IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

PEGGY CRAFTON	*}*	*SUMNER CHANCERY*
	}	*No. Below 92C-70*
Plaintiff/Appellant	*}*	
	}	*Hon. Tom E. Gray*
vs.	*}*	*Chancellor*
	}	
	}	*No. 01S01-9709-CH-00199*
CHALLENGER ELECTRICAL MATERIALS, INC. AND CHALLENGER ELECTRICAL EQUIPMENT CORPORATION AND CONTINENTAL INSURANCE COMPANY	*}*	
Defendants/Appellants	*}*	*AFFIRMED*

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 will be paid by Plaintiff/Appellant and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on November 17, 1998.

PER CURIAM

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

FILED

November 17, 1998

Cecil W. Crowson
Appellate Court Clerk

PEGGY CRAFTON,	)	
	)	
Plaintiff/Appellant	)	SUMNER CHANCERY
	)	
v.	)	NO. 01S01-9709-CH-00199
	)	
CHALLENGER ELECTRICAL	)	HON. TOM E. GRAY,
MATERIALS, INC., and	)	CHANCELLOR
CHALLENGER ELECTRICAL	)	
EQUIPMENT CORPORATION and	)	
CONTINENTAL INSURANCE COMPANY)		
Defendants/Appellees		

For the Appellant:

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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Justice William M. Barker
Senior Judge John K. Byers
Special Judge Robert E. Corlew, III

CORLEW, Special Judge

OPINION

This worker's compensation appeal has been referred to the Special Worker's Compensation Appeals Panel of the Supreme Court in accordance with the provisions of *Tennessee Code Annotated §*50-6-225 (e) (3) (1997 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. Our review is *de novo* upon the record accompanied by the presumption of correctness unless the preponderance of the evidence is otherwise. *Tennessee Code Annotated §*50-6-225 (e) (2) (1997 Supp.).

The Plaintiff appeals from the decision of the Trial Court alleging that the Trial Court's determination that the Plaintiff's injuries did not arise out of the course and scope of her employment is not supported by the preponderance of the evidence. We have reviewed the record, *de novo*, and presumed the correctness of the determination made by the Trial Judge only as to those witnesses who testified live. Realizing that the primary evidence on the issues of causation was presented by experts who testified by deposition, we have reviewed that testimony *de novo*, without a presumption of correctness. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). We have concluded that the Trial Court correctly determined the issues, and we therefore affirm the decision below.

The Plaintiff is a forty-two year old who left school in the tenth grade and began working at the age of seventeen. She began working for the Defendant in March, 1991, and ceased her employment some ten months later in January, 1992.

The Plaintiff alleges that she sustained permanent injury to her lungs and vocal cords and loss of cognitive functioning as a result of exposure to toxic chemicals while an employee of the Defendant. The evidence shows that within the work place on some occasions, the following were present: wood dust, wood flour, hydrated lime, hydrated alumina, zinc, sterate, plenco 10919, demkate, demkate premium cleaner, other solvents, hexane, propane, carbon dioxide, chloroform, silicon, toluene, and trichloro-triflourethane. She began smoking cigarettes when she was sixteen years of age, and smoked a pack and a half a day for twenty-two years. She smoked to a lesser extent at the time of the trial, although her husband continued to smoke a pack a day.

Injuries due to occupational diseases are compensable under the provisions of the Worker's Compensation Act. *Tennessee Code Annotated §*50-6-301 (1991). In order for a disease to be compensable, however, the disease must be deemed to arise out of the employment. *Tennessee Code Annotated §*50-6-301 provides six conditions, all of which must be met in order for an occupational disease to be deemed to arise out of the employment:

> (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 diseases.

Id.

Whether these conditions have been met depends upon the findings of the factual issues presented. The burden of proof is upon the Plaintiff to show that an occupational disease arises out of and in the course of employment. *Electro-Voice, Inc. v. Hurley*, 530 S.W.2d 78, 79 (Tenn. 1975) and *Greener v. E.I. Dupont DeNemours & Co.*, 228 S.W.2d 77, 278 (Tenn. 1950). The Plaintiff presented lay testimony showing that the plant in which the worker was employed was dusty and dirty. She also presented proof from the employer's records that the toxic chemicals stated above were present within the work place. The only expert proof presented, however, with regard to exposure to any of these substances in the work place was presented by an industrial hygienist, Frank Vilkofski, Jr., who testified as a defense witness, that despite the presence of a number of chemicals found in air studies conducted during the time when the Plaintiff alleges exposure, no chemicals were present at harmful levels. The burden of proof is upon the Plaintiff to show that an occupational disease arises out of and in the course of employment. Considering all of the evidence presented, it does not appear that the evidence adequately demonstrates exposure occasioned by the nature of the employment, or proximate cause. Thus, the Court finds that the Plaintiff has failed to carry the burden of proof in establishing the first requirement provided by the provisions of *Tennessee Code Annotated §*50-6-301, and that

the evidence does not support the Plaintiff's contention that there was exposure to hazardous dust and chemicals occasioned by the nature of her employment. Having found that these chemicals were not present at hazardous levels, the Court must necessarily find that the remaining provisions of *Tennessee Code Annotated §*50-6-301 likewise have not be satisfied by the proof presented by the Plaintiff.

