IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
June 1, 2005 Session

PAUL JOHNSON, JR. v. SNAP-ON INCORPORATED

Direct Appeal from the Chancery Court for Washington County
No. 34180 G. Richard Johnson, Chancellor

Filed November 30, 2005

No. E2004-01759-WC-R3-CV - Mailed August 26, 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 plaintiff alleges that his employment subjected him to heavy metal dust which decreased his pulmonary function. The defendant says that the decreased pulmonary function, if any, was caused by smoking forty cigarettes a day for forty-five years, and pleads the statute of limitation of one year, and lack of proof of causation. The trial court awarded benefits based on a finding of 40 percent permanent partial disability. We reverse and dismiss.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Reversed and Case Dismissed

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

Jennifer P. Keller, Johnson City, Tennessee, for appellant, Snap-On Incorporated.

Howell H. Sherrod, Johnson City, Tennessee, for appellee, Paul Johnson, Jr.

MEMORANDUM OPINION

This complaint, filed May 4, 2001, alleges *only* that "the plaintiff has been exposed to heavy metal dust which has resulted in decreased pulmonary function." The defendant denied (1) that the plaintiff's condition arose out of or in the course of employment, and (2) asserted an affirmative defense of the statute of limitations.

The trial judge found that the plaintiff began to have breathing problems in late 1998 and that

"*he had a forty-five year habit of smoking two packs of cigarettes a day.*" [Emphasis added.] The trial judge further found that the plaintiff sought treatment for his breathing problems in 1999, but because he was "dull-witted," he "would not know if his shortness of breath or respiratory-pulmonary problems were caused by smoking cigarettes or from other sources."[1]

The plaintiff was employed by the defendant for twenty-one years before he "took early retirement" of his own volition. For the last nine years of his employment he used an automatic polisher which "polishes the flats and sides of a screw driver." He described his job thusly:

> A: You put the parts in the machine. They go around. It's got an oil mist. Oil goes on the blades. It keeps the parts cool. It polishes out.

Further testifying, he said:

> Q: On (sic) the *last couple of years that* you were on that machine, what did you notice about yourself and your health? [Emphasis added.]
>
> A: Well, *I had problems breathing*; couldn't do my work like I should have. [Emphasis added.]
>
> Q: Did you go to a doctor?
>
> A: Yes, I did.
>
> Q: Did they (sic) send you to a workers' comp doctor?
>
> A: Yes, he was.
>
> Q: When you went to Dr. Farrow when (sic) did you first go see him (sic)?
>
> A: The first time I went to see him was 1999 . . . . Probably January 1999. He examined me, took x-rays of my lungs . . . .
>
> Q: How long did you continue to work?

---

[1] The plaintiff left school after the sixth grade. He was fifty-eight years old at the time of trial. His responses to questions are clear, concise, pithy, and well articulated. His syntax is certainly above average, and we note few lapses in grammar on his part.

It cannot be accepted that the plaintiff, who smoked forty cigarettes a day for forty-five years, was unaware of the causal relationship between heavy smoking and breathing problems. Aside from common, bruited knowledge of the risks of smoking, since 1964 a warning of the dangers of smoking has been affixed to every package of cigarettes. (The plaintiff says that he reads and writes well.) Although he testified that "no one told him" of the dangers posed by smoking, he admitted that Dr. Farrow, his physician, advised him to stop smoking in 1999, but that he could not overcome his addiction.

A: I worked up until 2000 . . . . the 30th of May.

Q: . . . [U]ntil the last day you worked did any doctor tell you [that] you had any permanent disability . . . . or could not work?

A: No.

Q: Did you take early retirement?

A: I took early retirement.

Q: How were you able to do that?

A: Well, it came up that I could take an early retirement at my age. [55.]

Cross-Exam

Q: And you read and write pretty well?

A: Pretty good.

Q: Dr. Farrow told you that you had a decreased pulmonary function as a result of heavy metal dust in January of 1999?

A: Yes, ma'am.

Q: And he also told you that you had some metal fragments in your lungs in January of 1999?

A: Yes, he did. [Later retracted by Dr. Farrow.]

* * * * *

Q: And Dr. Farrow told you in January of 1999 that you were going to have to quit your job?

A: No, he did not. [Later retracted by the plaintiff.]

