IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

FILED

February 17, 1998

Cecil W. Crowson
Appellate Court Clerk

KAREN FARMER,	)	DAVIDSON CIRCUIT
	)	
Plaintiff/Appellee	)	NO. 01S01-9706-CV-00135
	)	
v.	)	HON. ERNEST PELLEGRIN,
	)	SPECIAL JUDGE
ZURICH-AMERICAN	)	
INSURANCE COMPANY	)	
a/k/a/ and d/b/a	)	
ZURICH INSURANCE COMPANY,	)	
	)	
Defendant/Appellant	)	

For the Appellant:

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

Members of Panel:

Justice Lyle Reid
Senior Judge William H. Inman
Special Judge Joe C. Loser, Jr.

AFFIRMED **INMAN, 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 plaintiff alleged that during the course of her employment by Porter Paints she contracted asthma, an occupational disease, which resulted in partial, permanent physical disability, all of which was denied by the defendant.

The trial judge found that the plaintiff suffered occupational asthma, causing her to be 50 percent permanently partially disabled and benefits were awarded accordingly.

The issue presented for review is whether the finding of job-related asthma is supported by a preponderance of the evidence.

I

The plaintiff was initially employed by Porter paints in 1991 as a decorator. About one year later, she was transferred to a Broadway store in Nashville, which catered to commercial customers. This store prepared two-part industrial paints, referred to as epoxies, one part of which, hythane, contained a chemical known as hexamethylene diisocyanate [HDI]. an isocyanate.

In 1993, the Broadway store compounded a large quantity of hythane for a customer who had contracted with Vanderbilt University to paint its stadium.

The plaintiff became ill, attended by coughing and wheezing, shortness of breath and congestion. Her family physician diagnosed bronchitis, prescribed antibiotics, and recommended absence from work for one week. Upon her return, she experienced a severe episode of wheezing and shortness of breath and was instructed to leave the store. She was thereupon referred to a pulmonary specialist, Dr. Eric Dyer, who made a tentative diagnosis of asthma caused by exposure to TDI, an isocyanate commonly found in paints.

The plaintiff had been exposed to TDI at the store, where the two parts of hythane were mixed for the Vanderbilt job.

In June, 1993, the medication prescribed by Dr. Dyer had not corrected the plaintiff's asthmatic condition. He then administered a methacholine inhalation challenge test, which was positive for asthma.[1]

II

Dr. Dyer testified:

A. "I have a note that her employer had confirmed that there was a chemical called toluene diisocyanate, it's abbreviated TDI, was contained in some of the paint she had worked with in the paint store, and any lung specialist, when you're thinking of a possible asthma and you hear the word "paint," I mean, you immediately think of TDI. It's just something that everybody knows about, all lung specialists know about, and its's just something that links up in your mind. And so when I knew that she worked in a paint store and she had an illness which was looking like asthma I drew a - - undoubtedly drew a correlation in my mind and had asked that, and apparently she had brought in - well, I don't remember. I say that her employer had confirmed that. I don't know the details of the confirmation. I don't know if she brought me a list of ingredients in the paint or what, but TDI is something that's in all paint stores, as far as I know.

Q. Is TDI a recognized cause of asthma?

A. Yes, it is. It's a - - it's in all the textbooks. It's a chemical that when some people are exposed to it causes asthma, and about 50 percent of the people who it causes asthma in have the asthma permanently. it tends to be -- it tends to be a difficult asthma to treat. It tends to not respond to medication as well as standard asthma and it tends to persist. It's - - TDI-induced asthma, it's not straightforward, garden variety asthma and how it's different exactly than other asthmas is not - - that's not known.

Q. Is TDI commonly found in the typical outside environment?

A. No, I don't believe so.

Q. What kinds of paints have TDI in them?

[1] Dr. Dyer had administered this test hundreds of times.

A. Oil-based paints, the - - it's my understanding that TDI is found in the hardeners of oil-based paints, certain other anti-corrosives. I know from my experience it's used in the casket industry, it's used in certain industrial paints, specialized paints in airplane wings, that sort of thing, and it's also an ingredient in household paints.

. . . .

with her I expressed an opinion that her - - that she did have asthma, or as I used bronchiospasm, and in my opinion it was related to her work in the paint store and that I did not feel it was wise for her to work in the paint store in the future.

Q. Is the opinion about the relationship between Karen's asthma and her job expressed in your letter of, I believe it's June 22, 1993, still your opinion?

A. Yes, it is.

Q. and is --

A. Clearly by this point after two visits I was thinking that this young lady had TDI asthma and it's - - it can be a very serious problem and it's - - it can be very risky to go back in an environment that can eventually cause a life-threatening problem.

Q. Is your opinion regarding the cause of Karen's asthma to a reasonable degree of medical certainty?

A. In my opinion it is."

Dr. Dyer continued his observation, treatment and testing of the plaintiff. He confirmed his diagnosis of asthma and testified that according to the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Ed.,* and the standards adopted by the American Thoracic Society, the plaintff had a permanent impairment of 50 percent.

III

On January 6, 1997, the plaintiff was seen by Dr. John B. Hagan for purposes of evaluation. Dr. Hagan is board-certified in internal medicine, allergy and immunology, with 18 months' practice. He received plaintiff's health history in considerable detail and testified that "it is questionable

whether she has asthma," and believed there was "inadequate evidence to suggest a relationship between her asthma and any work exposure."

IV

A chemist, Don Collier, called by the defendant, testified that there can be no exposure to isocyanates unless the vapors are released. He opined that a person could not be harmed by exposure to a product in an amount less than the Threshhold Limit Value stated in the Material Data Safety Sheet [MDSS].

The MDSS for hythane states that persons with a pre-existing, non-specific bronchial hyperactivity can respond to concentrations below the Threshhold Limit with similar symptoms as well as an asthma attack. The plaintiff had several pre-existing characteristics, such as sensitivity to paint fumes and tobacco smoke, with a tendency to hay fever and bronchitis. This fact tends to lessen the weight of the testimony of Mr. Collier.

V

The appellant argues that the medical proof failed to establish a causal connection between HDI and the plaintiff's condition because the testimony of Dr. Dyer indicated that "he never made a definitive link between the plaintiff's condition and her work." Dr. Dyer opined that he knew nothing about the concentration or source of the paint fumes to which the plaintiff was exposed, other than observing that MINUTE quantities may cause asthma. He further testified that the plaintiff's asthma fits the profile commonly associated with isocyanate asthma, that being unusual test results, resistance to typical asthma medications, and permanency of the condition.

VI

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of

the finding, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995).

VII

The Workers' Compensation Law defines an occupational disease as one arising out of employment if:

> "(1) It can be determined to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
>
> (2) It can be fairly traced to the employment as a proximate cause;
>
> (3) It has not originated from a hazard to which workers would have been equally exposed outside of the employment;
>
> (4) It is incidental to the character of the employment and not independent of the relation of employer and employee;
>
> (5) It originated from a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected prior to its contraction; and
>
> (6) There is a direct causal connection between the conditions under which the work is performed and the occupational disease. Diseases of the heart, lung, and hypertension arising out of and in the course of any type of employment shall be deemed to be occupational diseases.

T.C.A. § 50-6-301.

The defendant does not dispute that job-related asthma is an occupational disease. Rather, the insistence is three-fold: (1) that the plaintiff was not exposed to paint fumes containing either TDI or HDI because she was not working on the two occasions when hythane was tinted; (2) that the expert testimony established there could be no exposure to HDI during hythane conversion; and (3) that the medical proof did not establish a causal connection between HDI and the plaintiff's condition.

The plaintiff rebuts these insistences by pointing out that the evidence on which the employer relies to show, ostensibly, that she was not present on the days alleged is highly suspect, because the orders for hythane could have been

prepared before or after the date stamped on the sales tickets which allegedly established the plaintiff's working days. Other evidence offered by defendant respecting exposure was somewhat impeached, leading the trial judge to pronounce from the Bench that the evidence supported the plaintiff's Complaint.

Finally, we observe that medical experts frequently disagree, and the trial judge must choose which view to believe. *Orman v. Williams Sonoma,* 803 S.W.2d 672 (Tenn. 1991). In doing so, he may consider the qualifications of the experts, the circumstances of their examinations, the information available to them, and the evaluation of the importance of that information by other experts. *Crossno v. Publix Shirt Factory,* 814 S.W.2d 730 (Tenn. 1991). The trial judge accredited the testimony of Dr. Dyer, whom we have quoted. Dr. Hagan was less assertive.

We cannot substitute our judgment for that of the trial judge, but are limited to a *de novo* review to determine where the proponderance of the evidence lies. We cannot say that the evidence preponderates against the judgment, which is affirmed at the costs of the appellant.

____
William H. Inman, Senior Judge

CONCUR:

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Joe C. Loser, Jr., Special Judge

____
Lyle Reid, Justice

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KAREN FARMER,	}	*DAVIDSON CIRCUIT*
	}	*No. 94C-1201 Below*
Plaintiff/Appellee	}	
	}	*Hon. Ernest Pellegrin,*
vs.	}	*Special Judge*
	}	
ZURICH-AMERICAN INSURANCE	}	
COMPANY a/k/a and d/b/a ZURICH	}	
INSURANCE COMPANY,	}	*No. 01S01-9706-CV-00135*
	}	
Defendant/Appellant	}	*AFFIRMED.*

JUDGMENT ORDER

This case is before the Court upon 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 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 will be paid by Defendant/Appellant and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on February 17, 1998.

PER CURIAM