

**IN THE COMMON PLEAS COURT OF
OTTAWA COUNTY, OHIO**

Fred F. Pinto,	:	Case No. 02-CVD-205
	:	
	:	
Plaintiff,	:	Judge Paul C. Moon
	:	
	:	
v.	:	<u>DECISION AND ORDER</u>
	:	
	:	
Brush Wellman, Inc., et. al.	:	
	:	
	:	
Defendants.	:	

* * * * *

{¶1} This cause comes before the Court upon Defendant Brush Wellman, Inc.’s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, filed March 25, 2005. Plaintiffs’ Memorandum in Opposition was filed April 11, 2005. An Oral Hearing on Defendant’s Motion for Reconsideration was held on May 20, 2005.

{¶2} Defendant’s Motion seeks to have this Court reconsider its Decision and Order of March 15, 2005, in which it denied Defendant’s Motion for Summary Judgment. Thus, this Court will again consider whether no genuine issues of material fact exist by which Plaintiff can meet the standard for establishing that Plaintiff has contracted an occupational disease as defined by R.C. 4123.68(V) and is entitled to the compensation provided by sections 4123.55 to 4123.59 and 4123.66 of the Revised Code.

{¶3} This case concerns Plaintiff’s claim for personal injuries stemming from the alleged contraction of berylliosis due to the negligence of the Defendants. Plaintiff filed his Notice of Appeal in this Court as a matter of right pursuant to R.C. 4123.512, following denial of his appeal from the April 16, 2002, decision of the Staff Hearing Officer of the Industrial Commission of Ohio. The Staff Hearing Officer held that the Plaintiff had not demonstrated by a preponderance of the evidence that he had contracted berylliosis due to work exposure. The decision was based on the fact that “all of the beryllium lymphocyte proliferation tests were negative except for one,” and “A bronchoscopy failed to reveal evidence of granuloma.”¹

{¶4} Defendant Brush Wellman, Inc. asserts that “the undisputed facts establish that plaintiff does not meet accepted diagnostic criteria, recently codified in the Beryllium Policy of the Bureau of Worker’s Compensation, for chronic beryllium disease or beryllium sensitivity.”² As such, Defendants assert that “there is no basis for diagnosing [Plaintiff] with CBD [chronic beryllium disease] or beryllium sensitivity.”³

{¶5} This Court now finds that there are no genuine issues of material fact in dispute. Thus, Plaintiff has failed to demonstrate that there is a genuine issue of material fact as to whether the policy applied by the Bureau of Worker’s Compensation (“BWC”) and the Industrial Commission of Ohio is appropriate. Further, Defendants are entitled to judgment as a matter of law on its claim because Plaintiff cannot demonstrate that he has contracted an occupational disease and thus entitled to compensation.

¹ Complaint with Jury Demand Endorsed Hereon and Plaintiff-Appellant’s First Set of Interrogatories and First Request for Product of Documents to Defendant-Appellee Brush Wellman, Inc., at ¶ 8.

² Motion for Summary Judgment, at 1.

I. STANDARD OF REVIEW

{¶6} Under Civ.R. 56(C), summary judgment is appropriate when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party.⁴

{¶7} The moving party bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record that support the requested judgment.⁵ If the moving party discharges this initial burden, the party against whom the motion is made then bears a reciprocal burden of specificity to oppose the motion.⁶ Moreover, it is well settled that the party seeking summary judgment bears the burden of showing that no genuine issue of material fact exists for trial.⁷

{¶8} In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the party opposing the motion.⁸

³ Memorandum in Support of Defendant's Motion for Summary Judgment, at 1.

⁴ *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St. 3d 367, 369-370, 696 N.E. 2d 201, Citing *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 1995 Ohio 286, 653 N.E. 2d 1196, paragraph three of the syllabus; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 117, 522 N.E.2d 489, 505.

⁵ *Vahila v. Hall* (1997), 77 Ohio St. 3d 421, 430; see also *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293, 662 N.E.2d 264 ("the moving party cannot discharge its initial burden under Civ.R.56 simply by making a conclusory assertion that the non-moving party has no evidence to prove its case").

⁶ *Vahila v. Hall* (1997), 77 Ohio St. 3d 421; see also *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112.

⁷ *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 91 L. Ed. 2d 265, 106 S. Ct. 2548; *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112, 115, 526 N.E.2d 798; *Dresher v. Burt* (1996), 75 Ohio St. 3d 280.

⁸ *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St. 3d 45; *Harless v. Willis Day Warehousing* (1978), 54 Ohio St. 2d 64; *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 3d 356, 358-359, 604 N.E.2d 138 (Doubts must be resolved in favor of the nonmoving party).

