

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

FILED

December 19, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

RICHARD CALDWELL,)
)
Plaintiff/Appellee)
)
v.)
)
ACTIVATED METALS & CHEMICALS,)
INC., et al.,)
)
Defendants/Appellants)

SEVIER CIRCUIT
Hon. Ben W. Hooper, II,
Judge
NO. 03S01-9602-CV-00015
(No. 94-866 Below)

For the Appellants:

Daryl R. Fansler
Fansler & Williams
P.O. Box 2644
Knoxville, TN 37901

For the Appellee:

Gregory F. Vines
Butler, Vines & Babb
800 First American Ctr.
507 S. Gay St.
P.O. Box 2649.
Knoxville, TN 37901

MEMORANDUM OPINION

Members of Panel:

Justice E. Riley Anderson
Senior Judge John K. Byers
Senior Judge William H. Inman

**AFFIRMED
AND REMANDED**

BYERS, Senior Judge

_____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 trial court awarded plaintiff 35% permanent partial disability to the body as a whole. Defendant challenges the trial court's finding that plaintiff's impairment arose out of a work-related injury and the trial court's consideration of the testimony of the plaintiff's expert witness.

Plaintiff, 43, finished the eleventh grade. He has a varied work experience, having worked in restaurants, construction, as a stockboy, a janitor/security guard and as a salesperson of draperies and linens. He testified that he suffered an injury in the nature of an occupational disease from inhaling aluminum oxide dust and the dust of a nickel aluminum alloy at his workplace, resulting in his having to stop working and seeking medical care on July 28, 1993. He began working for defendant in January 1993.

Plaintiff was referred to Barry Frame, M.D., a specialist in thoracic and cardiovascular surgery, who testified in this case by deposition. He diagnosed pneumonia with complicating empyema (or lung abscess). Apparently, plaintiff suffered a pneumothorax, or puncturing of the lung. Dr. Frame opined that this pneumothorax was the result of infection, a pneumonia resulting from the aspiration of some anaerobic organism. No organism was cultured. When asked if plaintiff told him that his condition started as a result of exposure to a metal compound at work, Dr. Frame testified that he was aware that there was some consideration of an occupational factor, but that plaintiff should be referred to a pulmonologist to evaluate that; he had been concerned with dealing with the pneumonia and its complications.

Chaim Cohen, M.D., a specialist in occupational medicine, examined the plaintiff at the request of his attorney. He examined plaintiff, reviewed material safety data sheets for compounds to which plaintiff had been exposed, reviewed

plaintiff's medical records and reviewed medical literature. He opined that plaintiff suffered a spontaneous pneumothorax related to his work exposure to certain metal compounds. He further opined that plaintiff has suffered both a loss of air flow and a loss of his ability to exchange gas in his lungs. He assigned plaintiff a 20% impairment rating under the AMA Guides.

Defendant challenges Dr. Cohen's testimony, claiming there was a lack of showing that he relied upon facts or data of the type reasonably relied upon by experts in the field of occupational medicine. See TENN. R. EVID. 703.

Our review is *de novo* on the record, accompanied by the presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992). However, this tribunal is as well-situated to gauge the weight, worth and significance of deposition testimony as the trial judge. *Seiber v. Greenbrier Industries, Inc.*, 906 S.W.2d 444, 446 (Tenn. 1995).

We have reviewed the evidence in this case, including the transcript of the proceedings and the medical depositions, and we cannot find that the evidence preponderates against the trial court's award of 35% permanent partial disability to the body as a whole.

The judgment is affirmed, and the case is remanded for assessment of costs on appeal, which are taxed to the defendant/appellant.

John K. Byers, Senior Judge

CONCUR:

E. Riley Anderson, Justice

William H. Inman, Senior Judge

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vs.)	Hon. BEN w. HOOPER, II
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)	
Defendants/Appellants)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation 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 act 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 defendant/appellant, Activated Metals & Chemicals, Inc., and surety, Daryl R. Fansler, for which execution may issue if necessary.

12/19/96

