IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, DECEMBER 1998 SESSION

FILED

March 24, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

VELMA BRADLEY	)	KNOX CHANCERY
	)	
Plaintiff/Appellee	)	
	)	
V.	)	Hon. Frederick McDonald,
	)	Chancellor
DEROYAL INDUSTRIES, INC. AND	)	
LIBERTY MUTUAL INSURANCE	)	
COMPANY	)	
	)	
Defendants/Appellants	)	No. 03S01-9802-CH-00018

For the Appellants:	**For the Appellee:**
James T. Shea IV P.O. Box 1708 Knoxville, Tenn. 37901	David H. Dunaway 100 South Fifth Street P.O. Box 231 LaFollette, Tenn. 37766

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

Members of Panel:

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

AFFIRMED. THAYER, Special 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.

Defendants, DeRoyal Industries, Inc. and Liberty Mutual Insurance Company, have appealed from the trial court's ruling that plaintiff, Velma Bradley, was totally and permanently disabled as a result of her work activities with her employer, DeRoyal Industries. At the commencement of the trial, a nonsuit was taken as to the Second Injury Fund.

On appeal there are two main issues. First, defendants insist the trial court was in error in allowing a recovery for an "occupational disease" which pre-dated the employment relationship with DeRoyal and which may have been aggravated by employment with DeRoyal. In the second issue, defendants contend the trial court was in error in allowing Dr. C. F. Smith to testify.

Velma Bradley, age 55 years, started working for DeRoyal during April 1983. She was initially assigned to work in the shrink wrap room and remained there until sometime in 1988 when she was transferred to the glue room. DeRoyal is engaged in manufacturing soft goods such as medical supplies. Her job in the glue room involved gluing the soles to orthopedic boots. This work was done in a small room with some ventilation. She used a Bostic super-glue which was stored in a five gallon container and about 2 ½ gallons of glue was used daily in performing this work. The record indicates that while working the lid on the glue container remained off and there was a strong smell of the glue in the work area. Mrs. Bradley testified she never wore a mask or any protective clothing but did use rubber gloves or a sock-like material to protect her hands. Often the gloves would deteriorate to such an extent that she would have to work without them. In addition to coming into contact with the glue, she was required to use a "615 cleaner" in order to remove the glue from machinery.

Plaintiff's daughter, Deborah Bradley, testified she worked for DeRoyal in the shipping department at one time and was aware of the strong smell of glue where her mother worked. She said that during the early part of 1992, she noticed a great

change in her mother's mental condition and that when she would come home from work she appeared "glassy-eyed" and would look as if "she was on a high". She stated her clothing and hair would have a strong smell of the glue.

Plaintiff left her employment during March 1992 when her job was relocated to a different plant and she has not worked since. She began to get worse during fall of 1992 and was hospitalized several times during 1992-1993. Another daughter, Kathy Brooks, testified that during a 1993 hospitalization she had lost her memory to such an extent she did not even recognize her children.

James Bradley, Plaintiff's husband, testified he stopped working in order to take care of his wife and that she suffered from asthma and obstructive pulmonary disease prior to working for DeRoyal; that she had high blood pressure and had been a smoker for a long period of time prior to going to work at DeRoyal.

Mrs. Bradley's testimony was somewhat limited at the trial below due to her mental condition. She did state she did not remember being in the hospital in 1993 but did recall going to the hospital from work in 1991 because she could not stop coughing.

The expert medical evidence in the case consists of the testimony of seven doctors. Most all of this evidence supports the Chancellor in his finding that she is unable to work because of her mental condition and this finding by the Chancellor is not an issue.

A Material Safety Data Sheet, which was a warning concerning health hazards, from the manufacturer of the glue was filed in evidence and indicated the glue contained methyl ethyl ketone and toluene as hazardous ingredients; that symptoms of overexposure were: irritation, dizziness, weakness, headache, nausea, vomiting, etc. and that long term overexposure to toluene has been associated with kidney and liver damage; that long term overexposure to methyl ethyl ketone was associated with central nervous system problems; and that one should avoid prolonged or repeated breathing of vapors and contact with the skin.

Dr. C. F. Smith, a physician specializing in occupational medicine rendered an opinion that the hazardous ingredients of the glue and cleaner caused permanent neurological damage to Mrs. Bradley and that his diagnosis was toxic

encephalopathy which was a generalized brain dysfunction. He testified orally before the trial court.

Dr. James E. Lockey, specializing in occupational and environmental medicine and occupational pulmonary disease, testified by deposition and was of the opinion that her asthma had been aggravated by her working conditions and that she had impairment due to her pulmonary condition caused by her cigarette smoking and the conditions in her workplace. His primary diagnosis was neurological problems due to prolonged exposure to solvents for five years and hypertension.

Dr. Glen R. Baker, a pulmonary disease specialist, first saw Mrs. Bradley during her November 1993 hospitalization and gave a diagnosis of (1) chronic obstructive airway disease and (2) neurological problem. He also stated he often saw patients with dementia after having been exposed to solvents. He testified by deposition.

Dr. Jerry B. Lemler, a psychiatrist, testified by deposition and evaluated her for the extent of disability purposes. He opined her dementia rendered her 100% impaired.

D. Randy Trudell, specializing in neurology, testified by deposition and said he first saw Mrs. Bradley during the March 1993 hospitalization at the request of her treating doctor; that she was suffering from headaches and was confused; that his history indicated she had been "talking out of her head" since December 1992 and he observed that she was very slow in talking and functioning. He performed extensive testing all of which did not reveal any accurate explanation for her mental status; that when he saw her again several months later, she was probably worse. He could not make a specific diagnosis and when he was told about her work conditions, he did not think there was a causal connection because her condition did not become worse until about six months after leaving her employment.

Dr. George E. Fillmore was Mrs. Bradley's family doctor and he testified by deposition. He had treated her since 1971 and admitted or saw her in the hospital numerous times from that first visit up to the 1993 hospitalization. He stated she had acute brochial spasms which was asthmatic; that she had been admitted to the hospital during 1982 for severe asthma and she was also confused, which could result from her high blood problem; that he saw her in his office during August 1987

when she was confused, short of breath, nausea, dizzy etc,; that again in 1989 she was having frequent headaches and dizziness; the 1992 and 1993 hospital visits were for mental confusion, headaches, etc. and that he never did determine the cause of her confusion. He never considered her work environment but when told about her working conditions, he said it could make her pre-existing problems worse.

Dr. John McElligott, an internal medicine doctor, first saw her during the 1993 hospitalization and was asked to give a second opinion about her mental condition. He felt that multiple medications she was taking could be some cause of her problem but opined that fumes from chemical can "screw up the brain". He testified by deposition.

From all of this evidence the trial court found Mrs. Bradley had suffered from asthma and bronchitis prior to her employment with DeRoyal and that such pre-existing conditions were probably caused and/or aggravated by her smoking habit; that she also suffered from hypertension which at times resulted in mental confusion and that this condition preexisted her employment with DeRoyal; and that her exposure to the hazardous ingredients of the substances she used at work aggravated and accelerated her pre-existing conditions to such an extent she was totally disabled.

The review of the case is de novo on the record accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The argument advanced concerning the first issue is that the claim is not compensable because the employee was suffering from an "occupational disease" prior to her employment with DeRoyal and that under our statute, T.C.A. § 50-6-301, there can be no recovery for aggravation of an occupational disease which pre-existed employment.

We do not find any merit to this contention. T.C.A. § 50-6-301 set out six conditions which must be met in order to qualify as an "occupational disease". One of the conditions under subsection (5) states the disease must originate from a risk connected with the employment. We find the evidence is very clear that Mrs. Bradley's underlying problems with asthma and bronchitis and her hypertension resulting in mental confusion were all non-work related problems pre-existing her

employment with DeRoyal. Therefore, her pre-existing conditions were not under our statute occupational diseases. The rule of law which defendants rely upon applies to different factual circumstances. *See American Insurance Co. v. Ison,* 519 S.W.2d 778 (Tenn. 1975).

The general rule is that an employer takes an employee as he finds him or her and is liable under the Workers' Compensation Act for disabilities which are the result of the activation or aggravation of a pre-existing weakness, condition or disease brought about by the occupation. *Arnold v. Firestone Tire & Rubber Co.,* 686 S.W.2d 65 (Tenn. 1984). *See also Crossno v. Publix Shirt Factory,* 814 S.W.2d 730 (Tenn. 1991) where recovery was upheld for aggravation of pre-existing asthmatic bronchitis from work-related exposure to the chemical formaldehyde.

The other issue questions the decision of the trial court in allowing Dr. C. F. Smith to testify. It is argued plaintiff failed to respond and identify Dr. Smith as a witness when answering interrogatories requesting names and opinions of expert witnesses, and that defendants were not furnished enough information about him to prepare for trial. The record does not support this contention.

When responses to interrogatories were filed during the year 1994, Dr. Smith was not listed as a witness. However, a supplemental response was filed on August 19, 1997, five months prior to the January 23, 1998 trial, and Dr. Smith was identified as a witness to be called and attached to the response was a copy of a detailed four page report from the doctor concerning history, symptoms, and the doctor's diagnosis or assessment. Defendants apparently chose not to depose the witness prior to trial.

The Chancellor held Dr. Smith could testify to matters pertaining to his report. Defendants also state allowing the witness to testify was error because the report did not specifically say the doctor was of the opinion plaintiff's condition was the result of her work environment and that this was the key issue in the case.

The report, Exhibit #6, begins by stating plaintiff was referred to the doctor regarding a work-related chemical exposure that occurred during her employment with DeRoyal; it contains numerous alleged facts regarding the operation of the glue room and the hazardous ingredients of the substances she was working with; her past medical history; findings from a physical examination; and the report concludes

with a diagnosis or assessment of: (1) neurotoxicity (2) ataxia (3) cognitive dysfunction and (4) toxic encephalopathy. We find the report to be of sufficient notice to defendants of the general scope of the testimony of the doctor, and that it was proper for the trial court to consider and weight this evidence with all the other medical evidence.

Defendants also claim his testimony should have been excluded as it did not meet the standards required by Rules 702 and 703, Tennessee Rules of Evidence, and citing the case of *McDaniel v. CSX Transportation, Inc.,* 955 S.W.2d 257 (Tenn. 1997). In this connection, we note that the witness was not attempting to introduce any scientific studies regarding the issues before the court and that his testimony as a whole did not extend much further than the Material Safety Data Sheet (Exhibit #1) which was a rather strong warning by the manufacturer of the glue of what could occur from overexposure to their product.

Generally, questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. *State v. Ballard,* 855 S.W.2d 557, 562 (Tenn. 1993). We do not find the trial court abused that discretion.

The judgment is affirmed. Costs of the appeal are taxed to Defendants.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

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THELMA E. SEIBER Plaintiff-Appellee, v. METHODIST MEDICAL CENTER OF OAK RIDGE Defendant/Appellant.	)	ANDERSON CIRCUIT No. 97LA0099 No. 03S01-9801-CV -00006 Hon. James B. Scott, Jr. Judge

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 facts 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 appellants, DeRoyal Industries, Inc. and James T. Shea, surety,for which execution may issue if necessary.

03/24/99