



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
WORKERS' COMPENSATION OFFICE OF ADJUDICATION
570-327-3735

Circulation Date: 06/30/2006

CLIFFORD GOLDSTEIN, ESQUIRE
CHARTWELL LAW OFFICES LLP
VALLEY FORGE CORP CTR
2621 VAN BUREN AVE
NORRISTOWN PA 19403

DECISION RENDERED COVER LETTER

Bureau Claim Number: 2495071

Injury Date: 11/21/2002

Insurer Claim Number: 221323396

Petitions:

Claim-Pet

TIM SCOTT
RR#1 BOX 321 B
162FORNWALTS LANE
NEW COLUMBIA, PA 17856-0000

Judge: Kenneth P Walsh
Suite 202, Westbrook Grit Building
208 W. Third Street, Rear
Williamsport, PA 17701

MATTHEW D. DEMPSEY ESQ
LENAHAN & DEMPSEY PC
116 N WASHINGTON AVE 400 KANE PROF BLDG
PO BOX 234
SCRANTON, PA 18501-0234

The attached Decision of the Judge is final unless an appeal is taken to the Workers' Compensation Appeal Board as provided by law.

Vs

HOEGANAES CORPORATION
PO BOX 37
PARADISE RD
WATSONTOWN, PA 17777-0037

If you do not agree with this Decision, an appeal must be filed with the Workers' Compensation Appeal Board within 20 days from but not including the date of this notice.

CLIFFORD GOLDSTEIN, ESQUIRE
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NORRISTOWN, PA 19403

Forms for an appeal may be obtained from the Workers' Compensation Appeal Board, Capital Associates Building
901 North Seventh Street
Third Floor South
Harrisburg, PA 17102

ZURICH AMERICAN INSURANCE COMPANY
PHILADELPHIA CLAIMS
PO BOX 13761
PHILADELPHIA, PA 19104-3761

Employee Witnesses & Exhibits:

Darren Boop

Michael Conrad

Andrew C. Hoover

Testimony, Tim Scott

Testimony, Tim Scott

- 01 Fee Agreement
- 02 Deposition - Dr. Kolb
- 03 Objections to Deposition - Dr. Kolb
- 04 06/02/03 Transmittal Letter, Claimant's Counsel to WCJ, with attachments
- 05 Diagram of Work Area
- 06 Chemical Label
- 07 Job Description - Operations Technician
- 08 Statement of Wages
- 09 MSDS sheets - packet
- 10 Blue Cross/Blue Shield Subrogation Document
- 11 Citation/Penalty OSHA Violations
- 12 Air Monitoring Results - 2 pages
- 13 CIH - Industrial Hygiene Reports - large packet
- 14 Deposition - Dr. Levinson, 03/08/05
- 15 Claimant's Preserved Objections - Dr. Levinson
- 16 Deposition - Joseph Cocciardi, Ph.D., 03/07/05
- 17 Claimant's Preserved Objections - Dr. Cocciardi
- 18 Claimant's Preserved Objections - Dr. Guidotti
- 19 Mr. Dempsey's Washington, D.C. Expenses
- 20 Fry Motion Rebuttal
- 21 Deposition - Joseph Cocciardi, Ph.D., 04/26/05
- 22 Nickel Purchased and Used
- 23 Claimant's Litigation Costs
- 24 Preservations of objections, Dr. Cocciardi deposition, 4/26/05

Employer Witnesses & Exhibits:

Testimony, Tim Scott (In Rebuttal)

- 01 Motion to Preclude Testimony of Dr. Levinson
- 02 Exhibit Book (loose leaf, tabbed), in support of Motion to Preclude Testimony
- 03 Packet - Table of Actual Hours Worked
- 04 Last page of time records
- 05 Deposition - Dr. Joseph Guidotti
- 06 11th Edition Report on Carcinogens
- 07 Objection to Dr. Cocciardi's

Judge Witnesses & Exhibits:

JU1 Claim Petition & Assignment
JU2 Defendant's Answer
JU3 Claimant's brief
JU4 Claimant's letter brief, 11/11/05
JU5 Defendant's brief/findings/conclusions
JU6 Defendant's response brief

Hearings:

