IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
September 15, 2006 Session

CAROLYN GOSS v. TENNALUM, a Division of Kaiser Aluminum

Direct Appeal from the Chancery Court for Madison County
No. 60986 Hon. James F. Butler, Chancellor

No. W2005-01411-WC-R3-CV - Mailed January 29, 2007; Filed March 1, 2007

The Employer has appealed the determination by the trial court awarding compensation to the Employee. After consideration of the evidence, the Workers' Compensation Appeals Panel finds that the evidence does not preponderate against the finding of the trial court with regard to causation of the Employee's respiratory injury or the amount of vocational disability determined by the trial court.

Tenn. Code Ann. §50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court Affirmed as Modified.

ROBERT E. CORLEW, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and DONALD P. HARRIS, SR. J. joined.

John D. Burleson, and Gregory Dean Jordan, Jackson, Tennessee, for the Appellant, Tennalum, a Division of Kaiser Aluminum.

Ricky L. Boren, Hill-Boren, Jackson, Tennessee, for the Appellee, Carolyn Goss.

MEMORANDUM OPINION

FACTS

The facts of this case are largely undisputed. The Employee was employed at Tennalum in 1998 on the utility line. Her duties involved the operation of a computerized mechanical saw. In March, 2002, she transferred to the small diameter line where she worked with a team cutting, burnishing, and packaging long bars of aluminum metal. The Employee began to suffer respiratory symptoms, and, on July 14, 2002, without reporting any problems to her Employer, she went to the emergency room at Jackson General Hospital. She was treated there and was told to see a pulmonologist. Still without reporting any problems to her employer, the Employee made an appointment to see Dr. Marc E. Hofmann, M.D., a specialist in pulmonary and critical care medicine. She first saw Dr. Hofmann on August 1, 2002, and provided a history to him. Based on the history and his examination on the first visit, Dr. Hofmann immediately suspected

that the Employee suffered from asthma. He told the Employee that "her occupation could be a reason for her problems." Dr. Hofmann testified that, on the Employee's first visit, he "spent a significant amount of time discussing her symptoms, the treatment plan, and what [he] thought was wrong." He ordered a Methacholine Challenge Test, which was performed on August 6, 2002. The test results were positive, confirming Dr. Hofmann's suspicions concerning the Employee's respiratory problems. At that point, Dr. Hofmann reiterated to the Employee that he thought her problem might be due to her work, as she had advised him of dust particles in the work environment at Tennalum. The Employee also told Dr. Hofmann that her symptoms improved when she was away from work. Dr. Hofmann prescribed asthma medications to help stabilize her shortness of breath.

It was not until August 20, 2002, that the Employee informed her Employer that she suspected that her respiratory difficulties were related to her employment. She told Renia Johnson, a Staff Accountant at Tennalum, on August 20 that she had asthma and that the doctor suggested that she be moved from the area in which she was working, if the dust was a problem. Ms. Johnson notified the plant nurse, Michael J. Harris, and the Human Relations Manager, Marilyn J. Gambill, on that same day. Approximately a week later, the Employee informed Mr. Harris that she had asthma and felt it was due to breathing the dust around the burnishers. In his testimony before the court, Mr. Harris acknowledged that the Employee advised him that her doctor recommended she quit her job if she had to work in a dusty environment.

The Employee was 55 years of age at the time of trial. She has a GED and has worked as a retail cashier, cook, manufacturing inspector, bookkeeper, merchandise stocker, and as co-operator of a youth foster-care center. She continued working at Tennalum until she voluntarily resigned on June 3, 2003. The Employee submitted a letter of resignation which was introduced into evidence which states, "I Carolyn Goss am quitting this job at Tennalum due to Occupational Hazards on the job, as of June 3, 2003." The Employee testified that now she can no longer perform yard work, such as gardening and cutting grass. She stated she can no longer play ball with her grandson because she has shortness of breath. She continues to perform housework, but she tires very quickly when performing these duties. Suit was filed on April 22, 2003, and the case was tried on November 30, 2004.

EXPERT TESTIMONY

The Trial Court considered the testimony of the treating physician, Dr. Marc E. Hofmann, M.D., and the testimony of Dr. Jeffrey P. McCartney, M.D., who performed an independent medical evaluation. Because neither doctor testified in person before the trial court, the judge of that court is not in a superior position to evaluate the expert testimony. Thus, in our consideration of the matters before us, we must determine the weight to be given to the expert testimony and draw our own conclusions with regard to issues of credibility. Elmore v. Traveler's Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992).

Dr. Hofmann testified that he is board certified in internal, pulmonary, and critical care medicine. Based upon his examination and tests, together with the medical history provided by the Employee, it was Dr. Hofmann's opinion that the Employee suffered from occupational

asthma, which he testified was "mild persistent or moderate persistent."[1] Dr. Hofmann felt the results of the Methacholine Challenge were most significant in forming a diagnosis. Further, he felt the medical history which the Employee related--that she was exposed to dust fumes and that her condition worsened while she was at work and improved while not at work over a period of time--was significant. Dr. Hofmann acknowledged that the medical history given by the Employee was his only information regarding the existence of dust and fumes in the work place and that he had no means of corroborating that information independently. Nonetheless, he opined that there is a causal connection between the Employee's employment and her respiratory problems and he assigned a permanent impairment of ten to twenty-five percent to the body as a whole. He placed the Employee on a work restriction to remain away from the "burnishers," which the evidence shows were machines within the workplace which polished aluminum and generated a large amount of dust and metal particles. Dr. Hofmann acknowledged that the fact that the levels of dust at the Employee's place of employment complied with standards established by the Occupational Safety and Health Administration (OSHA), would cause the condition suffered by the Employee to be less likely to develop, but not impossible.[2] He testified that the Employee will continue to have problems with stamina and that she should avoid exposure to chemical solvents used in cleaning because they "could precipitate an asthmatic-type response."

Dr. Hofmann also recognized the presence of acid reflux in the Employee and prescribed medication to control this ailment. Like Dr. McCartney, who determined that the Employee suffered from gastroesophogeal reflux disease, Dr. Hofmann acknowledged a connection between the Employee's "asthmatic-type complaints" and her acid reflux. It was Dr. Hofmann's opinion, however, that the acid reflux did not cause the Employee's asthma, but that the presence of acid reflux "may be causing more asthmatic-type complaints." He testified that acid reflux may, in fact "irritat[e] the upper airway causing inflammation and then as a result giv[e the Employee an] asthmatic-type response; shortness of breath, cough, wheezing." Dr. Hofmann acknowledged that acid reflux could, in fact exacerbate the Employee's asthmatic condition. He was asked, near the conclusion of his testimony, to assume that the Employee had both asthma and acid reflux disease, and he was asked to discuss the effect of each upon the other. He stated:

> Well, it could be significant from the standpoint that if, you know, we don't control her reflux symptoms she'll have repeated nocturnal asthma events. That's why I don't know that the reflux was really causing her problems because she was having more problems while she was at work and it got better. It wasn't that she was having more problems at night while she was sleeping. I don't know that I documented that anywhere, that she was having more nocturnal symptoms. Patients with reflux usually have nocturnal asthma exacerbations. They'll wake

[1]Dr. Hofmann testified that there are a number of categories of asthmatic conditions, including mild, mild intermittent, mild persistent, moderate persistent, and severe persistent.

[2]Dr. Hofmann testified that "if she had very minimal exposure to aluminum dust or lead dust or any dust, for that matter, the likelihood of her having a significant problem relation to occupational asthma is lower. It is not zero."

> up in the middle of the night coughing, wheezing. In this situation, most of her problems that, you know, I was able to come to in dealing with here [sic] were more related to when she got home. And she was having problems at work. She would cough and have shortness of breath. And, certainly, the reflux issue didn't come into play until later on in our interview process in me treating her.

Dr. McCartney, the Defendant's independent medical evaluator, is a pulmonary specialist who evaluated the Employee on June 17, 2004. Dr. McCartney diagnosed the Employee with gastroesophogeal reflux disease (GERD) with secondary inflammation of the voice box. He disagreed with Dr. Hofmann's diagnosis of occupational asthma. Dr. McCartney did not relate the Employee's GERD induced symptoms to her employment at Tennalum.

Upon examination of the Employee, Dr. McCartney noted reduced airflow and a thickened chest wall, though Dr. McCartney considered the Employee's expiratory phase of her breathing to be acceptable. He found the Employee to have "a very strong gastroesophageal reflux history that follows her in every bit of paper trail she's been through from back to 2000 whenever we started." Dr. McCartney opined that the Employee now suffers from gastroesophageal reflux disease which is not related to her employment. Dr. McCartney testified that he "absolutely disagree[s]" with the diagnosis of asthma advanced by Dr. Hofmann.

Because of the difference of opinion of the two doctors, the trial judge ordered another independent evaluation, which was performed by Dr. Phil Lieberman. Dr. Lieberman was not able to diagnose either asthma or acid reflux with any degree of medical certainty. He would not give an opinion that the asthma was caused by the work environment but stated that it was possible that exposure aggravated the problem. He opined that if he were required to make a determination as to whether the Employee had asthma or acid reflux, he would favor asthma over reflux, but he was unable to so state with any degree of medical certainty.

ANALYSIS

Our 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). Conclusions of law established by the trial court come to us without any presumption of correctness. Watt v. Lumbermens Mut. Cas. Ins. Co., 62 S.W.3d 123, 127 (Tenn. 2001).

