

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 26, 2002 Session

**MICHAEL GLENN BINKLEY v. E. I. DUPONT DE NEMOURS &
COMPANY**

**Direct Appeal from the Circuit Court for Humphreys County
No. 8924 Robert E. Burch, Judge**

**No. M2002-00278-WC-R3-CV - Mailed - December 11, 2002
Filed - January 14, 2003**

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 this appeal, the claimant insists the evidence preponderates against the trial court's finding that the employee's death did not arise out of and in the course of his employment. As discussed below, the panel has concluded the judgment should be affirmed.

**Tenn. Code Ann. § 50-6-225(e) (2001 Supp.) Appeal as of Right; Judgment of the Circuit
Court Affirmed**

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and WILLIAM H. INMAN, SR. J., joined.

Charles L. Hicks, Camden, Tennessee, for the appellant, Martha Binkley, widow of Michael Glenn Binkley

John R. Lewis, Nashville, Tennessee, for the appellee, E. I. Dupont De Nemours & Company

MEMORANDUM OPINION

The employee, Michael Glenn Binkley, initiated this civil action to recover workers' compensation benefits for a gradually occurring work related lung disease. The employer, Dupont, filed an answer. After the employee died, his widow, Martha Binkley, was substituted as plaintiff and the complaint amended to demand dependent and other death benefits. Despite the existence of sticky procedural questions, the only issue presented for trial was whether the employee's death was caused by an occupational disease resulting from exposure to fibers at work. After a trial on the merits, the trial court dismissed the claim for lack of evidence that the employee's lung disease arose

out of and in the course of employment. The substituted plaintiff has appealed. We have reviewed only the issue presented to and adjudicated by the trial court.

Appellate review is 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) (2001 Supp.). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The extent of an injured worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 915 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002).

Michael Binkley worked as an operator in Dupont's Sontara facility from February 1994 until August 2000. Sontara produces products made from wood pulp and synthetic fibers. On February 15, 2000, the employee visited Dr. Sean Ryan with respiratory problems diagnosed by the doctor as pneumonia. When prescribed care failed to relieve his symptoms, Dr. Ryan referred the claimant to Dr. Robert Miller, a pulmonologist. Dr. Miller, on February 19, 2000, diagnosed interstitial pneumonia, which diagnosis was supported by the pathologist that performed a biopsy. The cause of the condition was reported as unknown. The employee was placed on steroids and oxygen and allowed to return to light duty.

On or about June 9, 2000, Mr. Binkley notified the employer that Dr. Miller had suggested that he inform the employer that his illness "may be" occupationally related. Dr. Miller, in a letter to Dr. Michael Crane, DuPont's plant physician, reported, however, that the exact cause of Mr. Binkley's condition was uncertain, but that there was "speculation" that synthetic fiber exposure is one of the risks for interstitial lung disease.

In August 2000, Mr. Binkley's health took a turn for the worse, resulting in hospitalization on August 18th. He died on August 21, 2000. According to the pathologist who performed an autopsy, the cause of death was acute respiratory distress syndrome or ARDS. The pathologist looked for but found no foreign materials, particles or substances in Mr. Binkley's lungs, and he

opined there was no connection between his ARDS and his interstitial lung disease. Although Dr. Ryan expressed concern that the employee's interstitial pneumonitis "may" have been work related, both he and Dr. Miller agreed that his death was unrelated to that condition. Dr. James Snell, another pulmonologist, studied the records, including the autopsy report. He opined the decedent suffered from two separate conditions, a viral lung infection and a kidney infection. The kidney infection, he testified, probably caused sepsis, which damaged the lungs and led to the fatal ARDS. The cause of those conditions, he testified, was idiopathic.

Under the Tennessee Workers' Compensation Act, the right of an employee who suffers a work-related injury to recover compensation benefits from his employer is governed by the statutes in effect at the time of the injury. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 368 (Tenn. 1998). Such statutes are part of the contract of employment and the rights and responsibilities of such injured employee and his employer can only be ascertained from a consideration of those statutes as construed by the courts. Hudnall v. S. & W. Constr. Co. of Tenn., Inc., 60 Tenn. App. 743, 751, 451 S.W.2d 858, 862 (1969). The entire workers' compensation system of law is statutory. Vinson v. Firestone Tire and Rubber Co., Inc., 655 S.W.2d 931, 933 (Tenn. 1983).

Injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee, Tenn. Code Ann. § 50-6-103(a), and occupational diseases arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. § 50-6-102(a)(12). The Act expressly provides that "a disease shall be deemed to arise out of the employment only if" certain conditions are met. Tenn. Code Ann. § 50-6-301. They are:

- a. the disease can be determined to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of employment; and
- b. the disease can be fairly traced to the employment as a proximate cause; and
- c. the disease has not originated from a hazard to which the worker would have been equally exposed outside of the employment; and
- d. the disease is incidental to the character of the employment and not independent of the relation of employer and employee; and
- e. the disease 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
- f. there must be a direct causal connection between the disease and the conditions under which the work is performed.

The party claiming the benefits of the Act has the burden of proof to establish his claim by

a preponderance of all the evidence. An award may not be based on conjecture; it must be based on material evidence and the rules of evidence are applicable. Testimony of witnesses is evaluated on the basis of reasonableness and unreasonableness of the testimony given, the interest, bias, prejudice or lack thereof on the part of the witnesses, their general credibility, their opportunity to see and observe, and all of the other standards and criteria applicable to factual decisions in a nonjury civil action. Parker v. Ryder Truck Lines, Inc., 591 S.W.2d 755 (Tenn. 1979).

In order to establish that an injury was one arising out of the employment, the cause of the death or injury must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873, 877 (Tenn. 1996). In all but the most obvious cases, causation may only be established through expert medical testimony. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (1991). Trial courts are not required to accept the opinion of a treating physician over any other conflicting expert medical testimony. When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983).

The trial court found that the appellant had failed to carry the burden of proof as to causation. The appellant contends the trial court should be reversed because the record contains speculative medical evidence of causation. In a workers' compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given incident "could be" the cause of a claimant's injury, when, from other evidence, it may reasonably be inferred that the incident was in fact the cause of the injury. McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995). However, an award may not be based on conjecture or speculation. Reeser v. Yellow Freight System, Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Moreover, we are unaware of any rule which requires a trial judge to make an award on the basis of the kind of speculative medical proof contained in this record, or to ignore the countervailing proof contained in this record.

For the above reasons, and because the evidence fails to preponderate against the finding of the trial court, the judgment is affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

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JUDGMENT

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 Martha Binkley, widow of Michael Glenn Binkley, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM