

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED
November 30, 1998
Cecil W. Crowson
Appellate Court Clerk

LINDA GERRY	}	SUMNER CHANCERY
	}	No. Below 92C-284
Plaintiff/Appellant	}	
	}	Hon. Tom Groves
vs.	}	Chancellor
	}	
	}	No. 01S01-9709-CH-00200
CHALLENGER ELECTRICAL	}	
	}	
Defendant/Appellee	}	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 the appellant and her surety, for which execution may issue if necessary.

IT IS SO ORDERED on November 30, 1998.

PER CURIAM

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

FILED

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**Cecil W. Crowson
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LINDA GERRY,)	
)	
Plaintiff/Appellant)	SUMNER COUNTY,
)	
v.)	NO. 01S01-9709-CH-00200
)	
CHALLENGER ELECTRICAL,)	HON. TOM GRAY,
)	CHANCELLOR
Defendant/Appellee)	

For the Appellant:

John Dunlap
1433 Poplar Avenue
Memphis, TN 38104

For the Appellee:

James C. Bradshaw
313 E. Main Street
Hendersonville, TN 37075

MEMORANDUM OPINION

Members of Panel:

Justice William M. Barker
Senior Judge John K. Byers
Special Judge Robert E. Corlew, III

AFFIRMED

CORLEW, Special Judge

OPINION

This worker's compensation appeal has been referred to the Special Worker's Compensation Appeals Panel of the Supreme Court in accordance with the provisions of *Tennessee Code Annotated* §50-6-225 (e) (3) (1997 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. Our review is *de novo* upon the record accompanied by the presumption of correctness unless the preponderance of the evidence is otherwise. *Tennessee Code Annotated* §50-6-225 (e) (2) (1997 Supp.).

The Plaintiff appeals from the decision of the Trial Court alleging that the Trial Court's determination that the Plaintiff's injuries did not arise out of the course and scope of her employment is not supported by the preponderance of the evidence. We have reviewed the record *de novo*, and presumed the correctness of the determination made by the Trial Judge only as to those witnesses who testified live. Realizing that the primary evidence on the issues of causation was presented by experts who testified by deposition, we have reviewed that testimony *de novo*, without a presumption of correctness. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). We have concluded that the Trial Court correctly determined the issues, and we therefore affirm the decision below.

The Plaintiff is forty-two (42) years of age. She left school during the eleventh grade and worked first as a sales clerk in a department store, and later as a

waitress and cashier at a truck stop. She ultimately began factory work and was employed by the Defendant in 1990. The Plaintiff alleges that she sustained permanent pulmonary injuries due to exposure to toxic chemicals while an employee of the Defendant. The evidence shows that dust and other chemicals were present in the work place. The Plaintiff and a number of lay witnesses testified that the work environment was dusty and dirty, and that the Plaintiff began to sustain various physical symptoms while employed by the Defendant. The Plaintiff ceased her employment in March, 1992, and upon her complaint of respiratory problems, was referred by the employer to Dr. James D. Snell, Jr. Although the evidence shows that Dr. Snell was an appropriately qualified board certified pulmonary specialist who treated the Plaintiff appropriately, we are nonetheless disturbed by the evidence which shows that the Plaintiff was never given the opportunity to select a treating physician from a panel of medical professionals as the law requires.

Dr. Snell treated the Plaintiff for a period of time, and determined that she has no permanent impairment as a result of her employment. Near the end of her course of treatment with Dr. Snell, the Plaintiff sought further treatment from Dr. Ralph Ruckle, a family practitioner near her home in Portland, Tennessee. Dr. Ruckle testified that the Plaintiff did in fact sustain permanent anatomical impairment, and that the impairment resulted, at least in part, from of the Plaintiff's employment. He did not, however, state a percentage of anatomical impairment.

All of the evidence shows that for a substantial period of time in question, the Plaintiff was an active cigarette smoker, and she had smoked since she was eighteen (18) years of age.

Injuries due to occupational diseases are compensable under the provisions of the Worker's Compensation Act. *Tennessee Code Annotated* §50-6-301 (1991). In

order for a disease to be compensable, however, the disease must be deemed to arise out of the employment. *Tennessee Code Annotated* §50-6-301 provides six conditions, all of which must be met in order for an occupational disease to be deemed to arise out of the employment:

- (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.

Id.

Whether these conditions have been met depends upon the findings of the factual issues presented. The burden of proof is upon the Plaintiff to show that an occupational disease arises out of and in the course of employment. *Electro-Voice, Inc. v. Hurley*, 530 S.W.2d 78, 79 (Tenn. 1975) and *Greener v. E.I. Dupont DeNemours & Co.*, 228 S.W.2d 77, 278 (Tenn. 1950). The Plaintiff presented proof from the employer's records that toxic chemicals were present within the work place. The only expert proof presented, however, with regard to exposure to any of these substances in the work place was presented by an industrial hygienist, Frank Vilkofski, Jr., who

testified as a defense witness that despite the presence of a number of chemicals found in air studies conducted during the time when the Plaintiff alleges exposure, no chemicals were present at harmful levels. The burden of proof is upon the Plaintiff to show that an occupational disease arises out of and in the course of employment. Considering all of the proof presented, it does not appear that the evidence adequately demonstrates exposure occasioned by the nature of the employment, or proximate cause. Thus, the Court finds that the Plaintiff has failed to carry the burden of proof in establishing the first requirement provided by the provisions of *Tennessee Code Annotated* §50-6-301, and that the evidence does not support the Plaintiff's contention that there was exposure to hazardous dust and chemicals occasioned by the nature of her employment. Having found that these chemicals were not present at hazardous levels, the Court must necessarily find that the remaining provisions of *Tennessee Code Annotated* §50-6-301 likewise have not be satisfied by the proof presented by the Plaintiff.

Further, the Court has considered the testimonies of the expert medical professionals who testified. Ralph Ruckle, M.D., testified on behalf of the Plaintiff. He is board certified in family medicine, and treated the Plaintiff for a period of time, including a six-day hospital stay. He diagnosed the Plaintiff with both obstructive and restrictive lung diseases. It was Dr. Ruckle's opinion that the Plaintiff's condition was in fact work-related, and was permanent in nature. Dr. James Snell, the doctor approved by the employer, also treated the Plaintiff for a period of time. Dr. Snell is board certified as a pulmonary specialist. He performed a number of tests and determined that the Plaintiff had no permanent impairment, and he attributed any respiratory

problems from which the Plaintiff suffered to cigarette smoking and a history of pneumonia.

The Trial Court determined the testimony of Dr. Snell to be more persuasive than that of Dr. Ruckle. We agree that the evidence supports the Trial Court's holding. Dr. Snell's curriculum vitae, submitted as an exhibit to his deposition, shows that he was in active practice nearly forty years prior to his testimony in this cause, and that he has a vast amount of post-graduate training and professional experience. He has been certified in the subspecialty of pulmonary diseases for twenty-four (24) years, is currently associated with Vanderbilt University, has previously been associated with New York Hospital and Cornell Medical Center, and has published a large number of articles. Dr. Ruckle is also well-qualified. He maintains a solo family practice in Sumner County, Tennessee, graduated from Southern Missionary College, completed medical school in Mexico, completed his internship at St. Vincent Hospital in Ohio, and completed his residency at St. Joseph Hospital in Michigan. With all due respect, however, in the area of pulmonary problems, the file does not reflect that Dr. Ruckle enjoys the degree of experience or expertise which the evidence reflects is possessed by Dr. Snell.

We thus find that the evidence supports the decision of the Trial Court denying compensation to the Plaintiff. We find that the evidence preponderates against a finding that the Plaintiff has a permanent occupational disease which is compensable under the provisions of *Tennessee Code Annotated* §50-6-301 (1991).

We thus find for the Defendant, and affirm the decision of the Trial

Court.

The costs of this appeal are taxed to the Appellant.

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Robert E. Corlew, Special Judge

CONCUR:

William M. Barker, Justice

John K. Byers, Senior Judge