We have recognized that the causal relationship between the Employee's employment and the injury must be established by the preponderance of the expert opinions supplemented by the lay evidence. The proof of the causal connection may not be speculative, conjectural, or uncertain. Clark v. Nashville Mach. Elevator Co., Inc., 129 S.W. 3d 42, 47 (Tenn. 2004); Simpson v. H.D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990); Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). Absolute certainty with respect to causation is not required, however, and the Court must recognize that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). When all of the medical proof is presented by deposition, we must determine

the weight to be given to the expert testimony and draw our own conclusions with regard to the issues of credibility. Bohanan v. City of Knoxville, 136 S.W. 3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

The Workers' Compensation laws should be "liberally construed to promote and adhere to the [purposes of the Workers' Compensation] Act of securing benefits to those workers who fall within its coverage." Martin v. Lear Corp., 90 S.W.3d 626, 629 (Tenn. 2002). Nonetheless, the burden of proving each element of his cause of action rests upon the Employee in every Worker's Compensation case. Cutler-Hammer v. Crabtree, 54 S.W.3d 748, 755 (Tenn. 2001). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the Employee. Phillips v. A. & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004); Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Our Courts have "consistently held that an award may properly be based upon medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury." Reeser, 938 S.W.2d at 692; accord, Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999); P & L Constr. Co. v. Lankford, 559 S. W.2d 793, 794 (Tenn. 1978); GAF Bldg. Materials v. George, 47 S.W.3d 430, 433 (Tenn. Workers' Comp. Panel 2001). The element of causation is satisfied where the "injury has a rational, causal connection to the work," Braden v. Sears, Roebuck & Co., 833 S.W.2d 496, 498 (Tenn. 1992).

We agree with the trial court that, though there is evidence to the contrary, the preponderance of the evidence shows that there is a causal connection between the Employee's lung impairment and the work environment. During his deposition, counsel questioned Dr. Hofmann, the pulmonary specialist who had treated the Employee as long as two years, as to whether he believed there was a causal relationship between the dust and her asthma, to which he responded positively. The doctor opined that

> It's based upon the fact that she has clear symptoms of coughing, wheezing, phlegm—or sputum production that seems to get worse with subsequent days at work and then gets better when she's off work and then seems to reoccur on a significant basis in addition to having normal pulmonary function tests that are then confirmed of asthma—confirmed for asthma with a positive methacholine challenge.

Dr. Hofmann last saw the Employee on June 21, 2004 when she was working at Wal-Mart and he explained that because the Employee had problems with her insurance, she had been off of her medications.

> She states, you know, that she was starting to work at Wal-Mart but she was having some----an exacerbation of some cough and yellow phlegm production that was also greenish in nature. So what I did is I put her back on her medications. In my best opinion, she probably was and probably had been stabilized on her current medication regiment until she ran out of her medications and then had an acute exacerbation which we treated her for.

Dr. Hoffman further stated that the employee's problems were the result of occupational exposure:

> Now, I think it also sensitized her and made her more responsive to other irritants and/or allergins that could precipitate her having problems. Now, as a result, I believe she has a chronic asthmatic condition.

On the other hand, Dr. McCartney opined that the Employee's problems were not due to asthma, but due to GERD or acid reflux, which he did not feel was work related. He did admit however, that a positive methacholine challenge test could be indicative of asthma:

> But if the test is positive, its actual predictive value is about sixty to eighty percent. So that leaves us as much as a forty percent---those are textbook numbers—a forty percent chance that that is not consistent with the diagnosis of asthma.

Dr. McCartney also admitted that one can have both reflux disease and also have asthma. He also agreed that by its very nature, asthma waxes and wanes, that a patient can have "perfect pulmonary function studies one day and be in very poor condition a day or two later." Dr. McCartney indicated that although Dr. Hofmann is a specialist, Dr. Hofmann did not have the full medical history of the Employee that he had.

The trial court appointed Dr. Phil Lieberman to act as a neutral physician, but Dr. Lieberman chose not to side against the opinions of either of the other physicians. In his report, filed with the court, Dr. Lieberman described the questions concerning the causal relationship between the Employee's medical condition and her employment to be "not answerable." He stated that the Employee did not exhibit symptoms of asthma at the time she was in his office and he did not have enough evidence to determine that the Employee suffered from gastroesophogeal reflux disease either. He expressed his opinion that further studies would not be helpful in determining the issue. Dr. Lieberman stated he could not definitively establish a diagnosis of either asthma or GERD and expressed the opinion that, in fact, the Employee may not suffer from either of these conditions. He stated, however, that were he required to choose between the two, he would favor asthma over GERD because of the positive methocholine challenge. He stated that he had a disadvantage of seeing the Employee after she had been off work and at a time when she was relatively asymptomatic.

It is important to note that the trial court found the Employee to be a competent and credible witness in her own behalf. Thus, after considering all of the evidence, we find that the Employee's work at Tennalum sufficiently contributed to the causation of the Employee's injury, and the injury is work-related. We find that the anatomical impairment rating of 10% given by Dr. Hofmann is reasonable and further that the vocational disability should be 30% to the body as a whole, as established by the trial court.

CONCLUSION

Thus we affirm the decision of the trial court in all respects. The Employee is entitled to an award of a 10% anatomical rating to the body as a whole and a permanent vocational disability of 30% to the body as a whole.

The costs on appeal will be taxed against the Employer.

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ROBERT E. CORLEW, SPECIAL JUDGE

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No. 60986

No. W2005-01411-WC-R3-CV - Filed March 1, 2007

JUDGMENT ORDER

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 on appeal are taxed to the Appellant, Tennalum, a Division of Kaiser Aluminum, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM