IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, DECEMBER 1996 SESSION

BOBBY L. MARLOWE,	)	CLAIBORNE COUNTY
	)	
Plaintiff/Appellee	)	
	)	
v.	)	HON. BILLY JOE WHITE,
	)	CHANCELLOR
VULCAN MATERIALS COMPANY,	)	
	)	
Defendant/Appellant	)	NO. 03S01-9605-CH-00058

For the Appellants	**For the Appellee:**
Julia S. Howard Hodges, Doughty & Carson 617 Main Street Knoxvillle, Tenn. 37902	Sherry Brashear William O. Shults 103 North First Street Suite 211 P.O. Box 1626 Harlan, Kentucky 40831

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

Members of Panel:

E. Riley Anderson, Justice
Roger E. Thayer, Special Judge
Joe C. Loser, Jr., Special Judge

MODIFIED AND AFFIRMED. **THAYER, Special 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 appeal has resulted from a finding by the trial court that plaintiff, Bobby L. Marlowe, was entitled to 100% disability benefits due to contracting an occupational disease while in the employment of his employer, defendant Vulcan Materials Company.

Defendant Vulcan contends the Chancellor was in error (1) in ruling the statute of limitations had not expired; (2) in finding plaintiff had been exposed and injured while in its employment; and (3) in finding plaintiff was totally disabled.

Plaintiff was 55 years of age and had completed the 9th grade. He has a long history of having worked under conditions exposing himself to smoke, dust, etc. He spent about 16 years working in a steel foundry; about 10 years working for various coal companies; and about 5 years with Vulcan at various quarry sites where his exposure was to rock dust.

When he first reported to work with Vulcan in 1988, he had a chest x-ray which apparently was not indicative of any problems. He began having some breathing problems sometime in 1991 and was x-rayed. As a result of this examination, he received a form letter dated January 13, 1992 from a medical clinic in Birmingham, Alabama. This informed him that his x-ray showed "abnormalities consistent with pneumoconiosis" and advised he needed to see a physician. Vulcan sent him to see a specialist in Kingsport, telling him the x-ray indicated something was wrong. There is no direct evidence as to the findings by this doctor. Plaintiff continued to work, saying he did not know what was wrong. Sometime later in his employment, he told the court, his condition began to worsen. He described this as noticing a greater shortness of breath and said any exertion would result in his being completely out of breath. Mr. Howell, the safety director of Vulcan, discussed the situation with him and said they would try to work with him and keep him out of as much dust as possible. At some later

point in time, he was told by his company they did not know what disease he had and there was some question as to whether it was black lung disease or a condition due to rock dust. Vulcan then sent him for an examination by a Dr. Beyers. The record is silent as to any direct evidence as to the findings by this doctor.

Plaintiff continued to work and, finally, in 1993 his employer reassigned him to a job which he testified he told company officials he could not do due to his condition. He did not take the job; was subsequently laid off from work on about August 20, 1993. The record indicates he has not worked since this date. At the trial, he said he still coughed up yellowish, black and brown substances and was taking a lot of different medications. He said he was not able to do any type of work and was also aware he had emphysema and asthma problems.

Plaintiff saw Dr. William F. Clarke, a physician in Lexington, Kentucky, who had been practicing medicine for about 50 years. His specialty was diagnostic cardiopulmonary disease. Dr. Clarke's testimony was by deposition, and he examined plaintiff on October 3, 1994. He said pneumoconiosis was defined as interstitial fibrosis of the pulmonary system due to inhalation of industrial dust; that according to medical textbooks, there were 64 different types of this condition; that silicosis was one type which was due to inhalation of rock or sand dust; that coal worker's pneumoconiosis was another type which was due to inhalation of coal dust. Dr. Clarke was asked whether a physician could make an accurate diagnosis of a chest disease merely by an x-ray reading. He replied this would not be sufficient because chest x-rays changed often and this was caused by many different conditions. He stated it would be necessary to take a detailed history from the patient along with physical and other test evaluations in order to reach an accurate diagnosis.

Dr. Clarke concluded plaintiff had anthrosilicosis, which is a type of disease which results from being exposed to a mixture of coal dust and rock or sand dust; that in his opinion plaintiff's employment with Vulcan contributed to cause the disease and injury; and that plaintiff was 100% disabled from any work

activity. During his examination, he was shown x-rays made in October 1991 and said the white spots through the lung would indicate fibronodulations indicative of anthrosilicosis. In looking at another x-ray taken in 1994, he said it showed some progression of the disease.

On cross-examination, counsel pointed out to the doctor his written report gave a diagnosis of coal worker's pneumoconiosis. He said this was an error by his typist as a great deal of their work involved a diagnosis of that type of lung disease.

Plaintiff contends this diagnosis by Dr. Clarke was when he first became aware of the real nature of his problem and this action for workers' compensation benefits was filed on November 17, 1994.

The Chancellor also heard the deposition testimony of Dr. David A. Slutzker, a physician in Knoxville, Tennessee, who had been in practice since 1984. Dr. Slutzker, who was also a specialist in pulmonary disease, first saw plaintiff on June 28, 1995 as a result of the referral by another doctor. His examination and tests caused him to conclude plaintiff had obstructive lung disease due to a combination of emphysema and asthma; he was of the opinion that the emphysema was not work-related; and he also found interstitial lung disease due to occupational dust exposure but said he did not have enough information to accurately determine causation.

Defendant Vulcan presented the deposition testimony of Dr. Jeffrey Dale Sargent, a physician in Bristol, Tennessee, who had been in practice about 11 years and who was specializing in internal medicine, critical care medicine and pulmonary diseases. Dr. Sargent never saw plaintiff but merely gave an opinion after reviewing several x-rays. He testified the June 2, 1989 x-ray did not indicate findings consistent with silicosis but showed emphysema; that the October 18, 1991 x-ray was of poorer quality and showed about the same; and the January 12, 1994 x-ray showed no technical abnormalities on anything consistent with silicosis.

Our review of the case is *de novo* on the record of the trial court accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

We are required under this review to examine in depth a trial court's factual findings and conclusions, and we are not bound by such findings but must conduct an independent examination to determine where the preponderance of the evidence lies. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991).

An employee has the burden of proving every element of the case, including causation and permanency by a preponderance of the evidence. *Tindall v. Waring Park Ass'n*., 725 S.W.2d 935, 937 (Tenn. 1987).

Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is in a better position to judge credibility and weigh evidence and considerable deference must be accorded to those circumstances. *Landers v. Fireman's Fund Ins Co.,* 775 S.W.2d 355, 356 (Tenn. 1989). On the other hand, where evidence is introduced by deposition, the appellate court is in as good a position as the trial court in reviewing and weighing testimony. *Id.*

The first issue deals with the statute of limitations. Defendant Vulcan contends the filing of the suit on November 17, 1994 was not timely as the one year statute ran after the beginning of plaintiff's incapacity for work which was in 1991, especially when he quit work in August 1993.

T.C.A. § 50-6-306 provides that in a case of this nature, suit must be commenced "within one (1) year after the beginning of the incapacity for work resulting from an occupational disease."

In the case of *Ingram v. Aetna Cas. & Sur. Co.*, 876 S.W.2d 91 (Tenn. 1994), the Supreme Court held this language means the statute begins to run on a disability claim when the employee has knowledge, actual or constructive, that

he has an occupational disability which injuriously affects his capacity to work to a degree amounting to a compensable claim.

We find the statutory language has been in place for a long time. In the case of *Cash v. Ideal Cement Company*, 524 S.W.2d 644 (Tenn. 1975), the employee, a rock quarry worker, was exposed to rock dust over a 27-year period of employment. His breathing problem became so bad during the last two years of his employment that he retired in March 1973 realizing he had hypertension and arthritis. Also, he knew his breathing was gone at this time. During June 1973, he was admitted to a hospital where diagnostic studies were conducted and it was determined he had silicosis. The doctor attending the employee testified the condition was compatible with his history of working in the dusty atmosphere of a rock quarry and it was his opinion the silicosis was present and disabling at the time of his retirement on March 28, 1973.

