IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 21, 2008 Session

RITESCREEN, INC., ET AL. v. DONALD CAMPBELL

Direct Appeal from the Circuit Court for Carter County
No. C9392 Thomas J. Seeley, Jr., Judge

Filed October 6, 2008

E2007-01441-WC-R3-WC - Mailed August 27, 2008

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 a hearing and a report of findings of fact and conclusions of law. Employee alleged that he sustained an aggravation of pre-existing pulmonary disease as a result of exposure to a chemical in the workplace. The trial court awarded benefits. On appeal the employer contends that the evidence preponderates against the trial court's decision. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Affirmed

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Jennifer P. Keller and Philip R. Baker, Johnson City, Tennessee, for the appellants, Ritescreen, Inc. and Zurich North America.

Angela Vincent Jones, Johnson City, Tennessee, for the appellee, Donald Campbell.

MEMORANDUM OPINION

Factual and Procedural Background

Donald Campbell ("Employee") was a maintenance mechanic for Ritescreen, Inc. ("Employer"). He alleged that he sustained an accidental work injury, which worsened his pre-existing lung disease. The incident at issue occurred on December 17, 2003. Employee's job duties took him to various areas of Employer's factory. He used a three-wheeled bicycle to move between areas. On the morning of December 17, he rode his bicycle into the maintenance shop. The shop was described as a four-thousand square foot area, with walls on three sides and a rolling-fence type of structure on the fourth. Two other employees had sprayed, or were spraying, a disinfectant

product called Ball-Phene in various parts of the shop, ostensibly because of a flu outbreak. Employee complained to the two co-workers because of the chemical smell.

He testified that he continued to work, but that coffee and food which he consumed later in the day had an odd, unpleasant taste, and he began to cough. When he returned home that evening, he told his wife that he thought he was "getting the flu." He called in sick the next day. On the day after that, he called the office of Dr. Watson, a pulmonary physician who had been treating him since 1998. Medication was prescribed. On December 22, 2003, Employee presented at a local emergency room with breathing difficulties. He was hospitalized for approximately two weeks. The admission record, written by Dr. Watson, states that his diagnosis was "Chronic obstructive pulmonary disease exacerbation. Most of this is viral but with the patient not improving with a shot of Depo-Medrol, we will also add intravenous antibiotics . . . ." The admission note does not refer to the Ball-Phene exposure. The discharge summary, also written by Dr. Watson, mentions the work event.

Dr. Watson kept Employee off work for several weeks. Eventually, he was allowed to return to work in a light duty capacity, avoiding exposure to dust and fumes. Employer provided a desk job to comply with this restriction. After a period of time, Employee wished to return to his regular job. However, this did not occur, because exposure to fumes could not be avoided.

Employee had been a smoker for over thirty years. He had been diagnosed with chronic obstructive pulmonary disease ("COPD") after a 1998 hospitalization for breathing problems. It is undisputed that the condition was caused directly by his smoking. Dr. Watson prescribed medication and evaluated him regularly thereafter. However, Employee had not been seen by Dr. Watson for over a year prior to December 2003. Dr. Watson left the medical group she was associated with in 2005. Thereafter, Dr. Sajatha Goli became Employee's treating pulmonary physician.

Neither Dr. Watson, nor Dr. Goli testified. Dr. Jeffrey Farrow, also a pulmonary specialist, testified by deposition on behalf of Employee.[1] Dr. Farrow was a member of the same practice group that Dr. Goli was, and Dr. Watson had been, associated with. His testimony was based solely upon the records of his colleagues. Dr. Farrow testified that Employee had COPD since at least 1998 as a result of cigarette smoking. He testified that COPD is a progressive disease, which worsens over time. He opined that the December 2003 exposure to Ball-Phene had injured Employee by causing his disease to worsen. He reached his conclusion based upon the rate of worsening of Employee's condition between December 1998 and September 2005.[2] That conclusion was based in part upon his understanding that Employee had stopped smoking some years before December 2003. That understanding was incorrect. However, Dr. Farrow stated that the rate of Employee's deterioration was worse than would normally be expected, even if he had continued to smoke. Dr. Farrow had not assigned an impairment prior to the deposition. He was shown the AMA Guidelines

[1] Employee's brief refers to Dr. Farrow as a treating physician. However, Dr. Farrow testified that he was not a treating physician, and that he had never examined or treated Employee.

