

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

ROSEMARY SNYDER

**PLAINTIFF-APPELLANT
CROSS-APPELLEE**

CASE NO. 1-05-41

v.

FORD MOTOR CO.

**DEFENDANT-APPELLEE
CROSS-APPELLANT
-AND-**

OPINION

GENERAL DYNAMICS, ET AL.

DEFENDANTS-APPELLEES

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court**

**JUDGMENT: Judgment Affirmed in Part, Reversed in Part and
Cause Remanded**

DATE OF JUDGMENT ENTRY: December 5, 2005

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BRYANT, J.

{¶1} The plaintiff/appellant/cross-appellee, Rosemary Snyder (“Rosemary”), appeals from the judgment of the Allen County Common Pleas Court denying her motion for summary judgment and granting summary judgment to the defendant/appellee/cross-appellant, Ford Motor Company (“Ford”); the defendant/appellee, General Dynamics Land Systems, Inc. (“General Dynamics”); and the defendant Rockwell International (“Rockwell”). Apparently, the trial court also granted summary judgment to G.F. Clingerman (“Clingerman”), which is represented by the defendant/appellee, Administrator of the Worker’s Compensation Bureau (“Administrator”). The trial court dismissed Rosemary’s cause of action.

Statement of the Facts

{¶2} Allen G. Snyder (“Allen”) was born on July 22, 1946 and married Rosemary on January 30, 1965. At the time of their marriage, Allen was employed by Rockwell, located in Kenton, Ohio. Allen continued his employment with Rockwell until 1971. Between 1973 and 1984, Allen worked for Clingerman in Bellefontaine, Ohio. Allen was employed by General Dynamics, located in Lima, Ohio from 1984 through 1993, and between 1993 and 1999, he was employed by Ford in Lima, Ohio.

{¶3} In 2000, Allen was diagnosed with malignant mesothelioma, which caused his death on November 11, 2001. Unlike asbestosis which is an “[i]nflammation commonly leading to fibrosis of the lungs[,]” mesothelioma “is a cancer, ‘[a] rare neoplast derived from the lining cells of the pleura and peritoneum which grows as a thick sheet covering the viscera[.]’” *State, ex rel. Hubbard v. Indus. Comm’n*, 96 Ohio St. 3d 336, 2002-Ohio-4795, 774 N.E.2d 1206, at ¶ 13 (quotation omitted).

Statement of the Case

{¶4} After Allen’s death, Rosemary filed four separate worker’s compensation claims for widow’s benefits, one against each employer, alleging that Allen died from mesothelioma, which was caused by asbestos exposure. The Industrial Commission of Ohio determined that Rosemary did not have a right to

participate in the worker's compensation fund and denied her claims. Rosemary filed an appeal in the Allen County Common Pleas Court on January 27, 2003.

{¶5} The trial court's docketing statement shows an extensive procedural history in this case; however, a summary of the key events is sufficient for our analysis and this opinion. Rosemary filed her complaint with the trial court on January 28, 2003, naming Ford, General Dynamics, and the Administrator as defendants. On June 16, 2003, Rosemary filed a request for admissions to which Ford failed to respond, and on July 22, 2003, Rosemary moved for summary judgment. On July 28, 2004, Ford filed a motion to amend admissions and a memorandum in support, which the trial court granted on August 13, 2003. On August 27, 2003, Ford filed its responses to Rosemary's first request for admissions, and on September 2, 2003, Ford filed a motion for summary judgment with the supporting affidavits of Gregory B. Denny, Gerald P. Liebrecht ("Liebrecht"), Kevin P. Bruin ("Bruin"), and Michael S. Miller ("M. Miller"). Ford filed the affidavit of Richard T. Callery, M.D. ("Callery") on September 22, 2003 and the affidavit of Paul J. Eby, M.D. ("Eby") on September 24, 2003.

{¶6} On January 5, 2004, Rosemary filed motions to strike the affidavits of Bruin, Liebrecht, M. Miller, and Gregory Denny. On January 8, 2004, the affidavit of Carlos M. Bedrossian, M.D. ("Bedrossian") was filed. The trial court filed its judgment entry on January 15, 2004, granting Rosemary's motion to strike

Gregory Denny's affidavit, overruling the remaining motions to strike, and overruling both motions for summary judgment.

