

WILLIAM ALLEN JONES v. TRAVELERS CASUALTY & SURETY COMPANY**No. E1999-01548-WC-R3-CV****SUPREME COURT OF TENNESSEE, SPECIAL WORKERS' COMPENSATION
APPEALS PANEL, AT KNOXVILLE***2000 Tenn. LEXIS 600***October 27, 2000, Decided**

NOTICE: DECISION WITHOUT PUBLISHED OPINION. CONSULT THE TENNESSEE SUPREME COURT RULES FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: [*1] Judgment Order of October 27, 2000, Reported at: *2000 Tenn. LEXIS 603*.

PRIOR HISTORY: Direct Appeal from the Chancery Court for Hamilton County. No. 98-0157. W. Frank Brown III, Chancellor.

DISPOSITION: Judgment of the Chancery Court Reversed and case Remanded.

COUNSEL: Harry Weill, of Chattanooga, Tennessee, for the Appellant, William Allen Jones.

Gary A. Cooper, of Chattanooga, Tennessee, for the Appellee, Travelers Casualty & Surety Company.

JUDGES: THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, C. J., and BYERS, SR. J., joined.

OPINIONBY: ROGER E. THAYER

OPINION: 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. The appellant-employee appealed the trial court's ruling that his injury was of a temporary nature and that appellee was only liable for medical expenses to the date of the trial. Appellant argues the only expert medical evidence established his injury was of a permanent nature. Judgment of the trial court is reversed to fix [*2] permanent disability at 20% to the body as a whole and case is remanded to enforce other alternative findings.

Facts

The employee, William Allen Jones, has appealed the trial court's ruling that his injury was of a temporary nature and that defendant insurance carrier was only liable for medical expenses incurred to the date of the trial.

Plaintiff was employed as a millwright during February 1997 upon the premises of W. R. Grace and Company when nitric oxide fumes escaped from the plant and overcame several workers including plaintiff.

Plaintiff testified the fumes were strong enough "to take your breath away" and that he and another worker went outside the building in order to improve their breathing; that he continued to work but became nauseated that night, coughed a lot and felt like he had the flu; upon his return to work on a Monday, he was sent to see the company doctor along with other workers. The company doctor treated him for a period of approximately nine months and then referred him to a specialist. He continued to work for his employer, S. & H. Erectors, Inc., until December 1998 when he found another job in a better work environment where there was no [*3] dust or welding duties.

He testified his condition had improved; that he had stopped smoking but was still short of breath and could not work in an area where there was dust or welding fumes. His mother, Jewel D. Jones, also testified as to his being sick several days after the exposure to the fumes.

Dr. Joel F. Ginsberg, a pulmonologist, testified by deposition and was the only expert medical witness before the court except for the notes of the company doctor which were offered into evidence for the limited purpose of showing or establishing the date of the incident as it had become somewhat disputed whether it occurred on a Friday or a Saturday.

Dr. Ginsberg stated his diagnosis was chronic obstructive pulmonary disease and chronic asthmatic bronchitis by history. He opined the employee had improved during the course of his treatment and that the improvement was from the moderate to mild category. He was of the opinion he had suffered an injury from inhaling the industrial fumes at work and that it aggravated his prior condition. He found that he had an impairment rating of

0 - 25% and fixed it more specifically at 12.5% to the body as a whole. He admitted part of the impairment [*4] rating would likely be due to his history of smoking but he could not separate that impairment from the impairment that resulted due to his exposure to industrial fumes at work. He said he would require treatment in the future and that his work environment should be limited in order to avoid exposure to an irritating environment.

Co-worker, Don Moses, testified he was working with employee Jones when the incident occurred and that he had a hard time breathing; his throat was raw but he did not become sick as employee Jones had indicated. Another employee, Virgil Lewis, was working in the general area of the plant and suffered a headache and had some breathing problems. He said that later he used a part of a bottle of oxygen to help his breathing. From all of the record, it appears that employee Jones was affected more by the fumes than the other workers.

Defense witness Roger Mathews, a health physicist technician for the employer, testified that prior to the incident in question, he had observed plaintiff coughing and wheezing.

In reaching a decision on the issues, the trial court stated he was not convinced from the proof that permanent disability could result from a single industrial [*5] exposure to gas fumes. The court was also of the opinion employee Jones had fully recovered from his temporary injury and cut off any future medical benefits as of the date of the trial.

After judgment was entered, the employee filed a motion to alter or amend the judgment and upon hearing same, the court made an alternative ruling that if the claim was determined to be of a permanent nature, the award of benefits would be fixed at 20% disability to the body as a whole as the employee had made a meaningful return to work; that his compensation benefit rate was \$ 453.14 and certain other provisions for the allowance of fees and costs.

Issues on Appeal

The sole issue on appeal is whether the evidence preponderates against the finding of the trial court that the work-related injury was of a temporary nature.

Standard of Review

The review of the issue on appeal is *de novo* accompanied by a presumption of the correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) [*6]. The general rule is that causation and

permanency of an injury must be shown in most cases by expert medical evidence. *Tindall v. Waring Park Ass'n.*, 725 S.W.2d 935 (Tenn. 1987); *Seay v. Town of Greeneville*, 587 S.W.2d 381 (Tenn. 1979). Although absolute certainty is not required, the medical proof must not be speculative or uncertain with reference to cause or permanency. *Patterson v. Tucker Steel Co.*, 584 S.W.2d 792 (Tenn. 1979).

An employer takes an employee as he finds him or her and is liable under the Workers' Compensation Act for disabilities which are the result of the activation or aggravation of a pre-existing weakness, condition or disease brought about by the occupation. *Arnold v. Firestone Tire & Rubber Co.*, 686 S.W.2d 65 (Tenn. 1984). See also *Crossno v. Publix Shirt Factory*, 814 S.W.2d 730 (Tenn. 1991) where recovery was upheld for aggravation of pre-existing asthmatic bronchitis from work-related exposure to the chemical formaldehyde.

[*7] Generally, where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is usually in a better position to judge credibility and weigh evidence but where evidence is introduced by deposition, the appellate court is in as good a position as the trial court in reviewing and weighing testimony. *Landers v. Fireman's Fund, Inc.*, 775 S.W.2d 355, 356 (Tenn. 1989).

Conclusion

We are of the opinion the evidence preponderates in favor of the finding that the employee sustained a work-related injury of a permanent nature as a result of an aggravation of his pre-existing condition.

This question must be determined by expert medical evidence as a lay person or the trier-of-fact would not have competent knowledge upon which to make this determination. The only expert medical evidence with regard to causation and permanency of the employee's injury was the deposition testimony of Dr. Joel F. Ginsberg, who was a specialist in the practice of medicine and was the author of numerous publications regarding respiratory problems. Our reading of his testimony does not raise any question [*8] in our mind regarding a lack of credibility of his testimony. He was clearly of the opinion that the employee's breathing of industrial fumes caused permanent injury to the employee and defendant insurance carrier did not offer any evidence that would conflict with this conclusion.

In ruling the injury to be of a temporary nature and also that the temporary injury had completely healed, the trial judge was substituting his judgment for that of the

doctor on a question or issue peculiarly within the field of medicine. This the trial court cannot do.

We find the record supports the conclusion of the trial court in his alternative ruling that the employee is entitled to an award of 20% permanent disability to the body as a whole and other findings with regard to workers' compensation benefit rate, fees, etc. and that the case

should be remanded for entry and enforcement of the alternative ruling.

The action of the trial court is reversed and the case is remanded. Costs of the appeal are taxed to defendant insurance carrier.

ROGER E. THAYER, SPECIAL JUDGE