

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

February 26, 2004 Session

**WILLIAM A. GLOVER v. NATIONAL MEDICAL HOSPITAL OF
WILSON COUNTY, INC. d/b/a UNIVERSITY MEDICAL CENTER**

**Direct Appeal from the Circuit Court for Wilson County
No. 11983 Clara Byrd, Judge**

**No. M2003-01534-WC-R3-CV - Mailed - December 8, 2004
Filed - February 23, 2005**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with the Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of the findings of fact and conclusions of law. The issues of this case are as follows: (1) whether the trial court erred in finding medical causation; and (2) whether the trial improperly denied employer's motion in limine to exclude the testimony of George Barnard and Dr. David Bradley Seitzinger. We find no error and affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2003 Supp.) Appeal as of Right; Judgment of the
Circuit Court Affirmed**

RITA L. STOTTS, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and ROGER A. PAGE, SP. J., joined.

Thomas J. Dement, II, Nashville, Tennessee, for the defendant/appellant, National Medical Hospital of Wilson County, Inc., d/b/a University Medical Center.

Henry D. Fincher, Cookeville, Tennessee, for the plaintiff/appellee, William A. Glover.

MEMORANDUM OPINION

STANDARD OF REVIEW

In Tennessee, appellate review 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). 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).

FACTS

On December 13, 2000, the employee, William Glover, spent 5-1/2 hours painting a stairwell at his place of employment, University Medical Center (hereinafter "UMC"). At the time, Mr. Glover was considered to be an exemplary employee who was noted to have had perfect attendance on a recent evaluation. After painting the stairwell, the employee became ill and was off for several days. Upon reporting his symptoms to the employer, the employee was referred by a company nurse to Dr. Roy Johnson, the company doctor, and benefits were initially provided.

The employee began working at UMC in 1977 and had no break in service. He obtained his GED in 1978. Initially, his job required that he spend part of the work day performing security services and the other part painting. There were some weeks where he was required to paint everyday. He was never told to wear a respirator while painting nor did he wear one.

Prior to December 13, 2000, the employee hunted, went to car shows, hiked and bought and sold old houses.

The employee tried to return to work as soon as he was feeling better. In mid-January, he reported to Dr. Johnson that his feet were swelling and that there was a burning sensation in his chest. When he tried to use paint he would become "sick" to his stomach. By early February, he was having pain in his feet, such that he could not stand.

At trial, the employee testified that he could only walk short distances without severe pain. Prior to his last day of work in February 2001, he could no longer stand to paint.

The employee spoke to a company representative about light duty but nothing was found for him.¹

¹ Gloria Gray, the worker's compensation coordinator for the employer, testified that the employee did want to come back to work and suggested a courier position. The position was filled at the time.

The medical testimony at trial was by deposition with the plaintiff's experts testifying that the employee's exposure to paint fumes caused his peripheral neuropathy. According to Dr. Seitzinger, peripheral neuropathy is a disease affecting the nerve endings of the body. The defendant's experts were of the opinion that Mr. Glover's condition was not caused by the exposure to paint fumes on December 13, 2000.

George Barnard, an industrial hygienist, testified as an expert at the trial. He testified that the employee was exposed to petroleum Naptha and mineral spirits on December 13, 2000. He opined that organic solvents, mineral spirits or petroleum Naptha can cause peripheral neuropathy and that the employee's single acute exposure to organic solvents caused his peripheral neuropathy. He had determined the likely exposure that Mr. Glover had suffered on December 13, 2000, was by a process referred to as modeling. According to this witness, modeling is a mathematical method of estimating an exposure over a given period of time to some toxic material in the air. Id.

On the basis of the volume of the stairwell and information provided by the employee about how much paint he had used on the day in question, Barnard was of the opinion that the exposure would have been 4,100 parts per million. George Barnard testified that this is a very, very high exposure well in excess of applicable exposure limits to mineral spirits. Occupational Safety and Health Administration (OSHA) limits are 500 parts per million and the National Institute of Occupational Safety and Health (hereinafter "NIOSH") limits are 100 parts per million.

Sheila Glover, the employee's wife of 35 years, testified that her husband's condition had been devastating because he had been unable to work and to do things as in the past. She had observed that prescription medication (Neurontin) had helped control his condition somewhat. She testified that the consequences of his not being able to work had forced him to live in a trailer and had impacted their marital relationship. He had been in good health before December 13, 2000, and had never before complained of tingling or burning in his feet.

Robert Cox, director of human resources for UMC, testified that maintenance workers are required to use respirators while painting, but noted on cross-examination that the word "paint" is not actually in the policy.

The plaintiff also presented the testimony of Dr. David Seitzinger, an internist, by deposition. Dr. Seitzinger had conducted an independent medical examination of the employee. Dr. Seitzinger's medical opinion was that the employee suffered from neuropathy and that his condition was caused by exposures experienced in the work place. He indicated that other causes of the neuropathy "were not manifest".

Dr. Seitzinger indicated that the employee reached maximum medical improvement on December 30, 2002, and that Mr. Glover had a permanent physical impairment to his upper and lower extremities based on the work place injury that he suffered on December 13, 2000. According to Dr. Seitzinger, the employee's condition would not improve.

