

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

September 30, 2004 Session

**RONNIE HAMILTON v. AMERICAN TISSUE INCORPORATED d/b/a
AMERICAN TISSUE MILLS OF TENNESSEE, LLC., ET AL.**

**Direct Appeal from the Circuit Court for Shelby County
No. CT-004359-00 Robert Lanier, Judge**

No. W2003-02396-SC-WCM-CV - Mailed November 3, 2004; Filed January 24, 2005

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. In this appeal, the plaintiff/employee insists the trial court erred in disregarding the testimony of Dr. Jay Segarra, the plaintiff's medical expert and in making a conditional award of only 10 percent to the body as a whole. The employers contend the trial court erred in admitting into evidence the opinion testimony of Dr. Segarra because Dr. Segarra is not licensed in Tennessee and because the doctor committed a crime by providing medical service to the plaintiff in Tennessee. As discussed below, the panel has concluded the trial court committed no reversible error and that the evidence fails to preponderate against the findings of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Circuit
Court Affirmed**

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOHN A. TURNBULL, SP. J., joined.

Steve Taylor, Memphis, Tennessee, for the appellant, Ronnie Hamilton

John R. Cannon, Jr., Memphis, Tennessee, Kimberly-Clark Corporation

Alex C. Elder, Memphis, Tennessee, for the appellee, Shepard Tissue, Inc.

MEMORANDUM OPINION

The employee or claimant, Mr. Hamilton, initiated this civil action to recover workers' compensation benefits. His complaint alleges that he developed asbestosis while working for the

employers, Kimberly-Clark Corporation and/or Shepard Tissue, Inc. After a trial on the merits, the trial court admitted the testimony of Dr. Segarra, but discredited his opinion in favor of another expert, and found the plaintiff had failed to prove by a preponderance of the evidence (1) that he had suffered injurious exposure to asbestos and (2) that he, in fact, suffers from asbestosis. The plaintiff has appealed.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Hill v. Wilson Sporting Goods Co., 104 S.W.3d 844 (Tenn. Workers' Comp Panel 2002). Issues of statutory construction are solely questions of law. Id. Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, McCaleb v. Saturn Corp., 910 S.W.2d 412, 414 (Tenn. 1995), because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Bridges v. Liberty Mutual Ins. Co. of Hartford, 101 S.W.3d 67 (Tenn. Workers' Comp Panel 2000).

The claimant is approximately sixty-two years old with an eleventh grade education and experience as a factory worker. He worked in various departments of a paper mill for Kimberly-Clark from March 1967 to September 1994, when he retired. There was often paper dust in the air from the various products the company manufactured. There were also pipes insulated with what the claimant believed to be asbestos. The plant included an oven with panes containing non-friable asbestos, which could become friable if disturbed. "Friable" means in a condition to be crumbled and released into the air. In September 1994, Shepard Tissue, Inc., purchased the plant. The claimant then began working for Shepard Tissue in the same capacity. In February 1999, Global Tissue. LLC purchased the plant and the claimant continued working there until he retired again in March 2000. He did not suffer any ill effects or lose any time for work because of any lung disease.

The claimant's union retained a firm, Workers Disease Detection Service (WDDS), to conduct x-ray examination of the claimant and other workers. The primary function of WDDS is to respond to requests from attorneys for such examinations, although the firm also does some

tuberculosis screening for the homeless in Los Angeles. A large number of x-rays, including one of the claimant's lungs, were taken and subsequently reviewed by Dr. Jay T. Segarra, who had been working with WDDS. Dr. Segarra testified that he obtained a brief history from the claimant and informed him, through WDDS, that he had asbestosis from working in the plant. Dr. Segarra did not examine the claimant, but based his diagnosis solely on his view of the x-ray film. The doctor testified that asbestosis is a lung disease which can only occur from the inhalation of asbestos fibers over a long period of time. Prior to receiving the letter, the claimant, who did not remember seeing or being interviewed by Dr. Segarra, was not disabled and had no suspicion of having any lung disease.

The claimant testified that, while he was working at the plant, a pipe would occasionally break or need some repair, at which time other employees would remove the insulation and repair the pipe. He said that no protective barriers were placed around the pipes being repaired. In the mid 1990s, professional asbestos removers removed the asbestos insulation. The claimant testified that dust entered the air through the plant's ventilation system during such removal, although a supervisor testified that the ventilation system was turned off during removal.