8/17/2005 15:15:00 Held
8/10/2005 11:30:00 Postponed by Employee Counsel on 07/22/05
10/6/2004 13:00:00 Postponed by Employer Counsel on 10/04/04
1/30/2004 13:00:00 Held
6/2/2003 10:00:00 Held

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FINDINGS OF FACT

1. Claimant, Tim Scott, filed a Claim Petition against Defendant, Hoeganeas Corporation with the Bureau on April 1, 2003. This matter was assigned to the undersigned WCJ April 17, 2003. The Claim Petition described the injury as "nickel exposure at work substantially contributed to development of cancer and inability to work with heavy metals." The date of last exposure was November 21, 2002. During the course of the proceedings, it was noted on the record that the case was being filed under the Section 301 (c) (1), Section 301 (c) (2), and Section 108 (n) of the Worker's Compensation Act. At the hearing conducted on January 30, 2004, the Claim Petition was amended to include an assertion that Claimant's exposure to methylenechloride and the combination of other chemicals contributed to the development of Claimant's cancer and that Claimant was proceeding under the same sections of the Act as mentioned in this Finding of Fact.
2. Hearings were scheduled and/or held and testimony and evidence were received as set forth in the Exhibit list. The Parties have set forth post hearing argument as noted in the Judge Exhibits in the Exhibit list. The matter is now ripe for decision.
3. At the outset of the proceedings, Defendant submitted a Motion asserting that the testimony that would be offered by Dr. Sander Levinson, a Board Certified pulmonologist, should not be permitted to be submitted into the record on the issue of the causal relationship between Claimant's exposure to nickel and his subsequent cancer based upon the case law authority and reasoning set forth Frye v United States, 293 F. 1013 (D.C. Cir. 1923). Defendant has reasserted that argument in Defendant's post hearing brief. The WCJ finds and concludes that Dr. Levinson's testimony and the testimony of Dr. Cocciardi is competent testimony under the Worker's Compensation Act and shall be considered in the disposition of this case.
4. Claimant began his employment with Defendant in February 1999 when he was employed as a Blending Operations Technician. The business operation undertaken at the Hoeganeas Corporation facility where Claimant worked involved the mixing of various powdered metals, primarily powdered nickel, powdered copper, and powdered ferrophous in various combinations that would then be shipped to Defendant's customers in the proportions that the various customers had ordered.
5. Based upon the credible testimony of the various witnesses including the planned view in which the WCJ, both counsel, the Claimant, and various

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Defendant representatives participated, the WCJ finds that Claimant was exposed to airborne elemental nickel metal powder on an ongoing basis during the time that he worked for the Defendant: that the elemental nickel powder was of a size between three (3) and seven (7) microns; and these powdered metal particles were small enough they were inhaled into the tissue of Claimant's lungs.

6. The WCJ finds that there were no smelting processes, sintering processes, refining processes, welding processes, or exposure to the application of heat to the nickel powder or exposure to gases by Claimant during his work for the Defendant.
7. The WCJ finds that Claimant did not work in an area where methylenechloride was used and that he was not exposed to methylenechloride during the time that he worked for the Defendant.
8. The testimony offered by Claimant with regard to any exposure to methylenechloride is found to be not credible. The WCJ finds the testimony of Darren Boop, an employee of the Defendant who actually worked in the IP area to be credible. He testified that he did not ever know Claimant to have entered the IP area. As to Claimant's testimony that he went into the IP area for coffee supplies about once a week for about a minute, Mr. Boop credibly testified that there were no coffee supplies in the IP area.
9. Claimant was born on November 3, 1959, was 5'8" tall, and weighed approximately 200 pounds at the time of his testimony.
10. After graduating from high school, Claimant began working at H. Warshow & Sons, a textile factory that dyed, dried, and cut elastic swimwear material. The Claimant ran a drying unit that dried the elastic material. Claimant described the Warshow plant as "hot" and that it "had no air that blew through" it. Claimant worked with or around detergents, cleaners, soaps, solvents, alcohol, resins, formaldehyde and dyes.
11. Claimant then worked at International Paper for about ten (10) years where Claimant would use his hands to move bales of fine polypropylene fibers that look like angel hair. Claimant testified that he had been told that he had been exposed to asbestos while working at International Paper but that he did not know he had been exposed to it but did know that International Paper took asbestos out of the factory.
12. Claimant worked for a home health care agency for approximately a year before he began working for the Defendant in February 1999. He testified that he did not have any health problems when he began working for the

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Defendant, was not taking any medications, and was not having any trouble breathing.