{¶9} The burden of establishing that no genuine issues of any material fact remain to be litigated is on the party moving for summary judgment.⁹ Once a party moves for summary judgment and has supported his or her motion by sufficient and acceptable evidence, the party opposing the motion has a reciprocal burden to respond by affidavit or as provided in Civ.R. 56(C), setting forth specific facts explaining that a genuine issue of material fact exists for trial.¹⁰ In accordance with Civ. R. 56(E), “a nonmovant may not rest on the mere allegations or denials of his pleading but must set forth specific facts showing there is a genuine issue for trial.”¹¹ The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial.¹²

II. BACKGROUND

{¶10} Plaintiff Fred F. Pinto was employed at the Brush Wellman, Inc., plant in Elmore, Ohio, from August, 1987, to August, 2001, as a senior engineer. Plaintiff alleges that he was exposed to beryllium during his employment at Brush Wellman, Inc., and that on August 8, 2001, he “was diagnosed as having contracted an occupational disease and/or sustained an injury in the course of and arising out of his employment with defendant.”¹³

{¶11} Plaintiff subsequently filed a claim with the BWC, which was denied as to beryllium disease because the District Hearing Officer found that “[Plaintiff] has not developed chronic beryllium disease as a result of exposure at named employer,” finding particularly

⁹ *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340; *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 120.

¹⁰ *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

¹¹ *Chaney v. Clark Cty. Agricultural Soc.* (1993), 90 Ohio App. 3d 421, 629 N.E.2d 513.

¹² *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St. 3d 108, 111, 570 N.E.2d 1095; *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 322-323.

¹³ Complaint, at ¶ 5.

persuasive “the lymphocyte proliferation testing * * * and the lack of finding in the transbronchial biopsies * * *.”¹⁴

{¶12} Plaintiff appealed this finding, and on April 16, 2002, a Staff Hearing Officer of the Industrial Commission of Ohio affirmed the finding of the District Hearing Officer, finding that “the evidence fails to establish by a preponderance of the evidence that the [Plaintiff] developed berylliosis or any other occupational disease due to work exposure.”¹⁵ The Staff Hearing Officer noted that “all of the beryllium lymphocyte proliferation tests were negative except for one. A bronchoscopy failed to reveal evidence of granuloma. The blood tests (lymphocyte proliferation tests) performed after the one borderline test were normal.”¹⁶

{¶13} Plaintiff filed an appeal from the Order of the Staff Hearing Officer, which was denied by Order of May 22, 2002. Subsequently, Plaintiff filed a Notice of Appeal in this Court, seeking a determination as to “whether plaintiff has the right to continue to participate in the benefits of the Worker’s Compensation Laws of the State of Ohio.”¹⁷

II. ANALYSIS

{¶14} Defendant Brush Wellman, Inc. asserts this Court’s decision of March 15, 2005, has “far-reaching significance in cases of claimed chronic beryllium disease” because it would “prevent reliance on tests that are now universally used in the diagnosis of CBD.”¹⁸ Plaintiff argues that “For many years, certainly over a decade, the blood and bronchoalveolar lavage

¹⁴ Complaint, at ¶ 7.

¹⁵ Complaint, at ¶ 8.

¹⁶ Complaint, at ¶ 8.

¹⁷ Complaint, at ¶ 10.

¹⁸ Defendant Brush Wellman Inc.’s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, at 1.

lymphocyte proliferation tests have consistently been used by the Bureau of Workers' Compensation, by physicians who examine claimants for CBD, and by physicians who diagnose and treat CBD.”¹⁹ And Defendant argues that “The effect of the Court’s decision if not reconsidered would be to prevent physicians from using in workers’ compensation matters a diagnostic test that is now standard.”²⁰

{¶15} Defendants suggest that this Court’s decision should be reversed because it “does not address a key argument advanced in Brush’s briefs and at the hearing on this motion: that the beryllium lymphocyte proliferation tests (“BeLPTs”) on Mr Pinto are ‘biopsies,’ and are therefore tests that Ohio Rev. Code §4123.68(V) permits to be used in evaluating cases of claimed CBD.”²¹ Defendant asserts that “These biopsy results, together with the results of other kinds of biopsy, conclusively show that Mr. Pinto does not have CBD.”²²

{¶16} Defendants also suggest that this Court’s decision should be reversed because this “Court’s Opinion expressly recognizes that §4123.68(V) contains an ambiguity – the reference to ‘characteristic changes’ produced by beryllium exposure -, but does not go on to consider whether the Bureau’s Beryllium policy is a proper agency clarification of that ambiguity that should be afforded due deference.”²³

¹⁹ Defendant Brush Wellman Inc.’s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, at 1.

²⁰ Defendant Brush Wellman Inc.’s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, at 1.

²¹ Defendant Brush Wellman Inc.’s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, at 1-2.

