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

GEORGE GOFF, Plaintiff/Appellee v. CITY OF DECHERD, Defendant/Appellant and DINA TOBIN, DIRECTOR OF THE DIVISION OF WORKERS COMPENSATION, DEPARTMENT OF LABOR, SECOND INJURY FUND, Third Party Defendant	)	FRANKLIN CHANCERY NO. 01S01-9611-CH-00232 HON. JEFFREY F. STEWART, CHANCELLOR

For the Appellants:

Timothy S. Priest
SWAFFORD, PETERS & PRIEST
Winchester, Tennessee

For the Appellee:

J. Russell Farrar
D. Todd Sholar
FARRAR & BATES
Nashville, Tennessee

MEMORANDUM OPINION

MEMBERS OF PANEL

LYLE REID, ASSOCIATE JUSTICE, SUPREME COURT
WILLIAM S. RUSSELL, RETIRED JUDGE
W. MICHAEL MALOAN, SPECIAL JUDGE

AFFIRMED AS MODIFIED, AND REMANDED — MALOAN, SPECIAL JUDGE

This workers' compensation appeal from the Franklin County Chancery Court has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The defendant, City of Decherd, appeals the judgment of the trial court finding the plaintiff, George Goff, suffered an occupational disease; awarding the plaintiff eighty-five percent (85%) permanent partial disability to the body as a whole; and requiring the defendant to pay certain medical expenses. For the reasons stated in this opinion, we affirm the trial court, as modified.

George Goff was 41 at the time of this trial. He dropped out of high school in the ninth grade to work on the farm, and he has been unable to pass his GED on three or four attempts. His work history is composed of manual labor. The City of Decherd hired him as a laborer in 1984 and made him a crew foreman in 1987. On May 11, 1990, during the course of his employment he was exposed to chlorine gas and missed approximately one week of work. He was treated by his family physician, Dr. Dewey Hood, for complaints of shortness of breath, coughing and fatigue on 11 or 12 occasions through September, 1993. Dr. Hood referred plaintiff to Dr. Eric Dyer, a pulmonologist, who first treated plaintiff on May 18, 1993. Dr. Dyer told plaintiff he became asthmatic due to the 1990 chlorine exposure and advised him to avoid asthma triggers, such as chemicals, humidity, and temperature extremes. He continued to work for the City of Decherd without significant problems until January 28, 1994, when he was exposed to paint fumes and his condition deteriorated. After the 1994 exposure, Dr. Dyer added paint fumes to his list of asthma triggers to avoid. Dr. Dyer assessed his permanent impairment at forty percent (40%) to the body as a whole, described his prognosis as poor, and advised the plaintiff he should not return to work for the City of Decherd. Dr. Hood stated "he is somewhat limited with his education and things he can do, and it may be that he just could not find a job--a sedentary job or a light working condition that he could return to." Plaintiff has not worked since January 28, 1994.

Betty Morris, a vocational expert for the plaintiff, testified plaintiff had a ninety-six percent (96%) loss of access to jobs and should be limited to sedentary work. The defendant presented Charles Randolph Thomas, also a vocational expert, who testified plaintiff suffered a sixty-two and one half percent (62.5%) loss of access to jobs due to the 1990 and 1994 chemical exposures, but only a one and one half percent (1.5%) loss of access due to the January 28, 1994, paint fumes

exposure. Mr. Thomas was of the opinion the plaintiff could do sedentary, light and medium jobs as long as they did not violate his environmental restrictions.

On May 21, 1996, the plaintiff and defendant requested the trial court to determine whether plaintiff's claim should be treated as an occupational disease or an injury by accident. After hearing, the trial court determined the claim should be treated as an occupational disease in accordance with Tennessee Code Annotated §50-6-301.

After trial on July 12, 1996, the trial court found the plaintiff to have sustained an eighty-five percent (85%) permanent partial disability to the body as a whole. The trial court also ordered the defendant to pay the medical expenses of Dr. Dyer in the amount of $3,260 for medical treatment before and after the January 28, 1994, exposure to paint fumes. The defendant Second Injury Fund was dismissed.

On appeal, the defendant City of Decherd raises the following issues for review:

> I. The trial court was incorrect in finding that the plaintiff suffered from an occupational disease which disabled the appellee on January 28, 1994, and for which a claim was timely filed.
>
> II. Whether the trial court erred by considering restrictions placed on the plaintiff prior to the January 28, 1994, incident because said restrictions were the result of an earlier on-the-job injury that was not timely pursued by the plaintiff and is now barred by the statute of limitations?
>
> III. Whether the trial court erred in finding the plaintiff to be eighty-five percent (85%) disabled as a result of the alleged incidents?
>
> IV. Whether the trial court erred by finding that the defendant is liable for medical expenses incurred by the plaintiff prior to the January 28, 1994, incident?
>
> Additionally, the plaintiff raises the issues of whether the trial court erred in not finding the plaintiff permanently and totally disabled and for penalties and sanctions for frivolous appeal.

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tennessee Code Annotated § 50-6-225(e)(2). *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw

its own impression as to weight and credibility from the contents of the depositions. *Overman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

I.

The defendant first submits the trial court should have found the plaintiff suffered an aggravation of a pre-existing condition not related to his employment rather than an occupational disease, as different criteria are used to determine when the applicable statute of limitations has run for an injury by accident, Tennessee Code Annotated §50-6-203, and for an occupational disease, Tennessee Code Annotated § 50-6-306(a).

An occupational disease is, by statute, an injury by accident. Tennessee Code Annotated §50-6-102(a)(5). 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. Tennessee Code Annotated §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. *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. *Knoxville Poultry and Egg Company, Inc. v Robinson*, 451 S.W.2d 675 (Tenn. 1970).

In the present case, there is some testimony the plaintiff or his mother gave Dr. Dyer a history of childhood asthma, but "that apparently left him." The family physician, Dr. Hood, testified he was unaware of childhood asthma and never treated the plaintiff for asthma before 1990. The plaintiff testified he was unaware he ever had asthma before being diagnosed by Dr. Dyer in May, 1993. Dr. Dyer and Dr. Hood testified that even if the plaintiff had childhood asthma, it was "latent." Dr. Dyer testified the cause of the plaintiff's asthma was the 1990 exposure to chlorine and his condition significantly deteriorated after the 1994 paint fumes exposure. There is no medical evidence in the record of the plaintiff having or ever being treated for asthma before 1990. Based on this equivocal evidence of asthma pre-existing his employment with the defendant, City of Decherd, and Dr. Dyer's unequivocal testimony as to the 1990 exposure to be the cause of the plaintiff's asthma, this panel is not persuaded the evidence preponderates against the trial court's finding the plaintiff suffered an occupational disease.

II.

The defendant next submits the trial court erred in considering the plaintiff's restrictions due to the 1990 chlorine exposure because no claim was filed until June 30, 1994, and, therefore, the 1990 incident and its resulting restrictions were time barred.

Tennessee Code Annotated §50-6-306(a) provides:

> The right to compensation for occupational disease shall be forever barred unless suit therefor is commenced within one (1) year after the beginning of the incapacity for work resulting from an occupational disease.

The "beginning of the incapacity for work" is the date when the employee knows, or in the exercise of reasonable care, should know, that he has an occupational disease that it has injuriously affected his capacity to work to a degree amounting to a compensable disability. *Ingram v Aetna Casualty & Surety Co.*, 876 S.W. 2d 91, 95 (Tenn. 1994).

On May 18, 1993, Dr. Dyer told plaintiff he had asthma and he became asthmatic after the 1990 exposure to chlorine. It was not until he was exposed to paint fumes on January 28, 1994, that plaintiff became incapacitated for work. The 1990 exposure only caused plaintiff to miss a short time from work and did not affect his capacity to work to a significant degree. Plaintiff continued to work and perform his job duties with the City of Decherd until 1994. The evidence does not preponderate against the trial court's finding.

III.

The defendant and plaintiff both take issue with the trial court's award of eighty-five percent (85%) permanent partial disability to the body as a whole.

Tennessee Code Annotated §50-6-241(a)(1) requires the trial court to consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition in determining the extent of an injured worker's permanent disability. From a thorough review of all these factors, we are not persuaded the evidence preponderates against the trial court's award of eighty-five percent (85%) to the body as a whole.

IV.

The defendant submits the trial court was in error in requiring the payment of Dr. Dyer's medical bills prior to January 28, 1994.

Tennessee Code Annotated §50-6-204(b) states:

> Where the nature of the injury or occupational disease... is such that is does not disable the employee but reasonably requires medical, surgical, or dental treatment or care, medicene, surgical supplies, crutches, artificial members, and other apparatus should be furnished by the employer.

Before the employer is liable for medical treatment, the employee is "to do no less than to consult his employer before incurring expenses called for by the statutue (50-6-204) if the employee expects the employer to pay for them." *Dorris v INA Ins. Co.*, 764 S.W.2d 538 (Tenn. 1989). In the present case, plaintiff became aware he had work-related asthma on May 18, 1993; however, no request for medical treatment was made to his employer prior to the January 28, 1994, exposure which disabled him. There is no proof in the record excusing plaintiff's failure to consult with his employer about payment of Dr. Dyer's medical bills prior to January 28, 1994.

The proof preponderates against the trial court's award of medical treatment prior to January 28, 1994. This cause is remanded to the trial court to recalculate the amount of Dr. Dyer's medical expenses and to deduct the cost of medical treatment before January 28, 1994.

V.

The plaintiff has filed a motion in this court for penalties and sanctions for a frivolous appeal in accordance with Tennessee Code Annotated §§27-1-122 and 50-6-225(i). The motion is denied.

The judgment of the trial court is affirmed as modified. The costs of this cause are taxed to the Defendant/Appellant.

_____
W. Michael Maloan, Special Judge

Concur:

_____
Lyle Reid, Justice

_____
William S. Russell, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

April 22, 1998

Cecil W. Crowson
Appellate Court Clerk

GEORGE GOFF,	)	Franklin Chancery
	)	No. 14154
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
CITY OF DECHERD,	)	Hon. Jeffrey F. Stewart, Chancellor
	)	
Defendant-Appellant,	)	
	)	
and	)	NO. 01S01-9611-CH-00232
	)	
DINA TOBIN, DIRECTOR OF THE DIVISION OF WORKERS COMPENSATION, DEPARTMENT OF LABOR, SECOND INJURY FUND,	)	
	)	Affirmed as Modified, and Remanded.
Third Party Defendant.	)	

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 are taxed to the defendant-appellant and its surety, for which execution may issue if necessary.

It is so ordered this 22nd day of April, 1998.

PER CURIAM

Reid, J., Not Participating