IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 27, 2002 Session

GLENN EDWIN BILYEU v. SHERWIN WILLIAMS COMPANY

Direct Appeal from the Circuit Court for Robertson County
No. 9290 John Gasaway, III, Judge

No. M2001-01338-WC-R3-CV - Mailed - May 22, 2002
Filed - June 21, 2002

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann.§ 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendant appeals the trial judge's decision that the plaintiff suffered the injury of occupational asthma in the course and scope of his employment which resulted in a 75 percent permanent partial disability to the body as a whole. We affirm the judgment of the trial court.

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

BYERS, SR. J., delivered the opinion of the court, in which DROWOTA, C.J. and LOSER, SP. J., joined.

William M. Billips, Nashville, Tennessee for the appellant, Sherwin Williams Company.

C. Michael Lawton, Nashville, Tennessee, for the appellee, Glenn Edwin Bilyeu.

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 finding, 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).

Facts

The plaintiff was fifty years of age at the time of this trial. He completed the eleventh grade in high school and has his GED. He did not attend college or any vocational school. He had worked continuously as the manager of the Sherwin Williams paint store in Madison, Tennessee, from 1973 until September, 1999. His duties as manager included selling paint and related sundries as well as a great deal of mixing and tinting paint.

The plaintiff testified that in May of 1998, he began having breathing problems. These problems seemed to be exacerbated whenever the plaintiff was around paint. He reported these problems to his supervisors and went to see his general practitioner, who referred him to pulmonologist William Faith. Dr. Faith saw the plaintiff twice in 1998, and he testified by deposition that he was suspicious that the plaintiff's breathing problems were related to his occupation but he reached no definitive diagnosis at that time. Based upon his initial report to his supervisors in May of 1998, he was denied benefits on the grounds of there being no evidence to support a claim under the Workers' Compensation Act.

The plaintiff testified that his condition fluctuated between June of 1998 and September of 1999, when he began having more serious problems breathing. During that time period, he continued working in his normal duties as store manager at Sherwin Williams. He returned to see Dr. Faith in September of 1999 and Dr. Faith advised him that he had occupational asthma.

The plaintiff was then sent by his employer to Dr. Brevard Haynes, a pulmonologist in Nashville. Dr. Haynes examined the plaintiff and determined that he did have asthma, but questioned whether the asthma was caused by working at the paint store.

Beginning in September of 1999, the plaintiff was unable to continue to perform his duties as store manager for Sherwin Williams.

The plaintiff was a smoker. He smoked approximately two packs of cigarettes a day from when he was very young until September of 1999, when he cut back to one pack a day.

Medical Evidence

The medical evidence for the purpose of the issues raised in this case was presented by the depositions of Dr. William Faith and Dr. James Brevard Haynes.

Dr. Faith, a board-certified pulmonologist in Nashville, testified that he first saw the plaintiff on May 26, 1998. On that date, the plaintiff came to Dr. Faith's office complaining of shortness of breath. Dr. Faith examined the plaintiff, gave him an inhaler to use when his breathing problems returned, and asked him to keep a record of any breathing problems he might have over time. Dr. Faith testified that he next saw the plaintiff on June 15, 1998. At that time the plaintiff reported that he was still having breathing problems, mainly when he was at work. Dr. Faith testified that at that

time he was under the impression that the plaintiff was suffering sensitivity to something at work. Dr. Faith did not see the plaintiff again until September of 1999, at which point his breathing problems had worsened considerably. Dr. Faith testified that at that time he diagnosed the plaintiff with occupationally induced asthma. He told the plaintiff that it was in his best interest to refrain from working in the paint store. Dr. Faith performed several tests on the plaintiff, including a methacholine test to determine that he had asthma. Dr. Faith assigned the plaintiff a 25 percent medical impairment rating.

Dr. Haynes, also a Nashville pulmonologist, testified that he examined the plaintiff on January 24, 2001. He reviewed the deposition of Dr. Faith, a copy of Dr. Faith's medical records, and the deposition of the plaintiff. Dr. Haynes testified that the only chemicals in the plaintiff's workplace known to cause asthma are isocyanides, which are found in epoxy paints. Dr. Haynes stated that it was his opinion that the plaintiff does have asthma, but that it is not occupationally induced. He further testified that it is his belief that mixing paints at work may aggravate the plaintiff's condition, but it did not cause his asthma.

Discussion

Although we are required to weigh the evidence in a case in depth to determine where the preponderance of the evidence lies, we are required to make such evaluation within the confines of established rules in evaluating the propriety of the trial court.

The appellant appeals the judgment of the trial court based upon five grounds.

The appellant first contends that the plaintiff's claim should have been barred by the statute of limitations. In support of this claim, the appellant contends that the statute began running on May 11, 1998, when the plaintiff first reported his problems to his superiors. The plaintiff's suit was not filed until June 6, 2000.

The statute of limitations in occupational disease cases is governed by Tenn. Code Ann. § 50-6-306(a), which states in part:

> "The right to compensation for occupational disease shall be forever barred unless suit therefor is commenced within one (1) year after the beginning of the incapacity for work resulting from an occupational disease..."

Interpreting courts have determined that the beginning of "incapacity for work" occurs when an employee has knowledge, or in the exercise of reasonable caution should have knowledge, that he has an occupational disease and that is has progressed to the point that it injuriously affects his capacity to work to a degree amounting to a compensable injury. *Adams v. American Zinc Co.*, 205 Tenn. 189, 326 S.W.2d 425 (1959).