²² Defendant Brush Wellman Inc.’s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, at 2.

²³ Defendant Brush Wellman Inc.’s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, at 2.

A. BeLPTs are Biopsies and are Therefore Tests Permitted by Statute

{¶17} Defendants' have misconstrued this Court's decision as finding that BeLPTs are not biopsies, in arguing that "the Court did not address the questions that Brush raised about what constitutes a 'biopsy,' and whether a beryllium lymphocyte proliferation test is a biopsy."²⁴ But Defendants acknowledged that "The Court recognized that §4123.68(V) does not preclude biopsies from being 'supplemented by new *techniques* which may be applied to the analysis of such designated tests or to the testing of collected samples.'"²⁵ As such, Defendants are correct in stating that "The BeLPT is * * * a 'new technique,' which may be applied to the analysis and 'testing of collected samples' from a biopsy, such as a sample of blood or lung fluid that may or may not contain beryllium-sensitized lymphocytes."²⁶ Thus, Defendants' argument that this Court has failed to consider whether a BeLPT is a biopsy is not well taken.

{¶18} However, this Court's decision turned on whether the BWC policy properly clarified the "characteristic changes"²⁷ produced by beryllium exposure and whether the BWC had the power to formulate policy implementing the legislative command, including whether the policy itself was reasonable.

B. The Phrase "Characteristic Changes" in R.C. 4123.68(V) is Ambiguous

{¶19} Suggesting that this Court's decision of March 15, 2005, should be reversed, Defendants argue that this "Court's opinion acknowledges that Rev. Code §4123.68(V) 'may be susceptible of more than one reasonable interpretation' as to what are the 'characteristic changes'

²⁴ Defendant Brush Wellman Inc.'s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, at 2.

²⁵ Defendant Brush Wellman Inc.'s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, at 2.

necessary to diagnose CBD,” but that this Court “did not take the next step of considering whether the BWC’s Policy is an attempt to interpret this admittedly ambiguous term and to clarify the unspecified ‘characteristic changes’ necessary for a diagnosis of CBD.”²⁸

{¶20} Plaintiff asserts, however, that the statute “designates the proper diagnostic tests to determine if a claimant indeed has berylliosis or an associated disease of the lungs due to breathing beryllium,” and argues that “absent ambiguity, statutory language is not to be enlarged or construed in any way other than that which its words demand.”²⁹

{¶21} In the case *sub judice*, this Court finds that the phrase, “characteristic changes,” in this statute to be ambiguous, and interpretation is necessary.³⁰ As well, the phrase “characteristic changes” is susceptible of more than one reasonable interpretation based on which of the three designated tests is used.³¹ Along with these statutory construction principles, this Court must also apply the directive found in R.C. 4123.95 to liberally construe the workers’ compensation laws in favor of employees. A liberal construction has been defined as giving “generously all that the statute authorizes,” and “adopting the most comprehensive meaning of the statutory terms in order to accomplish the aims of the Act and to advance its purpose, with all reasonable doubts resolved in favor of the applicability of the statute to the particular case. Interpretation and construction should not result in a decision so technical or narrow as to defeat the compensatory objective of the Act.”³²

²⁶ Defendant Brush Wellman Inc.’s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, at 2-3.

²⁷ R.C. 4123.68(V).

²⁸ Defendant Brush Wellman Inc.’s Motion for Reconsideration of Denial of Motion for Summary Judgment and Request for Oral Argument, at 3-4.

²⁹ Plaintiff’s Memorandum in Opposition to defendant Brush Wellman, Inc.’s Motion for Summary Judgment, at 7.

³⁰ See *State ex rel. Celebrezze v. Allen Cty. Bd. of Commrs.* (1987), 32 Ohio St. 3d 24, 27, 512 N.E.2d 332, 335.

³¹ See *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St. 3d 508, 513-514, 668 N.E.2d 498, 504.

³² Fulton, *Ohio Workers' Compensation Law* (2 Ed.1998) 9, Section 1.7.

COMMON PLEAS COURT OF OTTAWA COUNTY

{¶22} Defendant Brush Wellman, Inc. suggests that “the Legislature [] left large gaps in the Statute, and it falls to the Bureau to fill those gaps by defining ‘characteristic changes’ of CBD and by specifying the tests and findings that may be used to establish those changes.”³³ Therefore, “as science advances, the Bureau can rely on new tests without doing violence to the statute.”³⁴ As such, Defendant Brush Wellman, Inc. asserts that Plaintiff’s reliance upon *State ex rel. General Electric Corp. v. Industrial Commission of Ohio*,³⁵ is unsupported in that “the relevant point of *General Electric* is that undefined terms can be interpreted in ways that accommodate advances in medical procedure and reflect the ‘current state of medical art.’”³⁶