{¶7} Rosemary amended her complaint on April 23, 2004, joining Clingerman, through the Administrator, and Rockwell as defendants. On January 10, 2004, Bedrossian and Rosemary's depositions were filed. Between January 24, 2005 and May 18, 2005, General Dynamics and Rockwell filed motions for summary judgment, and Ford filed a second motion for summary judgment. Rosemary and the Administrator filed briefs in opposition, and General Dynamics, Ford, and Rockwell filed reply briefs. Attached to the parties' memorandums were various additional affidavits and exhibits. On May 18, 2005, the trial court entered judgment on the defendants' motions stating, "[i]t is, accordingly ORDERED [sic], ADJUDGED and DECREED each of the defendants' motions for summary judgment is granted and as to each defendant the case is dismissed, at plaintiff's costs." J. Entry, May 18, 2005, at 9.

{¶8} Rosemary filed a notice of appeal of June 15, 2005 and asserts the following assignments of error as to the trial court's January 15, 2004 and May 18, 2005 judgment entries:

The trial court committed reversible error when it granted summary judgment in favor of the defendant Administrator, Ohio Bureau of Workers' Compensation who did not file a motion for summary judgment.

The trial court committed reversible error when it granted Ford and [General Dynamics'] motions for summary judgment based upon a finding that no genuine issues of material fact remained to be litigated with respect to Allen Snyder's occupational exposures to asbestos and the proximate cause of Allen Snyder's death from malignant mesothelioma.

The trial court committed reversible error when it failed to strike the affidavits of Gerald Liebrecht, Kevin Bruin and Michael Miller submitted by Ford Motor Co.

The trial court abused its discretion when it allowed Ford Motor Co. to amend its admissions by default.

The trial court committed reversible error when it denied [Rosemary's] motion for summary judgment.

On June 23, 2005, Ford filed a notice of cross-appeal. Ford raises the following assignment of error as to the trial court's January 15, 2004 judgment entry, which overruled its initial motion for summary judgment:

The Trial Court Erred in Denying Ford's Motion For Summary Judgment Because, Owing to the LONG LATENCY PERIOD of Mesothelioma, [Allen] Did Not Suffer An Injurious Exposure in the Course of His Employment at Ford Which Proximately Caused His Death.

{¶9} As the result of a settlement agreement, Rosemary dismissed Rockwell with prejudice on September 14, 2005. Therefore, we review only those issues concerning Ford, General Dynamics, and the Administrator.

Standard of Review

{¶10} A trial court's grant of summary judgment is reviewed de novo on appeal. *Lorain Nat'l Bank v. Saratoga Apts.* (9th Dist. 1989), 61 Ohio App. 3d

127, 129, 572 N.E.2d 198. Thus, such a grant will be affirmed only when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and “reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.” Civ.R. 56(C).

{¶11} The moving party may file its motion for summary judgment “with or without supporting affidavits[.]” Civ.R. 56(A). However, “[a] party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.” *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112, 526 N.E.2d 798, syllabus. Once the moving party demonstrates it is entitled to summary judgment, the burden shifts to the non-moving party to show why summary judgment is inappropriate. See Civ.R. 56(E). If the non-movant fails to respond, or fails to support its response with evidence of the kind required by Civ.R. 56(C), the court may enter summary judgment in favor of the moving party. *Id.* Otherwise, summary judgment should be granted with caution, with a court construing all evidence and deciding any doubt in favor of the non-movant. *Murphy v. Reynoldsburg*, 65 Ohio St. 3d 356, 360, 1992-Ohio-95, 604 N.E.2d 138.

{¶12} We begin our review of this case with those matters associated with the trial court's first judgment entry filed on January 15, 2004.

Rosemary's Fourth and Fifth Assignments of Error

{¶13} In the fourth assignment of error, Rosemary contends that the trial court abused its discretion when it allowed Ford to amend its admissions. In the fifth assignment of error, Rosemary contends that the trial court erred by not granting summary judgment in her favor because Ford's failure to timely respond to her request for admissions "constitutes a conclusive admission and also satisfies the written admission requirement of OH Civ.R. 56(C)." In response to the fourth assignment of error, Ford contends that the trial court acted within its sound discretion in allowing Ford to amend its pleadings so the case could be resolved on the merits. Responding to the fifth assignment of error, Ford contends that Rosemary's motion for summary judgment was merely a procedural tactic, and "[w]ithout the deemed admissions resulting from Ford's inadvertent failure to respond, the cornerstone for [Rosemary's] motion for summary judgment was removed."

{¶14} Civil Rule 36 governs the use of admissions as a discovery tool and states in pertinent part:

[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . . the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved

thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

Civ.R. 36(B). Thus, the trial court has sound discretion in granting a motion to amend admissions, and its decision will not be disturbed absent an abuse of discretion. See *Graham v. Allen County Sheriff's Office*, 3rd Dist. No. 1-05-18, 2005-Ohio-4190, at ¶ 6 (citation omitted). An abuse of discretion is more than an error of law or judgment; rather it shows that the trial court acted arbitrarily, unreasonably, or unconscionably. *Mortimore v. Mayfield*, (3rd Dist. 1989), 65 Ohio App. 3d 450, 456, 584 N.E.2d 770 (citing *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, 87, 482 N.E.2d 1248 (citations omitted)).

{¶15} Rosemary filed her certificate of service for her first request for admissions on June 18, 2003. Because Ford failed to respond, Rosemary filed a motion for summary judgment on July 22, 2003 alleging that Ford admitted the elements of her complaint by default. On July 28, 2003, Ford requested leave to amend its admissions. The trial court's order was filed on August 13, 2003 and states in pertinent part:

the inadvertence in failing to respond to the discovery requests was due to the change in personnel in defendant's attorney's office and was not willful.

Plaintiff's motion to compel is well taken in part in that plaintiff is entitled to discovery and has made an effort, by way of the July 24, 2003 letter, to resolve the dispute. However, in the July 24, 2003 letter, the plaintiff demanded that defendant provide discovery within the one day left pursuant to the Court's original scheduling

order. . . . The Court finds Civ.R.37(E) requires a “reasonable” effort to resolve the matter through discussion and a one-day demand is arguably not reasonable.

Order, Aug. 13, 2003, 1-2. Additionally, we find no evidence to indicate how Rosemary would be prejudiced if Ford were permitted to amend its admissions. Therefore, the trial court did not abuse its discretion in allowing Ford to amend its admissions. The fourth assignment of error is overruled.

{¶16} Rosemary’s motion for summary judgment was grounded on Ford’s admissions by default. While Rosemary is correct that a failure to respond is a conclusive admission that may justify a grant of summary judgment, the trial court acted within its discretion by allowing Ford to amend its admissions. See *Dobbelaere v. Cosco* (3rd Dist. 1997), 120 Ohio App. 3d 232, 244, 697 N.E.2d 1016. In *Dobbelaere*, supra, the defendant was granted summary judgment because the plaintiff failed to either respond to admissions or file a motion to amend admissions. In this case, Rosemary filed a motion for summary judgment 36 days after she filed her request for admissions. Ford filed its motion to amend admissions six days later, and as noted above, the trial court did not abuse its discretion in granting Ford’s motion. Clearly, this case is not similar to *Dobbelaere*, supra.

{¶17} By amending its admissions, Ford created genuine issues of material fact as to whether Allen was exposed to asbestos during his employment with Ford

and whether any asbestos exposure at Ford was injurious, which precludes the trial court from granting summary judgment. The fifth assignment of error is overruled.

Rosemary's Third Assignment of Error

{¶18} In the third assignment of error, Rosemary contends that the trial court abused its discretion when it considered the affidavits of Liebrecht, Bruin, and M. Miller. Rosemary contends that Liebrecht and Bruin's affidavits were not based on personal knowledge because neither man witnessed Allen performing his job duties at Ford. Furthermore, Rosemary contends that M. Miller could not have personal knowledge about Allen's job duties because he was hired in the summer of 2000, and Allen worked for Ford from 1993 through 1999. Ford contends that the affidavits were made on the personal knowledge of each affiant based on their respective employment duties.

{¶19} A trial court's decision to grant or deny a motion to strike affidavits is reviewed for an abuse of discretion. *Churchill v. Gen. Motors Corp.*, 12th Dist. No. CA 2002-10-263, 2003-Ohio-4001, at ¶ 9 (citation omitted). A trial court may consider evidence in the form of an affidavit in deciding a motion for summary judgment; however, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Civ.R.