[2] Pulmonary Function Tests ("PFTs") were administered on those dates.

during the deposition, and opined that Employee had an impairment of 50% to 100% to the body as a whole due to COPD. He further stated that Employee should not "work in an environment of poor air quality, meaning extremes of temperature, extremes of humidity either too humid or too dry, dusts, chemicals, fumes, anything of that sort."

On cross-examination, Dr. Farrow stated that he did not know the level of exposure of the active ingredients in Ball-Phene (ethyl alcohol and isobutane) that would constitute a "toxic exposure" to Employee. He had not personally examined Employee, nor had he viewed the conditions such as ventilation in the area where the exposure occurred. He also agreed that, because the only PFT of Employee prior to December 2003 was administered in 1998, it was problematic to determine the extent to which the work event had caused his lung function to deteriorate. He restated that COPD was an irreversible and progressive condition. He also testified that Employee had a Class 1 or Class 2[3] pulmonary impairment in 1998.

Dr. Theron Blickenstaff, an occupational medicine specialist, conducted an independent medical exam at the request of Employer. He examined the Employee, had PFT's administered, reviewed the medical records and examined the shop area where the exposure occurred. He opined that the exposure did not significantly advance Employee's pre-existing COPD. He based that opinion in part upon the medical records, which suggested that Employee's December 2003 hospitalization was due to a viral infection. He also relied upon his inspection of the shop area in which the Ball-Phene exposure occurred. Based upon that observation, he considered it unlikely or improbable the Employee received an exposure near the maximum permissible level of one thousand parts per million. Dr. Blickenstaff opined that Employee had an impairment of 26% to the body as a whole due to COPD. He used the same portion of the AMA Guides considered by Dr. Farrow. The difference was based upon the set of measurements used. Dr. Farrow had used PFT's taken before, or without, the administration of medication. Dr. Blickenstaff testified that the Guides required the use of the best test results, with or without medication.[4]

On the date of the trial, Employee was sixty-eight years old. He was a high-school graduate. He had some additional training over the years related to his work as a machinist. He began working for Employer in 1996. Prior to that time, he had been a maintenance supervisor for North American Rayon for thirteen years. In that job, he had supervised eight to twelve persons. He had served in the Marines in the early sixties. The remainder of his employment history is unknown. He had smoked for approximately forty years prior to December 2003. He stopped smoking when he was hospitalized, and did not resume. In (approximately) early 2004, he was diagnosed with sleep apnea. There is no allegation that this was related to his employment. Employee testified that he had no problems breathing before December 2003. This assertion is contradicted by Dr. Watson's note of January 20, 1999, which states "he gets short of breath climbing 1 flight of stairs." Also, the December 2003 hospital admission record states that, immediately prior to the work incident, he had

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[3] 0% to 25% to the body as a whole pursuant to Table 5-12 of the AMA Guides.

[4] "Use the spirogram indicating the best effort, before or after administration of a bronchodilator, to determine FVC and FEV for impairment assessment." AMA Guides, Fifth Ed. at 93.

been able to walk only one hundred to two hundred yards before becoming short of breath. At the time of his admission, he was able to walk only a few yards before breathing difficulty started. The trial court found that Employee had sustained a compensable injury, and awarded 65% permanent partial disability. Employer has appealed, contending that the evidence preponderates against the trial court's finding concerning causation.

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) (Supp. 2007); *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 (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

Employer contends that the trial court erred in finding that Employee sustained a compensable injury. In support of its position, it argues that the testimony of Dr. Blickenstaff is more reliable than that of Dr. Farrow because he actually examined both Employee and the area in which the exposure occurred. Further, Dr. Blickenstaff had greater experience in dealing with industrial chemical exposures, and possessed a more accurate medical history, in that he was aware that Employee had continued to smoke until the date of the incident at issue. Employer points out that the uncontradicted evidence was that Employee had been diagnosed with COPD in 1998. That condition was admittedly caused by smoking, and was an incurable and progressive disease.

Employee contends that the testimony of Dr. Farrow should be given greater weight because he is a practicing pulmonary specialist.[5] In contrast, Employee characterizes Dr. Blickenstaff's primary practice as "litigation support." As noted above, Employee characterized Dr. Farrow as a treating physician, although the testimony indicates otherwise. Employee also notes Dr. Farrow's testimony that the amount of deterioration of Employee's pulmonary function was greater than would be anticipated from smoking alone. Although Employee does not emphasize the point, the

[5]Employee's brief implies that Dr. Blickenstaff was not licensed to practice medicine, and his testimony should therefore be accorded limited weight. However, Dr. Blickenstaff's CV, which is exhibited to his deposition states that he is licensed in Tennessee and Kentucky. Employee did not cross-examine concerning this contention, or otherwise raise the issue in the trial court.

trial court relied, to a great extent, on the fact that Employee was able to perform his job before December 2003, and was not able to thereafter.

