

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
March 15, 2001 Session

DAVIS REECE, JR. v. LIBERTY MUTUAL INSURANCE CO., ET AL.

**Direct Appeal from the Chancery Court for Claiborne County
No. 10,465 Billy J. White, Chancellor**

**No. E1997-00276-WC-R3-CV - Mailed - May 22, 2001
FILED: SEPTEMBER 6, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found the plaintiff sustained a 40 percent vocational disability to the body as a whole as a result of exposure to formaldehyde which caused permanent respiratory injury. The trial judge found the plaintiff failed to show by a preponderance of the evidence that he sustained any psychiatric injury as a result of the accident. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed.

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J., and ROGER E. THAYER, SP. J., joined.

James T. Shea, IV, Knoxville, Tennessee, for the appellants, Liberty Mutual Insurance Co., et. al.

David H. Dunaway, LaFollette, Tennessee, for the appellee, Davis Reece, Jr.

MEMORANDUM OPINION

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Discussion

The trial court found the plaintiff sustained a 40 percent vocational disability to the body as a whole as a result of exposure to formaldehyde which caused permanent respiratory injury. The trial judge found the plaintiff failed to show by a preponderance of the evidence that he sustained any psychiatric injury as a result of the accident.¹

The defendant argues the evidence shows the plaintiff's injury occurred because the plaintiff willfully failed to use a respirator—a safety device required by the Occupational Health and Safety Standards of 49 C.F.R. § 1048.

The plaintiff claims the evidence shows he sustained psychiatric impairment as a result of the accident.

We affirm the judgment of the trial court.

Facts

On December 24, 1993, the plaintiff, who is the president and principal shareholder of Reece Funeral Home, went to the University of Tennessee Hospital to pick up a body for embalming.

The plaintiff began the embalming process by pumping formaldehyde into the body. The process is intended to cause the body to “firm up.” In this instance, the process was not occurring as expected so the plaintiff increased the concentration of formaldehyde being pumped into the body to “almost straight fluid” and increased the pumping pressure as well. When the concentration and pressure was increased, formaldehyde began to escape from the body causing the plaintiff's fifteen to twenty-five minute exposure to formaldehyde. The plaintiff became ill, had to shut-off the process and leave the embalming room.

Later the plaintiff learned there were incisions in the body due to tubes that had been inserted during medical treatment at the hospital. The formaldehyde escaped from the incision sites. According to the plaintiff, after the increase in concentration and pressure, the formaldehyde seeped and squirted from the body.

Medical Evidence

The defendant does not contest the amount of the award given by the trial court, nor does the defendant deny the plaintiff sustained an injury as found by the trial court. Therefore, we see no reason to detail the medical evidence concerning the physical injury to the plaintiff except to note

¹ The plaintiff originally filed suit for an alleged injury received in a fall on the day he attempted to return to work following the formaldehyde exposure. The suit was dismissed and the only claim at issue is the formaldehyde exposure.

the medical testimony shows the plaintiff sustained a 10 percent permanent partial disability to the body as a whole as a result of the accident.

Psychiatric Evidence

Dr. Kelley Walker saw the plaintiff on January 17, 1995, at his request for an evaluation of his psychiatric condition. Dr. Walker diagnosed the plaintiff with major depression and personality disorder. She found this occurred as a result of the accident of December 24, 1993, exposure to formaldehyde and an injury that occurred on February 10, 1994.² No separation of impairment was made for the two events—the exposure to formaldehyde and the February fall.

Dr. Walker was unaware of the plaintiff's previous diagnosis of the same psychiatric condition she had diagnosed prior to her evaluation because she was unaware of the previous psychiatric treatment of the plaintiff.

Dr. Jerry Lemler saw the plaintiff on April 2, 1996, for evaluation at the request of the plaintiff. He found the plaintiff suffered major depression also.

Dr. Lemler was not aware of or well versed in the previous psychiatric treatment of the plaintiff.

Dr. Lemler's testimony, for the most part, dealt with the ill effects that long term exposure to formaldehyde could have on a person: it would result in a wide scope of problems, primarily physical as opposed to psychiatric. It seems Dr. Lemler's diagnosis was based upon the fact that the plaintiff appeared anxious about the general contact morticians have with formaldehyde over an extended period.

Dr. Donald Catron had treated the plaintiff for psychiatric problems starting on April 28, 1992. He found the plaintiff suffered from depression and anxiety.

On the whole, the generality of Dr. Catron's testimony gave little guidance on the issue of the plaintiff's psychiatric problems.

Discussion

The defendant argues the plaintiff should not be allowed to recover as a result of the accidental exposure to formaldehyde because he failed to use a safety device that was available to him at the time of the accident.

Tennessee Code Annotated § 50-6-110 provides in part that a plaintiff may not recover for an accidental injury when the injury occurred because of the willful failure or refusal to use a safety

² See footnote 1 *supra*.

appliance or perform a duty required by law.

The Code of Federal Regulations set out under the Occupational Safety and Health Administration regulations require the use of a respirator when there will be exposure to a significant amount of formaldehyde.

For the purpose of this case, the Appendix A to the provision is applicable. The provision deals with the necessity of the employer to make respirators available in case of an accidental release of formaldehyde.

The funeral home was equipped with respirators as required by the regulation.

In order to bar a recovery for failure to use a safety device, the employer, upon whom the burden of proof on this issue lies, must show the conduct of the plaintiff was (1) an intention to do the act, (2) purposeful violation of orders, (3) an element of perverseness. *Rogers v. Kroger Co.*, 832 S.W.2d 538 (Tenn. 1992).

In *Coleman v. Coker*, 310 S.W.2d 540 (Tenn.1959), the Court held that “(i)advertance, mistake of judgment, negligence or even gross negligence does not constitute willful misconduct.”

The trial judge found that the incident of December 24, 1994, was the result of an “unforeseen spilling incident, an accident not foreseeable, that it’s not a violation of the safety rule, not intentional, not gross.”

Whether willful failure to use a safety device is present in a particular case is a factual issue. The trial judge heard the evidence and found the plaintiff did not act willfully in not using the respirator at the time of the occurrence. The evidence does not preponderate against the finding.

We find further that the evidence does not preponderate against the trial court’s finding that the plaintiff was not entitled to recover for an alleged psychiatric injury.

The trial judge found that the testimony on the issue was “so back and forth that the court [had] great difficulty in assessing what, if any, problem came from the injury.” Further the trial court found:

“There were considerable problems before. It perhaps was aggravated, perhaps made somewhat worse, but the court can’t make any clear findings on that based on the evidence in this case.”

The burden is upon the plaintiff to show causation by a preponderance of the evidence. The medical evidence on an alleged psychiatric injury is, as the trial judge stated, not clear. The evidence does not preponderate against the refusal of the trial judge to award recovery to the plaintiff in an alleged psychiatric injury.

We affirm the judgment of the trial court. The cost of the appeal is taxed equally to the plaintiff and defendant.

JOHN K. BYERS, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon Liberty Mutual Insurance Company's motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid equally by plaintiff and defendant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

ANDERSON, J., NOT PARTICIPATING