13. Claimant began smoking cigarettes when he was fifteen (15) years old and had become a full time smoker by age eighteen (18). He testified that although it was hard to tell, he thought he was less than a pack-a-day smoker and he probably smoked fifteen (15) to twenty (20) cigarettes a day mostly while at work and if he did smoke at home he had to go outside. He testified that he quit smoking once for about three (3) months while hypnotized but continued to smoke up until November 2002 based on the history given to Dr. Levinson. Claimant underwent lung cancer surgery on November 21, 2002 and continued to work up until the day of his surgery.
14. Claimant was exposed to second hand smoke at home where his father smoked at home and a brother, noted to be a heavy smoker also smoked at home.
15. Following the November 2002 cancer surgery Claimant returned to work for a brief period of time in January 2003 performing light duty paperwork "shuffling papers." Claimant's employment with Defendant ended shortly thereafter in February, March, or April 2003. He then collected Unemployment Compensation Benefits for a period of time and in October or November 2003 began working for A & S Mechanical until April 2004. He worked for a home medical supply company and then began working for Evangelical Community Hospital on July 19, 2004.
16. Claimant presented the April 25, 2003 deposition testimony of Aaron J. Kolb M.D. Dr. Kolb is Board Certified in Occupational Medicine and Preventative Medicine. He is a panel physician for the Defendant.
17. Dr. Kolb performed a February 2, 1999 pre-employment physical on Claimant before he began working for Defendant. Claimant reported that he was a one half pack a day smoker for ten (10) years. A chest x-ray taken during the pre-employment physical was normal with no acute disease showing on the x-ray.
18. On April 12, 2002, a urine collection was obtained from Claimant as part of a screening evaluation for employees at the Defendant. The test showed that the actual nickel in the urine was 418 micrograms per liter and the nickel/creatinine ratio was 819. Dr. Kolb indicated that this was high nickel content in the urine.
19. A second test performed on Claimant on April 13, 2002 showed Claimant's nickel in urine to be 80 micrograms per liter and the nickel/creatinine ratio to be 47.9.

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20. Dr. Kolb did not express any opinion to the causal relationship of the Claimant's lung cancer to the nickel exposure.
21. Claimant presented the March 8, 2005 deposition testimony of Sander J. Levinson M.D. Dr. Levinson is Board Certified in Internal Medicine and Board Certified with a subspecialty in pulmonary diseases. He examined Claimant on one (1) occasion, January 16, 2003 at the request of Claimant's attorney.
22. Dr. Levinson discussed the medical information, reports, Material Safety Data Sheets, testimony, and materials that he reviewed at pages 54 and 55 of the transcript. He testified that Claimant had undergone a resection of the right upper lobe and right lower lobe of his right lung on November 21, 2002 to remove a cancer described as an adenocarcinoma of the lung by Dr. David Campbell at Hershey Medical Center. He reviewed the various laboratory and examinations undergone by Claimant leading up to that surgery.
23. Dr. Levinson obtained an occupational history from Claimant indicating that Claimant worked in the powdered metal industry beginning sometime in 1999 and that he was exposed to powdered metallic nickel on a regular basis and his job was a computer operator responsible for blending various additives into the base iron mix.
24. Claimant told Dr. Levinson he smoked less than one (1) pack of cigarettes a day for the last twenty (20) years and stopped smoking in November 2002. Claimant had a forty-eight (48) year old brother with a heavy smoking history who also developed lung cancer.
25. Dr. Levinson performed a physical examination then performed various tests described on pages 65,66, and 67 of the deposition transcript.
26. Dr. Levinson reviewed the urine tests showing high levels of nickel in Claimant's urine as noted by Dr. Kolb and testified that the nickel levels "were markably high" Dr. Levinson reviewed industrial hygiene studies, C6 (the nickel warning label), and was aware that high amounts of nickel were used by the Defendant in his mixing operations. He indicated that the Claimant's pre-employment chest x-ray was normal.
27. Dr. Levinson testified that it was his opinion that Claimant's working at Defendant caused him to be exposed to nickel in various forms, that the nickel to which he was exposed was respirable, that Claimant inhaled the nickel, the nickel became solubilized as demonstrated in the urine tests, and that this exposure to nickel caused and substantially aggravated Claimant's pulmonary condition to the development of a lung cancer.

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28. Dr. Levinson testified that Claimant's exposure to nickel accelerated the development of Claimant's lung cancer and accelerated the period of latency regarding the development of cancer. He opined that the excessive concentrations of nickel that Claimant was exposed to and accumulated within his body accelerated the latent period for developing lung cancer and that is why he developed at a very early age.
29. Dr. Levinson testified that elemental or metallic nickel is inhaled there is moisture in the body and that there is carbon dioxide and carbon monoxide is given off to a degree and these things combine because these materials don't exist in a vacuum and that is how the nickel becomes solubilized and that was how Claimant was exposed to elemental nickel that was soluble in his system.
30. Dr. Levinson testified that he believed that individuals who work in the metal powder industry who had exposures to the materials, including the nickel powder Claimant was exposed to had a higher incidence of lung cancer than the general population.
31. Dr. Levinson testified that he would not release Claimant to perform his old job at the Defendant's facility in terms of dust exposure or exposure to airborne particulate matter as well as humidity. He believed that Claimant's exertional capacity was limited and that he could work at a lighter sedentary level of work.
32. Dr. Levinson testified that he was not aware of any research studies done in the last ten (10) years that would link any human testing dealing with exposure to nickel and cancer in humans. However, Dr. Levinson testified that studies through Canadian operations dealing with Canadian miners showed a true association with the development of lung cancer and exposure to nickel.
33. Dr. Levinson testified that smoking would create carbon monoxide and if a person was smoking and inhaling nickel he believed that there would be a good likelihood of the carbon monoxide combining with nickel to form nickel carbonyl, a recognized carcinogen.
34. Dr. Levinson testified that methylenechloride was a carcinogen at that the metabolism of methylenechloride can give off carbon monoxide and that if a person is exposed to nickel and carbon monoxide; this would have the potential to form nickel carbonyl, a carcinogen.
35. Dr. Levinson testified that Claimant's exposure to nickel and its accumulation in his system with cigarette smoking increased Claimant's risk of lung cancer and that there was a multiplicative effect on these substances were combined

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that was greater than the exposure to either substance alone with regard to causing cancer.

36. Defendant presented the testimony of Joseph A. Cocciardi, Ph. D. He was deposed on two (2) occasions, March 7, 2005 and April 26, 2005. Dr. Cocciardi has a Ph. D. in Public Health and Safety. He is an Industrial Hygienist certified by the American Board of Industrial Hygiene.
37. Dr. Cocciardi testified that he was aware of nickel problems in the work place based upon the studies written by various organizations including the Agency for Toxic Substances and Disease Registry, which is a part of the U.S. Public Health Service, the Department of Health and Human Services, and the Risk Assessment Information System.
38. Dr. Cocciardi discussed the exposure to nickel that Claimant underwent at the Defendant and testified that he believed that Claimant was exposed to methylenechloride that was used in the area where Claimant worked. He testified that he believed that methylenechloride is transformed into carbon monoxide by the body and that carbon monoxide and nickel can combine to form nickel carbonyl. He testified that he did not know if that was what happened in this case because no testing had been done. He did not know if this could happen inside an individual's body because testing had not shown that to be the case.
39. Dr. Cocciardi referred to a summary fact sheet prepared by the Agency for Toxic Substances and Disease Registry (ATSDR) Exhibit #7 in his deposition. That document states "workers who breathe very large amounts of nickel compounds have developed lung and nasal cancers. ... The Department of Health and Human Services has determined that nickel and certain nickel compounds may reasonably be anticipated to be carcinogens. Cancers of the lung and nasal sinus have resulted when workers breathe the dust containing high levels of nickel compounds while working in nickel refineries or nickel processing plants. When rats and mice breathe nickel compounds for a lifetime, nickel compounds that were hard to dissolve caused cancer while a soluble nickel compound did not cause cancer." Working with the inhalation of "nickel dust" at the Defendant's facility was a hazard.
40. Dr. Cocciardi referred to the eleventh report on carcinogens published by the National Toxicology Program. He acknowledged that the report indicates, "nickel compounds are known to be human carcinogens based on sufficient evidence of carcinogenicity from studies on humans, including epidemiological and mechanistic information which indicates a causal relationship between exposure to nickel compounds and human cancer."

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41. This report identified "metallic nickel" as "reasonably anticipated to be a human carcinogen" based on sufficient evidence of carcinogenicity from studies in experimental animals... when metallic nickel powder is given by intratracheal installation or through other injections." The document also states "the available data from human studies of metallic nickel exposures are less informative. The available epidemiological studies of workers are limited by inadequate exposure information, low exposures, short follow-up periods, and small numbers of cases."
42. Dr. Cocciardi testified that he believed that individuals that worked in the powdered nickel metal industry such as Claimant suffered a higher incidence of lung cancer than the general population based upon the studies that he referred to. Dr. Cocciardi indicated that he was not aware of any actual epidemiological studies that showed that individuals who were exposed to powdered elemental nickel in the metal powder mixing industry suffered a greater incidence of lung cancer than the general population.
43. Defendant presented the June 6, 2005 deposition testimony of Tee Lamont Guidotti, M.D., M.P.H. Dr. Guidotti is Board Certified by the American Board of Toxicology that covers the area of toxicological hazards dealing with environmental exposures, with regulation, and a basic science of toxicology research. He is also Board Certified in Internal Medicine, and Occupational Medicine.
44. Dr. Guidotti testified that he reviewed the records contained in Guidotti deposition Exhibit #3 and the lay testimony and expert testimony as said forth on page 19 of his deposition. He noted that Claimant was 43 years old when his adenocarcinoma was detected and noted that this was a particular type of cancer that arises out of the glandular elements of the lung as opposed to the cells that line the airway. He testified that adenocarcinoma is usually slower growing than other types of cancer and this was the type of cancer in the Claimant's right lung. He is aware that of Claimant's work involving metallic nickel and aware that Claimant had a smoking history estimated to be about one (1) pack per day for twenty (20) years or more. He was aware that Claimant had undergone surgery for the cancerous tumor.
45. Dr. Guidotti discussed Claimant's occupational history of working in the textile industry from approximately 1978 to 1990 and that from 1990 to 1998 worked in a plant in which Claimant had been told there was an asbestos exposure.
46. Dr. Guidotti was aware of Claimant's high level of nickel in his urine testing but testified that there were no studies linking a high level of nickel in an individual's urine on one occasion with any estimation of cancer risk or other health effect related to nickel. He testified that one could not use nickel levels

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in urine for risk assessment and that part of the problem was that there was a great deal of variation in the way that people handled nickel and this would confuse the correlation between exposure to nickel and what comes out in the urine. He testified that there was no "biological exposure index" or an occupational health standard for nickel in urine or any predictive value in nickel urine testing to predict disease.

47. Dr. Guidotti testified unequivocally that there was no connection between Claimant's lung cancer and his exposure to powdered metallic nickel at the Defendant for a number of reasons. He testified that the number one consideration was that there was simply not enough time for Mr. Scott to develop the cancer on the basis of his exposure at the Defendant because of the time period was much too short. He testified that lung cancer required a certain time period to develop which was called the "latency period," which for a solid tumor and for lung cancer in particular is typically twenty (20) years; it is occasionally less than that but very rarely less than ten (10) years and certainly not three (3) years. He testified that there simply would not have been enough time for Claimant to develop the cancer even if he were exposed massively on the very first day to a very potent carcinogen because the tumor would have just not had enough time to develop. He testified there was no evidence in the literature suggesting that a human being can develop an adenocarcinoma that quickly.
48. Dr. Guidotti reviewed Dr. Levinson's testimony about "doubling time." He testified that he believed that Claimant's exposure to whatever carcinogen caused the cancer would have to have taken place at least ten (10) years before 2002 and possibly twenty (20) years.
49. Dr. Guidotti also testified that there was no relationship between Claimant's lung cancer and his job because Claimant was exposed to metallic nickel as opposed to those nickel compounds that are associated with lung cancer risks. He testified that although the literature on cancer and nickel exposure has been confusing and difficult to sort out, it was clear to him that nickel metal was either not carcinogenic or was a carcinogen at such a low potency that it rarely if even caused human cancers. He indicated that it was not a "known human carcinogen" but was a suspected human carcinogen and was so labeled because the literature on human exposure could not absolutely rule out the possibility that there was a low cancer risk associated with metallic nickel exposure and that because the epidemiological evidence could not rule it out, it was included as a suspected human carcinogen to err on the side of caution.
50. He testified that there were no studies in which he was aware that suggested a cancer risk associated with exposure to elemental nickel alone.

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51. Dr. Guidotti testified that there were no studies showing that inhalation of elemental metallic nickel in animals caused cancer. He testified the elemental nickel caused cancer in animals in two (2) ways in laboratory studies but that neither of these methods of causing cancers in laboratory animals could lead to the conclusion that metallic nickel inhaled by humans caused cancer.
52. Dr. Guidotti testified that the type of Claimant's type of exposure to elemental nickel powder at the Defendant's facility was vastly different from the type of exposure that individuals had in nickel smelting environments, nickel refining environments, or nickel mining environments.
53. Dr. Guidotti testified the elemental nickel powder that would be in the air in a room would not combine to form other compounds other than a slight bit of oxidation on the surface of the nickel and that other compounds would not be formed in the absence of high temperature.
54. Dr. Guidotti testified that if methylenechloride was somehow metabolized in the body to include carbon monoxide and the individual was exposed to metallic nickel, the metallic nickel and the carbon monoxide would not combine to form any carcinogenic compound of nickel. He testified that in order to get nickel and carbon monoxide to combine it has to be done at relatively high temperatures and pressures and that this would not occur in the human body.
55. Dr. Guidotti testified that Claimant's smoking history was a completely sufficient explanation for the cause of Claimant's cancer and was by far the most likely explanation for his cancer. He noted that Claimant had smoked in duration and to a degree that was entirely consistent with developing lung cancer in general and this type of lung cancer in particular.
56. The WCJ finds the testimony of Dr. Guidotti credible that Claimant's lung cancer is not related to his exposure to powdered nickel with the Defendant and adopts it as fact. Dr. Guidotti's credentials with regard to the matters at issue in this case far outweigh the credentials of Dr. Cocciardi and Dr. Levinson in this particular matter. Dr. Guidotti is the professor and chair of the Department of Environmental and Occupational Health Science at George Washington University; the director of the Division of Occupational Medicine and Toxicology, and the Director of the Occupational Medicine training program at George Washington University. He is the acting director for the Center for Risk Science and Public Health at the School of Public Health and Health Services at George Washington University. He undertook a fellowship in pulmonary disease and obtained a Masters of Public Health Degree from Johns Hopkins University. He is a peer reviewer for the American Journal of American Medicine, the American Journal of Public Health, the Annals of Epidemiology, the International Journal of Cancer; International Journal of

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Occupational and Environmental Health; Occupational Medicine; and Toxicological Sciences. His explanation of the various factors involving Claimant's case was clear, persuasive, logical, and consistent.

57. Dr. Cocciardi's testimony that there was a greater risk of cancer in Claimant's metallic powder work with the Defendant than the rest of the population is not credible and is rejected. Dr. Cocciardi could point to no study verifying this assertion and his testimony was unconvincing and is rejected.

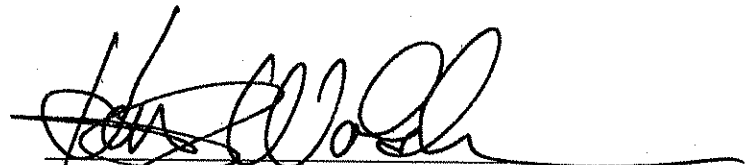
CONCLUSIONS OF LAW

1. The parties hereto are bound by the terms and provisions of the Pennsylvania Workers' Compensation Act as amended.
2. The WCJ concludes that the testimony of Dr. Levinson and Dr. Cocciardi is not credible testimony that supports Claimant's burden in his Claim Petition under the various sections of the Workers Compensation Act. The testimony of Dr. Guidotti on all issues pertaining to Claimant's claims has been found credible and the testimony of Dr. Levinson and Dr. Cocciardi is rejected in light of Dr. Guidotti's testimony.

ORDER

Wherefore, upon a consideration of the foregoing, it is hereby Ordered and Directed that:

1. Claimant's Claim Petition is denied and dismissed.


Kenneth P. Walsh
Workers' Compensation Judge

/jlp