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

FILED

April 30, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

GERALD GRAVES,	)	
	)	
Plaintiff/Appellee	)	KNOX CHANCERY
	)	
v.	)	NO. 03S01-9706-CH-00074
	)	
LIBERTY MUTUAL INSURANCE COMPANY and SUPERIOR STEEL, INC.,	)	HON. FREDERICK D. McDONALD, CHANCELLOR
	)	
	)	
Defendants/Appellants	)	

For the Appellants:

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

Members of Panel:

Chief Justice E. Riley Anderson
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED

BYERS, Senior Judge

OPINION

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.

In March 1995, the plaintiff in this case brought suit against Superior Steel, Inc. and Liberty Mutual Insurance Company ("the defendants") and the Second Injury Fund[1] claiming that he was entitled to recover workers' compensation benefits for two work related injuries: a knee injury and an occupational disease. First, the trial judge found that the plaintiff had sustained a ten percent permanent partial disability to his right leg. Second, the trial judge found that the plaintiff was 100 percent permanently and totally disabled as a result of a chronic obstructive pulmonary disorder which he classified as an occupational disease because the plaintiff's condition was exacerbated by breathing diesel fumes during his employment with the defendant. The trial judge merged the two injuries and thereby awarded the plaintiff 100 percent disability benefits.

The defendants appeal the trial court's findings regarding the plaintiff's occupational disease, contending that the trial judge erred (1) in ruling that the statute of limitations had not expired, (2) in ruling that notice had been properly given, and (3) in finding that the plaintiff's condition was an occupational disease which arose out of and in the course of his employment with the defendant. The defendants do not appeal the trial court's findings of disability to the plaintiff's leg, but a brief reference to the knee injury is necessary for a proper discussion of the facts.

We affirm the judgment of the trial court.

BACKGROUND

The plaintiff, 48 years of age, worked as an oiler and crane operator for most of his working life – approximately 28 years. For almost 32 years of his life, the plaintiff smoked two packs of cigarettes per day. The plaintiff quit smoking in June 1992.

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[1] The trial judge dismissed the Second Injury Fund from this case and we find the dismissal was proper. By reason of Tenn. Code. Ann. §§ 50-6-208(a) and (b), the Second Injury Fund is not liable to the plaintiff.

The plaintiff first worked as an oiler and later as a crane operator for Powell Erection Company, a job he held for 18 years. The plaintiff began working for the defendant as a crane operator in 1986 and left employment in January 1995.[2] The only break in the plaintiff's employment with the defendant occurred in April 1989 when he resigned to go work for another company. However, after discussing his union related reasons for leaving with the defendant's president, William Mark Monday, the plaintiff returned to work for the defendant after one or two weeks.

In his capacity as a crane operator, the plaintiff was exposed to and worked in close proximity to diesel fumes emitted from the crane. The plaintiff testified that "the exhaust system came out from underneath the crane" and that "90% of the work, or 70%, was just sitting and letting [the crane] idle . . . [and] the fumes would just kind of roll up around [him], and [he] just set and breathe in the fumes all day long."

As a result of his extensive smoking, the plaintiff testified that over time he developed a smoker's cough and had difficulty breathing. The plaintiff also testified that being around diesel fumes at work made breathing even more difficult. By June 1990, the plaintiff was experiencing physical difficulty in his daily and work activities as a result of his breathing problems. For example, the plaintiff testified that climbing a few stairs made him lose his breath.

Mr. Monday, the defendant's president, testified that in 1986 he became aware of the plaintiff's breathing problems, including his heavy coughing. Mr. Monday also testified that he certainly knew about the plaintiff's condition when he rehired the plaintiff after the brief resignation in April 1989.

Furthermore, the plaintiff testified that his breathing problems briefly improved in June 1992 after he quit smoking. Also, in September 1994, the plaintiff injured his knee while working for the defendant. As a result of this injury, the plaintiff underwent surgery and did not work for two months while recovering. The plaintiff testified that when he returned to work for the defendant after being off from work for two months he had severe trouble breathing around the diesel fumes.

In January 1995, the plaintiff was informed by a letter from Dr. McNeeley that he should not work. The plaintiff presented this letter to the defendant and resigned

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[2] During this nine year period, the defendant underwent corporate changes and operated under three different names. For purposes of this opinion, the plaintiff's employer remained the defendant.

at that time. Between 1987 and 1995, the plaintiff testified that he was never unable to perform his job duties because of his lung disease.

MEDICAL EVIDENCE

In January 1987, the plaintiff sought medical treatment for his breathing difficulty from Dr. Howard B. McNeeley, a board certified doctor in family medicine who testified by deposition. Dr. McNeeley diagnosed the plaintiff with a chronic obstructive pulmonary disorder and testified that this condition includes emphysema and bronchitis. Dr. McNeeley opined that the actual cause of the plaintiff's disease was his lifelong smoking and that the plaintiff's exposure to diesel fumes at work caused a temporary exacerbation of his breathing problems. In January 1995, Dr. McNeeley determined that the plaintiff could not perform normal work activities and wrote the plaintiff a letter recommending that he should not work. Dr. McNeeley did not assign the plaintiff a permanent physical impairment rating based on his lung disease.

In October 1996, the plaintiff saw Dr. James E. Lockey, a board certified physician specializing in occupational pulmonary disease who also testified by deposition. Dr. Lockey took a detailed medical and employment history of the plaintiff and performed a physical examination of him. Dr. Lockey opined that the plaintiff suffered from a fixed and partial reversible airway obstruction caused primarily by 32 years of smoking and by 25 years of breathing diesel fumes at work. Based on the *AMA Guides,* Dr. Lockey issued the plaintiff a 70% impairment rating to the body as a whole, finding that 50% was secondary to smoking and 20% was secondary to the occupational exposure to diesel fumes. Dr. Lockey testified that the plaintiff is limited to sedentary lifestyles and has a life expectancy of five to ten years.

ANALYSIS

The defendants appeal the trial court's findings regarding the plaintiff's occupational disease, contending that the trial judge erred (1) in ruling that the statute of limitations had not expired, (2) in ruling that notice had been properly given, and (3) in finding that the plaintiff's condition was an occupational disease which arose out of and in the course of his employment with the defendant.

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

evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). We have reviewed the evidence in this case, including the transcript of the proceedings and the medical depositions, and we cannot find that the evidence preponderates against the trial court's findings and award of 100% permanent and total disability to the plaintiff's body as a whole.

Statute of Limitations

Regarding the first issue on appeal, Tenn. Code Ann. § 50-6-306(a) provides that "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. . . . " This statutory language has been held to mean that "the statute of limitations begins to run on a disability claim when the employee has knowledge, actual or constructive, that he has an occupational disease which injuriously affects his capacity to work to a degree amounting to a compensable disability." *Ingram v. Aetna Casualty and Sur. Co.,* 876 S.W.2d 91 (Tenn. 1994).

The defendants contend that the plaintiff's filing of this suit in March 1995 was not timely because the plaintiff had actual and/or constructive knowledge that his lung disease was related to breathing diesel fumes at work as early as 1987 when he was diagnosed with a chronic obstructive pulmonary disease, or at least by June 1990 when the plaintiff experienced physical difficulties with work. In response, the plaintiff says the defendants' argument that the statute of limitations began to run in 1987 or 1990 is flawed because the proof shows that the plaintiff was never unable to perform his job duties because of his lung disease prior to January 1995.

We find that the record is clear that the plaintiff became incapable of performing his normal work activities in January 1995 when he was informed by Dr. McNeeley that his lung disease was exacerbated by his exposure to diesel fumes at work and that he should no longer work. Thus, we hold that the plaintiff's filing of his suit against the defendants in March 1995 was well within the applicable one year statute of limitations.

Notice

Regarding the second issue on appeal, Tenn. Code Ann. § 50-6-305(a) provides that "within thirty (30) days after the first distinct manifestation of an

occupational disease, the employee, or someone in the employee's behalf, shall give written notice thereof to the employer in the same manner as is provided in the case of a compensable accidental injury."

The defendants contend that the plaintiff failed to give notice of his work related injury as required by Tenn. Code Ann. § 50-6-305(a) and therefore argue that his claim should have been dismissed. The plaintiff says that he gave notice of his injury to the defendants in January 1995 when he provided them with a copy of Dr. McNeeley's letter which indicated that the diesel fumes at work were exacerbating his lung disease.

We find that the plaintiff met the notice requirements of Tenn. Code Ann. § 50-6-305(a) when he presented a copy of Dr. McNeeley's letter to the defendants in January 1995. The plaintiff's receipt of Dr. McNeeley's letter in January 1995[3] was the first time the plaintiff knew that his lung disease amounted to an occupational disease. Such a letter constitutes proper notice. *See Allen v. Consolidated Aluminum Corp.,* 688 S.W.2d 64 (Tenn. 1985); *Stratton-Warren Hardware v. Parker,* 557 S.W.2d 494 (Tenn. 1977).

Occupational Disease

In regard to the third and final issue on appeal, Tenn. Code Ann. § 50-6-301(6) sets forth that "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." In addition, Tenn. Code Ann. § 50-6-304 states that "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. . . ."

In contending that the plaintiff failed to demonstrate that his lung disease arose out of and in the course of his employment, the defendants argue that the preponderance of the lay and medical evidence proves that the plaintiff's lung disease resulted from his lifelong habit of smoking two packs of cigarettes per day and not from his work environment.

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[3] Dr. McNeeley's letter was dated January 16, 1994, but the trial court found convincing evidence that the letter was actually written January 16, 1995.

Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard testify, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315 (Tenn. 1987). However, when the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of N. Am.,* 884 S.W.2d 446 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co,* 775 S.W.2d 355 (Tenn. 1989).

We find that the plaintiff presented competent and credible lay and medical testimony which shows by a preponderance of the evidence that he suffers from an occupational disease. We recognize, just as the plaintiff and the medical professionals admit, that his lifelong smoking no doubt significantly contributed to his respiratory problems. However, the plaintiff presented the medical depositions of two doctors whose testimony that a portion of the plaintiff's lung disease was caused by his exposure to diesel fumes at work went unchallenged by the defendants. Dr. McNeeley testified that the plaintiff's exposure to diesel fumes at work exacerbated his lung disease and recommended that the plaintiff no longer work. And, Dr. Lockey, a specialist in occupational pulmonary disease, testified that a significant portion of the plaintiff's lung disease was caused by his occupational exposure to diesel fumes.

The defendants also contend that the plaintiff cannot recover for aggravation of an occupational disease which pre-existed the plaintiff's employment with the defendant. *See Gregg v. J. H. Kellman Co., Inc.,* 642 S.W.2d 715 (Tenn. 1982). In support of this contention, the defendants say that the plaintiff knew about his lung disease in 1987 and that Dr. McNeeley believed that the plaintiff's lung disease existed for a long period of time before 1987.

We disagree with the defendants' contention because the plaintiff was not diagnosed with an occupational disease until January 1995, and thereafter he no longer worked for the defendant.

CONCLUSION

We affirm the judgment of the trial court. Costs of this appeal are taxed to the defendants. The plaintiff is entitled to interest on the judgment from the date the judgment was entered pursuant to Tenn. Code Ann. § 50-6-225(h)(1).

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John K. Byers, Senior Judge

CONCUR:

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E. Riley Anderson, Chief Justice

_____
Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

GERALD GRAVES	) Knox Chancery No. 125358-1
	)
Plaintiff/Appellee	) Hon. Frederick D. McDonald,
	) Chancellor
v.	)
	) Supreme Court No.
LIBERTY MUTUAL INSURANCE COMPANY	) 03-S-01-9706-CH-00074
and SUPERIOR STEEL, INC.	)
	) Affirmed
Defendants/Appellants	)

FILED

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Cecil Crowson, Jr.
Appellate Court Clerk

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 of this appeal will be paid by the appellants for which execution may issue if necessary.

It is so ordered this 30th day of April, 1998.

PER CURIAM

Anderson, C.J., not participating