Employee Cash instituted suit on May 1, 1974 and upon hearing same, the trial court dismissed it, finding the claim had not been instituted within one year of the disability on March 28, 1973. The Supreme Court reversed finding that even though the employee was incapacitated at the time he retired in March 1973 and knew his incapacity was due to a large extent to his difficulty in breathing, the diagnosis of silicosis was not made until June 1973 and constructive knowledge that the disability was due to silicosis would not be attributed to the employee before that time, and the statute did not begin to run until the silicosis diagnosis was made. The court also quoted from an earlier decision in *Tenn. Products & Chem. Corp. v. Reeves*, 415 S.W.2d 118, 119 (Tenn. 1967) holding that "before the statute of limitations in occupational diseases cases begins to run, there must be: First, an incapacity for work; Second, either actual or constructive knowledge an occupational disease is the cause of the incapacity for work."

In the present action, there is no question that plaintiff's incapacity for work began in 1991 and was much worse when he ceased working in August 1993. Neither is there any question but that he knew that his condition was due

to a large extent to his difficulty in breathing. However, we do not find sufficient evidence in the record that he had either actual or constructive knowledge that his breathing difficulty was due to an occupational disease which was contracted or aggravated while in the employment of Vulcan. To the contrary, there is undisputed evidence that he was informed by his employer that the various examinations by the doctor left open a question as to whether his condition was due to coal dust or rock and/or sand dust.

Thus, it seems to us that where the employee has been in the employment of two different employers and could be exposed to two different types of pneumoconiosis and the employee is aware that he has an occupational disease but has no knowledge as to which employer could be held responsible for the condition, it would not be proper to impute constructive knowledge to the employee greater than the knowledge possessed by the examining physician.

Therefore, we find the statute of limitations on this workers' compensation claim began to run during October 1994, when employee Marlowe first became aware that his employment at Vulcan contributed to his condition and that his action, having been instituted the following month in November 1994, was timely filed under our statute.

The next issue raised by the employer relates to the sufficiency of the evidence to hold it responsible for plaintiff's condition.

T.C.A. § 50-6-304 provides:

> When an employee has an occupational disease, the employer in whose employment such employee was last injuriously exposed to the hazards of the disease, and the employer's insurance carrier, if any, at the time of the exposure, shall alone be liable therefor, without right to contribution from any prior employer or insurance carrier.

Under this statute, it is not the last employment nor the last exposure to the hazards of the disease which imposes liability; it is the last such exposure that is injurious to the employee. *Morell v. ASARCO, Inc.*, 611 S.W.2d 830 (Tenn. 1981).

Defendant Vulcan's complaint here is that the Chancellor should have accepted Dr. Sargent's testimony over the medical evidence offered by plaintiff. The conflicting medical opinions issue was resolved by the trial court, and we must conclude the evidence does not preponderate against the conclusion plaintiff was injured by rock and/or sand dust during the course of employment with Vulcan.

Our review does require us to make a modification of the trial court's ruling. The Chancellor found plaintiff to be suffering from silicosis and said his ruling was primarily based on Dr. Slutzker's opinion. We believe the referral to Dr. Slutzker was merely a misstatement as this doctor said the employee had an occupational disease but he did not have enough history to determine causation. Dr. Clarke diagnosed plaintiff's condition as anthrosilicosis rather than silicosis, and our judgment adopts these corrections of the record.

The last issue questions the award of total disability. There was conflicting evidence on this issue also. The trial court had the primary burden to reconcile this dispute. The issue is reviewed on appeal under a presumption in favor of the ruling, and we cannot say the evidence preponderates against this finding.

It results the judgment entered below is modified and affirmed. Costs of the appeal are taxed to defendant, Vulcan Materials Company, and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

BOBBY L. MARLOWE.	)	CLAIBORNE COUNTY
	)	No. 10,413
Plaintiff/Appellee,	)	
	)	
	)	Hon. Billy Joe White
vs.	)	Chancellor
	)	
	)	
	)	03S01-9605-CH-00058
VULCAN MATERIALS COMPANY,	)	
	)	
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, Vulcan Materials Company and their sureties, Hodges, Doughty & Carson, for which execution may issue if necessary.

02/27/97

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