

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

FILED

March 29, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

MARY MAUREEN BREWER,)	
)	
Plaintiff/Appellee)	CLAIBORNE CHANCERY
)	
v.)	NO. 03S01-9801-CH-00010
)	
LIBERTY MUTUAL INSURANCE)	HON. BILLY JOE WHITE,
COMPANY, ET AL,)	CHANCELLOR
)	
Defendant/Appellant)	

For the Appellant:

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For the Appellee:

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MEMORANDUM OPINION

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.

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 findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. See *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

The trial court found the plaintiff to be totally disabled.

The defendant raises the following issues:

1. Did the trial court commit error in finding that plaintiff was permanently and totally disabled as the result of being exposed to carbon monoxide and concrete sealant . . . ?
2. Did the trial court abuse its discretion in allowing Dr. Jerry Lemler, a psychiatrist, to testify as an expert witness as to his opinion that plaintiff had sustained an "Alzheimer's-type organic brain damage" . . . ?

The plaintiff, 66 years old at the time of trial, has a 10th grade education. Her prior work experience includes working in a supermarket, making T-shirts in a knitting mill, and housekeeping for a Days Inn. She had worked on the assembly line at DeRoyal for about five years when, on February 11, 1993, a tractor trailer unloaded into the work bay with its engine on and carbon monoxide fumes spread into the work area, causing carbon monoxide poisoning of the workers.

In addition, the concrete floor had been under repair since January of 1993, and a concrete sealer (Kure-N-Seal) had been applied. The plaintiff testified that the odor and fumes from the sealer had been noxious to her from some time in January 1993 until February 11, 1993. She also alleged ongoing toxic exposure to silicon glue at work.

On February 11, 1993, the plaintiff developed a headache, became nauseated and dizzy, and then passed out at her workstation. She awoke outside the building being treated by emergency medical technicians and was taken to the

Claiborne County Hospital, along with several other workers who had been in that bay while the truck was unloading and had developed the same symptoms. She remained in the hospital overnight and was then released to go home, where she remained for one week with continuing nausea and vomiting. She then returned to work with no medical restrictions, but she testified that she continued to have lethargy for two to three months.

The plaintiff quit work voluntarily when her husband started receiving disability benefits, although she wanted to quit before that but could not afford to leave. She and her husband now both receive Social Security Disability. At the trial on December 9, 1997, she testified that she continued to have headaches, nightmares, "smothering," and memory problems from her exposure to these toxins. She said that she was no longer able to work or care for herself and that her family and friends now take care of her.

There are no records or reports from any treating doctors although both of the plaintiff's Independent Medical Experts had those records when they evaluated her. The employer presented no medical evidence, therefore all of the medical evidence is "as of" four years after the incident at work.

Dr. James E. Lockey, Professor and Director of Occupational and Environmental Medicine for the Center for Occupational Health at the University of Cincinnati Medical Center, is board-certified in occupational medicine. He served as an Independent Medical Expert. Evidence from Dr. Lockey came from a telephonic deposition and a medical report dated June 4, 1997 of an evaluation that he conducted in Cincinnati on March 4, 1997.

_____ Dr. Lockey testified in his medical report that:

Based on what is currently available in the medical literature and her available laboratory results, it would be unlikely that there would be any longterm sequelae from the exposures that occurred on 2/11/92 [sic]. In addition, chronic exposures to solvents generally are not associated with persistent neurological abnormalities unless the patient is working with extremely high concentrations or has had a prolonged exposure of 10 to 30 years duration.

Further, in his telephonic deposition, Dr. Lockey was asked and answered as follows:

Q: Have you done any follow-up testing or were you able to arrive at an opinion at the time that you saw her when you produced this report for us, which is June 4, 1997, as I understand, as to whether or not she

has any permanent or long-lasting effects as a result of her exposure to the Silicon A-10?

A: No, I really can't. I felt that her acute symptomatology that she described in February [1993] was related probably to the carbon monoxide as well as the various solvents she was working with In relationship to being a long-term sequela from the solvent exposure, I would defer that to a psychologist or psychiatrist who has been trained and capable of doing neuropsychiatric evaluations and neuro behavior evaluations.

Further, he said that:

If she had any long-term problems in relationship to the acute exposure it may fall into the realm of something similar to a post-traumatic stress disorder. But again, that should be evaluated by somebody who is an expert in that area That's out of my field.

