Bacon's appeal was heard before a staff hearing officer ("SHO") on March 5, 2009. The SHO affirmed the prior DHO's order and addressed Roger Bacon's argument as follows:

It is the finding that the Decedent developed an occupational disease due to chronic exposure to asbestos fibers in the course of and arising out of his employment with the instant employer. The evidence indicates that the Decedent was employed at Roger Bacon High School in Cincinnati, Ohio in the summer of 1954 where he worked approximately three weeks. During this period of time he was exposed to an extensive amount of asbestos dust as another worker was installing and repairing asbestos installation to boiler pipes and other areas and as a result caused an extensive amount of asbestos dust which caused the Decedent to inhale while he was working at the high school. The exposure took place in the boiler area of the high school and is confirmed by multiple evidence in the claim file. Although he worked in other places of employment more specifically Carlisle Chemicals in the Navy he was not exposed to airborne asbestos particles that would have been of an injurious nature. Therefore, the last injurious exposure was at Roger Bacon High School and this is the employer that is responsible for this claim.

The death claim is allowed.

It is found that the Decedent's only dependent person is his spouse, Maria Carlevale-Mullaney. She was wholly dependent on the Decedent at the time of his death. The weekly benefits shall be determined by provisions of the Ohio Revised Code and wage records on file.

The continued payment of the surviving spouse's share shall be controlled and determined by the provisions of the Ohio Revised Code.

The basis for allowing this claim is a narrative medical review of Dr. John Cunningham dated 11/06/2008 and the testimony of the parties at today's hearing including provisions in the previous deposition that is in the claim file from the Decedent. The evidence supports the allowance of this death claim.

{¶27} 12. Roger Bacon's further appeal was refused by order of the commission mailed April 8, 2009.

{¶28} 13. Thereafter, relator, Roger Bacon High School, filed the instant mandamus action in this court.

Conclusions of Law:

{¶29} In this mandamus action, Roger Bacon argues that the commission abused its discretion by awarding death benefits in this claim based on the finding that Roger Bacon was the responsible employer under the last injurious exposure rule. Roger Bacon argues that the decedent was exposed to asbestos following his employment with Roger Bacon and that one of those later employers should be responsible for his workers' compensation claim under the last injurious exposure rule.

{¶30} There is conflicting medical evidence concerning the injurious nature of the decedent's exposure to asbestos at his various places of employment. Because the commission relied on the report of Dr. Cunningham who specifically opined that the decedent's exposure to asbestos while at Roger Bacon had direct causal relationship regarding his development of mesothelioma and that his other possible asbestos

exposures were not significant, the magistrate finds that commission did not abuse its discretion.

{¶31} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶32} The "last injurious exposure" rule developed because of the difficulties inherent in determining which of several employers should be responsible for a claimant's workers' compensation claim. As the court explained in *State ex rel. Pilkington N. Am., Inc. v. Indus. Comm.*, 118 Ohio St.3d 161, 2008-Ohio-1506, ¶6-7:

Occupational diseases can pose difficult questions of employer amenability for workers' compensation claims. Some common occupational diseases have latency periods of up to 40 years. When an employee has worked for multiple employers during that time, assigning workers' compensation responsibility can be difficult because "it is often impossible to go back over the years to quantify the

amount of exposure at each job or to pinpoint which exposure planted the seeds of eventual disease." [*State ex rel. Erieview Metal Treating Co. v. Indus. Comm.*, 109 Ohio St.3d 147, 2006-Ohio-2036, 846 N.E.2d 515] at ¶ 10.

This problem inspired the concept of last injurious exposure. Alluded to as early as 1950, see *State ex rel. Marion Power Shovel Co. v. Indus. Comm.* (1950), 153 Ohio St. 451, 456, 41 O.O. 438, 92 N.E.2d 14, the principle assigns responsibility to the employer last providing hazardous exposure. Concededly less than perfect, it "subordinates the practically unattainable scientific accuracy to the next best thing—consistency." *Erieview*, 109 Ohio St.3d 147, 2006-Ohio-2036, 846 N.E.2d 515, ¶ 10.

{¶33} In the present case, it is undisputed that claimant was exposed to materials containing asbestos after his employment with Roger Bacon ended. However, the question before the commission was not which employer last exposed claimant to asbestos, but which employer provided the last *injurious* exposure to asbestos.

