

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT KNOXVILLE  
June 11, 2004 Session

**WANDA LYNCH, ET AL. v. CF INDUSTRIES, INC.**

**Direct Appeal from the Chancery Court for Hamilton County  
No. 01-0729 W. Frank Brown III, Chancellor**

**Filed October 1, 2004**

**No. E2003-02166-WC-R3-CV - Mailed July 22, 2004**

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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. This is a death case. The decedent was diagnosed with mesothelioma, an ultimately fatal disease, but an autopsy revealed that he died of congestive heart failure. Death benefits were not awarded. The surviving widow appeals, claiming that the preponderance of the proof established that her husband died of mesothelioma which was job-related.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and ROGER E. THAYER, SP. J., joined.

A. Christian Lanier and Jimmy F. Rogers, Chattanooga, Tennessee, attorneys for appellant, Wanda Lynch, individually and as surviving spouse of Louis E. Lynch.

Robert J. Uhorchuk, Chattanooga, Tennessee, attorney for appellee, CF Industries, Inc., formerly known as Central Farmers, Inc., and Farmers Chemical Cooperative of Tennessee.

**MEMORANDUM OPINION**

This action began as one seeking workers' compensation benefits for mesothelioma. Six months after the complaint was filed, Mr. Lynch died and the complaint was amended appropriately. The defense centered, *inter alia*, on the issue of the cause of death since an autopsy revealed that Mr. Lynch died of congestive heart failure. Much expert testimony was presented, either in open court or by deposition, including the testimony of Dr. Stanton C. Kessler, a board-certified pathologist. The trial judge filed a detailed opinion setting forth his findings of fact and conclusions of law. One

of his findings – that Mr. Lynch died of congestive heart failure – is assailed as contrary to the preponderance of the evidence. The dispositive issue on appeal is whether the trial judge erred in concluding that Mr. Lynch’s death was not attributable to his employment. The Plaintiff also presents issues involving (1) the refusal of the trial court to impose sanctions for the alleged violation of Rule 26, Tenn. R. Civ. P., (2) the alleged restriction of the cross-examination of one of the Defendant’s expert witnesses, and (3) the denial of discretionary costs.

### **The Medical Proof**

Dr. Yune-Gill Jeong, who is board-certified in internal medicine and pulmonology, testified that he initially saw Mr. Lynch on July 25, 2000. His suspicion that Mr. Lynch was suffering from mesothelioma, a malignancy of the lung lining, was confirmed by a biopsy. He ‘observed’ that the disease either caused or contributed to Mr. Lynch’s death, and that any heart problem was aggravated by the disease. He twice saw Mr. Lynch and on neither occasion did he find evidence of a heart problem, but believed that Mr. Lynch’s complaints of back and chest pain related to the lung disease and not to his heart. He had x-rayed Mr. Lynch on July 25, 2000 and saw no evidence of an enlarged heart, although there were arteriosclerotic changes in the aorta. His last examination of Mr. Lynch was about eighteen months before his death. Although he testified that Mr. Lynch died of mesothelioma, he conceded that an autopsy is the accepted medical procedure to determine the cause of death, and that he did not review tissue samples, autopsy photographs or microscopic slides that were available to him. He also conceded that Mr. Lynch could have died from some other cause.

Dr. Dwight A. Hamilton, who is board-certified in cardiovascular-thoracic surgery, reviewed an EKG and the medical history of Mr. Lynch which revealed no evidence of heart disease other than arrhythmia. He concluded that Mr. Lynch died of mesothelioma, but conceded on cross-examination that the EKG revealed two electrical conduction problems.

Dr. Stanton Kessler performed an autopsy on January 26, 2002. He is board-certified and the medical examiner for Hamilton County, and serves on the faculty of Harvard Medical School.

Dr. Kessler saw and examined the mesothelioma tumors. He testified that these tumors were not significant or sizable enough to cause death, and were not restricting the lungs to the point where they were incapable of sustaining life, and had not metastasized or spread to any other organ such as the heart, liver, spleen or any other areas. He testified that he found no signs of wasting or cachexia that would be indicative of an individual who died from cancer or mesothelioma, but found substantial evidence that the cause of death was the result of arteriosclerotic cardiovascular disease, or congestive heart failure.

According to the pathologist, the internal findings that confirmed death by congestive heart failure included hypertrophied or enlarged heart, enlarged spleen and liver that were consistent with heart failure, and terminal arteriosclerotic disease that included severe stenotic changes in all vessels in the heart. Along with these finding, Dr. Kessler confirmed that his review of treatment medical records of Mr. Lynch within the appropriate year and one-half before death documented abnormal

heart rates and dangerous electrical heart activity that was consistent with congestive heart failure and Mr. Lynch's death resulting therefrom.

The remaining expert testimony did not impress the trial judge and our review of it would not be productive.

### Standard of Review

Findings of fact are *de novo* upon the record of the trial court with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Rule 13(d), Tenn. R. App. P. In making this determination, we must give considerable deference to the trial judge's findings with regard to weight and credibility of any oral testimony. *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992). We weigh the evidence to determine where the preponderance lies and make an evaluation of the judgment within the confines of established rules. If medical testimony is given by deposition or report of physician, we may make an independent assessment of the medical proof to see where the preponderance of evidence lies. *Cooper v. Ins. Co. Of N.A.*, 884 S.W.2d 446 (Tenn. 1994). But when the trial court has made a decision based upon testimony of a witness whom the trial judge has seen and heard, consider deference must be given to the findings of the trial court in determining where the preponderance of the evidence lies. See *Humphrey v. David Witherspoon Inc.*, 734 S.W.2d 315 (Tenn. 1987). Furthermore, the trial court has the discretion to accept the opinion of one medical expert over that of another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996).

### Analysis

The burden of proof rests with the party claiming benefits under the Workers' Compensation Act to establish by a preponderance of the evidence that the death in question was due to a compensable injury or occupational disease. *Parker v. Ryder Truck Lines, Inc.*, 591 S.W.2d 755 (Tenn. 1979). In all but the most obvious cases, causation or cause of death may only be established by competent expert medical testimony. *Thomas v. Aetna Life and Casualty Co.*, 812 S.W.2d 278 (Tenn. 1991).

There is no presumption of the cause of death and there must be sufficient medical proof to establish it. *Collins v. Liberty Mut. Ins. Co.*, 561 S.W.2d 456 (Tenn. 1978). An award of death benefits or any other benefits under the Tennessee Workers' Compensation Act may not be based upon mere speculation or conjecture. *Collins*, 561 S.W.2d at 457.

The trial judge minced no words in concluding that he accepted the opinion of Dr. Kessler as being more probable than any other. Dr. Kessler was the only medical expert who performed an autopsy and a postmortem internal and external examination of Mr. Lynch to determine the cause of death. He documented all of his findings with photographs and microscopic slides during his testimony, and reviewed all medical and treatment records concerning Mr. Lynch, including those from other experts.

According to Dr. Kessler, his internal and external examination of the decedent confirmed that the cause of death was arteriosclerotic cardiovascular disease as opposed to mesothelioma. Another significant finding by Dr. Kessler was that there was no evidence of cachexia or wasting of muscle mass of the body that would be expected from an individual who died of mesothelioma or some other kind of cancer.

In addition, Dr. Kessler made positive findings of arcus senilis in the pupil of the eyes and Frank's sign or cleft ear lobes. Dr. Kessler opined both conditions are indicative of hardening of the arteries which was confirmed upon the internal autopsy findings. There were no cancerous tumors in the heart space or in the pericardium. Mr. Lynch had a long history of smoking, and a hypertrophied heart, with severe hardening of the arteries, and his coronary arteries were stenotic from sixty to ninety percent either viewed grossly with the naked eye or microscopically.

Dr. Kessler found severe stenotic changes and arteriosclerotic disease in all vessels, to include the carotid arteries to the brain, the subclavian arteries, the ascending arteries, thoracic and abdominal aorta, and others, and explained that Mr. Lynch's arteriosclerotic cardiovascular disease and its severity actually resulted in the conversion of the heart muscle itself to a hard, fibrous tissue. In explaining the cause of death, Dr. Kessler testified that with this type of condition, "you squeeze the heart out so it doesn't get its blood supply and all these muscles are screaming for blood . . . and you die suddenly from an electrical death of the heart conduction system."

We see no need to belabor this issue further. We find that the evidence preponderates in favor of the judgment that Mr. Lynch died of congestive heart failure unrelated to his employment.

The Appellant complains that the testimony of Dr. Kessler should have been excluded owing to the failure of the Defendant to supplement an interrogatory by revealing the identity of its expert witness, Dr. Kessler. We are somewhat puzzled by the rhetoric employed, since the record reveals that the autopsy report of Dr. Kessler was furnished to counsel for the Plaintiff and who was advised by letter dated September 24, 2002 that Dr. Kessler would be called as a witness. Moreover, notice was given to the Plaintiff that the deposition of Dr. Kessler would be taken on January 6, 2003, and the Plaintiff filed a motion to exclude his testimony. The trial judge declined to do so, but offered to continue the trial date of January 9, 2003 to another date. The offer was accepted, and the trial eventually began June 2, 2003. We find no abuse of discretion on the part of the trial judge in allowing the testimony of Dr. Kessler.

The Appellant complains that the cross-examination of Dr. Kessler was unduly restricted concerning the side-effects of medication taken by Mr. Lynch. We have considered the arguments and find the issue to be without merit.

Finally, the Appellant complains of the failure of the trial judge to award discretionary costs pursuant to Rule 54, Tenn. R. Civ. P.

Discretionary costs were awarded to the intervener, BlueCross BlueShield, but not to *either*

party. The trial court cited four reasons why these costs were denied to the Plaintiff: (1) because the motion was not supported by affidavit; (2) because the Plaintiff was not the prevailing party; (3) because costs cannot be apportioned on an issue-by-issue basis; (4) the rationale enunciated in *Mix v. Miller*, 27 S.W.3d 508 (Tenn. Ct. App. 1999). We cannot find that the trial judge abused his discretion in declining to award discretionary costs to the Plaintiff.

The judgment is affirmed and the case is remanded for all necessary purposes. Costs of appeal are taxed to Appellant.

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WILLIAM H. INMAN, SENIOR JUDGE

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**JUDGMENT**

This case is before the Court upon a motion for review filed by Wanda Lynch 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 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 assessed to Wanda Lynch for which execution may issue if necessary.

PER CURIAM

Anderson, J., not participating.