IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 10, 2002 Session

JOANNE BISHOP v. ZURICH-AMERICAN INSURANCE COMPANY, ET AL.

Direct Appeal from the Chancery Court for Hamilton County
No. 96-0508 Howell N. Peoples, Chancellor

Filed July 30, 2002

No. E2001-00218-WC-R3-CV

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 plaintiff appeals the trial judge's decision that she failed to carry her burden of proof with respect to causation regarding an alleged work-related case of pulmonary disease. 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.

BYERS, SR. J., delivered the opinion of the court, in which ANDERSON, J., and THAYER, SP. J., joined.

Martin J. Levitt, Chattanooga, Tennessee, for the appellant, Joanne Bishop.

D. Brett Burrow and Gordon C. Aulgur, Nashville, Tennessee, for the appellees, Zurich-American Insurance Company and Olan Mills, Inc.

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 sixty-one years of age at the time of this trial. She is suffering from chronic lung disease that includes emphysema and asthma.

The plaintiff alleges that while in the course and scope of her employment for the defendant she received an injury by accident to her lungs resulting in her total and permanent disability. In the alternative, the plaintiff alleges that she sustained an occupational disease arising out of and in the course and scope of her employment for the defendant Olan Mills. The plaintiff alleges that this occupational disease caused her to be permanently and totally disabled.

At trial the plaintiff testified that chemical fumes around the area in which she worked caused her to have difficulty breathing. She also testified that a chemical fire at the defendant's facility in 1993 caused her to be hospitalized and that many of her health problems arose after that time.

Several of the plaintiff's co-workers at the defendant's facility also testified as to the conditions at the workplace. None of these co-workers testified that they had experienced any chronic health problems while or since working for the defendant.

The plaintiff was a smoker. She smoked between a half a pack and a pack of cigarettes a day from the 1950's until early 1995 when she quit.

Medical Evidence

The medical evidence for the purpose of the issue raised in this case was presented by: the deposition of Dr. Peter S. Soteres, a specialist in internal medicine and a pulmonologist who was the plaintiff's physician; and the deposition of Dr. James W. Snell, a pulmonologist.

Dr. Soteres testified that the plaintiff's primary medical problem was her emphysema and that the most significant factor in the plaintiff's emphysema was her cigarette smoking. Dr. Soteres also testified that the plaintiff suffered from chronic sinus problems and asthma, but he was unable to definitively state that these problems were caused by any chemicals in the workplace. Dr. Soteres testified that he did not know what chemicals the plaintiff was exposed to or the quantity of such chemicals in her workplace, so he could not definitively say that such chemicals caused the plaintiff's condition. Dr. Soteres also testified that it was his opinion that the plaintiff's symptoms were primarily attributable to her cigarette smoking.

Dr. Snell testified that the plaintiff's lung disease dominant health problem was her emphysema, which he said was caused by her smoking. Dr. Snell testified that the chemical fumes in the workplace could have temporarily aggravated the plaintiff's condition from time to time, but that he doubted that these fumes were a serious injurious factor. Dr. Snell testified that the chemical fire in 1993 could have caused injury to the plaintiff's pulmonary system. Like Dr. Soteres, Dr. Snell testified that he did not know the levels of which the plaintiff was exposed to various chemicals.

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 judgment of the trial court.

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).

The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996*); Johnson v. Midwesco, Inc.,* 801 S.W.2d 804, 806 (Tenn. 1990).

The medical testimony showed that while there was a possibility that the plaintiff's medical problems were exacerbated by chemical fumes that were possibly present in the plaintiff's workplace, there was no evidence of a direct causal connection between the conditions of the workplace and the plaintiff's condition.

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. However, such an award can only be given 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) and such evidence in conjunction with the medical evidence must be sufficient to raise the evidence above the level of speculation. *See, Johnson v. Midwesco, supra.*

Proof of causation in such cases must be shown by expert medical testimony. The medical testimony indicated that while it was possible that the plaintiff's problems were aggravated by the conditions at her workplace, the evidence did not show the conditions were indeed the cause of, or aggravated, plaintiff's condition.

The trial judge ruled that the defendant had failed to carry her burden of proof. We cannot say that the evidence preponderates against the finding of the trial judge so we must affirm the judgment. The cost of this appeal is taxed to the plaintiff.

JOHN K. BYERS, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon Joanne Bishop's motion of 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 by Joanne Bishop, for which execution may issue if necessary.

IT IS SO ORDERED.

ANDERSON, J. NOT PARTICIPATING