IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
(October 13, 2004 Session)

**WANDA ELY v. DEROYAL INDUSTRIES, INC., and DINA TOBIN, DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND**

**Direct Appeal from the Chancery Court for Claiborne County**
**No. 11,770 John D. McAfee, Judge**
**Filed April 29, 2005**

---

**No. E2004-00865-WC-R3-CV - Mailed**
**Filed**

---

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 of findings of fact and conclusions of law. The trial court found the employee failed to prove her claims of occupational disease or aggravation of pre-existing condition. We affirm.

**Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Claiborne County Chancery Court is affirmed.**

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and ROGER E. THAYER, SP. J. joined.

David H. Dunaway, Lafollette, Tennessee for the Appellant, Wanda Ely

James T. Shea, IV, Knoxville, Tennessee for the Appellee, DeRoyal Industries, Inc.

Paul G. Summers, Attorney General and Reporter, Richard M. Murrell, Assistant Attorney General, Nashville, Tennessee for Appellee, Second Injury Fund

## MEMORANDUM OPINION

### Facts

On September 10, 1997, Wanda Ely filed her complaint for workers' compensation benefits alleging occupational asthma.

Ms. Ely first suffered from asthma as a child and later began having additional problems with her asthma. In 1990, she visited Dr. Robert Overholt, who conducted pulmonary tests and found that Ms. Ely suffered from a severe obstructive pulmonary disorder. Dr. Overholt also performed allergy tests finding that Ms. Ely was allergic to environmental substances such as grass, weed and tree pollen, cats, dogs, mold, dust, and dust mites. After only one or two visits with Dr. Overholt, Ms. Ely began visiting other doctors on a regular basis for treatment of her asthma. The treatments included large doses of some medicines as well as steroid injections and inhalers. From 1990 until beginning her job with DeRoyal Industries, Ms. Ely regularly sought treatment for asthmatic bronchitis.

Ms. Ely began working for DeRoyal Industries in 1992. While at DeRoyal, she worked in different locations within two buildings. In her first position at DeRoyal, Ms. Ely worked at a sewing station and later at an assembly station where she assembled suction canisters. Between July 1992, and March 1993, Ms. Ely smelled an odor that she later learned was A-10 spray or "Swifty." Also during her first year, Ms. Ely smelled a glue called "Bostick" which was used in gluing orthopedic boots. Ms. Ely never used either of the products and never even saw the containers in which they were stored. However, other employees in the same building used the substances and were working behind partition walls that did not reach the ceiling and had open doors. In February of 1993, workers at DeRoyal applied a concrete sealant called "Kure-N-Seal" to an area of the floor some distance from Ms. Ely's workstation. At that time, Ms. Ely complained to her employer that she was suffering severe headaches, nausea, and mouth and throat numbness.

In March 1993, Ms. Ely suffered an injury to her shoulder at work and, as a result, was unable to work until February 1995. Ms. Ely testified that her breathing condition worsened while she was at home continuously during the time period from March 1993 until her return to work in 1995 After returning to work, Ms. Ely worked sporadically and was terminated in October 1995. Although she did not smell any of the chemicals after returning to work, Ms. Ely testified that the temperature was high and she had to work in ambient dust. Ms. Ely maintains that her breathing condition has continued to deteriorate since she left her employment at DeRoyal.

Ms. Ely filed her first workers' compensation claim in 1995 for her shoulder injury from March 1993 and claimed an injury to her mental function. Ms. Ely was awarded 40% disability to the body as a whole for the shoulder injury and 25% to the body as a whole for the mental injury.

In the present suit for workers' compensation benefits, Ms. Ely alleges that she suffers from occupational asthma that resulted in disability. She claims that she was unaware that the inhalation of the odors in 1992 and 1993 irritated her lungs and triggered asthmatic episodes until she spoke to Dr. Glen Baker on August 12, 1997.

After taking the matter under advisement, the trial judge made detailed findings of fact and discussed the credibility of both the live witnesses and the deposition testimony. The trial court found that Ms. Ely had a second-hand exposure to Bostic and "Swifty" during a seven-day period in July of 1992 and that she was exposed to Kure-N-Seal in February of 1993. The court also found that Ms. Ely had a severe condition prior to her employment at DeRoyal which required medical treatment on a month-to month basis. Finally, the court (a) found that Ms. Ely failed to sustain her burden of proof that her asthma was an occupational disease within the meaning of the statute and (b) discredited her testimony finding that she intentionally misled certain doctors in order to make a connection of her pre-existing asthma with her employment.

