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Pa. Court Revives Worker's Toxic Lead Exposure Suit

By **Y. Peter Kang**

Law360 (May 13, 2021, 6:11 PM EDT) -- A Pennsylvania appellate panel on Thursday revived a suit accusing a radiator manufacturer of causing a worker's permanent brain damage due to prolonged exposure to toxic lead, saying the suit is not barred by the state workers' compensation law because a claim of fraudulent misrepresentation was plausibly alleged.

In a published opinion, a three-judge Superior Court panel reversed the dismissal of a suit accusing Active Radiator Repair Co. and its owner, Martin P. Newell Jr., of negligently exposing employee Jerry A. Mercer Jr. to toxic lead for a year even though the company knew he had elevated levels of lead accumulating in his brain, which caused permanent brain damage.

The Philadelphia County judge had tossed the suit, reasoning that Pennsylvania's Workers' Compensation Act, which governs workplace injury claims, preempted Mercer's lawsuit.

On appeal, Mercer argued the WCA does not govern his claims because he alleged the company fraudulently concealed the fact that a company-hired doctor observed, through blood tests, elevated levels of lead accumulating in his brain and ordered he be removed from further exposure — yet the company failed to do so.

The panel agreed, saying Mercer's claim is not a work-related injury but an aggravation of a work-related injury that can be adjudicated outside the workers' comp system under an exception carved out by a 1992 Pennsylvania Supreme Court case, *Martin v. Lancaster Battery Co.*

Noting the trial court acknowledged the *Martin* exception "yet, without explanation," said it didn't apply and instead found Mercer's suit was preempted by the WCA, the panel said Mercer plausibly alleged Active Radiator took no steps to remove the employee from further lead exposure despite the doctor's instructions.

"As was the case in *Martin*, [Mercer] alleged fraudulent misrepresentation on the part of [Active Radiator that] caused a delay in Mercer's removal from his further lead exposure which aggravated a previous, work-related lead accumulation in Mercer's brain to permanent brain damage," the panel said. "[Mercer is] not seeking compensation for the work-related injury itself in the instant action."

The panel remanded the case back to the trial court for further proceedings.

Attorneys for the parties did not immediately respond to requests for comment Thursday.

Judges Jack A. Panella, Mary P. Murray and Correale F. Stevens sat on the panel for the Superior Court.

Mercer is represented by George Chada of the Law Offices of George Chada and David Senoff of First Law Strategy Group LLC.

Newell and Active Radiator are represented by Jason A. Snyderman and Huaou Yan of Blank Rome LLP.

The case is *Jerry A. Mercer Jr. et al. v. Martin P. Newell Jr. et al.*, case number 62 EDA 2020, in the Superior Court of Pennsylvania.

--Editing by Philip Shea.

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