IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 24, 2005 Session

TERRY L. SAHLIN v. LABORATORY GLASS, INC.

Direct Appeal from the Circuit Court for Sullivan County
No. C34953(M) John S. McLellan III, Judge

Filed August 19, 2005

No. E2004-01388-WC-R3-CV - Mailed April 15, 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. The trial court awarded the employee 100 percent permanent disability. The employer contends the trial court was in error in calculating the average weekly wage and in finding the employee was totally disabled. Judgment is affirmed.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and DON HARRIS, SR. J., joined.

David J. Silvus and Lindsey B. Lander, Knoxville, Tennessee, for appellant, Laboratory Glass, Inc.

H. Douglas Nichol, Knoxville, Tennessee, for appellee, Terry L. Shalin.

MEMORANDUM OPINION

Defendant, Laboratory Glass, Inc., has appealed from the trial court's ruling awarding plaintiff, Terry L Shalin, 100 percent permanent disability.

Facts

Plaintiff is a 48 year old high school graduate who was employed by defendant at its laboratory in Kingsport from 1974-1978. The company was engaged in the manufacturing of glassware for laboratories and scientific research. The glassware was made out of Pyrex glass and it was handled by glass workers through various means of asbestos gloves. Plaintiff testified the heat

process involved in the work would cause dust to form and he was exposed to breathing it.

Upon leaving employment at the glass lab, he started working in Johnson City for an automobile dealership in its sales department. After some period of time, he left that job to work for his brother-in-law at an auto dealership in Roswell, Georgia, where he was employed as the finance director. In this position, he was in charge of all paperwork for each automotive loan, etc.

Plaintiff had some pre-existing medical problems. In 1999 he had been diagnosed with having multiple sclerosis and he stated that it initially slowed him down but he was still able to work. He had also had sinus surgery and suffers from reflux problems.

During October 2001 he began having some health problems and had a chest x-ray which revealed a mass in his lower right lobe about the size of an egg. Further medical procedures, including surgery, indicated he had an asbestos disease. He continued to work until January 2, 2004 when he voluntarily stopped because he said he could not perform the work anymore. In this connection, he said the medicine he was taking would affect his mind and he would become disoriented and that he could not even drive while taking the different medications; that he would have to come in late at different times during the early part of the work day and he would not have been able to work that long with his condition if he had not been working for his brother-in-law.

As to his condition at the time of the trial, he said the pain had become much worse during the past two years; the pain had started in his rib cage and now had progressed up into his lungs; that his medications still affected his "thought process" and he has trouble breathing. He admitted smoking for many years before his initial diagnosis of a lung disease.

Plaintiff's wife, Nancy Sahlin, testified they had been married five years and her husband appeared normal when they married. She stated he could not really do anything now, had breathing problems especially when going up some steps and he could not stand up very long.

The record indicates plaintiff has seen many doctors since the initial diagnosis of having an occupational disease. Three have given testimony in this proceeding and all testified by deposition. All of the three agreed that his smoking history did not cause or contribute to his asbestos disease and as one doctor stated smoking causes emphysema and other problems, not asbestos disease.

Dr. Alan L. Plummer, a board certified pulmonary and critical care specialist at Emory Clinic, Emory University, Atlanta, testified he first saw the plaintiff during September 2002 and his complaints were shortness of breath and chest pain. His diagnosis was pleural disease secondary to his asbestosis exposure. He related the cause of the condition to his working at the glass lab during the seventies and said it was not unusual for this condition to develop 20 to 40 years after exposure. As to impairment, he opined there was a 50 percent impairment purely on a pulmonary status and a 50 percent pain impairment and he was not aware of how to combine the two to one impairment.

Dr. Gayle L. Mason, a pulmonary medicine doctor, testified the asbestosis related pleural

disease was contracted while working in defendant's lab and that four years of work of that nature was a long time to be exposed. He agreed that health problems usually did not arise until 20-30 years later. He stated the plaintiff had impairment because of his reduced lung function but he was not asked to give a percentage of impairment.