The trial court transcript includes the depositions of Doctors Robert M. Overholt and Glen Baker. Dr. Choudhury Salekin testified in open court that he saw Ms. Ely on one occasion in 1999 and his opinion was based, in large part, on her history of exposure to chemicals at DeRoyal. The trial court placed significant weight on the testimony of Dr. Overholt who saw Ms. Ely before she worked at DeRoyal industries and found she suffered asthmatic bronchitis and a severe obstructive airway disease.

## Standard of Review

The standard of review in a workers' compensation case 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); *Houser v. BiLo, Inc.*, 36 S.W.3d 68. 70-71 (Tenn. 2001). 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 to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser*, 36 S.W.3d at 71. However, this court is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002).

Questions of law are reviewed *de novo* without a presumption of correctness. *Tucker v. Foamex, LP*, 31 S.W.3d 241, 242 (Tenn. 2000).

## Issues

The issues as stated by counsel for the employee are:

1. Whether the trial court erred in finding, as a matter of law, that the employee could not recover for aggravation of her lung condition caused by chemicals to which she was exposed at her workplace.

2. Whether the Honorable John McAfee, General Sessions Judge for Claiborne County, Tennessee, sitting by interchange pursuant to T.C.A. 16-15-5004(f) had proper jurisdiction to hear this case and/or whether T.C.A. 16-15-5004(f) is otherwise in violation of the Tennessee Constitution, more specifically Article VI, § 11 of the Tennessee Constitution, Tennessee Code Annotated §§17-2-118, 122, and 202; Tennessee Supreme Court Rule 11 VII(c)(3) and T.C.A. § 50-6-225.

## Discussion

### I.

Appellant argues that the trial court committed reversible error in holding that, as a matter of law, Ms. Ely could not recover for the aggravation of her lung condition caused by exposure at work.

Under the Tennessee Workers' Compensation Act, an employee may not recover for aggravation of an occupational disease that pre-existed employment. *American Ins. Co. v. Ison*, 519 S.W.2d 778 (Tenn. 1975). However, where the employment conditions aggravate a non-occupational disease which pre-existed the employment, an employee may recover. See *Crossno v. Publix Shirt Factory*, 814 S.W.2d 730 (Tenn. 1991) (upholding an award for aggravation of a pre-existing asthmatic bronchitis from work-related exposure to formaldehyde). The employee may recover in such cases because generally, an employer takes an employee as he finds him or her and is liable under the Workers' Compensation Act for disabilities which are the result of the activation or aggravation of a pre-existing weakness, condition or disease brought about by the occupation. *Arnold v. Firestone Tire & Rubber Co*., 686 S.W.2d 65 (Tenn. 1984).

Appellant's argument presents two scenarios that this court must address. First, this court must determine whether the trial court judge made reversible error in finding that Ms. Ely did not suffer an occupational disease as defined by Tenn. Code Ann. § 50-6-301.

**Occupational Disease**

In order to prove an occupational disease under the Tennessee Workers' Compensation Act, the employee must show all six elements of Tenn. Code Ann. § 50-6-301. The elements are as follows:

> (1) It can be determined to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
>
> (2) It can be fairly traced to the employment as a proximate cause;
>
> (3) It has not originated from a hazard to which workers would have been equally exposed outside of the employment;
>
> (4) It is incidental to the character of the employment and not independent of the relation of employer and employee;
>
> (5) It originated from a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected prior to its contraction; and
>
> **(6)** There is a direct causal connection between the conditions under which the work is performed and the **occupational disease. Diseases of the heart, lung, and hypertension arising out of and in the course of any type of employment shall be deemed to be occupational diseases.**

Tenn. Code Ann. § 50-6-301.

The trial judge found that Ms. Ely "has not even come close in reference to showing that she has an occupational disease in reference to exposure to those chemicals. It's not even close."

After reviewing the record, we affirm the trial court's opinion that Ms. Ely did not prove the six elements of an occupational disease by a preponderance of the evidence. In this case, Ms. Ely suffered from asthmatic bronchitis and possibly a severe irreversible airway obstruction at least two years before working at DeRoyal Industries. Ms. Ely was first diagnosed with a severe condition during a visit to Dr. Overholt in 1990. Dr. Overholt's deposition testimony clearly establishes that Ms. Ely's asthma was not occupational asthma. When asked whether Ms. Ely would have known of any permanent work restrictions after her 1990 visit with Dr. Overholt, Dr. Overholt answered with the following:

> She would not have been aware that she would have permanent restrictions, but she knew she had extremely severe airway disease and I told – the chart relates to the fact that she was going to have a lot of problems and would be a problematic patient because of the severity of her asthma in the '70s, as well as the '90s.

This statement regarding the severity of her condition in 1990 came after Dr. Overholt explained that "[t]he diagnosis of asthma is clearly established in her history and there was nothing that suggested occupational disease." Given the uncontradicted evidence that Ms. Ely's breathing

condition existed before working at DeRoyal and was unrelated to any occupational hazard, we agree with the trial court that Ms. Ely did not prove that she suffered an occupational disease.

Since this Court finds that the trial court correctly determined that Ms. Ely did not suffer an occupational disease, we must then examine the second scenario and determine whether Ms. Ely may recover for aggravation of her pre-existing asthmatic condition.

**Aggravation of a Pre-existing Condition**

On appeal, Ms. Ely also argues that her pre-existing condition was aggravated by her exposure to chemicals at DeRoyal. The Tennessee Supreme Court has enunciated two different tests for determining the compensability of a work-related injury to a plaintiff with a pre-existing condition. The *Sweat* test requires (1) that there is an advancement, anatomical change or progression in the pre-existing condition; and (2) that the work injury caused the change in the pre-existing condition. *Sweat v. Superior Indus.*, 966 S.W.2d 31 (Tenn. 1998). The *Hill* test requires a plaintiff to prove that (1) the work injury causes an **aggravation** of the pre-existing condition; and (2) that this **aggravation** produces increased pain that is disabling. *Hill v. Eagle Bend Mfg.*, 942 S.W.2d 483 (Tenn. 1997).

Since the trial court judge correctly found that Ms. Ely's asthma was not occupational asthma, if Ms. Ely's complaints were "the result of the activation or aggravation of a pre-existing weakness, condition or disease brought about by the occupation," she may recover. See *Arnold v. Firestone,* 686 S.W.2d 65 (Tenn. 1984). However, the trial court judge found that Ms. Ely did not meet her burden of proof to establish that her exposure at work caused an aggravation of her pre-existing condition. Judge McAfee stated the following:

> The three chemicals, in tracing the three chemicals that are exposed in this case, Swifty and Bostick, I'm of the opinion that the plaintiff has not even come close in reference to showing that she has an occupational disease in reference to exposure to those chemicals. It's not even close.
>
> . . .
>
> According to Dr. Salekin, the plaintiff relayed to him that it was a large exposure to [Kure-N-Seal]. Looking at the evidence in the best light for the plaintiff, it would only indicate an aggravation, and that's based upon the doctors' depositions.
>
> I'm of the *opinion* that the statute precludes that. *However*, I find that she's not met her burden of proof in this case. She's not proven by a preponderance of the evidence, and again, it's a credibility issue in reference to her testimony.

Since the trial court judge's determination was based upon the credibility of the witnesses at trial, this court must give considerable deference to his decision. However, regarding the expert testimony given by deposition, this court makes an independent assessment of the weight and credibility of Dr. Robert Overholt and Dr. Glen Baker.

Dr. Overholt saw Ms. Ely before the lawsuit was pending. Dr. Overholt testified that in 1990 Ms. Ely had a severe irreversible airway obstruction, that he believed her condition would not improve over time, that "sometimes no matter what we do, people's airways continue to deteriorate," and that normally without the proper treatment asthma progressively destroys the airways. Dr. Overholt admitted that if Ms. Ely were exposed to chemicals for a long period of time, it could affect Ms. Ely's situation. We note Ms. Ely's testimony that her breathing condition worsened during the time she was off from work and at home. Dr. Overholt testified that a history that her breathing condition worsened when Ms. Ely would go home away from the workplace would not be consistent with "occupational asthma."

After filing a separate workers compensation lawsuit, Ms. Ely visited Dr. Baker in 1997. Dr. Baker saw Ms. Ely on only one occasion and relied on her statements in making his assessment. Dr. Baker determined that Ms. Ely's continually increasing problems with asthmatic bronchitis were related to her exposure to chemicals at DeRoyal. Dr. Baker testified that he was not sure which chemicals she was exposed to at DeRoyal, or the duration of the exposure, and he did not know the threshold limit value for any of the chemicals. Ms. Ely did not tell Dr. Baker the extent of her problems with asthma before going to work at DeRoyal. After learning of her pre-existing condition, Dr. Baker testified that his opinion did not change. We concur with the trial court in giving little weight to the testimony of Dr. Baker.

We find that that the medical testimony fails to demonstrate the necessary causal connection between Ms. Ely's deteriorating condition and the chemicals at DeRoyal. First, Ms. Ely had a severe condition before working for DeRoyal. Second, expert evidence fails to prove the duration and extent of her exposure to specific harmful chemicals at DeRoyal was sufficient to cause a permanent aggravation of her pre-existing condition. Third, Dr. Overholt's testimony indicates that Ms. Ely's condition was not typical of occupational injuries. That is to say, Ms. Ely was not worse while she was at work and then better when she was off work. After her secondary exposure to the chemicals, Ms. Ely went home and her conditions allegedly became worse. Fourth, the only evidence that the chemicals caused an injury or aggravation is a slight change in Ms. Ely's condition between 1990 and 1997. It appears that Ms. Ely's condition was slightly reversible 1990 and progressed to irreversible by 1997. However, Ms. Ely did not even draw a connection between her exposure at work and her asthma until visiting Dr. Baker in 1997. Her second-hand exposure to chemicals at DeRoyal occurred in 1992. Considering Ms. Ely's allergies to numerous substances and the naturally deteriorating nature of asthma as described by the doctors, we find no likely connection between Ms. Ely's gradual deterioration over seven years and her exposure to chemicals at DeRoyal. She has failed to prove the elements necessary to show a compensable aggravation of her pre-existing asthma.

II.

The Appellant next contends, for the first time in this case, that General Sessions Judge McAfee sitting by interchange pursuant to Tenn. Code Ann. § 16-15-5004(f) did not have "jurisdiction" to hear the case. Counsel for Appellant cites numerous statutes in Tennessee as

well as Articles VI and XI of the Tennessee Constitution to claim that the Tennessee Legislature acted unconstitutionally when it gave jurisdiction over workers' compensation law suits to general sessions judges. Attacks on statutes that are not raised in the trial court generally cannot be entertained on appeal, unless the statute involved is patently unconstitutional on its face. *In re Adoption of E.N.R.*, 42 S.W.3d 26, 32-33 (Tenn. 2001). We note, first, that courts are given jurisdiction and, second, judges exercise the jurisdiction of the particular court where the judge is presiding. Despite counsel's valiant effort to demonstrate a constitutional issue, the court finds that Article VI of the Tennessee Constitution gives the Tennessee Legislature the exclusive authority to establish and change the jurisdiction of the inferior courts in Tennessee. See *Moore v. Love*, 107 S.W.2d 982, 986 (Tenn. 1937); *Gouge v. McInturff*, 169 Tenn. 678, 90 S.W.2d 753 (1935); *Spurgeon v. Worley*, 169 Tenn. 197, 90 S.W.2d 948 (1935). Both the chancery and general sessions courts are inferior courts in Tennessee. Tenn. Code Ann. § 16-15-5004(f) adds workers' compensation cases to the jurisdiction of the Claiborne County General Sessions Court. The legislature was well within its constitutional authority when it decided to alter the jurisdiction of the general sessions court in Claiborne County.

There is another reason that the action of the trial judge is not flawed. This case was filed in the Chancery Court for Claiborne County, Tennessee. The Chancery Court has jurisdiction over workers' compensation cases pursuant to Tenn. Code Ann. § 50-6-225. In this case, Judge McAfee sat as judge of the Chancery Court, not as judge of the General Sessions Court of Claiborne County. No one objected or raised any issue concerning Judge McAfee hearing this case until this appeal. Even if Judge McAfee was not lawfully sitting, his decision is enforceable because he made his decision as a *de facto* judge. Even where the proper procedure for appointing a special judge is not followed, the ruling of a *de facto* judge may be affirmed. See *Ferrell v. Cigna Property & Cas. Ins. Co.*, 33 S.W.3d 731 (Tenn. 2000). That rule is derived from the following principle:

> The judicial acts of one in possession of a judicial office created and in existence by law, under color of right, assuming and exercising the functions of such office with a good faith belief in his right to exercise such authority, involved and acquiesced in by the parties, the bar, court officials and the public, are those of a *de facto* officer.

*Newsom v. Biggers*, 911 S.W.2d 194 (Tenn. 1995). As noted in *Bankston v. State of Tennessee*, 908 S.W.2d 194 (Tenn. 1995), Tennessee has long recognized the doctrine of *de facto* judges for the same policy reasons adopted by the United States Supreme Court. "For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined." *Norton v. Shelby County*, 118 U.S. 425, 441-42 (1886). By acquiescing to Judge McAfee conducting the trial, Ms. Ely waived the right to challenge Judge McAfee's authority to decide the case.

## Disposition

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the Appellant, Wanda Ely, and her surety.

_____

Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

**WANDA ELY v. DEROYAL INDUSTRIES, INC., ET AL.**

**Filed April 29, 2005**

**No. E2004-00865-SC-WCM-CV**

**JUDGMENT**

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

PER CURIAM

Barker, J., not participating.