

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

February 23, 2009 Session

WILLIAM W. BROWN, JR. v. ERACHEM COMILOG, INC.

**Direct Appeal from the Chancery Court for Humphreys County
No. CH-03-067 George Sexton, Chancellor**

**No. M2008-00265 -WC-R3-WC - Mailed - June 15, 2009
Filed - August 18, 2009**

In this action for workers' compensation benefits, the deceased spouse of William W. Brown, Jr., died of lung cancer. He contended that her cancer was caused by exposure to chemicals in the workplace. The employer, Erachem Comilog, Inc., contended that the cancer was caused by cigarette smoking. The trial court found for Erachem. Husband has appealed, asserting that the evidence preponderates against the trial court's ruling.¹ We affirm the judgment.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and ALLEN W. WALLACE, SR. J., joined.

Rocky McElhaney, Nashville, Tennessee, for the appellant, William Brown, Jr.

Dale A. Tipps, Nashville, Tennessee, for the appellee, Erachem Comilog, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

This is the second appeal of this case. The trial court initially dismissed the complaint on statute of limitations grounds after a trial on the merits. On appeal, the Supreme Court ruled that the

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.

complaint had been timely filed, and remanded the case for further proceedings. Brown v. Erachem Comilog, Inc., 231 S.W.3d 918 (Tenn. 2007). The facts were summarized in that opinion as follows:

In 1991, Shirley Brown (“Ms. Brown”) began working for Erachem Comilog, Inc. (“Erachem”), a manufacturer of electrolytic manganese dioxide, a black powder product used in dry-cell batteries. At Erachem, she was continuously exposed to chemicals in the plant. In 1999, Ms. Brown was diagnosed with lung cancer. In February 2000, she was informed that her cancer was caused by exposure to chemicals at Erachem. She gave notice to Erachem that she believed her cancer was caused by exposure to chemicals at work. Ms. Brown underwent surgery that same month, and a portion of her right lung was removed. As a result of the surgery, Ms. Brown missed work from February 14, 2000, through August 28, 2000. She returned to work at Erachem with no restrictions. Ms. Brown’s supervisor testified that Ms. Brown continued to do the same job that she had done prior to the surgery, that she did not ask for any special treatment or help, and that she was able to perform “her complete load.”

Ms. Brown underwent further treatment and, as a result, missed more work from December 27, 2001, through March 19, 2002. She again returned to work. Unfortunately, her cancer recurred in the spring of 2002. She continued working for Erachem, however, until July 11, 2002. Ms. Brown filed for workers’ compensation benefits on April 7, 2003, and died from causes related to cancer on November 11, 2003.²

Ms. Brown’s treating physician, Dr. Howard Burriss, an oncologist, testified she was cancer-free following her surgery in 2000. He stated that after her surgery there was no disability associated with her cancer and that he expected her to recover fully and live a normal life. Dr. Burriss testified that there was no evidence of a recurrence of cancer until the spring of 2002. He opined that the cause of the cancer was a combination of Ms. Brown’s smoking and her exposure to toxic chemicals at work.

Id. at 920-1.

Additional facts are relevant to the issue presented on this appeal. Ms. Brown’s deposition, taken on August 4, 2003, was placed into evidence. She testified that she began smoking when she was twenty-five years old. She stopped smoking on the night before she had surgery in February 2000, a period of approximately twenty-seven years. The record does not reveal her job title or titles while at Erachem. From her testimony, and that of a former supervisor, T. C. Clapp, it appears that

² William Brown, Jr., Ms. Brown’s surviving spouse, became the named plaintiff in this case after Ms. Brown’s death.

she worked in most of the areas of the facility during her tenure. How long and how often she may have worked in any area is not revealed. Mr. Clapp testified that employees were exposed to aluminum dust in the Briquette area, and to manganese ore throughout the facility. He also testified that exhaust fumes from propane-driven forklifts were present throughout the facility. Ms. Brown testified that she was exposed to four chemicals in the course of her employment. She referred to these as “acid,” “caustic,” “nash,” and “flock.” She did not know the chemical names of any of these materials. However, from material safety data sheets placed into evidence, it can be determined that caustic is sodium hydroxide (lye) in pellet or liquid form; nash is sodium hydrosulfide; and flock is polyacrylamide, also known as “superfloc 127.”

Dr. Burris testified by deposition. He is a physician researcher and director of drug development at the Sarah Cannon Cancer Center in Nashville. He first became involved in Ms. Brown’s care in 2003, upon a referral from Dr. McKay, another oncologist who had been treating her prior to that time. Based upon records of her early treatment, he opined that the cancer which was detected and surgically removed from her lung in 2000 was a “Stage 1” cancer. He testified that, when lung cancer is detected and treated at this stage, the rate of recovery is 80%. He also stated that the majority of relapses occur within two years after surgery, and that the rate of relapse decreases steadily after that. According to Dr. Burris, Ms. Brown’s relapse was detected in June 2002.³ At that time, her disease was classified as Stage 4, which meant that it had spread to other parts of the body, and could not be treated by surgery. Dr. Burris began seeing her in 2003.

Dr. Burris testified that, in his opinion, Ms. Brown’s cancer was caused by “a combination of her prior smoking history and her multiple year exposure to toxins and chemicals in the workplace.” He further testified that it was more likely than not that she “would not have developed lung cancer from simply smoking.” On cross-examination, he conceded that none of the substances described in the material safety data sheets for Erachem’s facility were known to be carcinogens. He explained that exposure to these substances over a long period of time, in combination with smoking, could be carcinogenic. He did not know the concentration or duration of exposure which Ms. Brown may have had to any material. He agreed that documents completed by Dr. McKay in 2000 indicated that her cancer was not related to her employment. He also acknowledged that Dr. McKay advised Ms. Brown to quit smoking but did not advise her to leave her workplace.

Dr. Renata Bluhm, a physician specializing in occupational and environmental medicine, having also earned a Doctor of Philosophy degree in pharmacology/toxicology, testified at the request of Erachem. She compared the substances noted to be present at the site as shown on the material safety data sheets maintained by Erachem to the list of known, probable and possible carcinogenic substances published by the International Agency for Research on Cancer. She stated that none of the substances listed in the material safety data sheets was considered to be a carcinogen. She believed that Ms. Brown would have developed cancer solely as a result of cigarette smoking. She also believed Ms. Brown was susceptible to cancer because of heredity. Ms. Brown’s

³Ms. Brown, however, testified that a second tumor was discovered on her lung in December 2001.

mother had also died of lung cancer. She disagreed with Dr. Burris' theory that prolonged exposure to a non-carcinogenic substance or combination of such substances could either cause or worsen cancer. She believed it improper to find some unnamed substance caused Ms. Brown's cancer unless the substance was identified and the nature of Ms. Brown's exposure to that substance was known. On cross-examination, she conceded that she did not treat patients for cancer, and that she did not know the number of new cancer cases nationally per year, or the percentage of incidence of cancer among smokers and non-smokers.

After the case was remanded to the trial court, no additional proceedings were held. The trial court issued a brief order which stated:

This court is of the opinion the medical proof for Plaintiff fails to meet any of the criteria established by [Tenn. Code Ann. § 50-6-307]. The only credible proof admitted at trial established that the only known carcinogen to which the deceased had been exposed was cigarette smoke. The Plaintiff's expert was only able to say the smoking and "the chemicals" from work were the cause of the cancer. The defendant's expert testified the Plaintiff was not exposed to any carcinogenic compound or concentration of compounds at work that would be considered carcinogenic. The court finds the testimony of defendant's expert on causation to be more credible. For this reason, the court finds the Plaintiff has failed to prove by a preponderance of the evidence that the worker is entitled to recovery in this case.

Mr. Brown has appealed, asserting that the trial court erred by finding that he did not sustain his burden of proof.

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 the issues involve 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). In such cases, the reviewing court may independently assess the medical proof to determine where the preponderance of the evidence lies. Crew v. First Source Furniture Group, 259 S.W.3d 656, 665 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin

v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

Mr. Brown contends that the trial court erred in finding Dr. Bluhm's testimony to be more credible than that of Dr. Burris. In that regard, we note that: "When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept." Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996).

Mr. Brown first asserts that Dr. Burris is "imminently qualified" and that Dr. Bluhm is "absolutely unqualified." These assertions are based upon several factors: Dr. Burris was a treating physician (albeit briefly) of Ms. Brown. Dr. Bluhm's medical group has a web page which lists independent medical examinations and expert testimony among the various services it provides. Mr. Brown also asserts that Dr. Burris' specialty as an oncologist is more closely related to the issue of causation than Dr. Bluhm's specialties as an occupational and environmental physician and a toxicologist. He also points out that in her testimony she gave vague responses to a number of questions regarding the articles or theses her opinions were based upon, and was unable to answer other questions regarding cancer statistics. Finally, he contends that direct disagreements between the two doctors concerning the relationship between hereditary and other factors and lung cancer demonstrate that Burris was more credible.

Erachem asserts that the relationship of occupational and environmental exposures to cancer and other diseases is precisely within Dr. Bluhm's specialty, while Dr. Burris' work as an oncologist is primarily concerned with the treatment of cancer after it is diagnosed. It also notes that Dr. Burris was not able to identify any known cancer-causing substance or combination of substances that Ms. Brown was exposed to in the course of her employment or to provide any scientific basis for his opinion that prolonged exposure to non-carcinogenic substances could cause cancer in combination with smoking.

We recognize that all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A. & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). Nevertheless, the proof on this issue may not be speculative, conjectural, or uncertain. Clark v. Nashville Mach. Elevator Co., Inc., 129 S.W. 3d 42, 47 (Tenn. 2004). Our review of the medical evidence leads us to conclude that the trial court correctly found that Dr. Burris' limited knowledge concerning the substances that Ms. Brown was exposed to in the course of her employment, or the nature of those exposures, lessened the weight to be given to his testimony. In the absence of scientific data to support it, Dr. Burris' theory that lung cancer can be caused by substances not believed to be carcinogenic if the exposure to those substances is prolonged, could be found to amount to nothing more than speculation or conjecture. Based upon Ms. Brown's testimony, Dr. Burris was also mistaken about when her cancer reappeared. Finally, Dr. Burris' reluctance to concede that Ms. Brown's lung cancer could have been caused by

smoking alone appears to be at odds with generally accepted medical knowledge.⁴ Cigarette smoke is, according to Dr. Bluhm, known to be carcinogenic. Ms. Brown “was regularly inhaling a carcinogen in her cigarette smoke, in a high concentration, on a regular and daily basis, for a long period of time.” Dr. Burris’s opinion that Ms. Brown’s lung cancer was not likely caused solely by cigarette smoking over a twenty-seven year period provides an additional basis for the trial court to give less weight to his testimony than to the other medical evidence in the record. We therefore conclude that the evidence does not preponderate against the trial court’s finding on the issue of causation.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to William Brown, Jr., and his surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

⁴See, e.g. Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 138, (2000)

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No. M2008-00265-SC-WCM-WC - Filed - August 18, 2009

ORDER

This case is before the Court upon the motion for review filed by William W. Brown, Jr., pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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 William W. Brown, Jr., and his surety, for which execution may issue if necessary.

PER CURIAM

KOCH, J., NOT PARTICIPATING