{¶23} Defendant Brush Wellman, Inc. correctly asserts that this Court did not consider the ambiguity presented within the statute by the legislature’s reference to “characteristic changes” in the lungs which must be “demonstrated by x-ray, by biopsy or by autopsy.”³⁷ In finding “that the words of this statute are not ambiguous and thus, interpretation is not necessary,” when considering the means of testing for CBD, this Court failed to acknowledge its later statement that “characteristic changes [] may be susceptible of more than one reasonable interpretation based on advances in medicine.”³⁸

{¶24} Although the legislature has provided for only three tests by which a determination of berylliosis is possible, the use of new techniques or methods of analysis utilizing any of the three tests to measure “characteristic changes” requires the formulation of a

³³ Defendant’s Post-Hearing Brief, at 1. (Letter dated January 26, 2005, from Jeffery D. Ubersax to Judge Paul C. Moon, Re: *Pinto v. Brush Wellman Inc.*, No 02-CVD-205. This letter does not reflect service upon Plaintiffs).

³⁴ Defendant’s Post-Hearing Brief, at 1.

³⁵ *State ex rel. General Electric Corp. v. Industrial Commission of Ohio* (2004), 103 Ohio St.3d 420, 2004 Ohio 5585, 816 N.E.2d 588, 2004 Ohio LEXIS 2599.

³⁶ Defendant’s Post-Hearing Brief, at 1.

³⁷ R.C. 4123.68(V).

³⁸ Decision and Order (03/15/05), at 8, ¶ 22.

BWC policy or rule by which BWC can fill the gap resulting from the ambiguity that exists within the statute.

{¶25} In *State v. Wilson*,³⁹ the Ohio Supreme Court held “the primary goal in statutory interpretation is to give effect to the intent of the legislature,” and emphasized in *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*,⁴⁰ “in determining legislative intent, the court first looks to the language of the statute and the purpose to be accomplished.”

{¶26} In *Morton v. Ruiz*,⁴¹ the United States Supreme Court held that “the power of an administrative agency to administer a * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly,” by the legislature. In *Northwestern Ohio Bldg. & Constr. Council v. Conrad*,⁴² the Ohio Supreme Court concurred, holding that “a court must give due deference to the agency’s reasonable interpretation of the legislative scheme.” Similarly, in *Swallow v. Industrial Commission of Ohio*,⁴³ the Ohio Supreme Court had implicitly recognized that no set of statutes and administrative rules will answer each and every administrative concern. The Court noted that when agencies promulgate and interpret rules to fill these gaps, as they must often do in order to function, “courts * * * must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command.”⁴⁴

³⁹ *State v. Wilson* (1997), 77 Ohio St. 3d 334, 336, 673 N.E.2d 1347, 1349.

⁴⁰ *State ex rel. Purdy v. Clermont Cty. Bd. of Elections* (1997), 77 Ohio St. 3d 338, 340, 673 N.E.2d 1351, 1353.

⁴¹ *Morton v. Ruiz* (1974), 415 U.S. 199, 231, 94 S. Ct. 1055, 1072, 39 L. Ed. 2d 270, 292.

⁴² *Northwestern Ohio Bldg. & Constr. Council v. Conrad* (2001), 92 Ohio St.3d 282, 2001 Ohio 190, 750 N.E.2d 130

⁴³ *Swallow v. Industrial Commission of Ohio* (1988), 36 Ohio St. 3d 55, 521 N.E.2d 778, 1988 Ohio LEXIS 75.

C. The BWC's "Beryllium Policy" is Reasonable

{¶27} Plaintiff contends that BWC's interpretation of R.C. 4123.68(V) cannot be a reasonable one because, in his view, R.C. 4123.68(V) "sets forth the diagnostic criteria to determine whether a claimant suffers from a disease of the lungs due to breathing beryllium." Plaintiff asserts that an x-ray "should be determined as suitable and acceptable method[] for diagnosing Mr. Pinto pursuant to the provisions of the revised code."⁴⁵

{¶28} The use of "high resolution computed tomography" ("HRCT"), which is a radiological technique for obtaining clear x-ray images of internal structures by focusing on a specific plane within the body to produce a cross-sectional image,⁴⁶ is provided for in the BWC beryllium policy, but only if "pathological tissue can not be obtained," and only after the injured worker has documented both a history of employment with employer with likelihood of exposure to beryllium dust, salt, oxide, or vapors * * * and [t]wo positive BeLPT tests consistent with sensitivity to beryllium.⁴⁷

{¶29} Because Plaintiff does not satisfy the criteria set forth in the BWC beryllium policy, he argues that the policy "is little more than an attempt by the Bureau to circumvent the properly enacted portion of the Ohio Revised Code that deals with berylliosis and related lung diseases."⁴⁸ Further, Plaintiff asserts that the beryllium policy "completely alters the criteria a claimant needs to fulfill in order to be diagnosed with any disease of the lungs from breathing

⁴⁴ *Swallow v. Industrial Commission of Ohio* (1988), 36 Ohio St.3d 55, 57, 521 N.E.2d 778, 779.