Dr. Daniel L. Miller, a thoracic surgeon also at Emory Clinic, Emory University, stated he saw plaintiff during October 2002 and he concurred in the diagnosis of pleural plaques and pleuritic asbestosis. He was of the opinion the condition was related to his lab work and also said it normally developed 30-40 years after exposure. He said plaintiff's impairment was 100 percent because "he cannot function at a normal quality of life, especially in the work — work state."

Standard of Review

On appeal the issues are to be reviewed *de novo* accompanied by a presumption of the correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Analysis

It is undisputed that the employee contracted an occupational disease as a result of working for the defendant laboratory. The main issue on appeal appears to be whether the trial court was in error in finding the employee was totally disabled.

The record indicates that when the case was presented to the trial court, defendant contended the permanent disability should be fixed at 90-95 percent but on appeal, defendant's reply brief suggests an award of 75 percent disability would be more appropriate.

In order to award total disability benefits, the evidence must establish the disability totally incapacitates the employee from working at an occupation which brings the employee an income. Tenn. Code Ann. § 50-6-207(4)(B).

Many factors must be taken into consideration in determining whether an employee is totally disabled such as the employee's age, education, work experience, local job opportunities, etc. and this is to be examined in relation to the open labor market. ***Orman v. William-Sonoma, Inc.***, 803 S.W.2d 672, 678 (Tenn. 1991); ***Clark v. National Union Fire Ins. Co.***, 774 S.W.2d 586, 588 (Tenn. 1989). The statutory definition of total disability focuses on an employee's ability to return to gainful employment. ***Davis v. Reagan***, 951 S.W.2d 766 (Tenn. 1997).

Mr. Shalin has detailed many reasons why he stopped working and is unable to work and there is no evidence that contradicts these statements. Defendant insists the expert medical testimony supports that he is able to return to work. We have carefully read all of this testimony and disagree with this conclusion. None of the three doctors were ever asked a direct question as to their opinion concerning plaintiff's ability to return to some type of work. Counsel states Dr. Miller's

testimony indicates it would be good for plaintiff to be working. In this respect, we find the doctor was aware that the employee had been working since his initial diagnosis in 2001 up to his leaving employment in 2004. The question to the doctor was whether his working during that period of time had affected his condition. The doctor replied, "No, actually its actually better for him to do that as much as he can." We do not construe this statement to mean the employee is able to return to work.

Considering his age, education, physical condition, etc. we find the evidence preponderates in favor of the trial court's conclusion the employee is totally disabled.

An issue was also raised concerning the calculation of the employee's average weekly wage. The trial court based the computation on wages paid prior to his becoming partially incapacitated when he was first diagnosed with the disease during October 2001. The parties agreed on what the maximum weekly benefit would be at that period of time. Defendant insists that it should have been based on the employee's salary when the exposure to the occupational disease occurred.

It is a general rule that in occupational disease cases, the date of the "accident or injury" is the date on which the employee becomes partially or totally incapacitated for work. Tenn. Code Ann. § 50-6-303. ***Liberty Mut. Ins. Co. v. Starnes***, 563 S.W.2d 178 (Tenn. 1978).

We find the trial court was correct in fixing the employee's weekly benefits.

Conclusion

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the defendant.

_____

ROGER E. THAYER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

TERRY L. SAHLIN v. LABORATORY GLASS, INC.

Circuit Court for Sullivan County
No. C34953

Filed August 19, 2005

No. E2004-01388-WC-R3-CV

ORDER

This case is before the Court upon the motion for review filed by Laboratory Glass, Inc., 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Laboratory Glass, Inc., for which execution may issue if necessary.

PER CURIAM

Anderson, J. - Not Participating

VIA E-MAIL ONLY

AUGUST 17, 2005

TO: ANNE BRUSH, DEPUTY CLERK, KNOXVILLE

FROM: WILLIAM M. BARKER, JUSTICE

RE: TERRY L. SAHLIN V. LABORATORY GLASS, INC.
SULLIVAN CIRCUIT - NO. E2004-01388-WC-R3-CV

MOTION FOR REVIEW: DENIED