Fracking Meets Medical Monitoring

May 31, 2011 by Sean Wajert

We have posted before about medical monitoring claims, and recently noted how plaintiff attorneys have cast their eyes on hydraulic fracturing operations as a new source of revenue.

Now let's see how they combine: some Pennsylvania residents are suing various drilling companies over hydraulic fracturing operations, alleging that such operations have increased their risk of future disease such that they need medical monitoring. Fiorentino v. Cabot Oil & Gas Co., et al., No. 3:09-cv-02284 (M.D. Pa.). Plaintiffs seek a medical monitoring trust fund, paid for by the drillers.

The case is in the discovery stages, and defendants, logically, are seeking medical records of the plaintiffs. Those not familiar with medical monitoring may wonder why medical records would be relevant regarding those plaintiffs who do not allege a traditional present physical injury but only the risk of future injury. Indeed, plaintiffs earlier this month filed a motion seeking to block defendants from obtaining the medical records.

However, defendants correctly point out in response that, in Pennsylvania, plaintiffs must prove all of the following elements to succeed on a claim for medical monitoring:

(1) exposure greater than the normal background levels;
(2) to a proven hazardous substance;
(3) caused by the defendant's negligence;
(4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease;
(5) a monitoring procedure exists that makes the early detection of the disease possible;
(6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and
(7) the prescribed monitoring regime is reasonable necessary according to contemporary scientific
principles.
Redland Soccer Club, Inc. v. Dep't of Army & Dep't of Def. of U.S., 696 A.2d 137, 195-96 (Pa. 1997).

At the least, medical records are relevant to the sixth element, namely that "the prescribed monitoring regime is different from that normally recommended in the absence of the exposure." For example, a plaintiff might already be undergoing testing because of an existing medical condition, or already be a candidate for screening because of other risk factors in his life, such as occupational exposure to toxins or a family history of disease or genetic risk factors, all requiring their own medical monitoring regime which may overlap the claimed monitoring regime for the alleged exposure in this case. Without medical records, a medical monitoring defendant is denied a fair opportunity to attack plaintiff's proof on this element and to show a plaintiff is not able to satisfy the sixth element of the *Redland* test -- and, therefore,

not prove a claim for medical monitoring. See, e.g., Barnes v. American Tobacco Co., 984 F. Supp. 842, 871-72 (E.D. Pa. 1997).

While arising here in a discovery context, this issue also is relevant to class certification claims in medical monitoring cases, as the individualized nature of the medical monitoring remedy demands that each plaintiff be evaluated to determine whether the medical monitoring on account of the alleged exposure to the class called for by plaintiff experts is any different from the medical monitoring a plaintiff is or should be receiving because of the separate and existing risk factors currently facing an individual proposed class member. Such an individual issue weighs heavily against class certification.

In any event, several courts have found that a defendant is entitled to the records. See O'Connor v. Boeing North American, Inc., 185 F.R.D. 272, 283 (C.D. Cal. 1999); Cook v. Rockwell Int'l Corp., 147 F.R.D. 237, 242 (D. Colo. 1993).