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

ANN B. HICKS, as next of kin to RONALD LEE HICKS, deceased,	)	HAMILTON CIRCUIT
	)	C.A. NO. 03S01-9702-CV-00016
Plaintiff-Appellant	)	
v.	)	HON. L. MARIE WILLIAMS JUDGE
BROWN GALVANIZING CO., a corporation,	)	
Defendant-Appellee	)	

HUGH P. GARNER and DAVE R. PRICKETT, Garner, Lewis & Prickett, Chattanooga, for Appellant.

PHILLIP E. FLEENOR and J CHRISTOPHER HALL, Shumacker & Thompson, P.C., for Appellee.

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

Members of Panel:

Hon. E. Riley Anderson, Justice
Hon. William H. Inman, Senior Judge
Hon. Don T. McMurray, Special Judge

AFFIRMED

McMurray, Special Judge

_____This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with T.C.A. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The decedent, Ronald Lee Hicks, was an employee of the defendant, Brown Galvanizing Co. Generally stated, the plaintiff claims that her husband, the decedent, was exposed to toxic chemicals at the defendant's plant and the exposure resulted in his death. The trial court found that the plaintiff had failed to carry the burden of proof on medical causation and dismissed the case. This appeal resulted. We affirm the judgment of the trial court.

Generally stated, the issues presented for our review question the preponderance of evidence relating to the cause of the decedent's death and secondly, whether the court erred in allowing witnesses who violated the rule for sequestration of witnesses to testify.

The deceased was employed by the defendant as a dock worker. For additional compensation, he and others would work in the "bag house" for short periods of time. The bag house was a dust collection system where toxic dust was collected in bags for proper disposal. On occasion, it was necessary for the bags to be shaken

down to loosen and knock out the dust that accumulated in the bags. When working in the bag house, the employees were required to wear a protective suit and a respirator.

At all times material, the decedent and a co-worker, Tim Blackburn were shaking down the bags in the bag house on Friday of each week. The plaintiff presented evidence of the following chronology of events:

> On March 26, 1993 (Friday) [the decedent] worked in the bag house from 6 a.m. to 3:30 p.m.
>
> March 27, 1993 (Saturday) worked).
>
> March 28, 1993 (Sunday) worked - evening hours stated with fever but subsided.
>
> March 29, 1993 (Monday) worked - no complaints; came home crying at noon over "something"; Ronald [decedent] indicated he had gotten into argument with boss; fever went up that evening.
>
> March 30, 1993 (Tuesday) worked - complained of being sick; was sent to doctor to be checked (doctors at Northpark) came home before going to doctor.
>
> March 31, 1993 (Wednesday) went to Northpark ER - Complained of aching all over; diagnosed with flu symptoms; discharged.
>
> April 1, 1993 (Thursday) had fever.
>
> April 2, 1993 (Friday) had fever.
>
> April 3, 1993 (Saturday) Went to Northpark, but not admitted until 4/4/93 — Complained "lungs hurt", fever, diarrhea.
>
> April 4, 1993 (Sunday) Went to Northpark ER — admitted.

April 8, 1993, (Thursday) transferred to Erlanger Hospital.

April 12, 1993, (Monday) Died.

The decedent's co-worker, Tim Blackburn, gave a statement wherein he stated, inter alia, as follows:

* * * *

10. I specifically remember the Friday prior to Ronald Hicks going to the hospital because when Ronald left the bag house, he became very sick and was gagging, choking and coughing and had to run to the bathroom.

11. I remember that Ronald attempted to work the next day and in the early part of the next week he attempted to work, but was sick. I remember about mid-week following the incident where Ronald got sick and was coughing real bad, he went home early because he was sick again. The next thing I knew, he was in the hospital and died shortly thereafter.

In addition, Mr. Blackburn gave testimony concerning his experiences with the protective clothing and respirator. He testified that, at times, the elastic bands on the sleeves of the protective suit would slip up and that the dust would burn his arms. He testified that the respirator was a full-face respirator and had to be adjusted to fit. Mr. Blackburn was asked the following questions and gave the following answers:

Q. What was your experience in working with respirators and how — how they would fit you, Mr. Blackburn?

A. Well, you'd have to adjust them to fit you, but it didn't seem to kept everything out of it.

Q. Were there occasions when you were in the bag house and when you were using the respirator that the dust, or chemicals of dust, would get beneath the respirator?

A. It never did get in your — on your face, or nothing like that. You could go outside the bag house and pull it off, but — and still see all the chemicals and everything from the outside.

There was no direct evidence that the decedent had breathed any of the toxic chemicals. As the trial judge noted, the testimony of Mr. Blackburn concerned his own experiences and not those of Mr. Hicks. We should also note that the testimony of Mr. Blackburn was somewhat impeached by the defendant's time cards. Mr. Blackburn conceded in his deposition that the time cards were the most accurate record of when he last worked in the bag house. The time cards which were placed into evidence reflect that Mr. Blackburn did not work in the bag house on the date that Mr. Hicks supposedly got sick.

Mrs. Hicks, the plaintiff, testified that after Mr. Hicks had been employed with the defendant for about six months, his cough got a lot worse. "He — when he blowed his nose, he blowed out black stuff, his breathing got a little bit rough, he lost weight real bad in his face" She further testified that on occasions when he worked at the bag house, he would have dust all over his face, in his nose in his ears, and in his hair.

Two physicians testified in the case. Dr. Benjamin Daniel Harnsberger, in person, and Dr. Jeffrey Werchowski, by deposition. Dr. Werchowski was the treating physician.

Upon admission to North Park, Dr. Werchowski diagnosed the deceased condition as bilateral lung injury, commonly referred to as ARDS, Adult Respiratory Distress Syndrome. Dr. Werchowski and his partner, Dr. Enjeti, both treated Mr. Hicks. He was placed on "empiric antibiotic therapy" and placed on a ventilator.

Dr. Werchowski was asked the following hypothetical question:

> Assume, if you will, that Ronald Lee Hicks worked in a bag house at Brown Galvanizing Company once a week, on a Friday, and that his duties were to shake down the bag house, which consisted of some materials that collected dust and/or fumes from the various metals, which we have furnished you as being on the property of and in the bag house at Brown Galvanizing Company.
>
> That to accomplish this shaking down, a person is required to stick his arm between the bags that are located in the house, and knock these bags from side to side, which would create a dust cloud at that time.
>
> That the personnel who were in the bag house, including Ronald Lee Hicks, while wearing protective clothing, such as a suit made of paper, or paper products, and a respirator, face — full face mask respirator, which at times was ill fitting and which at times would permit this dust to get up underneath the mask.
>
> That he came back the next day and attempted to work, but was ill, and that the person who worked with him from time to time experienced illness from the exposure he attributed to the bag house.

With that history, Doctor, and with what you observed during your care and treatment of Mr. Ronald Lee Hicks, could that have been — that exposure have been significant enough to cause the problems that you ultimately treated Mr. Hicks for, and for which he ultimately died?

A. It could have.

* * * *

On cross examination the following questions were asked and the answers elicited:

Q. Doctor, I've taken your sworn statement — oh, excuse me — your deposition previously, and I have — let me just follow up on Mr. Garner's question.

What you're telling us here is with that hypothetical situation is that he just — that he just gave you is that occupational exposure is a possibility. Is that correct?

A. Correct.

Q. Okay. Everything that you're testifying to about an occupational exposure is a mere possibility. Is that correct?

A. Correct.

Dr. Benjamin D. Harnsberger, a board certified pulmonologist testified, in person, on behalf of the defendant. He related that he had reviewed the medical records and x-rays of the deceased and had visited the defendant's facility. He attributed Mr. Hick's death to lobar pneumonia. While he testified that death was caused by lobar pneumonia, he stated that he did not know the organism or other cause of the pneumonia. The sum and substance of Dr.

Harnsberger's testimony is contained in the following statement given to him in response to a question.

> I can see no evidence that I can incriminate his work exposure with his presentation to the hospital with pneumonia.

After hearing all the testimony and reviewing the depositions, the trial court rendered a memorandum opinion. The court found that the medical proof does not rise to the level required by the Tennessee Worker's Compensation Act for meeting the causal connection requirements between the employment and the injury suffered. An accidental injury arises out of one's employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). Ordinarily, causation may only be established by expert medical testimony; and the trial judge has the discretion to determine which expert medical testimony to accept and which to reject. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996).

Our standard of review in cases of this nature is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings below, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). Under this

standard, we agree with the trial court that a sufficient causal connection between the deceased's employment and death has not been established by a preponderance of the evidence. We also agree that all of the facts set out in the hypothetical question posed to Dr. Werchowski are not established by the evidence.

An employee has the burden of proving every element of a worker's compensation case by a preponderance of the evidence. Tindall v. Waring Park Ass'n, 725 S.W.2d 935 (Tenn. 1987). Causation and permanency must be shown by expert medical evidence except in the most obvious cases. Id. While absolute certainty is not required, medical proof must not be speculative or so uncertain regarding the cause of injury that attributing it to the plaintiff's employment would be an arbitrary determination or a mere possibility. Id. "A doctor's testimony that a certain thing is possible is no evidence at all. .... Almost anything is possible, and it is thus improper to ... consider and base a [judgment] upon a 'possible' cause of death." Palace Bar, Inc. v. Fearnot, 269 Ind. 405, 381 N.E.2d 858, 864 (1978). "The mere possibility of a causal relationship, without more, is insufficient to qualify as an admissible expert opinion." Kirschner v. Broadhead, 671 F.2d 1034, 1039 (7th Cir.1982); Lindsey v. Miami Dev. Corp., 689 S.W.2d 856 (Tenn. 1985).

In conclusion, the record does not contain sufficient evidence to establish that the decedent's death, more probably than not, resulted from an exposure to toxic materials at his place of employment. We find no merit in the plaintiff's contention that the preponderance of the evidence is in favor of the plaintiff.

We will next examine the plaintiff's argument that the court erred in not excluding the testimony of Leon Dodson and Robert Diehl for violating the rule regarding sequestration of witnesses. Our review of the record in toto persuades us that, had their testimony been excluded entirely, the outcome of the case would have been the same. The testimony of Mr. Dodson and Mr. Diehl added nothing to demonstrate that there was a causal connection between Mr. Hick's employment and his death.[1]

We affirm the judgment of the trial court. Costs are assessed against the appellant.

_____
Don T. McMurray, Judge

CONCUR:

_____
E. Riley Anderson, Justice

[1]We agree with the trial court that such a violation of the court's instructions cannot and should not be condoned. It is appropriate to take specific punitive action to vindicate the dignity and authority of the law, and the court.

_____
William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

ANN B. HICKS, as next of kin to RONALD LEE HICKS, deceased,	)	HAMILTON CIRCUIT
	)	No. 94CV0652
Plaintiff/Appellant,	)	
	)	
	)	
	)	
vs.	)	Hon. L. Marie Williams
	)	Judge
	)	
BROWN GALVANIZING CO., ETAL	)	
	)	
		03S01-9702 -CV-00016
Defendants/Appellee.		

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' 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 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 appellant, Ann B. Hicks and Garner, Lewis & Prickett, surety, for which execution may issue if necessary.

09/19/97

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 will be paid by the plaintiff-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this _____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating

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 will be paid by the plaintiff-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this _____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating

al 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 plaintiff-appellant, Vernon Harris and
Gilbert and Faulkner. surety, for which execution may issue if necessary.

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