
**APPEALS BOARD
UTAH LABOR COMMISSION**

ADOLPH E. SHUBERT,

Petitioner,

vs.

GRANITE SCHOOL DISTRICT,

Respondent.

ORDER OF REMAND

Case No. 05-0588

Granite School District (hereafter “Granite”) asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Lima’s award of benefits to Adolph E. Shubert under the Utah Occupational Disease Act, Title 34A, Chapter 3, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers’ Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Mr. Shubert worked for Granite as a high school auto shop teacher. On June 27, 2005, Mr. Shubert filed for occupational disease benefits for a pulmonary condition that he alleged was caused by his work at Granite.¹ At the time he filed his claim, Mr. Shubert was under the impression that his condition was likely caused by his exposure to sump fumes at Granite. Granite denied liability on the basis that it was Mr. Shubert’s exposure to isocyanate in paint from his non-work activities that caused his lung disease.

Following an evidentiary hearing, Judge Lima referred the medical aspects of Mr. Shubert’s claim to a medical panel. The medical panel found that Mr. Shubert suffered from hypersensitive pneumonitis (“HSP”) caused by his work and non-work exposure to isocyanate.² Judge Lima adopted the panel’s opinion and found that Mr. Shubert’s exposure to isocyanate contributed to his occupational disease claim and awarded benefits accordingly.

In its motion for review, Granite argues that because Mr. Shubert identified sump fumes as the cause of his pulmonary disease, rather than isocyanate, Granite was not given proper notice of Mr. Shubert’s claim and thereby denied due process rights. Granite also contends that Judge Lima committed reversible error by failing to specify for the medical panel the exact chemicals found in

¹ Mr. Shubert also filed an alternative claim for workers’ compensation benefits, but based on the medical evidence Judge Lima dismissed this claim with prejudice. This decision was not challenged on a motion for review, and the Appeals Board does not review this issue further.

² Isocyanate is found in automotive and other types of paint.

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the sump pump that Mr. Shubert claimed caused his pulmonary disease. Finally, Granite argues that Mr. Shubert's exposure to isocyanate did not arise out of and in the course of his employment and therefore is not compensable as an occupational disease.

FINDINGS OF FACT

The Appeals Board adopts Judge Lima's findings of fact. The facts relevant to Granite's motion for review can be summarized as follows:

Prior to his employment with Granite, Mr. Shubert had worked at Alta High School as an auto shop instructor.³ At Alta, Mr. Shubert and his students painted cars, trucks, and trailers, with paint that would have contained isocyanate. Mr. Shubert also enjoyed painting cars in his free time and had done so in his garage at home or a storage unit. The paint that he would frequently use for these projects contained isocyanate.

In 2000, Mr. Shubert began working for Granite as an auto mechanic instructor. The auto shop consisted of a classroom, a shop area, and car wash booth—commonly referred to as a paint booth. Mr. Shubert used lacquers and finishers that may have contained isocyanate while working with the students painting toolboxes, cabinets, shelving units, drama projects, and car parts.⁴

From 2000 through 2003, Mr. Shubert also used the paint booth for various activities. Mr. Shubert and the students used the paint booth to paint items for extracurricular school activities like parades, Christmas fundraising activities and other projects. Mr. Shubert also used the booth to paint cars for friends and family, using automotive paint containing isocyanate. Mr. Shubert was permitted to paint cars in the booth until 2003, when Granite ordered him to stop this activity. The last car that Mr. Shubert painted at the school was in May of 2003. Mr. Shubert used various masks when he painted; however, the effect was minimized because of his full beard. Granite never required Mr. Shubert to request permission to paint at the school.

On January 13, 2004, responding to complaints of an unusual odor coming from the sump drains that were located in the auto shop, Granite had the sump drained and cleaned. Mr. Shubert assisted in the cleaning that day and did not suffer any ill effects at that time. However, by January 19, 2004, Mr. Shubert was admitted to the hospital for fever and chills. He was released from the hospital on January 29, 2004, with a diagnosis of hypersensitive pneumonitis (HSP), bronchiolitis obliterans-organizing pneumonia, hypoxia, hypertension, possible atypical pneumonia, and seasonal allergies.

Mr. Shubert was evaluated by several different specialists, including Drs. Nelson, Scholand,

³ Alta High School is not part of the Granite School District.

⁴ Mr. Shubert testified that by the time he began working for Granite, not all paints contained isocyanate (i.e., required isocyanate to dry).

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and Brown. The general diagnosis of these doctors was that Mr. Shubert had HSP. Dr. Nelson stated that unknown irritants at work were the cause of the HSP and Dr. Scholand indicated sewage gas from work as the likely cause of the HSP. Granite's medical consultant, Dr. Brown, initially found the cause was fumes of an unknown composition from Mr. Shubert's work place. However, Dr. Brown later revised his opinion, finding instead that Mr. Shubert's isocyanate exposure was the proximate cause of the HSP.

Due to the conflicting medical opinions as to the medical cause of Mr. Shubert's HSP, Judge Lima appointed a medical panel. The medical panel, consisting of a specialist in occupational and environmental medicine, examined Mr. Shubert and reviewed the medical records. The panel found "more likely than not [Mr. Shubert] has acquired [HSP] through occupational exposure to isocyanate containing **automotive paints**, including at Cyprus High School." (Emphasis added.) The panel indicated that while Mr. Shubert's exposure to isocyanate paint prior to his working at Granite probably caused his immune sensitization, "the two car painting events at Cyprus High School, as the most proximate exposure events to the discovery of the pulmonary condition, must be considered significant in the acceleration of this disease process." The panel apportioned 50% to Mr. Shubert's work-related exposure at Granite and 50% to other exposures.

DISCUSSION AND CONCLUSIONS OF LAW

Mr. Shubert claims that his pulmonary disease was medically caused or aggravated by his work activities at Granite. Under Section 34A-3-104 of the Utah Occupational Disease Act, "a compensable occupational disease means any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment."

The Appeals Board first addresses Granite's claim that Mr. Shubert was awarded benefits on a claim that he never raised at the hearing, therefore violating its due process rights. The Appeals Board disagrees. From the onset of this claim, Granite was put on notice that Mr. Shubert already suffered from a pulmonary disease that he developed from his work activity at Granite. This is the theory of his claim and this was the theory for which he was awarded benefits, regardless of whether Mr. Shubert was able to identify at the onset that it was his exposure to isocyanate or to another chemical. In fact, most of the medical experts were uncertain as to the etiology of the condition; however, Granite's own medical consultant, Dr. Brown, gave the opinion that it was Mr. Shubert's exposure to isocyanate that caused his condition. Thus, Granite not only was aware that isocyanate was a possible cause of the disease, but at the hearing Granite prepared a defense around the claim that isocyanate caused the condition (although it argued it was non-work related exposure). The Appeals Board also notes that Mr. Shubert's failure on his initial application to list isocyanate exposure as the cause of his condition does not forfeit his right to an award of benefits, provided Granite was given notice and the opportunity to defend against the claim, as we have so decided. The Appeals Board finds that Mr. Shubert sufficiently identified his claim for benefits and that Granite was properly given notice and had ample opportunity to defend against the claim.

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Granite also argued that it was reversible error for Judge Lima to send the matter to the medical panel without precisely identifying the chemicals present in the sump pump drain. The Appeals Board disagrees. The medical panel was asked to offer their expertise as to what was the likely etiology of Mr. Shubert's condition in light of the conflicting medical opinions, which included sump pump fumes and isocyanate. Under the facts of this case, the Appeals Board finds no error in this submission.

Granite's final contention is that all of Mr. Shubert's exposure to isocyanate was through non-work related projects, and therefore his exposure did not arise out of and in the course of his employment. Under Buczynski v. Industrial Commission, 934 P.2d 1169 (Utah App. 1997), an accident, or disease in this case, "arises out of" employment when there is a causal relationship between the injury and the employment, and "in the course of employment" when "it occurs while the employee is rendering service to his employers which he was hired to do or doing something incidental thereto, at the time and the place where he was authorized to render such service."

Judge Lima adopted the medical panel's opinion, which found that Mr. Shubert's pulmonary condition was caused by his exposure to automotive paint containing isocyanate both before and during his tenure at Granite. The panel reached this finding based on its assumption that all of Mr. Shubert's painting activities during his tenure at Granite, particularly the two car painting events mentioned in the panel's decision, were part of his work activities. However, whether Mr. Shubert's auto painting activity in the paint booth at Granite was work-related or not is a legal question outside of the panel's authority. The record is absent any findings of fact with respect to this issue. The Appeals Board has also reviewed the evidentiary record and finds the record lacks any details that would be pertinent to deciding whether the car painting referred to by the medical panel was incidental to Mr. Shubert's employment or completely unrelated (such as whether the activity took place during school hours, after school, or on weekends, whether any students participated in the car painting, etc.).

The Appeals Board hereby remands this matter to Judge Lima to make the necessary fact finding to resolve this narrow issue: which of Mr. Shubert's painting activities were in the course of his employment. If the facts on this issue as found by Judge Lima are different than those previously assumed by the medical panel, Judge Lima should return this matter to the panel for reconsideration in light of the correct facts.

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ORDER

The Appeals Board remands the matter to Judge Lima's for further proceedings as outlined in this decision. It is so ordered.

Dated this 21st day of July, 2009.

Colleen S. Colton, Chair

Patricia S. Drawe

Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.