THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

JOHN J. McNICHOL	:	**TRIAL DIVISION-CIVIL**
	:	
VS.	:	**December Term, 2003**
	:	**No. 2508**
HONEYWELL INTERNATIONAL, INC.	:	
_____	:	
	:	
JOHN J. McNICHOL	:	
	:	**December Term, 2004**
VS.	:	**No. 3167**
	:	
FRUENHAUF TRAILER CORPORATION	:	

O P I N I O N

This matter comes to this Court as a result of the Order entered by the Superior Court which remanded this matter for a "reconsideration in light of our Supreme Court's recent decision in *Summers v. Certainteed Corp.,* (citation omitted) Order of November 9, 2010."

In reconsidering this Court's original decision which was entered on August 7, 2008, this Court had the benefit of the comprehensive Supplemental Briefs of the parties, addressing the effect, if any, *Summers* had on the granting of Summary Judgment in this action.

For purposes of this review, it is necessary first to identify what was the basis for the decision on the issues presented in the underlying Summary Judgment Motion.

In its conclusion, this Court found the following:

> Moreover, as discussed previously, Plaintiff's own testimony reveals that his lifestyle has not been adversely impacted by his condition as he still walks two to three miles per day and continues to fish on his boat every other week in the summer. By all accounts Plaintiff is "able to lead [an] active, normal [life], with no pain or suffering, no loss of an organ function, and

> no disfigurement due to scarring." *Lonasco, supra* at 372.
>
> Thus, the entry of summary judgment was proper as Plaintiff has failed to show that he suffers disabling consequences or manifest physical symptoms from his asbestos exposure and he therefore does not have a cognizable claim in this Commonwealth. *Giffear,* 632 A.2d at 884.
>
> CONCLUSION
>
> For the forgoing reasons this Court's order granting summary judgment in favor of all Defendants pursuant to *Giffear* should be AFFIRMED.

This conclusion followed upon the earlier analysis:

> "The present rules for recovery in asbestos cases were established first by the Court in *Giffear v. Johns-Manville Corp., supra* and affirmed by the Pennsylvania Supreme Court in *Simmons v. Pacor,* 674 A.2d 232 (1996)." *Summers v. Certainteed Corp.,* 886 A.2d 240, 242 (Pa.Super. 2005). In *Giffear,* our Superior Court held that "pleural thickening, absent *disabling consequences* or *manifest physical symptoms,* is a non-compensable injury and is therefore not a cognizable claim in the Commonwealth." *Giffear,* 632 A.2d at 884 (emphasis added). "In affirming *Giffear, supra,* [our Supreme] Court observed that pleural thickening is considered asymptomatic when 'individuals are able to lead active, normal lives, with no pain or suffering, no loss of an organ function, and no disfigurement due to scarring.'" *Lonasco v. A-Best Prods. Co.,* 757 A.2d 367, 372 (Pa.Super. 2000) (quoting *Simmons,* 674 A.2d at 236).

The analysis was based upon the facts of record which consisted of Plaintiff's testimony.

> In the case *sub judice,* the record fails to show that Plaintiff's pleural disease adversely affects his lifestyle. Plaintiff's own testimony reveals the he continues to work 40 hours a week, five days a week at SEPTA with no restrictions or limitations. *See* Deposition of John McNichol, 6/29/06, p. 372. Plaintiff contends because his duties at SEPTA are now out of the subway, his job has altered. However,

> Plaintiff testifies that, "it's the same job." *Id.* At 373. Plaintiff is doing the same job as a title millwright repairing pumps and compressors and has to exert the same energy; his location has simply changed. *Id.*
>
> Q. Have your duties at SEPTA changed at all since you last described them in your prior deposition?
> A. No.
> Q. Your duties haven't been restricted or anything like that?
> A. No.
> Q. Okay. And your job description remains the same as you described it a year ago?
> A. Yes.
> Q. Okay.
> A. Well, I'll say this, I'm still the same title millwright, but I'm not in the subway, I'm out of the subway.
> Q. You're out of the subway?
> A. But it's the same job.
>
> *Id.* At 327-373.
>
> Plaintiff has not had to restrict any of his recreational activities and continues to walk about two to three miles during the course of the day. *Id.* Also, he continues to maintain a boat which he takes out for fishing in the bay and the ocean in Wildwood, New Jersey, about twice a month in the summer. *Id.* At 176. Given Plaintiff's description of his unchanged physical activity level, it is difficult to conclude that his asbestos-related pleural disease causes him to suffer from "disabling consequences or manifest physical symptoms" such that he can maintain a cognizable claim. *See Giffear, supra.*

In *Summers,* our Supreme Court reversed evenly a divided Superior Court panel which had affirmed the lower Court's decision to grant summary judgment. In doing so, the Court reviewed the Opinion in Support of Affirmance (OISA) which it found had:

> . . . extensively relied upon the Superior Court's panel decision in *Quate v. American Standard, Inc., 2003 PA Super 64, 818 A.2d 510 (Pa. Super. 2003),* for the proposition that Appellants' cigarette smoking

> and obstructive lung diseases "may have caused [their] shortness of breath upon exertion and therefore [the medical conditions] cannot be causally related to asbestos exposure sufficient to sustain a compensable injury. *Id.*

The specific holding of the Superior Court *Quate* Panel that was inconsistent with Pa. Law, was identified by our Supreme Court in *Summers:*

> …we hold that where a Plaintiff suffers from a non-asbestos-related medical condition, the symptoms of which are consistent with medical conditions arising from exposure to asbestos, the existence of those non-asbestos-related medical conditions negate his ability to establish the necessary causal link between his symptoms and asbestos exposure. Under these circumstances, summary judgment is proper.

This holding of the *Quate* Panel was disapproved by the Supreme Court in *Summers:*

> . . . where it is clear that reasonable minds could differ on the issue of causation, precluding asbestos litigants from pursuing causes of action, supported by competent medical evidence, merely because of the existence of competing health conditions, is unsustainable. Accord *Vattimo, 465 A.2d at 1234.* To that end, the *Quate* analysis defies the scores of cases decided over the decades by the appellate courts of this Commonwealth holding that disputed issues of causation are for the jury and jury alone. Accordingly, after careful consideration, to the extent *Quate* states or holds otherwise, it is explicitly disapproved.

Clearly, the issue in *Summers* was the compelling nature of disputed issues of causation based upon <u>competent medical evidence</u> (emphasis added).

That was not the issue before this Court. The issue <u>was</u> the asymptomatic nature of Mr. McNichol's illness. This is what <u>this Court focused on and it is what its decision</u> <u>turned on</u>. This Court did exactly what our Supreme Court said the *Quate* panel should have done to be in compliance with Pa. Law.

> Mr. Quate's shortness of breath, however, did not restrict his daily activities, nor prevent normal functioning. *Id. At 514.* Rather than concentrating on Mr. Quate's condition being asymptomatic in nature, the Superior Court panel instead decided that Mr. Quate's myriad of medical conditions, all of which may cause shortness of breath, precluded Mr. Quate from establishing the necessary causal connection between the breathlessness and asbestosis to survive a motion for summary judgment:
> 17. To be sure, had the Quate panel denied recovery on this basis, such a holding would have been wholly consistent with this Court's decision in *Simmons, supra pp.14-15.*

The decision by this Court to grant Summary Judgment was based upon the *Giffear, Lonasco, Simmons* line of cases which was undisturbed and in fact, reinforced by the Supreme Court *Summers* decision. *Id.* Therefore, affirmance in the instant case is appropriate.

BY THE COURT:

_____

ALLAN L. TERESHKO, J.

5-23-2011

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DATE