

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2008 Session

DAVID LAMBERT v. BECHTEL JACOBS CO., LLC

**Direct Appeal from the Circuit Court for Anderson County
No. A4LA062 Donald Elledge, Judge**

Filed March 5, 2009

No. E2008-00420-WC-R3-WC - Mailed February 3, 2009

In this workers' compensation action, the trial court found the employee had sustained an occupational disease as the result of environmental conditions at a hazardous waste storage facility on the Oak Ridge National Laboratory Reservation. The employer has appealed on the ground that no specific irritant or contaminant was identified as having caused the employee's illness and that the trial court was precluded from finding the employee sustained a compensable occupational disease because he suffered from chronic obstructive pulmonary disease prior to his employment with Bechtel Jacobs Co., LLC.¹ After review of the record, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which GARY R. WADE, J., and WALTER C. KURTZ, SR. J., joined.

Timothy W. Conner, Knoxville, Tennessee, for the appellant, Bechtel Jacobs Co., LLC.

Christopher H. Hayes, Oak Ridge, Tennessee, for the appellee, David Lambert.

MEMORANDUM OPINION

Factual and Procedural Background

David Lambert worked as a laborer for a subcontractor of Bechtel Jacobs Co., LLC ("Bechtel") from October 2003 to April 2004 on a project at a toxic waste disposal area at the Oak Ridge National Laboratory Reservation ("ORNL"). In April 2004, he was hospitalized for an acute

¹This 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 a hearing and a report of findings of fact and conclusions of law.

respiratory illness. He did not return to work thereafter. Mr. Lambert filed a complaint seeking workers' compensation benefits in which he alleged that during the time he worked for Bechtel, "[he] was exposed to an unknown substance which caused an infectious process in his lungs and as a result is now totally and permanently disabled."

The project on which Mr. Lambert was working was located in the X-10 Burial Grounds at ORNL in an area referred to as Solid Waste Storage Area 4 or SWSA4. Some contamination from this area had been discovered to have leaked into nearby White Oak Creek. Bechtel had been employed to place a cap over the entire 30 acre site to isolate it from rainwater. This cap was to be constructed by covering the entire area with a layer of gravel, followed by a layer of soil brought from another site, a geotextile fabric containing grout which hardens when wet, a polyethylene liner, and, finally, 12 inches of common soil and 6 inches of topsoil. The soil was brought in from a borrow area referred to as the Copper Ridge borrow area and another unnamed borrow area, both described as being upgrade of SWSA4 and as areas in which no dumping or storage of waste had occurred.

Mr. Lambert's job consisted primarily of operating a piece of construction equipment called a "screener." Large quantities of soil brought from the borrow areas were placed into the screener by earthmoving equipment. The screener then shook the material through a series of screens for the purpose of reducing the size of the clods of dirt and removing debris such as rocks, sticks and the like. The material was then taken and spread over the SWSA4 site. No excavation of the SWSA4 site took place. Mr. Lambert testified that, on several occasions, the material placed in the screener had an odor "like a dead animal." Mr. Lambert also sometimes worked on the SWSA4 site picking up debris from the dirt that had been spread there and filling sandbags to be placed on the liner that had been installed to prevent it from being blown off by the wind.

The SWSA4 site had been used as a landfill for toxic waste during the 1950's. Charlie Johnson, the project manager for Bechtel, testified that, as a result of a fire, there were no records concerning what materials had been buried on the site while it was in operation. Bechtel conducted very limited testing of the soil at the site to determine if the material was radioactive. No other testing was performed.

On April 20, 2004, Mr. Lambert went to a local emergency room with breathing difficulties. He was diagnosed with pneumonia, and was admitted to the hospital, where he remained for eight days. At the time of his admission, he gave a history of three or four weeks of increasing chest congestion, followed by fever, nausea and vomiting. While in the hospital, he was referred to Dr. Charles Bruton, a pulmonary medicine specialist. Dr. Bruton continued to provide medical treatment to Mr. Lambert thereafter, and testified by deposition.

In the opinion of Dr. Bruton, Mr. Lambert had pleural fibrosis, interstitial pneumonitis, and chronic inflammation which he believed were the result of exposure to unknown chemicals or irritants at work. He stated that he thought Mr. Lambert probably had a fungal infection called blastomycosis although a culture test for that disease failed to show positive results. He also diagnosed Mr. Lambert as having chronic obstructive pulmonary disease ("COPD"), which is

typically caused by smoking.² Based upon pulmonary function tests which he administered to Mr. Lambert in June 2006, he believed that Mr. Lambert had a Class IV pulmonary impairment and was totally disabled from working as a result.

During cross-examination, Dr. Bruton was shown the results of pulmonary testing done in July 2003, shortly before Mr. Lambert went to work for Bechtel. He agreed that those results also showed a Class IV impairment, but, on redirect examination, stated that Mr. Lambert's pulmonary function had definitely worsened since the July 2003 examination when compared to the most recent testing. Dr. Bruton conceded that Mr. Lambert's previous work as a blast furnace operator, and as a welder, could cause pulmonary dysfunction.³ He testified, however, that screening dirt and working in and around dirt, as Mr. Lambert did, could have caused blastomycosis (a fungal infection) or some other hypersensitivity reaction. Dr. Bruton was unable to identify any specific agent to which Mr. Lambert was exposed in the course of his employment.

Mr. Lambert also presented the testimony of Dr. John Ellis. Dr. Ellis, who is board certified in occupational medicine, is a district medical consultant with the United States Department of Labor out of the Jacksonville, Florida, office. In that capacity, he reviews medical records and is available to consult with the case managers of persons who have claimed an injury as the result of a harmful workplace exposure. Dr. Ellis had reviewed Mr. Lambert's case in connection with an application for federal benefits for occupational illness. He was asked by the case worker to give an opinion as to whether the medical records substantiated that Mr. Lambert "has symptoms consistent with pneumoconiosis or pneumonitis that is more likely than not related to toxic substance exposure at the X-10 work site." Dr. Ellis responded, "Yes. In my opinion, the severe illness and complications related to the 2004 hospitalization were associated with workplace toxic exposure." When asked if Mr. Lambert's smoking for 20 years would change the determination, Dr. Ellis responded: "No. While the record shows Mr. Lambert has a form of COPD, it is a most unusual form and not that related to smoking." Dr. Ellis noted that Mr. Lambert was able to work prior to the infection which progressed to pulmonary fibrosis with breathing impairment. During his deposition, Dr. Ellis was asked whether the inflammation and fibrosis could be the result of his COPD. He responded: "Well, I suppose it could. It would be usually something more than just COPD by itself, though. You have to have an infection on top of it to have that kind of picture."

During his deposition testimony, Dr. Ellis stated his opinion that Mr. Lambert's COPD was significantly aggravated by his exposures at the X-10 facility. He did not identify a specific irritant to which Mr. Lambert had been exposed. It appears from the record that a written inquiry was made to an industrial hygienist concerning the subject. Based upon the response to that inquiry, Dr. Ellis testified that a fungal exposure was a "suspected" cause of Mr. Lambert's illness, but conceded that

²Mr. Lambert testified that he had been a regular smoker since the 1970s, although he tried to quit several times, sometimes for as long as seven or eight months. He stated that he was smoking very little by summer 2003 and had quit altogether by the time he started working for Bechtel.

³Prior to working for Bechtel, Mr. Lambert worked around a blast furnace for three to four years and as a welder for 18 years.

there was no objective data to support that suspicion. Dr. Ellis did testify that in his opinion Mr. Lambert's infection was the result of something other than the normal progression of his COPD and most likely was something to which he was exposed at his place of employment, "perhaps even dirt and dust itself."

