IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 1, 2006 Session

MAHLE, INC. v. WALTER DEAN ROUSE

Direct Appeal from the Chancery Court for Hamblen County
No. 2001-263 Thomas R. Frierson II, Chancellor

FiledOctober 12, 2006

No. E2005-02432-WC-R3-CV - Mailed June 27, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee 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 awarded the Employee 85 percent permanent partial disability as a result of metal poisoning at his workplace. The Employer contends the action should be dismissed because notice of injury was not timely given and because the evidence was insufficient to establish causation of injury. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and SHARON G. LEE, SP. J., joined.

Kelly A. Campbell, Morristown, Tennessee, for Appellant, Mahle, Inc.

Jeffrey M. Cranford, Morristown, Tennessee, for Appellee, Walter Dean Rouse.

MEMORANDUM OPINION

Plaintiff, Mahle, Inc. [hereinafter "Mahle"], has appealed from the action of the trial court in awarding the Defendant, Walter Dean Rouse [hereinafter "Employee"], 85 percent permanent partial disability. Mahle contends the case should have been dismissed because of (1) lack of proper notice and (2) insufficient evidence to establish the injury was caused by the work environment.

Facts

Employee, a forty-five-year-old high school graduate with some college training, began working for Mahle in 1982 and was employed in the foundry part of the plant where the company manufactured pistons and related parts. His duties required him to work close to a furnace and pour melted aluminum into a mold, etc. He described the workplace as very hot at times, where it was hard to breathe both because of the heat and, in his early days, because "the fog off of the chemicals and stuff, you couldn't see your hand in front of your face." He said during the early days of his seventeen-year employment, the ventilation was very low.

Prior to the time in question, Employee had several surgical procedures on his back and knees and he also had a hernia operation and a skin graft on his toe. Most of these procedures were not work-related except the second operation on his back to restructure a spinal fusion and his employer paid for the restructuring surgery.

In November 1998, Employee began to feel like he had the flu with headaches, nausea and aching. Sometime later his symptoms increased to diarrhea, dizziness, memory problems, night sweats and balance problems, but he continued to work until April 1999. He has seen many local doctors for his various symptoms and was also seen at the Mayo Clinic at both Florida and Minnesota locations, and at Johns Hopkins hospital without any specific diagnosis as to the cause of his health problems. He was finally seen in October 2002 by Dr. William Reid who determined he was suffering from metal poisoning. Employee testified that once he was advised by the doctor that his workplace was probably responsible for his condition, he got in touch with an attorney who gave notice during April 2001 to Mahle of a workers' compensation claim. Mahle filed this action during the same month.

Tammy Rouse, Employee's wife, testified her husband was very active prior to the onset of his various symptoms and that they were not aware her husband's condition was work-related prior to seeing Dr. Reid. She also stated that upon request of a doctor who had referred them to Dr. Reid, she obtained material data safety sheets from Mahle and turned them over to Dr. Reid.

Dr. Dennis H. Duck, a general practitioner of internal medicine, testified by deposition that when he examined the Employee, he was complaining of fatigue, weight loss, memory problems and ataxia[1]; that although he had no specialized training in the toxicity field, he generally agreed with Dr. Reid's diagnosis; that Employee was presently unable to work at the foundry and was disabled from performing most occupations; and that his condition appeared to be chronic.

Dr. William K. Reid, a board certified hematologist/oncologist, testified by deposition that his practice was generally limited to cancer and blood disorder problems. His first contact with Employee was on October 9, 2000 when he began conducting tests, and he continued to see him and do further testing for several months. In addition to the symptoms testified to by the Employee, Dr.

[1] Unable to walk a straight line.

Reid said Employee was also complaining about joint pain, ringing in his ears and skin rash. He continued to see Employee until April 2001. Dr. Reid said his first thought was that cancer was involved but later included metal poisoning since testing had indicated elevated manganese and aluminum levels as well as borderline arsenic and lead levels. The doctor said that in rendering a final diagnosis of manganese and aluminum toxicity with possible damage to the brain and nerves, he also considered numerous "could be" causes and then eliminated the choices until he arrived at a final cause. He admitted that Employee's condition presented a complex medical problem which apparently had remained undiagnosed prior to his seeing the Employee. He was of the opinion that Employee's workplace most likely caused his condition.

Mahle presented several witnesses all of whom personally appeared before the trial court except the medical evidence witness who testified by deposition.

Danny Lee, the foundry quality manager, testified the foundry did not use manganese as a raw material in the production process; that the majority of their castings were aluminum; and that any manganese would only be a trace element in the manufacturing process. At another point, he stated that five primary alloys, specifically aluminum, nickel, magnesium, copper and silicone, were used and heated in a furnace at 1400 to1500 degrees Fahrenheit until it reached a molting phase. He testified that in recent years the ventilation system in the foundry had been improved.

Phillip Lawrence, the environmental safety manager, testified that he had worked at the plant since 1995; that the company had conducted regular air sampling tests; and that the results indicated readings which were well below acceptable standards fixed by OSHA. He stated there were no other reports of employees having similar problems and that although manganese was not used as a raw material, it was a base contaminant. He admitted there were no records of air samples during the period of October 23, 1990 to September 16, 1997.

Ken Troutman, an industrial hygiene consultant, was employed by an independent company. He stated it was their task to come into a plant and find health risks and then attempt to recommend ways to make the workplace safe for employees. He said his company had been working at Mahle since 1997. Mr. Troutman said the material used in the manufacturing process was made up of 99 percent aluminum and .3 percent manganese; that their review of records of those who had conducted tests and their own testing data indicated the use of the two metals in question never resulted in overexposure pursuant to safety standards. He also said there was no evidence of cluster problems (other cases of a similar nature).

Dr. John McElliott, an occupational physician, stated that he had never seen, examined or tested the Employee but he did review numerous medical records from hospitals and doctors who had seen him and that he had also read the deposition of Dr. William Reid. He did not agree with the diagnosis of metal poisoning and said the sample results had been within OSHA limits. He also noted that other employees were not complaining of similar symptoms and if exposure was high other individuals should also be complaining. He said Dr. Reid based his diagnosis on history while he preferred to rely on someone who had gone into the workplace and ran tests or obtained samples.

Dr. McElliott also stated that Employee's symptoms presented a complicated and complex medical situation where "there's some other things going on with this gentleman that still haven't been explained completely."

The Chancellor concluded that the claim was timely filed and that Employee's condition was work-related. Employee was awarded 85 percent permanent partial disability.

Standard of Review

The standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Analysis - Notice of Injury

Mahle argues that the Employee was aware as early as October 2000 that Dr. Reid felt his condition was due to metal poisoning and a notice of injury was not given until April 2001, almost six months after learning of the doctor's diagnosis.

In occupational disease cases, Tennessee Code Annotated section 50-6-305 directs that notice of injury must be rendered to the employer within thirty (30) days after the first distinct manifestation of an occupational disease or condition. General case law provides that notice can be excused or delayed if a reasonable excuse exists for not complying with the rule. *Kirk v. Magnavox Consumer Electronics Co.*, 665 S.W.2d 711 (Tenn. 1984). Usually, the first manifestation is considered to occur when there is a diagnosis from a physician and the employee knows or should know that his problems are work-related. *Christopher v. Consolidation Coal Co.*, 440 S.W.2d 281 (Tenn. 1969).

Employee testified that he began seeing Dr. Reid during October 2000, and that it was months later before he realized that the diagnosis of his condition was work-related. He stated that upon being told of the final diagnosis he immediately sought legal advice and employed an attorney who confirmed the diagnosis with Dr. Reid and then gave written notice to Mahle during April 2001. Employee admitted that he had been told during October 2000 that there was a possibility that his condition was work-related and the doctor's medical notes also confirm this point. However, the doctor stated he always considers numerous causes and first thought cancer was involved and that he continued to do testing and see the patient until possible causes were excluded leaving a final diagnosis. He did testify that, as of December 27, 2000, he felt that metal poisoning was a causative factor but he continued to see and test Employee until his last visit during April 2001.

The Chancellor found that Mahle was timely notified of the claim and we cannot say the evidence preponderates against the trial court's conclusion.

Analysis - Cause of Injury

Mahle argues that the Employee's medical evidence was not sufficient to establish causation because the various elements of the occupational disease were not shown pursuant to Tennessee Code Annotated section 50-6-301. This statute provides that a disease (or condition) shall be deemed to arise out of the employment only if:

1. It 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;

2. It can be fairly traced to the employment as a proximate cause;

3. It has not originated from a hazard to which workers would have been equally exposed outside of the employment;

4. It is incidental to the character of the employment and not independent of the employment and not independent of the relation of employer and employee;

5. It 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

6. There is a direct causal connection between the conditions under which the work is performed and the occupational disease.

While these various elements must be established in order to recover benefits for an occupational disease, we do not agree with counsel that each specific element of the statute must be posed as a specific question to the medical witness. We believe that it is sufficient if the evidence as a whole, both lay and expert, shows the requirements of the statute have been met. We concur with the Chancellor that the evidence supports the requirements of the statute.

Although causation of an injury cannot be based upon speculation or conjectural proof, absolute certainty is not required and reasonable doubt is to be construed in favor of the employee. *Hill v. Eagle Bend Mfg.*, 942 S.W.2d 483 (Tenn. 1997); *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992).

The trial court accepted Dr. Reid's testimony over the testimony of Dr. McElliott. When there are conflicts in the evidence, it is within the discretion of the trial court to resolve the dispute and determine which testimony will be accepted. *Thomas v. Aetna Life & Casualty Co.*, 812 S.W.2d 278 (Tenn. 1991); *Johnson v. Midwesco, Inc*., 801 S.W.2d 804 (Tenn. 1990).

On the issue of causation, we find the evidence does not preponderate against the finding of the trial court.

Conclusion

The judgment of the trial court is affirmed. Costs of the case are taxed to Appellant, Mahle, Inc., and its surety.

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ROGER E. THAYER, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Mahle, Inc. 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 the appellant, Mahle, Inc. and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

E. Riley Anderson, J., not participating

Supreme Court
State of Tennessee

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MEMORANDUM

TO: Frankie Holt, Chief Deputy Clerk - Knoxville

FROM: Justice Gary R. Wade

RE: Mahle, Inc. v. Walter Dean Rouse
(Hamblen County Chancery, No. 2001-263)
Appeal No.:E2005-02432-SC-WCM-CV

DATE: October 2, 2006

APPLICATION FOR PERMISSION TO APPEAL: **Denied**

RELEASE DATE: **Next Available Date**

DISPOSITION OF RECORD: **Previously returned via U.P.S.**

cc: Tracy Skiba, Deputy Clerk - Nashville (w/enc.)