IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MOLLY STOKES,

Appellant,

v.

SCHINDLER ELEVATOR CORP./ BROADSPIRE,

Appellees.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D10-1748

Opinion filed May 9, 2011.

An appeal from an order of the Judge of Compensation Claims.
Ellen H. Lorenzen, Judge.

Date of Accident: April 23, 2007.

Michael J. Winer of the Law Office of Michael J. Winer, P.A., Tampa, for Appellant.

Carlos D. Cabrera of Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A., Hollywood, for Appellees.

PER CURIAM.

In this workers' compensation case, Claimant, the surviving spouse of an injured and now-deceased worker, challenges an order of the Judge of Compensation Claims (JCC) that denies death benefits claimed under section

440.16(1)(a)-(b), Florida Statutes (2006). Claimant argues the JCC erred in admitting and relying upon the opinion of a non-physician toxicologist in determining issues of medical causation, and by concluding that the opinion testimony of two pathologists (medical doctors) was insufficient "as a matter of law" to establish the cause of the worker's death. We agree and reverse.

**Background**

As a result of a compensable accident and injury, Michael Stokes underwent an authorized ankle surgery, after which his surgical incisions did not heal. Notwithstanding the administration of professional wound care and a course of strong antibiotics, Stokes' wounds became swollen, pus-filled, odorous, and inflamed. While under the care of a wound-care nurse, Stokes became febrile, collapsed, and died. An autopsy performed by the county medical examiner revealed visible colonies of coccoid bacteria which had formed in Stokes' heart, causing acute inflammation of the heart tissues, the presence of which was preserved on slides and confirmed by microscopic inspection. A post-mortem examination of Stokes' body, performed by a pathologist, revealed marked redness and swelling around the oozing surgical wounds, but, despite a full autopsy, no other source of infection was located. The medical examiner, having ruled out all other possible causes of death and sources of infection, officially concluded that the cause of Stokes' death was the acute bacterial infection in the heart, caused by

bacterial infection resulting from the ankle surgery. After the cause of death was certified for official purposes, Stokes' body was cremated.

Claimant filed a petition for death and funeral benefits under the Workers' Compensation Law. The employer/carrier (E/C) denied the claim on the basis that Stokes' death was not caused by the ankle infection, and on the additional grounds that Claimant was not substantially dependent on Stokes. The doctor who performed the autopsy (a pathologist), and a pathologist who performed an independent medical examination (IME) on Claimant's behalf (both medical doctors whose opinions were admissible before the JCC), testified that based on their experience, education, and training, and examination of the existing evidence, the cause of Stokes' death, within a reasonable degree of medical certainty, was infectious endocarditis caused by the ankle infection.

The E/C did not introduce medical evidence supporting its theory that Stokes' death was not caused by the ankle infection. Rather, it retained a non-physician toxicologist who testified that Stokes could have died from other causes, and that one could not scientifically determine the cause of death without culturing the ankle wound to match the bacteria in the ankle and the heart, or identifying epidemiologic studies linking ankle wounds to endocarditis – propositions which were soundly refuted by the medical experts, and enjoyed no other support in the record. The JCC although cautioning that she would not consider medical opinions

expressed by the toxicologist -- sustaining Claimant's objection in this regard – denied death benefits "as a matter of law," because no culture was taken of Claimant's ankle wound and because no epidemiological studies were produced establishing a causal relationship between ankle wounds and endocarditis.

**Analysis**

In reaching her conclusion regarding the legal (in)sufficiency of the pathologists' testimony, the JCC of necessity adopted or accepted the toxicologist's opinion on issues of medical causation upon which he was not qualified to testify under the Workers' Compensation Law. See § 440.13(5)(e), Fla. Stat. (2007) (stating no medical opinion other than an authorized treating provider, an IME, or an expert medical advisor is admissible in proceedings before the JCC); see also § 440.09(1), Fla. Stat. (2007) (providing occupational causation must be established to a reasonable degree of medical certainty and demonstrated by medical evidence only). This court has recently held that a JCC may not rely upon the opinion of a Ph.D. toxicologist -- a non-physician -- in determining medical causation under the Workers' Compensation Law. See Witham v. Sheehan Pipeline Constr. Co., 45 So. 3d 105, 108-109 (Fla. 1st DCA 2010) ("Because Dr. Harbison is not a medical doctor, he was not qualified to testify as to the medical cause of Claimant's condition in this particular case."). Here, the essence of the toxicologist's testimony was that, absent a culture from the ankle