* * * * *

Q: Mr. Johnson, the bailiff has handed you a copy of the deposition that was taken in your matter . . . . I'll refer you to page 20 . . . . could you read what

is marked in blue pen brackets?

A: Yes, I do.

Q: What does that state? . . . What did he [Dr. Farrow] suggest that you do?

A: "Have to quit." . . . . I don't remember saying that, but if you've got it down in writing, I guess I did . . . . I kept on working, you know, at the time he said it, you can try it. Keep on working . . . . that was January 1999.

* * * * *

Q: Now, Mr. Johnson, you have smoked for forty years. Is that right?

A: I have.

Q: And you continue to smoke?

A: I do.

* * * * *

Q: Dr. Farrow told you explicitly that you had COPD [chronic obstructive pulmonary disease] and asthma, did he not?

A: Yes, ma'am.

The Medical Proof

Dr. Jeff Farrow, a pulmonary specialist, testified that he first saw the plaintiff on January 26, 1999, with a follow-up visit three months later. He last saw the plaintiff November 1, 2002.

Initially, he ordered a chest x-ray and pulmonary function tests. On the subsequent visit the plaintiff was given bronchial dilators and inhalers for underlying emphysema, and was counseled on "smoking cessation indicating that we felt that was a big part of his problem."

Dr. Farrow saw the plaintiff again on June 3, 2002, and "because there was a possibility of some occupational lung contribution lung disease contribution, to his shortness of breath and repeated bronchitis episodes, we gave him a peak flow meter and diary to use when he came and went from work. . . . . which revealed a definite reduction in peak flows when patient is at work as opposed to week-ends." Dr. Farrow was asked:

Q: Were you able to make any connection with reasonable certainty in your

profession as to whether or not his breathing problems related to his work environment?

A: I think that that was a definite contribution to his history of recurrent shortness of breath, bronchitic episodes, perhaps even his inability to perform his job. But I think it's a fair statement to say that his smoking was a contributor to this as well.

Q: Did you come up with a medical impairment that you could assign to his condition or to smoking or to his environmental pollution?

A: Yes, I did, and that was based on his PFTs as well as his history. I felt that he had Class 2 impairment of his breathing inability [sic] that was *based on his symptomatology more* than anything else. [Emphasis added.]

Q: When you say Class 2, is that in the A.M.A. Guides, Fifth Edition?

A: Yes sir.

Q: Is there any way to divide that up between smoking and environment?

A: No sir.

Q: Is this impairment temporary or permanent?

A: I think it's permanent characterized by the fact that he continues to have exposure tendency to various dust and chemicals. It becomes often specific to various dusts that he can come in contact with, like heavy metals, but becomes generalized to things such as perfume, other cigarette smoke, things of that sort.

Q: Are there any restrictions you put on his ability to perform work?

A: He would not be able to work probably life-long in a dusty environment with poor air quality.

Q: And just to be more specific, what would you categorize as poor air quality?

A; Dusty, smokey environment, poorly-ventilated areas and specifically he may have a tendency toward heavy metal dust although that has not objectively been proven with this fellow.

Q: What about temperature extremes and humidity? Would that have any

effect?

A: Humidity and temperature extremes are always a problem for our patients with a breathing disorder, be it from cigarette smoke or dust exposure.

Q: So, do you relate at least a portion of his condition to his working at Snap-On Tools?

A: I think that the best way characterize that is it exacerbated an underlying lung problem that he had.

* * * * *

Q: And I think some of the records reflect that he had been a smoker since approximately the age of twelve. Does that serve your recollection?

A: I believe that's right. His pack (sic) a year (sic) history, which we calculated, was quite high.

Q: And in fact there are a few diagnoses that appear in the records including asthma, emphysema, and COPD, I believe. Is that correct?

A: That's correct.

Q: And smoking has been a documented cause or contributor to all of those. Is that correct?

A: That's correct.

Q: Now, Doctor, is it possible, is it not, that Mr. Johnson's COPD, Asthma and/or emphysema *is caused entirely by his smoking, is it not?* [Emphasis added.]

A: *Yes, it is.* [Emphasis added.]

Q: And I think in fact I have one additional letter that was, I believe, in your file. It's a letter . . .

A: Sent to Ms. Presley.

Q: Yes.

A: Yes. Let me find that, or I'll look at yours. I read that.

A: Dated September 6, 2001.