In this case, Employee was exposed to Ball-Phene, sprayed into his face, by two employees. It is admitted this one time incident occurred, and the employees who sprayed the aerosols were terminated. Shortly thereafter, Employee began to cough and went home that night with flu like symptoms. He did not return to work the next day and sought medical treatment two days after the incident. Certainly the court was justified in finding that an accident occurred and, as in *Long v. Tri-Con Ind. Ltd.*, 996 S.W.2d 173, 177 (Tenn. 1999), may reasonably infer that the incident was in fact the cause of the injury.

This case was presented to the trial court as an accidental injury case. Diseases of the lung are deemed to be occupational diseases by Tennessee Code Annotated section 50-6-301(6). "As we said in *American Ins. Co. v. Ison*, 519 S.W.2d 778 (Tenn. 1975) there can be no recovery for aggravation of an alleged 'occupational disease' which pre-existed the employee's current employment." *Gregg v. J. H. Kellman Co.*, 642 S.W.2d 715, 716 (Tenn. 1982). However, in *Fritts v. Safety Nat'l. Cas. Corp.*, 163 S.W.3d 673, 681 (Tenn. 2005), the Supreme Court held that a chemical exposure which caused a coughing fit which resulted in a collapsed lung constituted a compensable injury. This was so, even though the employee had pre-existing COPD, caused by smoking, which was also a cause of the coughing fit. In *Manis v. Peterbilt Motors Co.*, No. 01S01-9407-CV-00065, 1995 WL 274487 *1 (Tenn. Workers' Comp. Panel May 8, 1995), the employee had severe COPD as a result of smoking. He alleged that exposure to diesel fumes in his workplace aggravated that condition. The trial court awarded benefits, and the Special Workers' Compensation Appeals Panel affirmed.

In contrast to *Manis*, *Johnson v. Snap-On, Inc.*, No. E2004-01759-WC-R3-CV, 2005 WL 3213910, *5 (Tenn. Workers' Comp. Panel Nov. 30, 2005) concerned an employee who alleged that he had suffered "decreased pulmonary function" due to exposure to heavy metal dust. As in this case, the employee had a pre-existing COPD as a result of decades of cigarette smoking. His contention was that the exposure at work had caused a permanent aggravation of his pre-existing disease. Also, as in this case, Dr. Farrow testified on behalf of the employee, while Dr. Blickenstaff testified on behalf of the employer. The trial court adopted the employee's theory and awarded benefits for permanent partial disability. The Special Workers' Compensation Appeals Panel reversed, based primarily upon its conclusion that the testimony of Dr. Blickenstaff was the more credible of the two doctors.

An employer takes an employee as they find him and is liable under the Workers' Compensation Act for disabilities which are the result of the aggravation of the pre-existing weakness, condition or disease brought on by the occupation. *Arnold v. Firestone Tire & Rubber Co.*, 686 S.W.2d 65, 67 (Tenn. 1984). Further, reasonable doubt concerning the cause of the injury should be resolved in favor of the employee. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 168 (Tenn. 2002).

Based upon our review of the entire record, we are unable to conclude that the evidence preponderates against the trial court's findings. First we note that a single, distinct event occurred,

that Employee's symptoms commenced shortly thereafter, and that he was unable to return to work due to medical restrictions placed upon his activities after the event. Dr. Farrow's testimony was somewhat equivocal. However, he repeatedly testified that Employee's condition deteriorated more rapidly than could be explained by smoking alone. Although he was clearly confused regarding the year in which Employee quit smoking, he did not recant his opinion when provided with correct information. The trial court could have reasonably reached a different conclusion based upon the evidence before it. However, we cannot say that the evidence presented by Employee was so weak, or that presented by Employer so compelling, that the record as a whole preponderates against that conclusion.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Ritescreen, Inc. and Zurich North America, and their sureties, for which execution may issue if necessary.

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ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

RITESCREEN, INC., ET AL. V. DONALD CAMPBELL
Carter County Circuit Court
No. C9392

Filed October 6, 2008

No. E2007- 01441-WC-R3-WC

JUDGMENT

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Ritescreen, Inc., and Zurich North America, and its sureties, for which execution may issue if necessary.