Dr. Jerry Lemler, a board-certified psychiatrist and a forensic psychiatrist, also served as an Independent Medical Expert. Testifying at trial, Dr. Lemler explained that he evaluated the plaintiff on April 29, 1997 at her attorney's request. He found that she was "suffering from what I call dementia, which is akin to an Alzheimer type of organic brain damage diagnosis." Upon examination, she was confused, her memory of anything beyond 25 minutes ago was marginally intact, her recent memory was very poor, and her immediate memory was virtually nonexistent. Dr. Lemler reviewed her medical records, including those of Dr. Eisenstadt at the Sleep Disorder Center in Knoxville, who diagnosed sleep apnea. She complained of nightmares, skin blotches that would come and go, trouble breathing, and difficulty retaining urine. She gave no psychiatric history prior to the incident at work. The MMPI test, a test for screening out malingering, which has a built-in lie scale, revealed that she had "responded to the items in a frank and open manner producing a valid MMPI-2 profile."

Dr. Lemler has treated and examined people with toxic exposures to mercury, beryllium, carbon monoxide, manganese, and other chemicals. He referred to the Material Data Safety Sheet on Kure-N-Seal (this is his first case involving Kure-N-Seal) and read that it can cause "permanent neural damage." Dr. Lemler has treated at least 50 patients who have attempted suicide by carbon monoxide and is familiar with the effects of carbon monoxide. He finds no "fabulous" post-injury significance to the fact that the plaintiff passed out after exposure to carbon monoxide fumes.

Dr. Lemler was asked and answered as follows:

Q: We know this lady was exposed both to carbon monoxide as well as Cure-N-Seal. If that were true, do you have an opinion within a

reasonable degree of medical certainty as to whether she has sustained emotional problems as the result of that exposure?

[The defendant objected and it was overruled.]

A: I think she has very significant impairments with respect to the dementia . . . I am willing to at this point -- offer a secondary diagnosis to the court that this lady does at least have a depression of a nonspecified nature along with dementia previously discussed.

Q: Dr. Lemler, in your opinion within a reasonable degree of medical certainty, is her dementia curable?

A: No, sir, not to the best of medical science in 1997.

Dr. Lemler was of the opinion that the plaintiff was “at the upper end of the marked, or 75 percent level” and that the condition “might deteriorate further from that level, but I do not at all expect it to rise.” Dr. Lemler explained that he is seeing several other workers who were also injured that day and that the plaintiff is the only one that he has diagnosed with dementia. Dr. Lemler stated that he is not aware that she has ever been seen or treated by a psychiatrist or had any mental treatment whatsoever prior to this referral, but he does think that Dr. Eisenstadt, a sleep apnea specialist, had placed her on Paxil, which is an anti-depressant.

Dr. Norman Hankins, the plaintiff’s vocational expert, opined that she sustained a 100 percent vocational disability after conducting numerous tests.

The defendant argues that the plaintiff was not attended by any physician for any residual problems arising from her alleged occupational exposures. Further, the defendant says that her only medical evidence is from Independent Medical Experts who saw her four years after the incident. The defendant points out the weaknesses in the testimony of the expert witnesses because Dr. Lockey diagnosed sleep apnea and Dr. Hankins equivocated on vocational disability. Further, the defendant says that it is illogical to find that she was permanently and totally disabled when she had no medical treatment after getting out of the hospital and continued to work full time with no restrictions until she decided to quit work voluntarily after her husband began receiving Social Security Disability.

The defendant further argues that Dr. Lemler failed to show any expertise in chemically induced dementia and thus that his testimony on this matter should not have been allowed. Also, the defendant argues that Dr. Lemler did not provide any basis to exclude other potential causes for the plaintiff’s injury.

An overall reading of Dr. Lemler's testimony shows a sufficient knowledge of the effects of chemicals on the nervous system to make his testimony admissible for consideration by the trial court in weighing all the evidence in the case. In addition to this, it appears the defendant agreed that the Material Data Safety Sheet for Kure-N-Seal, which was the alleged causative carrier of the chemical testified about, was reliable and the testimony of Dr. Lemler concerning this was reliable. Certainly, he was able to understand the significance of the warnings given on the data sheet.

Beyond this argument, as the trial judge said: "This court cannot disregard the only and totally unrebutted testimony of board-certified doctors stating that the Plaintiff has a serious disability." The defendant offered no medical evidence in this case to rebut the testimony of the plaintiff's expert witnesses.

We find the evidence does not preponderate against the judgment of the trial and we affirm the judgment. The costs of this appeal are taxed to the defendant.

John K. Byers, Senior Judge

CONCUR:

E. Riley Anderson, Chief Justice

Roger E. Thayer, Special Judge

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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 on appeal are taxed to the defendants.

IT IS SO ORDERED this ____ day of _____, 1999.

PER CURIAM

Anderson, C. J. - Not participating.