The employer presented the testimony of several experts, Dr. Thomas Baker, Dr. Roy Dehart, Dr. Michael Kaminski and Dr. Richard Rubinowicz. Dr. Baker, who is board certified in physical medicine and rehabilitation and in electro-diagnostic medicine. He first saw the employee on March 29, 2001, upon referral by Dr. Ken Anderson, the employee's primary care physician.

Dr. Anderson referred Mr. Glover to Dr. Baker for electro-diagnostic testing and for the pain that he was having in his feet. Dr. Baker testified that he was unable "to pick up objective findings of neuropathy but his symptoms were sounding very classic to neuropathy". Dr. Baker, who had been practicing for 3-1/2 years, acknowledged reading in his studies that pain can cause peripheral neuropathies.

Dr. Roy Dehart is a board certified physician in occupational medicine. He was asked to see the employee for an occupational medical consultation. He acknowledged that Mr. Baker presented with symptoms and problems in his central nervous system, that he was disabled from working and that the burning in his hands and burning in his feet were consistent with peripheral neuropathy.

Dr. Michael J. Kaminski, a neurologist, saw the employee only on February 5, 2002, upon referral from Dr. Ken Anderson.² His testimony was that there "are about 100 causes of peripheral neuropathy...." He also acknowledged having seen patients with solvent induced peripheral neuropathy and that organic solvents are known to cause peripheral neuropathy. He simply did not know the cause of Mr. Glover's neuropathy.

Another neurologist, Dr. Richard Rubinowicz, was asked to review Mr. Glover's records and was also of the opinion that his symptoms were not caused by his exposure to paint fumes. He acknowledged that a toxicologist, an industrial hygienist or an occupational medicine specialist would know more about the precise effects caused on the human body than a neurologist. He admitted that he did not know what caused Mr. Glover's neuropathy.

CAUSATION

The defendant vociferously challenges the opinions of the plaintiff's witnesses and argues that the Court should not have allowed that testimony pursuant to the Court's role as a "gate-keeper." See Daubert v. Merrill-Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); McDaniel v. CSX Transportation, 955 S.W.2d 257 (Tenn. 1997). Ironically, the Supreme Court in McDaniel rejected the defendant's attempt to strike expert testimony that organic solvents cause nerve damage. McDaniel, 955 S.W.2d at 263. McDaniel reaffirmed that a trial court has wide discretion in determining the admissibility of evidence under Tennessee Rule of Evidence 702 and 703. Id.

Under Rule 703, the Court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness. Tenn R. Evid. 703. The trial court properly admitted the testimony of George Barnard and Dr. David Seitzinger.

² Dr. Anderson is a primary care physician who was not deposed.

It has long been the rule of law in Tennessee that absolute medical certainty is not required to establish causation in a worker's compensation case. White v. Werthan Industries, 824 S.W.2d 158 (Tenn. 1992). Additionally, the causal connection needed to support a worker's compensation claim may be established by expert opinion combined with lay testimony, and reasonable doubt regarding causation is to be construed in favor of the employee. Id.

The trial court ruled "that based upon all the proof in this case, including but not limited to lay and expert testimony, Mr. Glover's age, education, skills, and training; Mr. Glover's work history as a manual laborer; Mr. Glover's local job opportunities; his lack of capacity to work at types of available employment; the medical proof in this case; the Court's own observations in court of Mr. Glover's demeanor and condition; and his disabled condition, the Court finds that the Plaintiff Mr. Glover's workplace injury at UMC on December 13, 2000, has caused Mr. Glover to be permanently and totally disabled, and that as a result of said workplace injury Mr. Glover is totally incapacitated from working at an occupation which brings him income."

We have carefully reviewed the medical depositions and the entire record, and we find no error in the trial court's determination that Mr. Glover's peripheral neuropathy was caused by his exposure to paint on December 13, 2000. While the employer challenges the plaintiff's experts regarding their opinions that the employee's condition was not caused by the exposure on December 13, 2000, the defendant's experts could not state what did cause the neuropathy. Added to that is the fact that Drs. Dehart, Baker and Rubinowicz all admitted that peripheral neuropathy can be caused by long term exposure to paint fumes and organic solvents.

REMAINING ISSUES

In addition to the issues herein discussed, the employer raised the following issues: (1) whether the trial court improperly denied the employer's request for a vocational examination; and (2) whether the trial court erred in ordering UMC to provide future medical benefits on behalf of the employee. We have thoroughly reviewed the record and conclude that these issues are without merit.

CONCLUSION

Based on the foregoing, we affirm the judgment of the trial court in all respects. Costs are taxed to the appellant, National Medical Hospital of Wilson County, Inc., d/b/a University Medical Center.

RITA L. STOTTS, SPECIAL JUDGE

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No. 11983**

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ORDER

This case is before the Court upon the motion for review filed by National Medical Hospital of Wilson County, Inc., d/b/a University Medical Center 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to National Medical Hospital of Wilson County, Inc., d/b/a University Medical Center, for which execution may issue if necessary.

PER CURIAM