

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 21, 2003 Session

**HELEN M. ASHFORD v.
THE AEROSTRUCTURES CORPORATION, ET AL.**

**Direct Appeal from the Chancery Court for Wilson County
No. 00197 C. K. Smith, Chancellor**

**No. M2002-01276-WC-R3-CV - Mailed - February 24, 2004
Filed - March 29, 2004**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found that employee had sustained a permanent partial disability of 90% to the body as a whole as a result of the gradual injury she sustained during her employment and that the events on December 7, 1999, aggravated a preexisting lung condition. The trial court awarded workers' compensation benefits in the lump sum amount of \$188,632.80, along with certain discretionary costs. The trial court also allowed employer a setoff for medical benefits in the amount of \$3,036.37 but disallowed setoff for disability benefits. We find no error and affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2000 Supp.) Appeal as of Right; Judgment of the
Chancery Court Affirmed**

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and JOE C. LOSER, JR., SP. J., joined.

Stephen W. Elliott, Nashville, Tennessee, for appellants, The Aerostructures Corporation and Travelers Property Casualty.

William Edward Farmer, Lebanon, Tennessee, for appellee, Helen M. Ashford.

MEMORANDUM OPINION

FACTS

This cause of action originated from a complaint filed by employee, Helen M. Ashford, on

May 26, 2000. Employee worked for employer, Aerostructures Corporation, from 1981 until her injury on December 7, 1999. During this period of time employee was responsible for cleaning and painting various airplane structures. As a result, she used paint, acetone, and other solvents on a regular basis. At the time of her injury, employee suffered from a pre-existing lung condition of chronic obstructive pulmonary disease. Employee was also a chronic smoker.

On December 7, 1999, employee was working with two other employees, Jerry Keeton and Kay Walker, on an aircraft panel. Employee was shaving rivets when suddenly she and the other employees were overcome by some type of chemical that went into her nose and "burnt [her] lungs." She turned a fan around in an attempt to blow the chemicals away from her. She and fellow employee, Kay Walker, then went outside the building. Employee stayed outside approximately fifteen to twenty minutes before going back inside to resume her work. Employee stated that she had difficulty breathing and had to go back outside more times to get away from the fumes.

On December 8, 1999, employee did not go to work. When employee returned to work on December 9, 1999, she was once again overcome by dust and fumes. Employee was taken by fellow employees to the nurse's station. Employee went to the hospital and later to her family physician, Dr. Bachstein. Dr. Bachstein testified that his findings on December 13, 1999, were consistent with someone who had encountered chemical fumes and breathed them into their lungs. Employee returned to work in January 2000, worked only a few days and has not worked since.

Employee's family doctor, Dr. Bachstein, later referred her to a pulmonary specialist, Dr. Frederick Dow. Dr. Dow determined that employee had a permanent lung condition related to her exposure to fumes in December 1999. He testified that the fume incident more than likely substantially aggravated her preexisting lung condition. He informed employee that she should not return to work where she would be exposed to smoke, fumes, or vapors.

ANALYSIS

Employee's treating physicians, Dr. James Bachstein and Dr. Frederick Dow, both testified that employee had a prior lung condition of chronic obstructive pulmonary disease. They testified that she was working regularly and the events of December 7, 1999, aggravated and exacerbated her condition, and except for this incident, employee would have continued to work for several more years. Dr. James D. Snell, Jr., performed an independent medical evaluation for employer and disagreed with the findings of Dr. Bachstein and Dr. Dow. However, Dr. Snell acknowledged that fumes at employee's work could have aggravated her previous lung condition. Obviously, the trial court accepted the testimony of the treating physicians.

Appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2002 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 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). 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). Where the trial court has seen and heard witnesses, especially where the issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). 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 issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the deposition and the reviewing court may draw its own impression as to the weight and credibility of the contents of the deposition. *Ormon v. Williams Sanoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

Further, any reasonable doubt as to whether an injury arose out of the course and scope of one's employment is to be resolved in favor of the employee. *Tapp v. Tapp*, 192 Tenn. 1, 236 S.W.2d 977 (1951); *Hall v. Auburntown Industries, Inc.*, 684 S.W.2d 614, 617 (Tenn. 1985). Once permanency has been established, the second step involves determining the amount of vocational disability suffered upon the plaintiff by reason of her work injury. In making this determination, the trial court must determine how much the injury impairs the employee's earning capacity considering the degree of anatomical impairment. *Black v. Liberty Mutual Ins. Co.*, 4 S.W.3d 182 (Tenn. 1999). The trial court must consider a variety of factors, both medical and non-medical, expert and non-expert, in reaching this determination. Non-medical factors include the employee's age, education, skills and training, local job opportunities and the capacity to work at a type of employment available in employee's disabled condition. *Orman v. Williams Sanoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991); *Miles v. Liberty Mutual Insurance Co.*, 705 S.W.2d 665, 666 (Tenn. 1990). The assignment of errors cited by employer as to compensability lends itself mainly in this case to the credibility of witnesses. Considerable deference must be accorded the trial court's factual findings. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

Sufficient evidence was presented in this case to show a causal connection between employee's injuries and her work. At least two doctors testified that the events on December 7, 1999 aggravated or exacerbated employee's prior lung condition. Further, there was sufficient testimony that the condition was permanent.

Employer also insists that the trial court erred by not accepting the testimony of Dr. Snell. Where there is a conflict between medical experts, a trial court has the discretion to accept the opinion of one medical expert over another unless evidence preponderates against a medical opinion. *Kellerman v. Ford Lion, Inc.*, 920 S.W.2d 333,335 (Tenn. 1996); *Johnson v. Midwesco*, 801 S.W.2d

804, 806 (Tenn. 1990).

Employer alleges error by the trial court in not allowing a setoff of disability benefits paid to employee pursuant to Tennessee Code Annotated section § 50-6-114. The disability plan under which employee collected benefits was the result of a collective bargaining agreement and no such agreement was introduced at trial. If there is a collective bargaining agreement in effect, the provisions of Tennessee Code Annotated section § 59-6-114 shall be subject to the agreement of both parties. The trial court, therefore, held employer had failed to meet its burden of proof. We find no error.

Finally, employer argues that employee's claim is barred by the applicable statute of limitations. Tennessee Code Annotated section 50-6-203 provides that a workers' compensation claim must be brought within one year of the accident resulting in injury or death. Exacerbation of a lung condition is a gradual injury. Where an injury occurs gradually from repeated incidents, the accidental injury is deemed to have occurred when the employee's condition reached the point in which the employee could no longer work at a job. *Barker v. Home Crest Corporation*, 805 S.W.2d 373-74 (Tenn. 1991). In this case, no evidence was presented that employee missed any appreciable length of time from work due to illness prior to the December 7, 1999 incident. Thus, we conclude that employee's claim filed on May 25, 2000, was not time barred.

The trial court in this case articulated very detailed and well reasoned findings of fact. After considering all of the relevant factors in this case, we find that the evidence does not preponderate against the trial judge's findings and award.

CONCLUSION

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the appellants, The Aerostructures Corporation, and The Travelers Insurance Company.

ALLEN W. WALLACE, SENIOR JUDGE

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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 the appellants, The Aerostructures Corporation, and The Travelers Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

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IT IS SO ORDERED.

PER CURIAM