IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(June 27, 1996 Session)

GENEVA HICKS,	)	GIBSON CHANCERY
	)	
Plaintiff-Appellee,	)	Hon. George R. Ellis,
	)	Chancellor.
v.	)	
	)	No. 02S01-9602-CH-00022
EMERSON MOTOR COMPANY,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Steven W. Maroney
Mary Thomson LeMense
Waldrop & Hall
Jackson, Tennessee

For Appellee:

Ricky L. Boren
Hill Boren P. C.
Jackson, Tennessee

M E M O R A N D U M O P I N I O N

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Billy Joe White, Special Judge

REVERSED AND DISMISSED

Loser, 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer contends the evidence preponderates against the findings of the trial court with respect to causation and permanency. The panel finds the preponderance of the evidence to be contrary to the finding of the trial court with respect to causation.

The employee or claimant, Geneva Hicks, is 45 with an eleventh grade education. She has worked at a day care center, caring for small children, in a clothing factory and as a fruit packer. She has worked in various jobs for the employer, Emerson, since 1980.

She has suffered from hoarseness and shortness of breath at work since about 1992, for which she has seen numerous doctors. In the course of her work for Emerson, she was exposed to various fumes. The employer has attempted to accommodate her by transfer to different departments and by the use of fans. She finally commenced this action for workers' compensation benefits for a claimed occupational disease, which she labeled allergic bronchitis.

She was referred by her attorney to Dr. A. Clyde Heflin, Jr., who saw her on several occasions and opined in his deposition testimony that she was possibly having asthmatic attacks at work. The doctor was given a list of chemicals and asked and answered as follows:

> Q. ...(A)t this point in time, do you have an opinion, based upon a reasonable degree of medical certainty, as to what connection this lady's job place has as to her asthmatic condition?
>
> A. The list of substances that I've been supplied have numerous items which are -- and maybe we need to regress a second. The workplace environment, as far as causing asthma, you have to understand that asthma we now consider to be this hyper-reactive or irritable state of the lungs; and that is caused or generated by someone or a substance causing what we call an inflammatory condition or direct irritation of the lungs.
>
> So there is a long list of substances now known in the workplace that actually can induce asthma; and the classic one of these are TDI's, or diasocyanates, which are used in the plastics industry, for instance. The epoxy resins, which I don't see here specifically listed, but are often used in electrical manufacturing, can cause this as well.

And then there are other substances that will actually sensitize the lung to an asthmatic condition. Then there are substances in the workplace that are known as irritants, meaning that if you give somebody an asthmatic condition, and then place them in the workplace, then there are substances or chemicals, themselves, that will induce the asthmatic attack. But it's not induced the condition, it's only exacerbated the condition or caused the acute attack.

So in the electrical manufacturing systems that I'm aware of, cocophony, or where they're actually doing some form of soldering where cocophony gases are emitted, are known to be sensitizing agents. They will actually induce an asthmatic condition as will the epoxy resins, which are oftentimes used in the painting process, especially in electrical equipment. Occasionally, in electrical systems, polyurethane is being used as well.

Then we go to the long list of substances which you have given me here, all of which on any given occasion, depending on their concentration in the workplace, could cause, to some degree, irritation. And the classic one of those, for instance, is Toluene, which is always listed in any discussion of irritant gases.

But, again, if you go down all the aromatic hydrocarbons and aromatic solvents, to an asthmatic, they would be irritants, as can thichloroethane, which I see here just kind of scanning over these, which can actually cause irritation or an asthmatic attack; but they don't induce it.

So discussing that, I think there are -- and in response to your question, I think there are a reasonable number of substances in this workplace that, if I assume Ms. Hicks has an asthmatic condition already, that, yes, I can say with a reasonable degree of medical certainty that there are substances in the workplace to which you state she is exposed that would cause an asthma attack and cause worsening of an asthmatic condition.

Looking down through all of this, if you told me that she was exposed -- I don't see cocophony or soldering fumes listed here -- soldering fumes over a long period of time -- and I think she has worked at this place for over twelve years -- and/or exposure to certain epoxy resins, paint fumes, over a long period of time could have induced her asthmatic condition as well.

Q. Doctor, if you assume for the sake of my question here that the testimony at trial shows that she has, in fact, been exposed to soldering fumes off and on for a significant period of time, what would be your opinion regarding the causation of her underlying asthmatic condition?

A. My assumptions would be, if the cocophony fumes -- if she was directly exposed to them in large concentrations over a long period of time, that they could induce an asthmatic condition. Now, I mean, if she was exposed to these, say, in passing by as she walked by a table where they were soldering, and part of her job was to walk by that table twice a day, then, no, I don't think I could relate that.

If she was working right in the same environment where other folks were soldering and she was directly exposed to fumes on a daily basis for five, six months, yes, she could have been sensitized to asthma.

Q. And in addition to soldering, I believe you mentioned epoxy resins. Would that same apply?

A. Yes, sir.

We do not find in the record evidence that the claimant was directly exposed to soldering fumes or epoxy resin at work for five or six months, although she was exposed to smoke and fumes. Moreover, the evidence clearly preponderates against a finding of the presence of cocophony gases where she worked. Dr. Heflin assigned a permanent impairment rating of twelve percent, using AMA guidelines.

She was referred by the employer's attorney to Dr. Paul Rumble Deaton, an internist, board certified in both internal medicine and pulmonary medicine. Dr. Deaton testified by deposition that he could not find any chemicals on the list provided by the claimant's attorney which would induce or cause occupational asthma. The doctor found the claimant to be asymptomatic and not permanently impaired.

The claimant has not returned to work for Emerson. At the time of the trial, she was able to breathe normally.

The trial judge found that the claimant had a permanently disabling

lung condition as the result of a gradually occurring injury arising out of and in the course and scope of employment. He awarded, among other benefits, permanent disability benefits based on twenty-four percent to the body as a whole.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Presley v. Bennett, 860 S.W.2d 857 (Tenn. 1993). Moreover, the appellate tribunal is as able to gauge the weight, worth and significance of deposition testimony as the trial judge. Seiber v. Greenbrier Industries, Inc., 906 S.W.2d 444 (Tenn. 1995).

Unless admitted by the employer, the employee has the burden of proving, by competent evidence, every essential element of the claim. Mazanec v. Aetna Ins. Co., 491 S.W.2d 616 (Tenn. 1973). This claimant must therefore prove that she suffered an injury by accident arising out of her employment and that she is permanently disabled from such injury.

An occupational disease is, by statute, an injury by accident. Tenn. Code Ann. section 50-6-102. A disease may be deemed to arise out of employment only if the disease **originated** from a risk connected with the employment and flowed from that source as a natural consequence, among other requirements. Tenn. Code Ann. section 50-6-301. Moreover, it has long been the rule in Tennessee that there can be no recovery for the aggravation of an occupational disease which pre-existed the current employment. Brooks v. Gilman Paint Company, 208 Tenn. 595, 347 S.W.2d 665 (1961); Davis v. Yale & Towne, Inc., 221 Tenn. 18, 423 S.W.2d 862 (1967); American Ins. Co. v. Ison, 519 S.W.2d 778 (Tenn. 1975); Gregg v. J. H. Kellman Co., Inc., 642 S.W.2d 715 (Tenn. 1982).

In order to establish that the disease had its origin in a risk connected with the employment and flowed from that source as a natural consequence, suitable expert testimony is required because the conclusions called for can result only from expert training and education not to be found in laymen such as judges. Knoxville Poultry and Egg Company, Inc. v. Robinson, 224 Tenn. 124, 451 S.W.2d 675 (1970). The expert testimony in this case preponderates against the trial court's finding that the claimant suffers from a disease that had its origin in a risk connected with the employment and flowed from that source as a natural consequence. Although the evidence does not preponderate against the trial judge's finding of permanency, the judgment must be reversed for failure of the evidence to establish a necessary element of a claim for benefits for an occupational disease.

The judgment of the trial court is accordingly reversed and the case dismissed. Costs on appeal are taxed to the plaintiff-appellee.

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Joe C. Loser, Jr., Judge

CONCUR:

_____
Lyle Reid, Associate Justice

_____
Billy Joe White, Judge

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

GENEVA HICKS,	)	GIBSON CHANCERY
	)	No. 2860 T.D. Below
Appellee,	)	
	)	Hon. George R. Ellis,
v.	)	Chancellor
	)	
	)	No. 02S01-9602-CH-00022
EMERSON MOTOR COMPANY,	)	
	)	
Appellant.	)	

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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 plaintiff-appellee.

IT IS SO ORDERED this 23rd day of October, 1996.

PER CURIAM

Reid, J. - Not participating.