

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
(October 13, 2004 Session)

**RAYMOND E. PLEMONS v. UNION CARBIDE CORPORATION,
MARTIN MARIETTA ENERGY SYSTEM, INC., and LOCKHEED
MARTIN ENERGY SYSTEM, INC.**

**Direct Appeal from the Chancery Court for Roane County
No. 14087 Frank V. Williams III, Chancellor
Filed February 17, 2005**

No. E2004-01019-WC-R3-CV - Mailed January 14, 200

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court found the employee failed to prove his chronic lung problems were related to his occupational exposure. We affirm.

Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Roane County Chancery Court is affirmed.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and ROGER E. THAYER, SP. J. joined.

April Carroll Meldrum, Jim Terry, Clinton, Tennessee for Appellant Raymond E. Plemons

Robert M. Stivers, Jr., O'Neil, Parker & Williamson, Knoxville, Tennessee for the Appellees Union Carbide Corporation, Martin Marietta Energy System, Inc., and Lockheed Martin Energy System, Inc.

MEMORANDUM OPINION

Facts

Raymond E. Plemons was employed by various contractors of the Department of Energy in Oak Ridge, Tennessee from 1954 until he retired in 1985. On September 28, 2001, Mr. Plemons filed a complaint alleging that throughout his employment he was exposed to various

metals, solvents, radioactive materials, acids, chemicals and other agents, including but not limited to beryllium, and that he had developed chronic obstructive lung disease and beryllium disease. As the only lay witness, Mr. Plemons testified that he worked with uranium, beryllium, lead and nickel from 1954 to 1957 when he was a machinist.

He worked as an inspector from 1957 until 1985 testing dimensions only, and did not use any chemicals or other substances. He was required to clean the parts to inspect them, but he had no idea what kind of cleaner he might have used. Mr. Plemons testified that, during his employment as an inspector, he had the opportunity to breathe beryllium until 1977. In 1977, for reasons not at issue in this cause, his left lung was removed. After that time, he no longer worked with beryllium.

After retirement, Mr. Plemons suffered three collapses of his right lung and his shortness of breath, which had begun after removal of the left lung, worsened. Mr. Plemons testified to a 39-year history of smoking one-half to one pack of cigarettes per day commencing at age 15 and ending in 1977 when his lung was removed.

Dr. Adel Seifeldeen Zurob, pulmonologist, the only other witness, testified by deposition. He treated Mr. Plemons from August 2001 until January 20, 2003. Dr. Zurob testified that his diagnosis was chronic obstructive pulmonary disease, together with pulmonary fibrosis affecting his right lung, likely secondary to his previous occupation. He based the diagnosis on the history of exposure to beryllium, uranium and other substances at work as related by Mr. Plemons. Dr. Zurob found no physical evidence of any exposure to anything during his examination and testing of Mr. Plemons, and had no idea how much of any substance to which he had been exposed. Dr. Zurob testified:

A I think based on all the tests that we have done so far, that his dyspnea (shortness of breath) on exertion is multi factorial. I don't think it's assigned to a thing in particular. I think it's because of a history of smoking. The fact that he is minus one lung. The fact he has worked with these injurious agents and also the fact that he does have some emphysema on the right side. And also his cardiac function is within acceptable range, but it's not totally normal so it's the combination of all these things together that is making him short of breath.

Q Can you, in any way, differentiate between the percentages of the cause?

A No, I don't think that would be a reasonable thing to do, no. . . .

Dr. Zurob also testified:

In answering your question, I have already told you that I have no way of telling you that his disease was related to any of the things he was exposed to. I think, however, based on his history, that it was a contributing factor to his impairment based on his history and all the other things that we have gone through, but I have already told you it

is not the one factor. He has many other things that also are adding to his impairment. (emphasis supplied)

Based on this evidence, the trial court in a letter opinion said:

Except for the removal of the Plaintiff's lung and his history of smoking, I take Dr. Zurob to be saying that she cannot say what other conditions caused his pulmonary problems. She lists a number of possible contributing factors, including, by history, his work with hazardous materials. But she cannot say how, or even if, the work-related hazards caused his pulmonary problems. She seems to be hedging her testimony in such a way as to not cut off the Plaintiff from receiving workers' compensation benefits if he should be entitled to them. But the contradictory and speculative nature of the medical proof is insufficient to create in my mind a conclusion that the Plaintiff's employment with the defendant caused or contributed to his present problems. The doctor's testimony about work-related exposure to harmful material comes across as entirely speculative.¹

Standard of Review

The standard of review in a workers' compensation case 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); *Houser v. BiLo, Inc.*, 36 S.W.3d 68, 70-71 (Tenn. 2001). 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 to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser*, 36 S.W.3d at 71. However, this court is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002).

Questions of law are reviewed *de novo* without a presumption of correctness. *Tucker v. Foamex, LP*, 31 S.W.3d 241, 242 (Tenn. 2000).

Issue

Did the trial court err in finding that the employee's chronic lung condition was not causally related to the employee's history of occupational exposure to injurious agents?

¹ The gender of Dr. Zurob is not apparent from the deposition. Both counsel refer in their briefs to the doctor as "he."

Discussion

This is an occupational disease case and the employee must prove each of the statutory elements of an “occupational disease.” Tenn. Code Ann. § 50-6-301 provides:

50-6-301. Occupational diseases” defined. – As used in the Workers’ Compensation Law, “occupational diseases” means all diseases arising out of and in the course of employment. A disease 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 the 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 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. Diseases of the heart, lung, and hypertension arising out of and in the course of any type of employment shall be deemed to be occupational disease.

In this case, Dr. Zurob clearly fails to testify that Mr. Plemons’ lung disease (a) followed as a natural incident of his exposure occasioned by the nature of the employment or (b) can be traced to the employment as a proximate cause. He definitely states that it could have originated from a hazard to which Mr. Plemons was exposed outside his employment. Mr. Plemons has failed to prove the elements of an occupational disease.

Disposition

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the Appellant, Raymond E. Plemons, and his surety.

Howell N. Peoples, Special Judge

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JUDGMENT

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Raymond E. Plemons, for which execution may issue if necessary.