{¶34} In his July 14, 2008 and January 21, 2009 reports, Dr. Thorpe opined that claimant's most significant exposures to asbestos occurred from 1937 through 1953.² Dr. Thorpe opined that claimant's "last injurious exposure" to asbestos was not at Roger Bacon, but that it actually occurred while he served in the United States Navy. By comparison, in his January 6, 2008 report, Dr. Cunningham concluded that claimant's exposure to "asbestos in 1954 while working for a summer at Roger Bacon High School" had direct causal relationship to his development of mesothelioma and that

² Because claimant was born in 1937 and did not begin performing remodeling work with his father until he was ten years old in 1947, it appears that the year 1937 is a typographical error which occurred in both reports.

claimant's "other possible asbestos related exposures, including in childhood when working with his father, and his employment and military activity subsequent to 1954 are not significant factors in causing this individual's mesothelioma condition."

{¶35} The determination that claimant's "last injurious exposure" to asbestos occurred while he was employed with Roger Bacon is supported by the report of Dr. Cunningham on which the commission specifically relied.

{¶36} In challenging the commission's order, Roger Bacon does not argue that Dr. Cunningham's report does not constitute some evidence upon which the commission could rely. Instead, Roger Bacon points to portions of claimant's deposition testimony from his products liability case where claimant indicated that, to his knowledge, his only exposure to asbestos at Roger Bacon occurred, not while he was cleaning the boiler, but while repairing and cleaning the pipe insulation which he did not actually install, but handled and scrubbed while it was on the pipes. By comparison, Roger Bacon points out that claimant testified that, while working for Carlisle Chemical, he removed asbestos insulation from boxes and handed it to the installers. Roger Bacon points out further that claimant testified that, while he was aboard the USS Navarro, there was a tremendous amount of pipe insulation which was not necessarily in good condition. Roger Bacon argues that claimant's deposition testimony clearly establishes that his last injurious exposure to asbestos occurred after his employment at Roger Bacon ended. Further, the magistrate points out that at page 25 of the stipulation, claimant actually testified that he believed he was exposed to asbestos while cleaning the boiler. Further, at page 26, claimant described the condition while working

in the boiler as being a "heavy fog" without any mask or other ventilation. This contradicts Roger Bacon's argument that claimant's exposure to asbestos at Roger Bacon was minimal and similar to claimant's exposure at Carlisle Chemical.

{¶37} Questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. Further, it is immaterial whether other evidence, even if greater in quality and/or quantity, supports the decision contrary to the commission's. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373.

{¶38} In determining that Roger Bacon was the employer where claimant's last injurious exposure to asbestos occurred, the commission specifically relied on Dr. Cunningham's November 6, 2008 report as well as testimony provided at the hearing before the SHO and the previous deposition testimony. The magistrate notes that claimant's deposition testimony was taken as part of his lawsuit against numerous manufacturers of asbestos containing materials to which claimant was exposed and which he believed caused his mesothelioma. This lawsuit did not include any of claimant's employers. While the record indicates that claimant was a doctor, there is no evidence in the record that would indicate that he was an expert in this particular field. Further, some of the defendants in the lawsuit manufactured products to which claimant was exposed while working for more than one employer. For instance, claimant described working with pipe insulation as being half-moon shape while working for both Roger Bacon and Carlisle Chemical. Further, contrary to Roger Bacon's assertions, claimant did testify that he handled the half-moon insulation while he was working for

Roger Bacon. Specifically, claimant testified that as he passed the insulation to his coworker, the material would flake off the insulation every time it was touched, that the insulation had to be cut and shaped to fit the pipes, and that a certain compound was used as well. (Tr. 26.) By comparison, when describing his work at Carlisle Chemical, claimant indicated that he was a painter, and that he followed the men who were fitting the pipes with the insulation and painted over the insulation. Claimant did also testify that he handled the insulation at Carlisle Chemical. (Tr. 27.)

{¶39} After reviewing the specific portions of the deposition transcript to which Roger Bacon directs the court's attention and after reading through all the deposition testimony, the magistrate finds that Roger Bacon's narrow interpretation of claimant's testimony does not establish that claimant's asbestos exposure while employed with Roger Bacon was necessarily so minimal that it could not have accounted for his last injurious exposure to asbestos.

{¶40} The commission cited the evidence upon which it relied and the report of Dr. Cunningham does constitute some evidence upon which the commission could properly rely. That report supports the commission's determination that claimant's employment at Roger Bacon, while not his last exposure to asbestos, was his last injurious exposure to asbestos. As such, the magistrate concludes that Roger Bacon has not demonstrated that the commission abused its discretion and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).