Further the Court has considered the discrepancies in the expert medical testimony. The Plaintiff presented her witness, Dr. George T. Critz, Sr., who testified that the Plaintiff in fact suffers from lung problems occasioned by exposure to hazards at the work place, while the Defendant's expert, Dr. James D. Snell, Jr., testified that the Plaintiff did not, in fact, so suffer. When two experts testify in apparent contradiction to each other, it is the first duty of the Court to attempt to reconcile those testimonies, but having determined the testimonies of the two doctors to be absolutely in conflict, the Court has the duty to determine which of the testimonies the Court will accept. *Crossno v. Publix Shirt Factory,* 814 S.W.2d 730, 731-732 (Tenn. 1991); *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

The Trial Court considered the testimony of the two medical professionals who testified, and found the testimony of Dr. James D. Snell, Jr., who testified for the Defendant to be more persuasive than that of Dr. George T. Critz, Sr., presented on behalf of the Plaintiff. We agree that the evidence supports the Trial Court's holding. Dr. Snell's curriculum vitae, submitted as an exhibit to his deposition, shows that he was in active practice nearly forty years prior to his testimony in this cause, and that he has a vast amount of post-graduate training and professional experience. He is board certified in the sub-

specialty of pulmonary diseases, and has been so certified since 1974, with training at Vanderbilt University and at the New York Hospital, Cornell Medical Center in New York City. He has also served on the faculty at the Vanderbilt Medical School for more than thirty years, and has published a large number of articles.

Dr. George T. Critz, Sr., testified that he is an allergist and immunologist, who specializes in the study of allergic diseases and their immunological consequences. He completed a residency in pediatric medicine, and immunology, as well as post-graduate training in the study of allergic diseases. He taught at Harvard University in the past, and is currently a clinical professor of pediatrics at Vanderbilt. He is board eligible but not board certified as an allergist, and has no specific training in the area of pulmonology, other than as otherwise stated. Dr. Critz' credentials are certainly very impressive, and Dr. Critz did serve as the treating physician while Dr. Snell saw the Plaintiff only for purposes of evaluation. We affirm the Trial Court's finding that Dr. Snell's testimony is more convincing, however, finding Dr. Snell's qualifications in this area to be superior. Dr. Snell conducted a number of pulmonary function tests which Dr. Critz apparently did not perform, and given his testimony and apparent superior knowledge in the field of pulmonary function, we find his testimony to be more convincing as to the Plaintiff's condition. He testified that, as a pulmonary specialist, one particular area of interest for him is that of occupational lung diseases, and that a "significant fraction" of his medical practice includes treatment of such disorders.

Questions were also raised as to the hazard to which the Plaintiff was

exposed, and whether that hazard was one to which workers would have been equally exposed outside of the work environment. There is proof in the record that the major problem from which the Plaintiff suffers relates to her smoking of cigarettes, and there is no proof in the record that the employment enhanced this hazard. Having considered all of the evidence presented to the Trial Judge, and having considered the ruling made by the Trial Court, we are persuaded that the Trial Judge correctly decided the matters before him, and we too find that the proof presented preponderates in favor of the employer. The evidence preponderates against a finding that the Plaintiff was exposed to chemical hazards in the work place in sufficient quantities to create the problems which she alleges. We specifically hold that the proof preponderates against a finding that problems which the Plaintiff alleges were caused by hazards at the work place. In making this decision, we are mindful of the body of caselaw which recognizes that although the Plaintiff has the burden of proving causation of her problems, the proof should be liberally construed for the worker as to the issue of causation. *Hall v. Auburntown Industries, Inc.*, 684 S.W.2d 614, 617 (Tenn. 1985); *Knox v. Batson*, 399 S.W.2d 765, 772 (Tenn. 1966); *Ward v. Ward*, 378 S.W.2d 754, 757 (Tenn. 1964).

Further the medical proof preponderates against a finding that the Plaintiff has suffered a job-related injury. Although the proof shows that the Plaintiff has in fact suffered a tragic disability, we find that the disability suffered by the Plaintiff is not work-related, and thus not compensable.

We thus find for the Defendant, and we affirm the decision of the Trial Court.

The costs of this appeal are taxed to the Appellant.

Robert E. Corlew, Special Judge

CONCUR:

William M. Barker, Justice

John K. Byers, Senior Judge