IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

December 27, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

EDDIE RONALD EADY,	)	
	)	RUTHERFORD COUNTY
APPELLANT	)	
	)	
v.	)	
	)	M1998-00524-SC-WCM-CV
CIGNA PROPERTY & CASUALTY COMPANIES,	)	
	)	
APPELLEE	)	

JUDGMENT

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 will be paid by Eddie Ronald Eady, for which execution may issue if necessary.

It is so ordered.

PER CURIAM

BIRCH, .J. - NOT PARTICIPATING

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT NASHVILLE
(MAY 27, 1999 SESSION)

EDDIE RONALD EADY,	)	
	)	
Plaintiff/Appellant,	)	M1998-00524-SC-WCM-CV
	)	
	)	RUTHERFORD COUNTY CIRCUIT
v.	)	NO. 34335
	)	
	)	Hon. Robert E. Corlew, III
CIGNA PROPERTY & CASUALTY	)	
COMPANIES, INSURER	)	
	)	
Defendant/Appellee,	)	

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For Appellants	For Appellee
D. Russell Thomas	Patrick A. Ruth
Herbert M. Schaltegger	Gracey, Ruth, Howard, Tate & Sowell
Murfreesboro, TN	Nashville, TN

MEMORANDUM OPINION

Members of Panel:

Justice Adolpho A. Birch, Jr.
Henry D. Bell, Special Judge
Hamilton Gayden, Jr., Special Judge

AFFIRMED — Gayden, Judge

MEMORANDUM 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. Section 50-6-225(e)(1). In this appeal, the employee, Eddie Ronald Eady, alleges four errors were committed by the trial court; (1)the trial court erred in finding that appellant did not suffer any compensable physical and/or psychiatric injury arising from workplace exposure of ozone; (2) the trial court erred in denying appellant the benefit of negative evidentiary inferences against the Defendant/Appellee under the doctrine of spoliation of evidence and the missing witness rule;(3) the trial court erred in referring to and relying upon the TOSHA inspection file of the appellee in its memorandum opinion; (4) the trial court erred in allowing the defendant to present evidence and witnesses after failing to respond to appellant's interrogatories and/ or request for production. This panel finds that the evidence preponderates in favor of the finding of the trial court, therefore, as discussed below we affirm.

The relationship between the Appellant' s injuries and the air quality of the workplace is a question of fact. Review is therefore de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann.§50-6-225(e)(2).

The employee or appellant, Eady, is forty-seven with a ninth grade education. Appellant had worked at Fleming Dairy for ten years at the time of the injury. Appellant moved into the bottling room in 1987.

In April of 1990, appellant developed pneumonia and was hospitalized for several days. He subsequently developed pneumonia two or three times before leaving Fleming Dairy. Appellant asserts that the onset of pneumonia and his subsequent respiratory problems are a result of ozone contaminated air at the plant. The appellant further asserts that after finding out the dangers of ozone exposure he suffered psychological damage.

Appellant's proof offered at trial included, his own testimony regarding the odor which was emitted when water was being ozonated, and the expert testimony of three physicians. Dr. Woodhall

Stopford, who is a specialist in industrial hygiene and internal medicine, and an expert in occupational and industrial toxicology and environmental toxicology, diagnosed appellant as having reversible airways disease caused from ozone exposure. Dr. Stopford concluded this condition would be permanent. Dr. Stopford assessed appellant as having a 10 to 15% impairment to the body as a whole. The appellant called to licensed psychiatrist who testified that appellant had suffered psychological damage as a result of finding out the dangers of ozone exposure. Dr. Narciso Gaboy assessed appellant as having a 65% psychiatric impairment to the body as a whole.