In this case, the plaintiff certainly had knowledge that he was having breathing problems in

May, 1998. The record indicates that there was even suspicion by Dr. Faith that these problems might be work-related. However, the plaintiff was not advised at that time to stop working with paint and he continued working at his job until September of 1999. The record reflects that the plaintiff's problems in 1998 were mild and fluctuating. It was in September of 1999 that the plaintiff's problems worsened to a degree that he again needed medical attention and it was at this point that he was told by Dr. Faith that his condition was definitely work-related and that he should not work around paints anymore. As the court in *Adams* reasoned, "full knowledge of [an occupational disease], may exist long before a compensable disability develops. It is injury from the disease, rather than the disease, which entitles an employee to compensation." *Id.*

There was no compensable injury in this case until September of 1999 and as such the statute of limitations did not begin to run until that time.

Next the appellant contends that the trial court erred as the plaintiff did not carry his burden of proof as to causation of his injury. As support for this contention, the appellant contends that Dr. Faith's testimony is not credible.

It is well-settled that in order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. § 50-6-102(a)(5). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted); *Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993).

In all but the most obvious cases, such as the loss of a member, expert testimony is required to establish causation. *Thomas v. Aetna Life & Casualty Co.*, 812 S.W.2d 278 (Tenn. 1991). When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

Dr. Faith testified that he fully examined the plaintiff and treated him for a period of time and that it was his opinion, within reasonable medical certainty, that the primary cause of the plaintiff's asthma was his occupation and exposure to chemicals at work. As his treating physician, Dr. Faith has at least as much credibility as Dr. Haynes, if not more. Dr. Haynes' opinion that the plaintiff's exposure to epoxy paints was very slight was based upon misinformation that epoxy paints were not mixed. The plaintiff testified at trial that he mixed epoxy paints regularly. Such exposure to the chemicals in these epoxy paints, as stated by both medical experts in this case, could have caused the plaintiff's asthma.

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical

testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted). In light of the foregoing, we do not disturb the trial court's finding that the plaintiff's asthma was caused by his exposure to chemicals at his workplace.

The appellant next contends that the plaintiff failed to carry his burden of proof regarding impairment from his asthma. In support of this contention, the appellant points out that Dr. Faith only performed one methacholine test on the plaintiff to determine the extent of his asthma problems, as opposed to the three such tests at least one week apart the appellant contends are required by the current AMA Guides.

The appellant's argument is well taken, yet as the plaintiff points out, the appellant cites no authority for disregarding Dr. Faith's testimony. As the plaintiff contends, the AMA Guides do not set forth a mandatory requirement of three methacholine tests for the assessment of impairment. Three tests are merely the suggested guideline for diagnosing respiratory impairment. Further, the "requirement" of three such tests at least one week apart as set forth in the paragraph cited by the appellant from Table 10, page 164 of the Guides, is used to diagnose *severe* respiratory impairment under the Guides. Dr. Faith's impairment rating for the plaintiff was 25 percent, which is listed in Table 8, page 162 of the AMA Guides as "mild impairment of the whole person", *not* "severe" impairment as would require three tests one week apart.

Dr. Faith testified that it was his opinion within a reasonable medical certainty under the AMA Guides, Fourth Edition, that the plaintiff's medical impairment rating was 25 percent to the body as a whole. The trial court accepted Dr. Faith's rating. The trial judge has the discretion to accept the opinion of one expert over that of another. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). Unless there is something inherent in the deposition of the expert whom the trial judge credits to make the testing unreliable, we will not disagree with the trial judge.

Fourth, the appellant contends that the trial court's award of 75 percent permanent partial disability was excessive.

The ultimate question in a workers' compensation case is vocational disability. In making a determination as to vocational disability, the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work in at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(c); *Robertson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). A medical expert's testimony is one of the relevant factors for determining the extent of vocational disability in a workers' compensation proceeding, but vocational disability is not restricted to precise estimate of anatomical disability made by a medical witness. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446 (Tenn. 1994).

In making its decision as to the plaintiff's vocational disability rating, the trial court did take

the aforementioned factors into account. The court considered that the plaintiff has problems walking, that he has limitations as to what he can lift, that any exertion whatsoever aggravates his symptoms, and that he has virtually no vocational skills other than his ability to work with paint, which he can obviously no longer do. The award decided upon by the trial court is within its discretion pursuant to the Tennessee Workers' Compensation Act and thus we do not disturb the award.

Finally, the appellant contends that the trial court abused its discretion in commuting the plaintiff's award to a lump sum payment. According to Tenn. Code Ann. § 50-6-229(a), in determining whether to commute an award, the court must consider (1) whether the commutation will be in the best interest of the employee, and (2) the ability of the employee to wisely manage and control the commuted award. Whether to commute a workers' compensation award to a lump sum is discretionary with the trial court, and the trial court's decision will not be disturbed on appeal unless the trial court's decision amounted to an abuse of discretion. *Edmonds v. Wilson County*, 9 S.W.3d 106 (Tenn. 1999). In this case, the trial court relied on the testimony of the plaintiff, who has considerable experience managing a business, and who has definite plans for investment of his award from this case. This the trial court may do and we do not disturb its decision on this issue. The current state of the economy and its effects on financial investments do not render such a decision an abuse of discretion.

We cannot say that the evidence preponderates against the findings of the trial judge on any of the issues brought by the appellant and we affirm the judgment. The cost of this appeal is taxed to the appellant.

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JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

GLENN EDWIN BILYEU v. SHERWIN WILLIAMS COMPANY

Circuit Court for Robertson County
No. 9290

No. M2001-01338-WC-R3-CV - Filed - June 21, 2002

JUDGMENT

This case is before the Court upon 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 Memorandum Opinion of the Panel should be accepted and approved; 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 by the appellant, Sherwin Williams Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM