

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(June 27, 1996 Session)

SIDNEY EUGENE ABBOTT and) SHELBY CIRCUIT
WILLIE BEAN,)
)
Plaintiffs-Appellants,) Hon. Janice Holder,
) Judge.
v.)
) No. 02S01-9510-CV-00097
FIRESTONE TIRE & RUBBER CO.)
and LIBERTY MUTUAL INSURANCE)
COMPANY,)
)
Defendants-Appellees.)

FILED
November 19, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

For Appellants:

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For Appellees:

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MEMORANDUM OPINION

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Billy Joe White, Special Judge

AFFIRMED

Loser, 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this consolidated appeal, the employees or claimants, Abbott and Bean, contend the evidence preponderates against the trial judge's finding that they have not suffered a compensable occupational disease. The panel finds the judgment should be affirmed.

Bean worked for Firestone for 39 years as a janitor, mold cleaner and production worker. Abbott worked for Firestone for 15 years as a maintenance man. Both were exposed to dust and fumes from chemicals used in the manufacturing of tires and other rubber products. Before the plant closed in 1983, both men began to experience difficulty breathing. Both are, or were during their years of work for the employer, heavy smokers. They developed chronic obstructive pulmonary disease (COPD).

The diagnoses were first made in 1989 and 1990, by Dr. Richard Wunderink, a physician board certified in both pulmonary and critical care medicine. The doctor also diagnosed Abbott with asbestosis and asbestos related pleural plaques. In his testimony, Dr. Wunderink opined that the exposure at Firestone contributed to and aggravated the COPD and that the asbestosis and asbestos related pleural plaques were directly related to exposure to asbestos.

The doctor diagnosed Bean as having asbestosis and asbestos related pleural plaques, in addition to COPD. He also opined that Bean's asbestosis and pleural plaques were "caused by his occupational exposure to asbestos." The COPD was aggravated by exposure to dust at work.

Dr. Paul Wheeler, a staff radiologist and chief of the pneumoconiosis section at Johns Hopkins, studied the x-rays of both claimants and opined in his testimony that neither claimant showed evidence of occupational disease related to exposure to asbestos. At the suggestion of Dr. Wheeler, the trial judge ordered CT scans, the results of which were read by separate doctors, one chosen by the claimants and one chosen by the defendants. Both found the claimants lungs to be normal, except that Bean apparently suffered from emphysema.

The trial judge found that the evidence failed to establish the elements necessary for an award of workers' compensation benefits for an occupational disease. 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. section 50-6-225(e)(2). Where the trial judge has seen and heard the witnesses, especially with issues of credibility, where weight to be given oral testimony are

involved, considerable deference must be accorded the trial judge under those circumstances. Townsend v. State, 826 S.W.2d 434 (Tenn. 1992).

Unless admitted by the employer, the employee has the burden of proving, by competent evidence, every essential element of the claim. Mazanec v. Aetna Ins. Co., 491 S.W.2d 616 (Tenn. 1973). Each of these claimants must therefore prove that he suffered an injury by accident arising out of his employment. An occupational disease is, by statute, an injury by accident. Tenn. Code Ann. section 50-6-102.

A disease may be deemed to arise out of employment only if the disease **originated** from a risk connected with the employment and flowed from that source as a natural consequence, among other requirements. Tenn. Code Ann. section 50-6-301. Moreover, it has long been the rule in Tennessee that there can be no recovery for the aggravation of a disease which pre-existed the current employment. Brooks v. Gilman Paint Company, 208 Tenn. 595, 347 S.W.2d 665 (1961); Davis v. Yale & Towne, Inc., 221 Tenn. 18, 423 S.W.2d 862 (1967); American Ins. Co. v. Ison, 519 S.W.2d 778 (Tenn. 1975); Gregg v. J. H. Kellman Co., Inc., 642 S.W.2d 715 (Tenn. 1982).

From a deliberate examination of the record and application of the above precedents, we are unable to find that the evidence preponderates against the findings of the trial judge. The judgment is accordingly affirmed. Costs on appeal are taxed to the plaintiffs-appellants.

Joe C. Loser, Jr., Judge

CONCUR:

Lyle Reid, Associate Justice

Billy Joe White, Judge

Costs on appeal are taxed to the plaintiffs-appellants.

IT IS SO ORDERED this ____ day of _____, 1996.

PER CURIAM

Reid, J. - Not participating.