The appellee called four physicians to testify about their diagnosis of the appellant. Dr. James Snell assessed appellant as having pulmonary problems as a result of his smoking two packs a day for twenty-four years, not as a result of ozone exposure. Dr. Snell specifically stated that the appellants symptoms are not consistent with someone who had been exposed to ozone. Dr. Evelyn Frye, a licensed clinical psychologist, attributed his psychological problems to his addiction problems, specifically to marijuana and Xanax both of which can cause anxiety, depression, and paranoia. Dr. Alsha Dunn assessed appellant as having a substance dependency problem starting with his alcohol abuse to his current Xanax addiction. Dr. Dunn found no relation between appellants psychological problems and the effects of possible exposure to ozone. Defendants fourth medical expert Dr. David Dodd was a specialist in addiction medicine and he testified that appellants problems were not caused by his employment, but by his addictive personality.

Further evidence presented at trial included TOSHA's ozone testing results of Fleming Plant which were negative for the presence of ozone. Appellant contends that this is not credible evidence because the testing was not performed until three months after claimant left Fleming. Fleming claimed to have lost or misplaced the previous testing results for ozone.

The appellant asserts four basis for reversing the trial courts ruling. The first is that the weight of the evidence adduced at trial showed that he suffered lung injury from workplace exposure to ozone which resulted in psychological damage. Appellant argues that even if he did have a latent

premorbid paranoid traits, if the shock and fright he experienced when realizing he may have been exposed to ozone worsened that conditioned, the employer is liable.

The second argument is that he is entitled to the benefit of specific negative inferences at trial under the doctrine of spoilation of evidence and the missing witness rule. Appellant basis this argument on the fact that Fleming claims to have misplaced the TOSHA testing records for ozone and the defendant failed to call two witnesses who could have testified to the presence or absence of ozone between 1990 and 1994. The appellees assert that the case upon which appellant basis his argument is Foley v. St. Thomas hospital, 906 S.W.2d 448 (Tenn. App. 1995), which requires the spoilation or destruction of evidence to be intentional, which the appellee denies. The appellee states the reason for not calling witness as trial tactics.

The third error the claimant alleges is that the TOSHA records are inadmissable heresay. The appellee, CIGNA Property & Casualty Companies, Insurer, contends that it is up to the discretion of the trial court and should not be overturned unless their is clear evidence of abuse. Furthermore, the appellees argue that the records were submitted for limited purposes of showing that the test were negative which other witnesses testified to.

The fourth error the appellant assigns is that appellees did not respond to his interrogatories or discovery, and was not informed about the defendants experts in a timely manner. Appellees contend that they did respond to appellants Rule 26 interrogatories, and because appellant did not object at trial to the admission of Dr. Snell's deposition, he waived his right to object now. Appellees also point out that it was the appellant who ask for the expedited hearing, therefore, he should not assert now that he was prejudiced by time constraints.

Having considered the record and the arguments made on appeal, we affirm .We find that the trial court was correct in their finding that the proof did not establish the presence of ozone at or near the plaintiff's workplace in quantities sufficient to be harmful. Additionally, this court finds proof of other factors that have had a harmful effect upon the appellant's pulmonary system. We agree that

the proof preponderates against a finding that the injuries suffered by appellant are those generally associated with ozone exposure. The trial court was correct in finding that the appellant failed to carry the burden of proof to show a causal relationship between his psychological injuries and his worries concerning possible ozone exposure at Fleming Dairies. This court, therefore, finds that the appellant has not established an injury or illness arising out of or caused by his employment. In regards to negative inferences, there was no proof offered at trial to show that the appellee purposefully destroyed the previous testing records . Regarding inadmissable heresay we find that the witnesses testimony about the testing and the results make the TOSHA record admissible. When a party chooses to place their case on a fast track it is with their own knowledge of how long they will need that they make this decision. It is not acceptable to come later and allege that an error was committed in the lower court because of shortened deadlines . Affirmed. Cost on appeal taxed to the appellant.

Hamilton Gayden, Jr., Special Judge

CONCUR:

Justice Adolpho A. Birch, Jr.

Henry D. Bell, Special Judge