

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE AUGUST 1999 SESSION**

FILED January 7, 2000 Cecil Crowson, Jr. Appellate Court Clerk

TOMMIE FAYE BURNETTE,)	HAMILTON CHANCERY
)	
Plaintiff/Appellee)	NO. 03S01-9807-CH-00081
)	E 1998000581-SC-WCM-CV
v.)	HON. VAN OWENS
)	
OLAN MILLS, INC.,)	
)	
Defendant/Appellant)	

For the Appellant:

D. Brett Burrow
Brewer, Krause & Brooks
Suite 2600, The Tower
611 Commerce Street
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For the Appellee:

Martin J. Levitt
Levitt & Levitt
312 Vine Street
Chattanooga, TN 37403

MEMORANDUM OPINION

Members of Panel:

Chief Justice E. Riley Anderson
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED

BYERS, Senior Judge

_____ 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.

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995).

The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. See *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

The plaintiff alleged she suffered from an occupational illness, to wit, reactive airways disease. The trial judge found the plaintiff did not have an industrial illness but that she had asthma, bronchitis and emphysema, which was aggravated by the conditions under which she worked.

The trial judge found the plaintiff had sustained a 60% whole body disability as a result of the aggravation of her pre-existing condition.

The defendant says the evidence does not support the finding and further claims the plaintiff failed to give notice of her injury as required by TENN. CODE ANN. § 50-6-305.

We affirm the judgment of the trial court.

FACTS

The plaintiff at the time of trial was 49 years of age with a tenth-grade high school education and an I.Q. of 100 (50th percentile). She has worked as a cashier, a pharmaceutical assistant, a secretary, and as an artist for the defendant. She has smoked cigarettes for over 30 years—approximately one pack a day—and resides with other smokers. She has a family history of lung problems. She has

been diagnosed with asthma, emphysema and chronic bronchitis; however, she claims to have had no problems with these illnesses prior to her employment with the defendant in 1981. In March of 1995, she claimed to have a work-related injury of reactive airways disease due to chemical exposure.

Testing of the defendant's facilities showed no chemical exposure problems or ventilation system problems. The plaintiff's last day of employment at the defendant's facility was September 5th or 6th of 1995. The plaintiff did not report her alleged occupational disease until October 1995, after having undergone a methacholine challenge test that resulted in a diagnosis of her respiratory problems. The plaintiff's supervisor denies receiving the notice. In December 1995, the plaintiff submitted a long term disability form but did not answer the questions pertaining to work-related injuries and workers' compensation claims.

MEDICAL EVIDENCE

Dr. Pete S. Soleres, a specialist in internal medicine and a pulmonologist who was the plaintiff's physician testified that the plaintiff had a history of asthmatic problems prior to March 1995. Dr. Soleres testified that precipitating factors to her asthmatic problems might be outside the workplace; however, he also stated that the work she performed aggravated her respiratory problems. Dr. Soleres further testified that the plaintiff performed better on tests given after she had been off work for two weeks. He also stated cigarette smoking almost surely increases or worsens emphysema.

Dr. Soleres was unable to determine that chemicals at the plaintiff's workplace caused asthma. He did testify that acetone, which the plaintiff used in her work, could exacerbate asthma.

Dr. Soleres set the plaintiff's impairment rating at 50 percent permanent anatomical impairment to the body as a whole. He also, for medical reasons, advised the plaintiff against returning to her job and against exposure to dust, fumes or sprays. He was of the opinion her work at the defendant's company aggravated the condition.

Dr. James W. Snell, a pulmonologist, conducted independent tests on the plaintiff. Dr. Snell concluded the single most causal factor of the plaintiff's condition was cigarette smoking, followed by sinusitis—she did not meet the medical diagnosis of occupational asthma. He further testified the work environment at the defendant's facility did not exacerbate the underlying problem from a permanent standpoint, but the workplace did aggravate her asthma. Dr. Snell placed the plaintiff's impairment at a 25 percent medical impairment and advised avoidance of exposure to the chemicals in her workplace.

Dr. Myron Mills, a specialist in occupational medicine, examined the plaintiff's medical records and determined the plaintiff's main problem was emphysema due to tobacco smoke. Dr. Mills further testified the chemicals used in the plaintiff's work were organic solvents that do not cause allergic responses such as asthma; however, he did state that breathing any aerosol would aggravate asthma.

VOCATIONAL EXPERTS

Thomas Waymire, an occupational specialist called by the plaintiff, testified the plaintiff was 85 percent vocational impairment as a result of her medical condition.

Patsy Bramlett, a vocational expert called by the defendant testified the plaintiff had a vocational disability of 9 to 12 percent.

There is very little significant dispute among the medical witnesses who testified in this case. All concur in finding the plaintiff's work did not cause the plaintiff's asthma, bronchitis or emphysema. All of them agree that the plaintiff's exposure to chemicals and compounds in her work aggravated her condition.

In *Arnold v. Firestone Tire and Rubber Co.*, the Tennessee Supreme Court held that the plaintiff's underlying condition did not arise out of and in the course of the plaintiff's employment, but the aggravation of the condition by inhalation of various substances at work entitled the plaintiff to recover workers' compensation benefits. 686 S.W.2d 65 (Tenn. 1984).

In *Crossno v. Publix Shirt Factory*, the court held that, although the plaintiff had smoked cigarettes prior to becoming employed with the defendant, the permanent condition of the plaintiff's lungs did not require treatment until two years after being exposed to formaldehyde in the workplace and was therefore a condition arising out of and in the course of the plaintiff's work. 814 S.W.2d 730 (Tenn. 1991).

NOTICE

The trial court found the defendant had actual notice of the plaintiff's condition and the relationship of the condition to her employment.

The plaintiff testified she checked her breathing at work for two weeks and told her supervisor that her doctor thought the spray, chemicals and dust at work might be causing her breathing problems. Further, she testified she told the supervisor she would be off from work for two weeks to test her breathing capacity away from the work area. The plaintiff testified that after the test came back, she told her employer she would have to quit work because the longer worked the sicker she became.

The record contains a letter from Dr. Soleres dated April 24, 1995, to the effect that he was testing the plaintiff for occupational lung disease. This letter was written prior to Dr. Soleres's conclusion on the plaintiff's lung disease and the aggravation thereof by the work.

The witnesses for the defendant generally denied the plaintiff had told them she was suffering from any job-related illness.

The record shows the plaintiff filled out a claim for long term disability on December 1, 1995, and did not indicate that her illness was caused by her employment. Further, the record shows the plaintiff started recognizing symptoms of her illness on June 7, 1995.

Tennessee Code Annotated § 50-6-305

The cost of the appeal is taxed to the defendant.

CONCUR:

E. Riley Anderson, Chief Justice

Roger E. Thayer, Special Judge

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)	NO. 96-0475
PLAINTIFF/APPELLEE,)	
)	HON. VAN OWENS,
v.)	CHANCELLOR
)	
OLAN MILLS, INC.)	S. CT. NO. 03S01-9807-CH-00081
)	
DEFENDANT/APPELLANT.)	AFFIRMED

JUDGMENT

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well taken and should be denied; 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 defendant Olan Mills, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

ANDERSON, J. NOT PARTICIPATING