Shortly after his retirement, the claimant complained to his family physician of episodes of shortness of breath and chest discomfort. He was referred to Dr. Oscar Brewster Harrington, a thoracic and cardiovascular surgeon, who diagnosed angina, or chest pain, caused by coronary disease. Dr. Harrington listened to the claimant's lungs but heard no evidence of lung disease. He performed open coronary bypass surgery on the claimant and, after a brief period of recuperation, the claimant was released from the hospital. The claimant returned to the hospital on April 3, 2000, almost three weeks after the surgery, with shortness of breath and fever. He was diagnosed with pulmonary embolus and deep vein thrombosis or blood clots in the lungs and lower legs. He was referred to Dr. Paul Deaton, a specialist in pulmonary and critical care medicine.

Dr. Deaton first saw the claimant on August 31, 2000, when he took a detailed history and conducted a physical examination of him. He also viewed a different chest x-ray of the claimant's lungs, which had been performed in April 2000. Dr. Deaton found nothing wrong with the claimant's lungs and opined by deposition that the claimant did not have asbestosis.

The trial court, who personally observed Dr. Segarra while testifying, weighed and evaluated the conflicting expert medical opinions and, giving greater weight to the opinion of Dr. Deaton, dismissed the complaint for failure to prove the existence of asbestosis by a preponderance of the evidence. The claimant contends it was error, citing Dr. Segarra's qualifications. When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Story v. Legion Ins., Co., 3 S.W.3d 450, (Tenn. 1999).

Dr. Segarra testified that he received his undergraduate degree from Harvard University in 1977 and graduated from Boston Medical School in 1981. After internships in the military and participation in an internal medicine residency program, followed by a dual fellowship in the specialties of both pulmonary and critical care, he became board certified in both specialties in 1989. He also testified that he is a certified B reader and has hospital appointments at several hospitals, including the one at Keesler Air Force Base, on the gulf coast. He is licensed in Mississippi and several other states, but not Tennessee. His B reader certification was obtained by taking and passing a proficiency examination after receiving special training in the use of a classification system that was developed by the International Labor Office of the National Institute of Occupational Safety and Health. The classification system is a way of classifying chest x-rays done on workers who have been exposed to potentially hazardous dust in the workplace. In addition to being a certified B reader, Dr. Segarra is board certified in pulmonary diseases, critical care and internal medicine, and is the author of several publications.

Dr. Deaton is licensed in Tennessee and Arkansas and has practiced medicine for nine years, treating patients with diseases of the lung, including asbestosis. He graduated from Rhodes College in 1983 and the University of Tennessee medical school in 1987 with highest honors, receiving the faculty award for the highest grade point average, served an internship at the University of Alabama, where he received additional training in pulmonary and critical care medicine, is a member of the American College of Physicians, the American College of Chest Physicians, the American Thoracic Society and the Tennessee Medical Association, serves on the Methodist Hospital Critical Care Committee, is an attending physician in Methodist Hospital's teaching service, is board certified by the American Board of Internal Medicine, the American Board of Internal Medicine Pulmonary Diseases and the American Board of Internal Medicine Critical Care Medicine, and has authored several publications. The claimant was referred to Dr. Deaton by the claimant's chosen family care physician.

While both physicians have impressive credentials, we are not persuaded, considering all the circumstances, including the fact that Dr. Deaton actually examined and treated the claimant, that the trial court erred in giving greater weight to the opinion of Dr. Deaton. On the other hand, we are not persuaded that the trial court erred in admitting the testimony of Dr. Segarra into evidence. The mere lack of a license to practice medicine in Tennessee does not disqualify him, *per se*, as an expert medical witness. Moreover, our independent examination of the record reveals no evidence that he has been charged with or convicted of the crime of practicing medicine in Tennessee without a license, or any other crime.

Finally, the claimant contends the trial court's conditional award of permanent partial disability based on 10 percent permanent partial disability to the body as a whole is inadequate. Although the claimant testified that he is unable to work because of shortness of breath on exertion, Dr. Segarra testified that his alleged lung disease is mild and estimated his medical impairment at 10 percent. Dr. Deaton gave no impairment rating. In determining the extent of an injured worker's permanent disability, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled,

and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). Giving due deference to the factual findings of the trial court and considering the relevant factors, to the extent they were established by the proof, we cannot say the evidence preponderates against a conditional award based on 10 percent to the body as a whole.

For the above reasons, the judgment of the trial court is affirmed. Costs are taxed to the Plaintiff/Appellant.

JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
September 30, 2004 Session

**RONNIE HAMILTON v. AMERICAN TISSUE INCORPORATED d/b/a
AMERICAN TISSUE MILLS OF TENNESSEE, LLC, ET AL.**

Shelby County Circuit Court
No. CT-004359-00

No. W2003-02396-SC-WCM-CV - Filed January 24, 2005

JUDGMENT

This case is before the Court upon Ronnie Hamilton'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 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 Ronnie Hamilton for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating.