

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 23, 2007 Session

**DAISY L. MILLER, surviving spouse of MASSEY MILLER, deceased v.
LEHMAN-ROBERTS COMPANY**

**Direct Appeal from the Chancery Court for Shelby County
No. CH-02-1464-III Kenny W. Armstrong, Chancellor**

No. W2006-01263-WC-R3-WC - Mailed August 31, 2007; Filed October 1, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court found that the employee died as a result of a compensable occupational disease, silicosis, which was caused by exposure to silica dust in the course of his employment. The court awarded death benefits and specified medical and funeral expenses to employee's widow. The employer has appealed that ruling, contending that the evidence preponderates against the trial court's finding on causation. In the alternative, the employer requests that the case be remanded to the trial court to determine the amount of a set-off, if any, for Social Security old-age insurance benefits in accordance with Tennessee Code Annotated section 50-6-207(4)(A)(i)(2005). We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Chancery Court
Affirmed**

ALLEN WALLACE, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SR. J., joined.

W. Stephen Gardner, Memphis, Tennessee, for the appellant, Lehman-Roberts Company.

B. J. Wade, David Riley, and Charles Rye, Memphis, Tennessee, for the appellee, Daisy Miller.

MEMORANDUM OPINION

FACTUAL BACKGROUND

The decedent, Massey Miller ("Employee") worked for Lehman-Roberts ("Employer"), a paving company, from September 1960 until February 2002. In November 2001, he was diagnosed with pulmonary fibrosis. He died in May 2002 from cardiopulmonary arrest secondary to that condition.

For the first twelve years of his employment, Employee worked as a "carboy." Crushed limestone was delivered to Employer's facility in railroad cars. The limestone would be removed from the cars by a large mechanical shovel or "clam bucket." The carboy then used a hand shovel to move the remaining limestone from the floor of the car. A portion of the limestone material was dust, which Employee was exposed to. Employee's widow testified that during this time he would often arrive at home after work with limestone dust covering his hair, clothes, and shoes.

In 1972, Employee became a loader operator. His primary job duty was operating a front end loader, moving materials used to make asphalt throughout the facility. The machine which he operated had a fully enclosed cab, was air conditioned, and had air filters. He held this job for the remainder of his tenure with Employer. According to Jimmy Bowen, a managerial level employee who testified on behalf of Employer, Employee also operated a rock crusher from time to time. Danny Thornton, who had been Employee's supervisor, testified that he told Employee's widow that Employee would have been exposed to "quite a bit of dust" in the course of his employment. Thornton also testified that he conducted safety meetings at which he advised employees that dust exposure could lead to lung damage.

In late 2001, Employee began to have noticeable shortness of breath. He consulted his primary care physician, who referred him to Dr. James Andrews, a pulmonary medicine specialist. Dr. Andrews testified by deposition. He examined Employee and ordered diagnostic tests, including x-rays, a CT scan, bronchoscopy, and spirometry. His diagnosis was pulmonary fibrosis. He described this condition in layman's terms as scar tissue in the lungs. Based upon the history given to him, he opined that the cause of this condition was occupational exposure to smoke and dust. Dr. Andrews treated Employee until his death in May 2002. He signed the death certificate, which gave the cause of death as cardiopulmonary arrest secondary to pulmonary fibrosis. Dr. Andrews further testified that the damage to Employee's lungs which he observed was not the type of damage associated with cigarette smoking. The evidence showed that Employee had been a smoker from childhood, but had stopped smoking eight years before he first saw Dr. Andrews.

Dr. Arthur Frank is an occupational medicine specialist who has studied and written extensively on the subject of pulmonary fibrosis. He reviewed the data concerning Employee and testified as an expert witness on behalf of his widow. He testified by deposition. Dr. Frank opined that Employee had silicosis, which is a particular type of pulmonary fibrosis. He stated that this condition can be caused by breathing limestone dust. He opined that Employee's silicosis was caused by exposure to rock dust at work. Dr. Frank also testified that there is a minimum period of ten years after exposure before the resulting silicosis becomes apparent. This period of "latency" can be much longer, up to thirty or more years.

Dr. Keith Mansel is a pulmonary medicine specialist who examined the data concerning Employee and testified as an expert on behalf of Employer. He testified live at trial. He opined that

Employee had "idiopathic" pulmonary fibrosis. Idiopathic, in this context, means without a known cause. He disagreed with Dr. Frank's diagnosis of silicosis. He based his conclusions on his review and interpretation of essentially the same information (x-rays, breathing tests, etc.) relied upon by Dr. Frank. Dr. Mansel stated that the rapid deterioration in Employee's condition after the initial onset of symptoms was inconsistent with the diagnosis of silicosis.

The case was tried before the Chancery Court of Shelby County on February 22, 2006. A Final Judgment for Plaintiff was entered on March 27, 2006. In that judgment, the trial court found that the decedent "suffered an occupational disease, particularly silicosis, as a result of his years of exposure to silica while employed with [Employer]." The judgment awarded temporary total disability benefits, death benefits, medical expenses, funeral expenses, and discretionary costs. Employer filed a Motion to Alter or Amend Final Judgment which was granted in part and denied in part. An Amended Judgment was entered on May 17, 2006. In that judgment, no temporary benefits were awarded and the award of discretionary costs was reduced.