Q: Yes. And in fact in that letter you indicated, I believe, reading the last sentence, "As you well know it would be impossible to determine what percentage that each may have contributed, but *a 45+ pack year history of tobacco use certainly could have caused a significant amount of injury to his lung, if not all of it."* Is that correct? [Emphasis added.]

A: Correct,

Q: So at least in that letter written, I believe, September 6, 2001 it was your belief that there was at least a distinct possibility that all of his lung problems could be caused by smoking. Is that correct?

A: That's correct. But if I may clarify: His underlying significant loss of lung function I don't doubt is due to his smoking. However, his recurrent bouts of chronic bronchitis and asthmatic-like symptoms are coming in contact with certain environmental dust and chemicals, presumably some of which were in his work environment. That's based on objective findings from his diary that he provided in which his peak flows were measured both at work and outside of work.

* * * * *

Q: But actually there is no objective evidence to show that Mr. Johnson has significant injury to his lungs. Is that correct?

A: Oh, he has significant injury based on pulmonary functions, although mild. *But as to the cause of that, as stated before, I can't comment.* [Emphasis added.]

Dr. Theron Blickenstaff is a specialist in occupational and environmental medicine. His education background includes degrees in biology, medicine, and epidemiology; he is board certified in occupational medicine and in preventive medicine. He was a staff physician at Eastman Chemical Company for several years, concerned with occupational toxicology, the effect of chemical exposure, and the like. He has treated or evaluated a host of persons with respiratory complaints, and conducted an independent medical examination of the plaintiff after reviewing clinical records of his medical treatment, industrial hygiene surveys, air-monitoring results at Snap-On, and the depositions of the plaintiff and Dr. Farrow.

He testified that the x-rays of the plaintiff's chest showed chronic obstructive pulmonary

disease, mild, "if any impairment at all." [2]

Dr. Blickenstaff's examination of the plaintiff included a visit to the Snap-On plant where he observed the polishing machine operated by the plaintiff.

He further testified:

Q: What is your opinion as to Mr. Johnson's diagnosis?

A: In my opinion, he has mild chronic obstructive pulmonary disease.

Q: And in your opinion and to a reasonable degree of medical certainty, what is the cause of Mr. Johnson's condition?

A: The cause of his condition is cigarette smoking.

Q: How would you evaluate Mr. Johnson's condition in comparison to the general population of smokers with Mr. Johnson's smoking history?

A: In my opinion, it's about average; about what would be expected. Some people can smoke cigarettes without any adverse health effects and some can – some get severe adverse health effects from even less smoking that he had done in his lifetime, but I would characterize his as about what would be expected from a long history of one pack a day smoking.

Q: All right. If Mr. Johnson had smoked more than one pack a day, would that have any impact on your analysis?

A: No.

Q: Okay. Now, based upon the Fifth Edition of the A.M.A. Guides, does Mr. Johnson currently have any permanent impairment?

A: Not in my opinion. His most recently – most *recent pulmonary function test was normal.* [Emphasis added.]

Q: Would, in your opinion, Mr. Johnson's current physical condition and the restrictions that you have mentioned prevent him from returning to work?

---

[2] The plaintiff told Dr. Blickenstaff that he began smoking when he was ten or twelve years of age, and that he smoked a pack per day. He told Dr. Farrow he smoked two packs a day, until 1999, when he quit smoking. He told the trial judge that he smoked two packs a day, and that he never quit, because he could not do so. He was still smoking on the date of trial.

A: No.

Q: And finally, Dr., in your opinion and to a reasonable degree of medical certainty, does Mr. Johnson's condition originate from anything to which he was exposed in his work place at Snap-On?

A: Not in my opinion.

Q: And is all the testimony that you've given today been to a reasonable degree of medical certainty?

A: Yes.

The Judgment

The trial court found that the "plaintiff's respiratory condition is causally related [to his employment], timely filed, and is compensable," and awarded benefits based on 40 percent permanent partial vocational disability. The defendant appeals, and presents for review the (1) issue of the Statute of Limitations, Tenn. Code Ann. § 50-6-306(a), and the (2) issue of whether the plaintiff's alleged pulmonary condition is causally related to his employment, proof of which is required by Tenn. Code Ann. § 50-6-301.