Bechtel also presented testimony from two doctors. Dr. Arnold Hudson, a pulmonary specialist, conducted an independent medical examination at the request of the attorney for Bechtel. He reviewed the July 2003 pulmonary function test that had been performed prior to Mr. Lambert's employment with Bechtel and described the results as similar to the results of tests he performed in August 2005. The earlier test did not measure diffusion capacity and lung volumes as did Dr. Hudson's. Dr. Hudson diagnosed Mr. Lambert's April 2004 condition as being a community acquired atypical pneumonia with severe underlying chronic obstructive bronchitis. He found no basis in Mr. Lambert's medical record from which he could conclude that a fungal exposure or any other occupational exposure caused or contributed to Mr. Lambert's lung problems. Dr. Hudson acknowledged, however, that it was possible that exposure to some fungus or biological materials by inhalation at the job site contributed to Mr. Lambert's lung disease.

Dr. Donna Seger, a toxicologist, evaluated Mr. Lambert's medical records. She opined that there was no evidence of an occupational exposure which would have worsened Mr. Lambert's lung condition. She stated that Mr. Lambert's symptoms, course and test results were not consistent with any known type of occupational exposure.

The trial court found that Mr. Lambert had an occupational disease as a result of his employment. It found him to be permanently and totally disabled and awarded benefits accordingly. Bechtel has appealed, asserting that the trial court erred by finding that Mr. Lambert sustained an occupational disease or injury.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where factual issues are dependent on expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992).

Analysis

Tennessee Code Annotated section 50-6-301(6) (2008) provides that "[d]iseases 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.” Section 50-6-301 further provides that 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, 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.”

Bechtel argues that the evidence preponderates against the trial court’s finding on the issue of causation because there is no evidence of an occupational exposure to any identifiable “hazard.” As outlined above, Drs. Bruton and Ellis suggested a possible fungal exposure as the cause of Mr. Lambert’s acute episode in April 2005. However, the laboratory testing of Mr. Lambert for a fungal infection failed to produce a positive result. Nevertheless, both doctors continued to maintain that Mr. Lambert’s infection was caused by work-related exposure to contaminants. Both doctors testified that Mr. Lambert’s exposure to dust and dirt created an environment that was likely to have caused his condition.

The Tennessee Supreme Court encountered a similar claim as that made by Bechtel in Stratton-Warren Hardware v. Parker, 557 S.W.2d 494 (Tenn. 1977). In that case, the employee had been suffering from asthma since early childhood. Despite asthmatic attacks once or twice a month, the employee enjoyed general good health at the time of his employment and was not disabled by his disease. The employee had also smoked cigarettes since his late teens. He worked on the third floor of Stratton-Warren's warehouse, an old brick building without air conditioning. The air on the floor where he worked was contaminated with a black dust, the origin of which was unclear. The air was also contaminated by gas and exhaust fumes, which drifted up from lower floors of the warehouse where forklifts were operated. Id. at 495. Over the years, plaintiff’s respiratory condition gradually worsened until he went to a doctor and was diagnosed with emphysema, pulmonary fibrosis, bilateral bronchiectasis and “life-long asthma,” all of which, except for the asthma, had developed during the period of his employment. Id. Despite testimony that asthmatics may eventually show some signs of the conditions disabling plaintiff and that other factors, including smoking, could also contribute to the development of emphysema and fibrosis, there was testimony

by the employee's physician that the dust and other work factors were causally related to plaintiff's condition. Id. at 497. The physician testified "that trauma associated with [the employee]'s work excited and aggravated his asthma, a pre-existing condition, with the result that [the employee] was prematurely, if he would ever have been, crippled by emphysema and fibrosis." Id. The trial court found that plaintiff was suffering from a compensable occupational disease occasioned by his workplace exposure.