ISSUES

Employer contends that the evidence preponderates against the trial court's ruling on the issue of causation. Employer further contends that if the finding of causation is affirmed, the case should be remanded to the trial court for consideration of a possible set-off of Social Security old age pension benefits.

STANDARD OF REVIEW

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825-26 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the court on appeal must extend considerable deference to the trial court's factual findings. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). In reviewing documentary evidence such as depositions, however, we extend no deference to the trial court's findings. Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006). Conclusions of law are subject to de novo review without any presumption of correctness. Rhodes, 154 S.W.3d at 46; Perrin, 120 S.W.3d at 826.

ANALYSIS

On appeal, Employer first contends that the evidence preponderates against the trial court's finding that Employee's death was the result of silicosis caused by exposure to limestone dust during his employment. Employer premises its argument upon two bases. The first of these is that from 1972 until 2002, Employee worked in the enclosed, air-conditioned cab of a front end loader, which minimized his exposure to dust in the workplace during that period. In addition, Employer argues that the opinion of Dr. Andrews is unreliable because it was based in part upon his understanding that Employee had been exposed to dust and smoke while laying asphalt. The record contains no

evidence that Employee had laid asphalt in the course of his employment. For those reasons, Employer contends that Dr. Andrews' opinion is based upon an incorrect premise and should be disregarded.

Employer correctly observes that it is undisputed that Employee worked in an enclosed, air conditioned space, the cab of a front end loader, from 1972 until 2002. On cross-examination, Drs. Andrews and Frank conceded that if Employee worked in an enclosed environment such as an office, occupational silicosis would be a less likely diagnosis, and idiopathic pulmonary fibrosis would be more likely. Employer's argument implicitly presumes that Employee was continuously in the cab of his vehicle while working. The evidence, particularly the testimony of supervisors Bowen and Thornton, does not support this presumption. All of the proof on the subject indicates that the facilities in which Employee worked were dusty places. These facts were not addressed during Employer's cross-examination of Drs. Andrews and Frank.

In any case, Employee was exposed to limestone dust on a daily basis for at least the first twelve years of his employment. Employee's widow testified that he would arrive home from work during this period with dust in his hair, clothes, and shoes. Lee Wooten, who held the job of carboy before Employee, confirmed that the conditions were very dusty. When viewed in light of Dr. Frank's testimony that symptoms of silicosis may not arise for decades after exposure, that evidence is sufficient to support a finding of causation, irrespective of the nature and extent of any exposure which may have occurred after 1972. Dr. Mansel, who testified as an expert on Employer's behalf, conceded on cross-examination that the level of dust exposure described by Wooten, occurring over a period of ten years, could produce silicosis. The crux of his testimony was that Employee did not have silicosis.

Dr. Mansel and Dr. Frank reviewed the same information and came to differing conclusions. Mansel was of the opinion that Employee had idiopathic pulmonary fibrosis; Frank opined that Employee had occupational silicosis. When expert medical testimony conflicts, the trial judge has discretion to determine which to accept. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996). Factors which may be considered are 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). In this case, Dr. Mansel and Dr. Frank reviewed the same information, under similar circumstances. However, Dr. Frank had greater expertise concerning pulmonary fibrosis, as evidenced by his extensive study of and numerous publications concerning the subject. The trial court specifically found that Dr. Frank was more credible than Dr. Mansel, and the record does not preponderate against that conclusion.

Based upon our independent review of the evidence, we find that the trial court correctly ruled that Employee's death was the result of silicosis caused by exposure to limestone dust during his employment.

We turn to the second issue raised by Employer on appeal, which is that if the trial court is upheld concerning liability, the case should be remanded to determine if Employer is entitled to receive a set-off of Social Security old age benefits pursuant to Tennessee Code Annotated § 50-6-

207(4)(A)(i)(2005). The Supreme Court's decision in Correll v. E.I. DuPont de Nemours & Co., 207 S.W.3d 751, 757 (Tenn. 2006), held that the Social Security set-off is applicable to death claims. The issue was not raised in Employer's answer to the complaint or otherwise presented to the trial court at any time. There is no evidence in the record that Employee's widow was receiving such benefits. Issues not raised in the trial court cannot be raised for the first time on appeal. Simpson v. Frontier Cmty. Credit Union, 810 S.W.2d 147, 153 (Tenn. 1991). We therefore decline to remand the case.

CONCLUSION

The judgment is affirmed in all respects. Costs are taxed to Lehman-Roberts Company and its surety, for which execution may issue if necessary.

ALLEN WALLACE, SENIOR JUDGE

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JUDGMENT ORDER

This case is before the Court upon 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; 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 on appeal are taxed to the Appellant, Lehman-Roberts Company, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM