

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 16, 2002 Session

RAY DUNNAGAN v. FOAMEX

**Direct Appeal from the Chancery Court for Madison County
No. 58423 Joe C. Morris, Chancellor**

No. W2001-03076-SC-WCM-CV - Mailed November 5, 2002; Filed February 26, 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 employer insists (1) the action is time barred, (2) the evidence preponderates against the trial court's finding that the employee's restrictive lung disease was caused by exposure to silica at work and (3) the award of permanent partial disability based on 65 percent to the body as a whole is excessive. 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 Chancery Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and W. MICHAEL MALOAN, SP. J., joined.

Joseph M. Crout, Memphis, Tennessee, for the appellant, Foamex

Ricky L. Boren, Jackson, Tennessee, for the appellee, Ray Dunnagan

MEMORANDUM OPINION

The employee or claimant, Ray Dunnagan, initiated this civil action on April 5, 2001 to recover workers' compensation benefits for an alleged occupational disease resulting from exposure to chemicals at work. By its answer, the employer denied liability. After a trial on the merits, the trial court resolved the issues in favor of the employee, awarding, among other things, permanent partial disability benefits based on 65 percent to the body as a whole. The employer has appealed.

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).

The employee or claimant, Ray Dunnagan, began working for the employer, Foamex, on March 22, 1965. He served as a compounder during the initial years, mixing various products and chemicals used in the production of foam rubber. He developed breathing problems in approximately 1977 and was referred to Dr. Rodney Fields. Dr. Fields advised him that his breathing problems were caused by exposure to chemicals at work and that his breathing capacity would not improve unless he got away from the chemicals. The employer became concerned about his reduced breathing capacity and began checking his airflow levels every six months.

In 1979, because of the claimant's reduced breathing capacity, the employer transferred him from the compounding job to one in the maintenance department as a maintenance mechanic. He testified that he believed the condition was permanent as early as 1979. However, he continued to work as a maintenance mechanic until his retirement in 2000, less than one year before suit was filed. In 1991, the tests revealed that the claimant had not recovered his lost breathing capacity. He was so advised. The same occurred in 1994. The record clearly reflects that the claimant knew of his chronic restrictive lung disease caused by exposure to chemicals at work for a number of years before he retired and commenced this civil action. On the other hand, the employer never denied that his condition was caused by such exposure until the commencement of this civil action. Yet, he worked continuously for the employer until his retirement at age 62.

At trial, the claimant testified that he took early retirement because of concern about working in the environment at Foamex. He further testified that it was only after retirement that a physician, Dr. Blythe, told him his condition was indeed permanent.

The employer contends the action is barred by the applicable statute of limitations. The right

to compensation for an occupational disease, other than coal miners' pneumoconiosis, is barred unless suit is filed within one year after the beginning of the incapacity for work resulting therefrom. Tenn. Code Ann. § 50-6-306(a). The beginning of incapacity to work occurs when an employee has knowledge, or in the exercise of reasonable caution should have knowledge, that he has an occupational disease and that it has progressed to the point that it injuriously affects his capacity to work to a degree amounting to a compensable injury. Adams v. American Zinc Co., 205 Tenn. 189, 196, 326 S.W.2d 425, 428 (1959). Although Mr. Dunnagan knew that exposure to chemicals at work caused his condition, which he suspected was permanent, we are not persuaded the evidence preponderates against the trial court's finding that he did not know until after he retired that the disease injuriously affected his capacity to work to any degree. The issue is resolved in favor of the appellee.

The employer next contends the trial court erred in accepting the opinion of Dr. Blythe, instead of that of Dr. Jerry H. Berke, as to causation and permanency. Dr. Berke opined that the claimant's condition was neither work related nor permanent. 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). Any reasonable doubt concerning the cause of the injury should be resolved in favor of the employee. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 168 (Tenn. 2002). While both doctors appear to be eminently qualified, Dr. Blythe's testimony is more consistent with the lay testimony found by the trial court to be credible. The issue is thus resolved in favor of the appellee.

Finally, the employer contends the award is excessive. Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. § 50-6-241(b). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Pittman v. Lasco Industries, Inc., 908 S.W.2d 932 (Tenn. 1995).

Mr. Dunnagan is sixty-three years old with experience as a manual laborer. Because of his lung condition, he tires easily and must rest every few minutes after any exertion. Dr. Blythe estimated his permanent medical impairment to be between 18 and 20 percent to the whole person. Under the circumstances, we cannot say the preponderance of the evidence is other than as found by the trial court.

For those reasons, the judgment of the trial court is affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

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ORDER

This case is before the Court upon the motion for review filed by Foamex 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 Foamex, for which execution may issue if necessary.

PER CURIAM

HOLDER, J - NOT PARTICIPATING