⁴⁵ Plaintiff's Memorandum in Opposition to Defendant Brush Wellman, Inc.'s Motion for Summary Judgment, at 8.

⁴⁶ "tomography." *Britannica Concise Encyclopedia* from Encyclopædia Britannica Premium Service.

<<http://www.britannica.com/ebc/article?tocId=9380912>> [Accessed July 8, 2005]. HRCT permits the examination of structures that are obscured by overlying organs and soft tissues and do not show up clearly on conventional X-ray images.

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⁴⁸ Plaintiff's Memorandum in Opposition to Defendant Brush Wellman, Inc.'s Motion for Summary Judgment, at 10.

beryllium.”⁴⁹ As such, Plaintiff asserts that “worker’s compensation claimants, such as Mr. Pinto [] are subject to a change of the rules in the middle of the game.”⁵⁰

{¶30} Defendant Brush Wellman, Inc. asserts that BWC’s beryllium policy “defines the characteristic changes that must be found in order for a claimant to be diagnosed with CBD,” because “the statute provides no diagnostic criteria.”⁵¹ BWC’s beryllium policy notes that the statute was “written prior to the development of the BeLPT and the medical knowledge of beryllium sensitivity.”⁵² The affidavit testimonies of Dr. Milton Rossman and Dr. Lawrence Repsher reflect the general acceptance within the scientific community of BeLPTs, biopsies, and of the requirement for two positive BeLPT tests. Further, Dr. Rossman’s acknowledgment that the positive blood test performed in his own laboratory at the University of Pennsylvania was likely a false positive emphasizes the risk of relying on only one BeLPT and is also supported by BWC’s observation that a DOE article stated that “25% of individuals who initially test positive do not test positive on a second test.”⁵³ The BWC’s beryllium policy also reflects that the United States Department of Energy is now “requiring two positive BeLPT results to confirm beryllium sensitivity.”⁵⁴

{¶31} BWC’s exclusion of x-rays as a primary diagnostic tool in its beryllium policy reflects concerns within the scientific community as to its reliability as a means of diagnosing

⁴⁹ Plaintiff’s Memorandum in Opposition to Defendant Brush Wellman, Inc.’s Motion for Summary Judgment, at 10.

⁵⁰ Plaintiff’s Memorandum in Opposition to Defendant Brush Wellman, Inc.’s Motion for Summary Judgment, at 10.

⁵¹ Reply Memorandum in Support of Defendant Brush Wellman, Inc.’s Motion for Summary Judgment, at 3.

⁵² Exhibit A,

⁵³ Exhibit A, “DOE Chronic Beryllium Disease Prevention Program.”

⁵⁴ Exhibit A, “DOE Chronic Beryllium Disease Prevention Program.” That Plaintiff was awarded \$150,000.00 pursuant to Energy Employees Occupational Illness Compensation Program Act (EEOIPA), as amended, 42 U.S.C. §7384 et. seq., because he satisfied the “post 01/01/93 requirements for chronic beryllium disease” and “the criteria established for this diagnosis under 42 U.S.C. §7384I(13)(A)” has no affect on this Court’s decision. Plaintiff’s

chronic beryllium disease. But Plaintiff has not offered any further evidence supporting the use of x-rays as a primary diagnostic tool. That the statute provides that berylliosis may be “demonstrated by x-ray examination, by biopsy, or by autopsy,”⁵⁵ does not reflect a requirement that each of the three diagnostic tests is to be given equal weight. The statute also states that berylliosis produces “characteristic changes” which is “demonstrated by x-ray examination, by biopsy, or by autopsy.”⁵⁶ Recognizing that these “characteristic changes” may be more readily identified by the use of biopsy instead of x-ray, the BWC has formulated a policy that takes into consideration advances in medical science, technology and new techniques of analysis, and which is inherently more reliable. Regulating x-rays to a lesser or secondary diagnostic level does not eliminate it as a diagnostic tool, but acknowledges its inherent limitations in providing a reliable diagnosis of berylliosis.

{¶32} Here, BWC has not ignored express terms in the statute in order to unduly restrict its application. As in *Swallow v. Industrial Commission of Ohio*,⁵⁷ and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁵⁸ the agency’s interpretation of R.C. 4123.68(V) has furthered the intent of the General Assembly. And to the extent that BWC’s interpretation restricts the use of x-ray as a diagnostic tool, it has not rendered the statute “inconsonant” with its original legislative intent.⁵⁹ In *State ex rel. General Electric Corp. v. Industrial Commission*

Supplemental Memorandum in Opposition to Defendant Brush Wellman, Inc.’s Motion for Summary Judgment, at Exhibit A.

⁵⁵ R.C. 4123.68(V).

⁵⁶ R.C. 4123.68(V).

⁵⁷ *Swallow v. Industrial Commission of Ohio* (1988), 36 Ohio St. 3d 55, 521 N.E.2d 778, 1988 Ohio LEXIS 75.

⁵⁸ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694, 703.

⁵⁹ *State ex rel. General Electric Corp. v. Industrial Commission of Ohio* (2004), 103 Ohio St.3d 420, 2004 Ohio 5585, 816 N.E.2d 588, 2004 Ohio LEXIS 2599.

of Ohio,⁶⁰ the Ohio Supreme Court held that the legislature “presumably left the terms deliberately undefined in order to accommodate advances in medical procedure.” Having construed the statute in the plain meaning of its word, this Court does not find the BWC beryllium policy to be “inconsonant” with its original legislative intent.⁶¹ According to the policy of the BWC, Plaintiff has failed to demonstrate that he has contracted an occupational disease for which he is entitled to compensation.

{¶33} In *Northwestern Ohio Bldg. & Constr. Council v. Conrad*,⁶² the Ohio Supreme Court stated: “It is axiomatic that if a statute provides the authority for an administrative agency to perform a specified act, but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme.⁶³ A court must give due deference to the agency’s reasonable interpretation of the legislative scheme.⁶⁴ In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁶⁵ the United States Supreme Court stated “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” And in *Swallow v. Industrial Commission of Ohio*,⁶⁶ the Ohio Supreme Court noted that “the commission is vested with the authority to formulate policies and standards for administering the Workers’ Compensation Act.”

⁶⁰ *State ex rel. General Electric Corp. v. Industrial Commission of Ohio* (2004), 103 Ohio St.3d 420, 2004 Ohio 5585, 816 N.E.2d 588, 2004 Ohio LEXIS 2599.

⁶¹ *State ex rel. General Electric Corp. v. Industrial Commission of Ohio* (2004), 103 Ohio St.3d 420, 2004 Ohio 5585, 816 N.E.2d 588, 2004 Ohio LEXIS 2599.

⁶² *Northwestern Ohio Bldg. & Constr. Council v. Conrad* (2001), 92 Ohio St.3d 282, 2001 Ohio 190, 750 N.E.2d 130

⁶³ See *Swallow v. Industrial Commission of Ohio* (1988), 36 Ohio St. 3d 55, 521 N.E.2d 778, 1988 Ohio LEXIS 75.

⁶⁴ See *Swallow v. Industrial Commission of Ohio* (1988), 36 Ohio St. 3d 55, 521 N.E.2d 778, 1988 Ohio LEXIS 75.

⁶⁵ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694, 703.

⁶⁶ *Swallow v. Industrial Commission of Ohio* (1988), 36 Ohio St. 3d 55, 521 N.E.2d 778, 1988 Ohio LEXIS 75.

{¶34} Because this Court has found that R.C. 4123.68(V) is ambiguous as to the *techniques* or methods of analysis that may be applied to the specific diagnostic tests described in the statute to determine whether the Plaintiff has suffered an occupational injury, this Court finds that the BWC was justified in interpreting “characteristic changes” and in establishing standards reflecting the sound application of science, and advances in medical procedure and diagnosis. Thus, BWC’s interpretation of the statute is reasonable, and for this reason alone, this Court should accord it due deference.⁶⁷

D. The BWC’s “Beryllium Policy” is Admissible Pursuant to Evid. R. 803(A)

{¶35} Plaintiff asserts that the “defendant bears the responsibility for proving to this court that the Bureau of Worker’s Compensation’s ‘Beryllium Policy’ is valid and is applicable in the instant case,” and that “Defendant has completely failed to do so.”⁶⁸ Plaintiff argues that the “copy of the ‘policy’ is not a certified copy, nor is there any statement from the source indicating that the ‘policy’ contained in the defendant’s motion is a true and accurate copy of the actual document.”⁶⁹

{¶36} In the case *sub judice*, Defendant Brush Wellman, Inc. has provided this Court with a copy of the “Beryllium Policy” that was posted on the BWC website. As well, Defendant Brush Wellman, Inc. has provided this Court with a letter from BWC, dated June 11, 2004,

⁶⁷ *Swallow v. Industrial Commission of Ohio* (1988), 36 Ohio St. 3d 55, 521 N.E.2d 778; *See State ex rel. McLean v. Indus. Comm. of Ohio* (1986), 25 Ohio St. 3d 90, 92, 25 Ohio B. 141, 143, 495 N.E.2d 370, 372 (holding that commission did not abuse discretion in awarding compensation for loss of foot even though claimant suffered amputation five inches below the knee).