The employer in Stratton-Warren argued that, in the absence of any sensitivity tests to determine what type of dust irritated the employee, any medical opinion that the work environment caused his condition was "mere speculation and without foundation." Id. To this argument, the Tennessee Supreme Court responded that "[a]bsolute certainty on the part of a medical expert is not necessary to support a workmen's compensation award, for expert opinion must always be more or less uncertain and speculative." Id. (citing Am. Ins. Co. v. Ison, 538 S.W.2d 382 (Tenn. 1976); Great Am. Indem. Co. v. Friddell, 198 Tenn. 360, 280 S.W.2d 908 (1955)). Accordingly, the Court held that although no sensitivity tests had been made to determine what type of dust irritated the employee, the physician was still able to state that he believed that the diseases in question were caused by the "particular hazards" of the employee's workplace. Id.

In the present case, our review of the record indicates that Mr. Lambert had COPD prior to his employment with Bechtel. The record also indicates, however, that he was not under the care of any type of lung specialist and, in fact, had never seen a lung specialist. He had never been hospitalized overnight for any breathing problems. He was not on any medication for his breathing. As the trial court pointed out in its findings of fact, Mr. Lambert worked long hours during his time at the SWSA4 site. In the eight day period beginning January 15, 2004, he worked a total of 79 hours. In an eleven day period beginning March 17, 2004, he worked a total of 98 hours. The trial court also noted it to be even more important that he worked 54 hours in the last 5 days that he had worked just prior to his hospitalization. These facts support the trial court's apparent belief that Mr. Lambert was not disabled by his COPD prior to the inflammation or infection that he sustained in April 2004.

Both Drs. Bruton and Ellis testified that working around dust and dirt created an environment that was likely to cause a hypersensitivity reaction, inflammation or infection such as that suffered by Mr. Lambert. The record supports the fact that Mr. Lambert worked in such an environment. Mr. Lambert's testimony was to that effect. His wife, Kathleen Lambert, testified that when he came home his clothes were covered with dust and there was so much dust on his face that she "could barely see his eyes." Rudy Weigel, Bechtel's safety advocate for the SWSA4 project, testified that the job site was a dusty place and that, at times, the screener that Mr. Lambert operated was a pretty dusty piece of equipment.

Our review of the record reveals that Mr. Lambert sustained a pulmonary inflammation in April 2004, that progressed into pneumonia and pleural fibrosis. The results of that disease together with his pre-existing COPD have resulted in Mr. Lambert's disability. The trial court found the inflammation and resultant pulmonary disease to have been caused by Mr. Lambert's workplace exposure to irritants. While this is admittedly an extremely close case, from our review of the record, we are unable to find that the evidence preponderates against the findings of the trial court

in this regard.

Bechtel also argues that Mr. Lambert's pre-existing COPD precludes a finding that his condition "originated from a risk associated with the employment." See Tenn. Code Ann. § 50-6-301(5). While the physicians all testified that the COPD made Mr. Lambert more susceptible to the infection, the trial court apparently believed it was caused by something more than the natural progression of that disease. A pre-existing condition such as COPD does not preclude the finding of an occupational disease merely because it makes the employee more susceptible to that disease or may eventually have resulted in the same disability hastened by the disease. Stratton-Warren, 557 S.W.2d at 497. An employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability greater than if he or she had not had the pre-existing conditions. Rogers v. Shaw, 813 S.W.2d 397, 399 (Tenn. 1991); Stratton-Warren, 557 S.W.2d at 496-97. The evidence does not preponderate against the trial court's finding that Mr. Lambert met all the criteria for an occupational disease.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Bechtel Jacobs Co., LLC, and its surety, for which execution may issue, if necessary.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

DAVID LAMBERT V. BECHTEL JACOBS CO., LLC
Anderson County Circuit Court
No.A4LA062

Filed March 5, 2009

No. E2008- 00420-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, Bechtel Jacobs Co., LLC, and its surety, for which execution may issue if necessary.