The standard of review in a worker's compensation case 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); ***Houser v. Bi-Lo, Inc.***, 36 S.W.3d 68, 70-71 (Tenn. 2001). We are 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). Moreover, we are required by law to examine *in depth* a trial court's factual findings and conclusions. ***GAF Bldg. Materials v. George***, 47 S.W.3d 430, 432 (Tenn. 2001). Where the medical testimony in a workers' compensation case is presented by deposition, we may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. ***Cooper v. INA***, 884 S.W.2d 446, 451 (Tenn. 1994).

Discussion

In his complaint the plaintiff approached the issue of causality and diagnosis in a gingerly fashion, alleging *only* that he "has been exposed to heavy metal dust which has resulted in decreased pulmonary function." The gingerly approach continued to the trial prelude when his counsel informed the trial judge that "the issue is not as to whether he falls under the occupational disease (sic) or not, what it is, it's an aggravation of a pre-existing condition." The plaintiff persisted in this theory of his case throughout the trial and, essentially, on appeal. Conversely, the defendant argues that, if anything, the plaintiff suffers from an occupation disease which is not causally related to his employment, and only after it because clear that the medical proof did not support his singular

allegation the plaintiff devised the exacerbation theory he now relies on.

The Workers' Compensation Act specifically provides that diseases "of the heart, *lung,* and hypertension arising out of and in the course of any type of employment" are deemed to be occupational diseases. Tenn. Code Ann. § 50-6-301 [Emphasis added.] Since the Complaint alleges "decreased pulmonary function" the condition alleged is a "disease of the . . . lung" and must be considered as an occupational disease.

Claims involving occupational diseases are subject to a specific statute of limitations, Tenn. Code Ann. § 50-6-306(a), which provides that:

> The right to compensation for occupation disease shall be forever barred unless suit therefore is commenced within one (1) year after the beginning of the incapacity for work resulting from an occupational disease.

The operative words in this statute are "the beginning of the incapacity to work." We have previously held that:

> the beginning of the incapacity to work occurs when an employee has knowledge, or in the reasonable exercise of caution should have knowledge, that he has an occupational disease and that it has progressed to a point that it injuriously affects his capacity to work to a degree amounting to a compensable injury.

Shelton v. Torrington Company, 1998 WL 107995 at **2 (Tenn. Sp. Workers' Comp.) (No application for full court review filed) (citing ***Adams v. American Zinc Co.***, 326 S.W.2d 425 (Tenn. 1959)); *see also* ***Ingram v. Aetna Casualty and Surety Company***, 876 S.W.2d 91, 95 (Tenn. 1994).

We have also heretofore determined that a *partial incapacity for work* caused by an occupational disease triggers the running of the statute of limitations under Tenn. Code Ann § 50-6-306(a). ***Shipp v. Baptist Memorial Hospital***, 1995 WL 381750 at **2 (Tenn. Sp. Workers' Comp.) (No application for full court review filed). The Supreme Court has specifically held that to hold that the statute of limitations does not begin to run until the employee is totally incapacitated from employment is to ignore the word "beginning" in the statute. ***Adams v. American Zinc Co.***, 326 S.W.2d 425 (Tenn. 1959).

It is clear beyond peradventure that the plaintiff knew his pulmonary condition was related to his work environment in January 1999. He testified that when he first saw Dr. Farrow in January 1999 he was told that he had metal dust in his lungs, and that he would "have to quit" his job. But he continued to work, and later demonstrated his inability to do so in April 2000 when he missed several days owing to his pulmonary problems.

In ***Adams v. American Zinc Company****, supra*, the plaintiff employee had been continuously exposed to a "dust laden atmosphere" during his forty years of employment and had developed a chronic cough and shortness of breath. The plaintiff's condition worsened and he saw the company physician sometime in 1955, whose diagnosis was silicosis, and who told him that "he would have no trouble settling with the company," and "to take it easy." This diagnosis was later confirmed in August 1956 by another physician. The plaintiff *continued working for the defendant after his diagnosis in 1955 and 1956*, until approximately one month before he was determined by the second physician to be *totally disabled* in September, 1957. He filed suit on October 14, 1957.

Under Tennessee law, an occupation disease is defined as follows:

> As used in the Workers' Compensation Law, "occupational disease" means all diseases arising out of and in the course of employment. A disease shall be deemed to arise out of the employment only if:
>
> (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*, through 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 an in the course of any type of employment shall be deemed to be occupational diseases.

Tenn. Code Ann. § 50-6-301 (1999) [Emphasis added].

The plaintiff in any workers' compensation action has the burden of proving causation and permanency by the preponderance of the evidence. *See* **Thomas v. Aetna Life & Cas. Co.**, 812 S.W.2d 278, 282 (Tenn. 1991), and in all but the most obvious cases, such as the loss of a member, expert medical testimony is required to establish causation. ***Thomas v. Aetna Life & Cas. Co.**, supra.* Additionally, when the medical testimony is presented by deposition, as it was in this case,

the reviewing court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. ***Cooper v. INA***, 884 S.W.2d 446, 451 (Tenn. 1994).

We first observe that Dr. Farrow's testimony was, in point of fact, all over the place. At one point he testified that the plaintiff's condition was possibly caused *entirely by his smoking*. He later stated that smoking and work environment caused his pulmonary condition, but did not way which came first or when. He later testified that the work environment aggravated the plaintiff's lung condition, implying that smoking initially caused the pulmonary disease. At one point he testified that he could not say that the plaintiff's condition was made worse by his work environment; he wrote a letter before his deposition was taken that smoking could have caused *all* of his lung problems. Moreover, Dr. Farrow's arguable conclusion about work environment was based wholly upon assertions he made based on the plaintiff's statements. Dr. Farrow knew nothing about the employer's plant, and had never visited it.

The plaintiff is the only employee of the defendant to claim a pulmonary disorder resulting from the work environment.

In contrast to the testimony of Dr. Farrow, the IME physician, Dr. Blickenstaff, unequivocally testified that there is *no evidence that plaintiff's illness is related to his work environment* and that "the cause of [plaintiff's] condition is cigarette smoking." He testified that the plaintiff's condition was not caused by exposure to chemicals at his work place, and that the plaintiff's pulmonary condition is "about what would be expected from a long history of one pack a day smoking."

In direct contrast to Dr. Farrow's approach in reaching an opinion on causation, Dr. Blickenstaff[3] reviewed MSDS sheets for the mist plaintiff was allegedly exposed to in his workplace, and reviewed a number of air monitoring studies conducted around plaintiff's former work area. Dr. Blickenstaff also visited the Snap-On facility and actually observed in operation the polishing machine the plaintiff operated for the last nine years of his employment. According to his extensive analysis the presence of potentially harmful elements in the air around the working area were always below levels of concern. This conclusion was consistent with the testimony of a supervisor.

Conclusion

An in-depth consideration of the testimony of the two experts can lead to but one conclusion: the plaintiff's lung condition, whether a COPD, asthma or emphysema was caused by his extraordinary heavy smoking and is not attributable to his employment. Dr. Blinkenstaff's testimony was sharply definitive and unequivocal. Dr. Farrow's testimony was equivocal, and inconsistent. While the workers' compensation law must be construed liberally in favor of an injured employee,

---

[3] The Workers' Compensation Reform Act, effective July 1, 2005, requires the Commission of Labor and Workforce Development to maintain a registry of IMEs and establish their qualifications, because the "dueling doctor" scenario "needs to end."

the burden remains on the employee to prove causation by a preponderance of all the evidence. ***Thomas v. Aetna Life & Cas. Ins. Co.***, 812 S.W.2d 278 (Tenn. 1991).

The plaintiff knew more than two years before he filed this action that he had a lung condition. His physician so advised him. He saw the physician because he was experiencing shortness of breath. About a year after his first treatment, he was unable to work for several days owing to his condition. The preponderant evidence clearly establishes that the plaintiff was aware of his lung condition more than one year before suit was filed, and it is significant that his condition did not materially worsen after he first began to experience shortness of breath. The evidence preponderates against the judgment. Rule 13(d) Tenn. R. App. P.

For the reasons expressed herein, we hold that the plaintiff's action (1) is barred by the statute of limitations, and (2) fails for lack of proof of causation. Finally, it is markedly significant that according to Dr. Blinkenstaff, the most recent pulmonary function test of the plaintiff was normal. The judgment is reversed, and the complaint is dismissed at the costs of the appellee.

____

WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
June 1, 2005 Session

PAUL JOHNSON, JR. v. SNAP-ON INCORPORATED

Chancery Court for Washington County
No. 34180

No. E2004-01759-SC-WCM-CV

JUDGMENT

This case is before the Court upon the motion for review filed by Paul Johnson, Jr. 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 Paul Johnson, Jr., for which execution may issue if necessary.

BARKER, C.J., NOT PARTICIPATING