⁶⁸ Plaintiff’s Memorandum in Opposition to Defendant Brush Wellman, Inc.’s Motion for Summary Judgment, at 9.

⁶⁹ Plaintiff’s Memorandum in Opposition to Defendant Brush Wellman, Inc.’s Motion for Summary Judgment, at 9.

including a “copy of the final version of BWC’s policy on beryllium related diseases.”⁷⁰ Both copies were accompanied by an affidavit.

{¶37} Civ.R. 56(C) provides that only “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence * * * and written stipulations of fact” are properly considered on a motion for summary judgment. While the beryllium policy may not fit squarely into one of those categories, this policy may properly be considered on summary judgment if it is accompanied by an appropriate affidavit.⁷¹ Indeed, the “proper procedure for introducing evidentiary matter not specifically authorized by Civ.R. 56(C) is to incorporate it by reference in a properly framed affidavit pursuant to Civ.R 56(E).”⁷²

{¶38} Plaintiff argues that the beryllium policy “isn’t signed by any official of the Bureau of Worker’s Compensation. It was not produced on Bureau of Worker’s Compensation Letterhead, nor does it contain any other identifying mark to show that it is indeed a Bureau of Worker’s Compensation document. In *McKinley v. Screw Machine Products Co.*,⁷³ the District Court stated “[u]nsworn and unsigned statements are not materials authorized by Civ.R. 56(C) for consideration on a motion for summary judgment.”⁷⁴ But in a footnote, the Court in *McKinley* observed, “McKinley had ample opportunity to identify the individual who wrote the report, and either take his/her deposition or secure an affidavit” during the “discovery stage.”⁷⁵ Here, Plaintiff also had ample opportunity to contact the BWC and attempt to refute Defendant’s claim that the BWC beryllium policy which was provided to this Court exists.

⁷⁰ Affidavit of Jeffery D. Ubersax, at 1, ¶ 3.

⁷¹ See, *Muncy v. Am. Select Ins. Co.* (1998), 129 Ohio App. 3d 1, 5-6, 716 N.E.2d 1171.

⁷² *Muncy v. Am. Select Ins. Co.* (1998), 129 Ohio App. 3d 1, 6, 716 N.E.2d 1171.

⁷³ *McKinley v. Screw Machine Products Co.*, 8th District, No. 80146, 2002 Ohio 3112, 2002 Ohio App. LEXIS 3124.

⁷⁴ See, *Dorsey v. Morris* (1992), 82 Ohio App.3d 176, 611 N.E.2d 509; *Butler v. Young* (Jan. 14, 1999), 1999 Ohio App. LEXIS 32, Cuyahoga App. No. 73549, unreported; *Celinski v. Benke*, 11th Dist. No. 95-A-0030, 1996 Ohio App. LEXIS 5396; *Botello v. Reyes*, 6th Dist. No. S-96-003, 1997 Ohio App. LEXIS 169.

{¶39} However, this Court finds that the beryllium policy is admissible pursuant to the public records and reports hearsay exception as contained in Evid.R. 803(8), which provide: “Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency.”⁷⁶

E. That Defendant’s X-Ray is “Consistent” with Beryllium Disease is not Sufficient to Create a Genuine Issue of Material Fact

{¶40} Finally, this Court must consider whether Defendant Brush Wellman, Inc. has presented sufficient evidence to demonstrate that Plaintiff has not contracted an occupational disease as defined by R.C. 4123.68(V).

{¶41} Defendant Brush Wellman, Inc. argues that “the generally accepted medical criteria for a diagnosis of CBD and/or beryllium sensitivity * * * require two positive beryllium lymphocyte proliferation tests.” Further, Defendant Brush Wellman, Inc. asserts that “it is widely accepted in the medical community that a single positive result is not sufficient to establish that a patient is sensitized to beryllium,” because “experience has shown that there are false positive and false negative results, so that it would be inappropriate to rely on the results of one test to reach a conclusion about whether a person is sensitized.”⁷⁷

{¶42} Defendant Brush Wellman, Inc. asserts that Plaintiff has “had nine blood BeLPTs; that all but one of them were negative.” As well, Defendant Brush Wellman, Inc. asserts that Plaintiff has had three biopsies: “a beryllium lymphocyte proliferation test on cells obtained from

⁷⁵ *McKinley v. Screw Machine Products Co.*, 8th District, No. 80146, 2002 Ohio 3112, 2002 Ohio App. LEXIS 3124.

Mr. Pinto's lungs by bronchoalveolar lavage, which was negative; an analysis of cell types in the fluid obtained by this lavage, which showed a normal percentage of lymphocytes, and hence no lymphocytosis (a characteristic finding in CBD); and a transbronchial biopsy, which was negative for granulomas (another characteristic, indeed defining feature of CBD).” Plaintiff does not contest these findings but asserts that he has had one positive BeLPT, and that he has computerized axial tomography scans showing changes consistent with chronic beryllium disease, as attested to by Dr. Lalaine E. Mattison.

{¶43} Plaintiff argues that characteristic changes in the lungs can be demonstrated by x-ray examination and that x-ray examination is one of three tests provided for by statute. In her affidavit, Dr. Lalaine E. Mattison states “Since the inception of my treatment of Mr. Pinto I have reviewed multiple x-ray examination films taken of Mr. Pinto. I have also reviewed his multiple CT scans and pulmonary function studies.”⁷⁸ Finally, Dr. Lalaine E. Mattison concludes “It is my professional opinion, to a reasonable degree of medical certainty, that Mr. Pinto's x-ray examination films demonstrate characteristic changes in his lungs such that he has chronic interstitial lung disease consistent with chronic beryllium disease.”⁷⁹ Although the BWC policy states that “The disease is usually limited to the lungs with interstitial, endobronchial, and thoracic lymph node involvement,”⁸⁰ Dr. Lalaine E. Mattison does not define “chronic interstitial lung disease.”⁸¹ Nor does she indicate that that hilar lymphadenopathy or DLCO is present, or

⁷⁶ See, *Leskovac v. Ohio Dept. of Transp.* (1990), 71 Ohio App.3d 22, 593 N.E.2d 9; *Sanders v. Hairston* (1988), 51 Ohio App.3d 63, 554 N.E.2d 951; *Cincinnati Ins. Co. v. Volkswagen of Am., Inc.* (1987), 41 Ohio App.3d 239, 535 N.E.2d 702.

⁷⁷ Memorandum in Support of Defendant's Motion for Summary Judgment, at 3.

⁷⁸ Affidavit of Lalaine E. Mattison, M.D., at Exhibit 3.

⁷⁹ Affidavit of Lalaine E. Mattison, M.D., at Exhibit 3.

⁸⁰ Exhibit A, “Chronic Beryllium Disease (CBD).”

⁸¹ Affidavit of Lalaine E. Mattison, M.D., at Exhibit 3.

that the requisite spirometry is present in the x-rays and CT scans.⁸² She asserts that Plaintiff's symptoms are consistent with chronic respiratory disorder, because "he has clearly shown deterioration of his pulmonary function since he started working at Brush Wellman."⁸³

{¶44} In the case *sub judice*, this Court finds that Dr. Lalaine E. Mattison's affidavit statement that Plaintiff's x-rays demonstrate characteristic changes "consistent" with chronic beryllium disease to be inadequate because she fails to define those characteristic changes. Plaintiff's one positive BeLPT does not invalidate the eight other negative BeLPTs or the three other biopsy results.

{¶45} Further, the affidavit testimonies of Dr. Milton Rossman and Dr. Lawrence Repsher reflect the general acceptance within the scientific community of BeLPTs, biopsies, and of policies requiring two positive BeLPTs. That the BWC has not incorporated into its policy measurements or criteria by which characteristic changes can be identified by x-rays also raises concerns as to its general acceptance in the scientific community and its reliability as a means of diagnosing chronic beryllium disease. Nor has Plaintiff offered any further evidence supporting the use of x-rays as a diagnostic tool.

III. CONCLUSION

{¶46} Based on the foregoing, Defendants have established that no genuine issues of material fact exist, and that Plaintiff can not meet the standard for establishing that he has contracted an occupational disease as defined by R.C. 4123.68(V) and that he is entitled to the

⁸² See Exhibit A, "Chronic Beryllium Disease (CBD)."

⁸³ Affidavit of Lalaine E. Mattison, M.D., at Exhibit 3.

COMMON PLEAS COURT OF OTTAWA COUNTY

compensation provided by sections 4123.55 to 4123.59 and 4123.66 of the Revised Code. As such, this Court finds Defendants' Motion for Reconsideration to be appropriate. Accordingly,

{¶47} IT IS ORDERED, ADJUDGED, and DECREED that Defendants' Motion for Reconsideration is GRANTED,

{¶48} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Defendants' Motion for Summary Judgment is GRANTED, and this cause is DISMISSED.

{¶49} Clerk of Courts shall send copies of this Decision and Order to all parties of record or their counsel by regular U.S. Mail.

JULY 13, 2005

PAUL C. MOON, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing "Decision and Order" was delivered by regular Mail, this 13th day of July, 2005, to the following:

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JULY 13, 2005

JOAN MONNETT, CLERK OF COURTS/
DEPUTY CLERK