56(E). “Personal knowledge” has been defined as “knowledge gained through firsthand observation or experience, as distinguished from a belief based upon what someone else has said.” *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St. 3d 314, 2002-Ohio-2220, 767 N.E.2d 707, at ¶ 26 (quotation omitted). In deciding whether to strike the affidavits in question, the trial court noted:

the affidavits of Miller, Liebrecht and Bruin *are* made on the personal knowledge of the affiant. Judging what each of those affiants says, based on their respective position, point of view, tenure or ability to personally witness plaintiff’s decedent, would result in the Court’s passing on the credibility of what they state.

J.Entry, Jan. 15, 2004, at 2 (emphasis in original).

{¶20} Liebrecht’s affidavit indicates that he was employed at Ford since 1974, and he has been the Supervisor of Technical Construction Maintenance for over 25 years. *Aff. Liebrecht, Gerald P.*, Sep. 2, 2003, at ¶ 2. Liebrecht also states that he supervises skilled tradesmen, including hydraulic machine repairmen, which would have included Allen, and none of the machines or objects around which Allen was required to work contained any asbestos. *Id.* at ¶¶ 2-3. Bruin’s affidavit contains the following statements: he was employed as the environmental engineer at Ford since 1985, the typical duties of a hydraulic machine repairman, Ford’s manufacturing equipment has not contained asbestos since at least 1993, and “Allen G. Snyder, Sr., was never exposed to asbestos as part of his job duties at [Ford].” *Aff. Bruin, Kevin P.*, Sep. 2, 2003, at ¶¶ 2-6. In

M. Miller's affidavit, he stated the following: he has been employed at Ford since the summer of 2000 as a safety engineer, the duties of a hydraulic machine repairman, the manufacturing equipment at Ford has not contained asbestos since before 1993, and "Allen G. Snyder, Sr., was never exposed to asbestos as part of his job duties at [Ford]." Aff. Miller, Michael S., Sep. 2, 2003, at ¶¶ 2-6.

{¶21} Liebrecht, Bruin, and M. Miller's affidavits were made with personal knowledge based on their employment and job duties at Ford. We cannot find that the trial court abused its discretion by not striking these affidavits. The third assignment of error is overruled.

Ford's Assignment of Error

{¶22} In its sole assignment of error, Ford contends that the trial court erred in overruling its initial motion for summary judgment. Ford contends even if Allen was exposed to asbestos at Ford, the exposure was not the proximate cause of the malignant mesothelioma, which caused his death. Ford contends the latency period for mesothelioma is at least 20 years, and since Allen began working for Ford seven years before he was diagnosed, any asbestos exposure at Ford could not have caused the cancer. Rosemary contends that there were genuine issues of material fact as to latency, and the trial court did not err in overruling summary judgment for Ford.

{¶23} Appellate courts are required to consider only the evidence that was before the trial court when it made its decision. *Walter v. AlliedSignal, Inc.* (3rd Dist. 1999), 131 Ohio App. 3d 253, 258, 722 N.E.2d 164 (citations omitted). Therefore, when the trial court entered its judgment on January 15, 2004, the record consisted of the following evidence: Rosemary's motion for summary judgment; Bedrossian's affidavits; Bedrossian's reports dated July 29, 2001, August 2, 2002, and December 12, 2003; Ford's motion for summary judgment and response to Rosemary's motion for summary judgment; Liebrecht's affidavit; Bruin's affidavit; M. Miller's affidavit; Callery's affidavit; Eby's affidavit; Rosemary's response to Ford's motion for summary judgment; Jerald Knotts' affidavit; Mike Lawson's affidavit; Rosemary's supplemental brief; and John Martin Murphy's affidavit.

{¶24} The latency period is "the time span between the injurious exposure to asbestos and the onset of the disease." *Gradwell v. A.S. Helbig Constr. Co.*, 9th Dist. No. 14520, 1990 WL 136068, at * 4. Ford correctly cites *Gradwell* for the proposition that summary judgment is proper when the latency period of a disease is longer than the length of the most recent employment. However, *Gradwell* is not applicable here because in that case the evidence was "completely one-sided and overwhelming[.]" *Id.* In *Gradwell*, the claimant's decedent had worked at his last place of employment for less than two years before he died of mesothelioma.

Id. at * 1. The experts testified that the latency period for mesothelioma is at least 15 years, and several of them acknowledged shorter latency periods of one or five years. Id. at * 4. However, all of the experts agreed that the disease was not caused by his last place of employment. Id.

{¶25} This case does not contain such “one-sided and overwhelming” evidence. Ford presented the following evidence:

Malignant mesothelioma which is contracted as a result of occupational exposure to asbestos has a long latency period of from 20 to 30 years or more . . .

Because of the long latency period involved in the development of the disease of malignant mesothelioma, the disease process had to . . . have been already initiated at the time of [Allen’s] first employment at Ford in 1993.

No matter what kind of exposure to asbestos [Allen] may have had due to his employment at Ford, it could not have caused the malignant mesothelioma.

Aff. Callery, Richard T., M.D., Sep. 2, 2003, ¶¶ 5-7; Aff. Eby, Paul J., M.D., Sep. 2, 2003, ¶¶ 5-7.

{¶26} Rosemary presented a genuine issue of material fact by introducing Bedrossian and Murphy’s affidavits. Attached to Murphy’s affidavit was an Industrial Relations Bulletin, which had been contained in a packet entitled “Asbestos Action Program” prepared by the UAW-Ford National Joint Committee on Safety and Health. Murphy properly authenticated the bulletin by testifying that it was a true and accurate copy of the original. See *Zeedyk v. Agric. Soc’y of Defiance County, Inc.*, 3rd Dist. No. 4-04-08, 2004-Ohio-6187, at ¶ 19 (citation

omitted); Pl. Supp. Br., Jan. 12, 2004, Ex. A, ¶¶ 3-4. The bulletin stated in pertinent part:

[m]esothelioma of the peritoneum and pleura (cancer of membraneous lining of abdominal and chest cavities) are also associated with asbestos inhalation. . . . Some forms of asbestos appear far more carcinogenic than others. As with asbestosis, there is a long *latent period of at least five years* and typically more than 20 years before cancer may develop.

Pl. Supp. Br., at Ex. A (emphasis added). Likewise, Bedrossian stated the following:

I cannot exonerate any of [Allen's] occupations, nor can I implicate one, more than the other, in their ability to generate dust and expose [Allen] to asbestos. . . . The degree of scientific progress in this field also *mitigates against assuming that the older exposure is the culprit and the most recent one is automatically the safer one in the chain of events*. Short of direct measurements, [Allen] could well have been exposed to more asbestos as a maintenance man at Ford than a machinist at any of his other jobs.

[O]ur knowledge about the latency period resides on distribution curves, whereby averages and means are calculated and a range is offered. Few scientists would issue a firm opinion regarding an individual case on statistical calculations based on population studies. In all such studies there are always the outliers, either the more susceptible patient who developed the condition more precociously or the late bloomer, who took longer to develop the same ailment.

In the absence of a scientific means to exonerate or implicate one occupation more than another, I also conclude, based on a reasonable degree of medical probability, that *all exposures, including the one [Allen] experienced at Ford*, are significant contributing causes to his mesothelioma.

Pl. Br., Jan. 5, 2004, at Ex. 5B (emphasis added).

{¶27} Clearly, there is a genuine issue of material fact as to whether the latency period bars Rosemary from participating in the fund as against Ford. Although Bedrossian acknowledged a lengthy latency period for most mesothelioma cases, he clearly stated that any exposure at Ford could have caused or contributed to Allen's cancer. The trial court did not err in denying Ford's initial motion for summary judgment, and Ford's sole assignment of error is overruled.

Rosemary's First Assignment of Error

{¶28} In the first assignment of error, Rosemary contends that the Administrator never filed a motion for summary judgment, nor did it join Ford or General Dynamics' motions for summary judgment. Therefore, Rosemary contends that the trial court erred in granting summary judgment to the Administrator in its May 18, 2005 judgment entry. In response to Rosemary's first assignment of error, the Administrator acknowledges that a trial court may not generally grant summary judgment sua sponte; however, it contends there are exceptions to the general rule. The Administrator argues that "[s]ua sponte summary judgment will be upheld when the relevant facts are before the court on a motion of a co-defendant, . . . by the opposing party's motion for summary judgment and the subsequent responsive briefs . . . , and when a party's motion includes some but not all claims presented." The Administrator contends that all

relevant evidence was before the trial court through Ford and General Dynamics' motions for summary judgment, and therefore, the trial court properly included it in granting summary judgment to all defendants.

{¶29} Generally, “a party who has not moved for summary judgment is not entitled to such an order, even where co-defendants have filed for and obtained this relief.” *L & W Supply Co., Inc. v. Constr. One, Inc.*, 3rd Dist. No. 5-99-55, 2000 WL 348990, at * 5 (citing *Marshall v. Aaron* (1984), 15 Ohio St. 3d 48, 472 N.E.2d 335, syllabus). However, “an entry of summary judgment against the moving party does not prejudice his due process rights where all relevant evidence is before the court, no genuine issue as to any material fact exists, and the non-moving party is entitled to judgment as a matter of law.” *State, ex rel. Cuyahoga County Hosp. v. Ohio Bureau of Workers' Comp.* (1986), 27 Ohio St. 3d 25, 28, 500 N.E.2d 1370 (citation omitted). Assuming all of the evidence was before the trial court based on Ford and General Dynamics' motions, we must determine whether the Administrator was entitled to summary judgment.

{¶30} When the claimant wishes to appeal more than one decision of the Industrial Commission, it may join the cases into one appeal, which was apparently done in this case in the interest of judicial efficiency. See *State, ex rel. Republic Steel Corp. v. Quinn* (1984), 12 Ohio St. 3d 57, 465 N.E.2d 413. On appeal, the only matter at issue is the claimant's right to participate in the fund.

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See R.C. 4123.512(D); *State, ex rel. Burnett v. Indus. Comm'n* (1983), 6 Ohio St. 3d 266, 268, 452 N.E.2d 1341. Therefore, the “question as to which employer is to be charged is not a question appropriate for appeal.” *Bagin v. IRC Fibers Co.* (11th Dist. 1991), 72 Ohio App. 3d 1, 6, 593 N.E.2d 405 (citation omitted).

Likewise, the Supreme Court has established that

[t]he right at issue in the appeal is the *right to participate* in the state fund and *not a claim directed against a particular employer*. The appeal proceeding is a trial de novo and the Civil Rules apply. By discovery and joinder, the proper employers can be ascertained and made parties, if necessary.

Burnett, supra at 268. In the instant case, it is irrelevant that this matter began as four separate worker’s compensation claims. Once any of the claims were appealed, the other employers could be joined to the appeal, and the only issue properly before the trial court was whether Rosemary had a right to participate in the worker’s compensation fund. If the trial court found that Rosemary had a right to participate in the fund, the case would be remanded to the Bureau of Worker’s Compensation to act as the fact finder and determine which employer was liable. See R.C. 4123.512(G) (“[i]f the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code”); *Anders v. Powertrain Div.*,

Gen. Motors Corp., 3rd Dist. Nos. 4-03-16 to 4-03-47, 2004-Ohio-2469, at ¶ 18 (if a right to participate is established on appeal, “the claimant has cleared the first hurdle, and then may attempt to establish his or her extent of disability.”) (citations omitted).

{¶31} To prove a right to participate in the worker’s compensation fund, Rosemary must first establish that Allen was exposed to asbestos at any employer’s facility. See *Gradwell*, supra at * 3. Second, as to any such exposure, Rosemary must establish it was injurious. *Id.* An injurious exposure either proximately causes the occupational disease or augments or aggravates a pre-existing occupational disease. *Id.* (citing *State, ex rel. Hall China Co. v. Indus. Comm’n* (1962), 120 Ohio App. 3d 374, 377-378, 202 N.E.2d 628). “Proximate cause” in worker’s compensation cases is given the same meaning as in tort cases; “a happening or event which as a natural and continuous sequence produces an injury without which the result would not have occurred.” *Zavasnik v. Lyons Transp. Lines, Inc.* (8th Dist. 1996), 115 Ohio App. 3d 374, 377, 685 N.E.2d 567 (citation omitted). Proximate cause is therefore a “but-for” test; as in, but for the asbestos exposure, mesothelioma would not have resulted. Furthermore, where expert medical testimony is required to “establish a causal connection between the industrial injury and a subsequent physical condition, the proof must establish a probability and not a mere possibility of such causal connection.” *Id.* (quoting

Randall v. Mihm (2nd Dist. 1992), 84 Ohio App. 3d 402, 406, 616 N.E.2d 1171, 1174).

{¶32} Finally, Rosemary must establish that mesothelioma is an occupational disease. See R.C. 4123.59. Although mesothelioma is not a scheduled occupational disease under R.C. 4123.68, it qualifies as an occupational disease if it meets the following test:

“(1) The disease is contracted in the course of employment; (2) the disease is peculiar to the claimant’s employment by its causes and the characteristics of its manifestation or the conditions of the employment result in a hazard which distinguishes the employment in character from employment generally; and (3) the employment creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.”

Id. (quoting *State, ex rel. Ohio Bell Tel. Co. v. Krise* (1975), 42 Ohio St. 2d 247, 327 N.E.2d 756, at syllabus). In this case, the parties have apparently conceded that mesothelioma caused Allen’s death and also that it is an occupational disease within the meaning of R.C. 4123.68. Therefore, we need only consider whether there are genuine issues of material fact as to Allen’s exposure to asbestos and whether that exposure was injurious.

{¶33} The following evidence is before us: all evidence mentioned above; General Dynamics’ motion for summary judgment; the affidavit of Eugene Miller; the affidavit of John Wetli; Ford’s second motion for summary judgment; Rosemary’s answers to Ford’s request for admissions; the Administrator’s

memorandum in opposition to General Dynamics' motion for summary judgment; the affidavit of Ruth Formoso; the affidavit of Edwin Patterson; General Dynamics' reply to the Administrator's brief; Dan Pulfer's affidavit; Rosemary's response to Ford's motion for summary judgment; Ford's reply memorandum; Rosemary's response to General Dynamics' motion for summary judgment; a copy of Lester Leon Snyder, Jr.'s ("Lester") deposition; Lester's affidavit; Bedrossian's deposition; Rosemary's deposition; and Eby's deposition.

{¶34} Our review of the record indicates genuine issues of material fact as to whether Allen was exposed to asbestos at Clingerman and whether that exposure was injurious. On January 27, 2005, Ford filed Rosemary's admissions, which contained the following statements:

9. [Allen] was occupationally exposed to asbestos containing products while he was working at the Clingerman Facility . . . during the years 1973 to 1984. ANSWER: Admitted.
10. [Allen] inhaled and ingested asbestos fibers while he was working at the Clingerman Facility . . . during the years 1973 until at least 1984. ANSWER: Admitted.

Accordingly, there is a genuine of material fact as to whether Allen was exposed to asbestos at Clingerman's facility.

{¶35} As to whether the exposure proximately caused, augmented, or aggravated the mesothelioma, there are also genuine issues of material fact. As quoted above, Bedrossian has opined that all exposures to asbestos were significant causes of the mesothelioma. See Pl. Br., Jan. 5, 2004, at Ex. 5B.

Likewise, Bedrossian stated that he has no opinion as to which exposure caused the mesothelioma, “[a]nd because of that it is accepted practice by virtually all pathologists that since you cannot exonerate or pinpoint either or any of them you have to say that all of them are significant.” Dep. Bedrossian, Carlos Wanes Menino, M.D., Jan. 10, 2005, at 42-43. Additionally, Bedrossian testified:

Q: If I asked you the question was the exposure at Ford from '93 to 2000 the cause of this man's mesothelioma you would not be able to give an opinion on that, is that correct?

...

A: I think it was a significant contributing factor. *All of them were.*

Q: . . . can you say to a reasonable degree of medical certainty taking one at a time, that that particular exposure caused the mesothelioma?

...

A: It's just what I said before. There is no way that any pathologist can single out one as opposed to the other. So the answer is to each of the questions I would say that was a significant contributing factor from No. 1, No. 2, No. 3, No.4. . . .

A: In other words, it is not necessary to have multiple companies. The company itself has nothing to do with it. The pathogenesis has to do with exposure to airborne asbestos. And if I make the assumption, as I did here, that in these four employment situations he worked with and around asbestos and, therefore, asbestos fibers were suspended in the air, I have to assume that all three or – excuse me, that all four of them are significant contributing factors.

Q: And you are not saying that the employment at Ford or the particular employment at Clingerman, et cetera, was the cause of the meso [sic], is that correct?

A: Right. *I'm not pinpointing or exonerating any of them.*

Id. at 52-55 (emphasis added).

{¶36} Because we must construe all evidence in favor of the non-movant, Rosemary, we find a genuine issue of material fact as to whether Allen's employment at Clingerman proximately caused, augmented, or aggravated his mesothelioma, which ultimately caused his death. Therefore, the Administrator does not fall within the above mentioned exception, which would allow the trial court to grant summary judgment sua sponte. The first assignment of error is sustained.

Rosemary's Second Assignment of Error

{¶37} In her second assignment of error, Rosemary contends there are genuine issues of material fact as to whether Allen was injuriously exposed to asbestos at both General Dynamics and Ford. In response, each employer argues there were no genuine issues of material fact, and Ford again raises the issue of latency. Ford contends that Bedrossian has submitted inconsistent statements in his affidavits and deposition, which support its experts' opinions as to latency.

{¶38} As to General Dynamics, our review of the record reveals that summary judgment was improperly granted. Rosemary's admissions, filed by Ford on January 27, 2005, state the following:

16. [Allen] was occupationally exposed to asbestos containing products while he was working at the General Dynamics Facility . . . during the years 1984 to 1993. ANSWER: Admitted.

17. [Allen] inhaled and ingested asbestos fibers while he was working at the General Dynamics Facility . . . during the years 1984 to 1993. ANSWER: Admitted.

Likewise, Lester's affidavit states in pertinent part:

“[w]hile he was working at the General Dynamics Facilities from 1984 to 1994, I witnessed Allen Snyder being *exposed to and breathing in airborne asbestos* which emanated from asbestos containing products including but not limited to: pipe covering, high temperature wire insulation, welding rods, gaskets and packing, and gloves.”

Pl.'s Br., Feb. 22, 2005, at Ex. 2, ¶ 3 (emphasis added). Accordingly, there are genuine issues of material fact as to whether Allen was exposed to asbestos at the General Dynamics facility.

{¶39} There is also a genuine issue of material fact as to Allen's exposure at Ford. In reaching his opinion, Bedrossian relied on “[t]he cover letter, Social Security information, affidavit from the patient, and his answers to medical questions posed by the patient's physicians.” Dep. Bedrossian, 26:20-23. The “affidavits”¹ upon which Bedrossian relied were attached to his deposition as Exhibits 1 and 2. The first “affidavit” contains the following statement: “[d]uring the course of and as a result of my employment at *Ford Motor Company, General Dynamics Land Systems* and the *G. F. Clingerman MFG Company*, I was occupationally exposed to *asbestos fibers* and asbestos-containing products[.]” Id. at Ex. 1, ¶ 3 (emphasis added). The second “affidavit” added Rockwell to the list

of employers and states, “I was occupationally exposed to *asbestos fibers* and various asbestos-containing products[.]” *Id.* at Ex. 2 ¶ 3 (emphasis added). Although these “affidavits” are unattested, Bedrossian relied upon them in reaching his expert opinion. Accordingly, there is a genuine of material fact as to whether Allen was exposed to asbestos at Ford.

{¶40} As to whether asbestos exposure at Ford or General Dynamics proximately caused, augmented, or aggravated Allen’s mesothelioma, the same analysis applies here as discussed in the first assignment of error. Because we must construe the evidence in favor of the non-movant’s, Bedrossian’s deposition and affidavit testimony create a genuine issue of material fact as to whether the exposure was injurious.

{¶41} As to any issue concerning the latency period, we do not find inconsistent statements in Bedrossian’s deposition and affidavits. His opinion has remained unchanged throughout this matter. Even if Bedrossian’s statements were inconsistent, Ford would not be entitled to summary judgment because a witness’ inconsistent statements are grounds to deny a motion for summary judgment. See *Turner v. Turner* (1993), 67 Ohio St. 3d 337, 341-342, 617 N.E.2d 1123. The second assignment of error is overruled.

¹ The “affidavits” Bedrossian relied upon were unattested written statements set forth in the form of an affidavit.

{¶42} The trial court's January 15, 2004 judgment is affirmed, and the May 18, 2005 judgment is reversed. Upon remand, the fact-finder will determine whether Rosemary has a right to participate in the worker's compensation fund. If the fact-finder, in this case on remand, determines that Rosemary has proved 1) exposure to asbestos, and 2) that the exposure was injurious, the Bureau of Worker's Compensation will determine liability, if any, and any possible apportionment. See R.C. 4123.512(G); *Anders*, supra at ¶ 18. This cause is remanded to the trial court for additional proceedings.

***Judgment Affirmed in Part,
Reversed in Part and Cause Remanded.***

CUPP, P.J. and SHAW, J., concur.

/jlr