wound, one could not be absolutely certain that the bacteria found clumped in Stokes' heart in fact entered through the ankle wound. Nevertheless, Claimant was not charged with the duty of proving beyond any question and to all degrees of certainty that Stokes' fatal infection resulted from the ankle wound, as was seemingly concluded by the JCC; rather, she had the obligation of proving this was so within a *reasonable degree of medical* certainty -- not absolute certainty, or the reasonable degree of certainty exacted by some other unspecified field of science. See § 440.09(1), Fla. Stat. (2005); see generally Castillo v. E.I. Du Pont De Nemours & Co., 854 So. 2d 1264, 1276 (Fla. 2003) (explaining under circumstances where evidence of Benlate exposure was equivocal, plaintiffs did not have to "establish" that Benlate was sprayed; rather, "they need only present the greater weight of the evidence [the applicable burden of persuasion] that it was"). The Workers' Compensation Law requires that occupational causation be established within a *reasonable degree of medical* certainty and by medical evidence only. Accordingly, the JCC erred in relying on the non-physician toxicologist's (non-medical) testimony as to other possible causes of Stokes' death, and by accepting his opinion regarding the protocols, testing, and the degree of certainty used in the medical community to determine the cause of death. Moreover, the JCC's conclusions that the medical experts' opinions were legally infirm because of the lack of epidemiological studies linking endocarditis to ankle

wounds, and her conclusion that no evidence established that the fatal heart infection stemmed from the ankle wound, misapprehends the use of expert opinion testimony in Florida courts. See U.S. Sugar Corp. v. Henson, 823 So. 2d 104, 109 (Fla. 2002) (stating when expert's opinion is based upon generally accepted scientific principles and methodology reasonably relied upon by experts in relevant field of expertise, it is not necessary that expert's deductions based thereon and opinion also be generally accepted as well). Here, the pathologists' expert opinion testimony was *evidence* demonstrating causation, from which the JCC could conclude a sufficient causal relationship, established within a reasonable degree of medical certainty, as required by the Workers' Compensation Law. See § 90.702, Fla. Stat. (providing qualified expert witness may testify in form of opinion); see also § 90.703, Fla. Stat. (providing expert testimony in form of opinion or inference is not objectionable because it includes an ultimate issue to be decided by trier of fact).

Accordingly, we REVERSE and REMAND for the JCC to make those findings of fact necessary to determine Claimant's entitlement, if any, to benefits, without reliance on the opinion testimony of the non-physician toxicologist. We do not address the E/C's ill-suited attempt to reverse the JCC's factual findings regarding Claimant's dependency, because the request for the affirmative relief of reversal by the E/C through its Answer Brief is improper. On remand, however,

the JCC shall make ultimate conclusions and findings regarding Claimant's dependency.

WOLF AND ROWE, JJ., CONCUR; THOMAS, J., CONCURS WITH OPINION.

THOMAS, J., CONCURRING.

I concur in the panel opinion, but write to address a claimant's appropriate burden of persuasion. (Generally, "burden of persuasion" is the better phrase to refer to the standard by which a party must convince the fact finder, as the phrase "burden of proof" includes two burdens: (1) that of moving forward with evidence, and (2) the obligation to establish a requisite degree of belief concerning a fact in the mind of the trier of fact – the latter being the burden of persuasion.)

Claimant contends that the proper burden of persuasion in workers' compensation proceedings is "competent, substantial evidence" and not the elevated "preponderance of the evidence" standard – meaning a claimant need not prove anything to the satisfaction of the JCC, but must only present a prima facie case on causation to prevail. This argument relies on indisputable authority, as the supreme court concluded 50 years ago in Johnson v. Koffee Kettle Restaurant, 125 So. 2d 297, 299 (Fla. 1961):

> [Workers'] compensation is a complete departure from the civil and criminal code; the issues are different and require a different procedure to resolve them. As heretofore stated, in [workers'] compensation, it is essential that claimant prove or show a state of facts from which it may be reasonably inferred that deceased was engaged in his master's business when the accident resulting in his injury took place. If the evidence to establish such a state of facts is competent and substantial and comports with reason or from which it may be reasonably inferred that deceased was engaged in his master's business when he was injured, it is sufficient.

(Emphasis supplied.)

This court, in Schafrath v. Marco Bay Resort Ltd., 608 So. 2d 97, 102 (Fla. 1st DCA 1992), relied on Johnson to reject the idea that 1990 legislative amendments to the workers' compensation statute (which eliminated a statutory presumption that a claim by an employee was covered under chapter 440) altered a claimant's burden of persuasion, and reaffirmed the claimant's lesser burden of persuasion of competent, substantial evidence.

Schafrath, however, incorrectly rejected implicit legislative intent to establish a preponderance of the evidence burden of persuasion in workers' compensation cases. Although the Legislature has not reacted specifically to abrogate either Johnson or Schafrath, this court has clarified those holdings in more recent decisions to, in essence, apply the preponderance standard. See, e.g., Alston v. Etcetera Janitorial Servs., 634 So. 2d 1133, 1134 (Fla. 1st DCA 1994) (holding that "while the broad language in Schafrath and Johnson addressed the burden of proof . . . , the decisions do not compel application of the doctrine merely upon a prima facie evidentiary predicate"). Although I may agree with the actual holding of Alston that the claimant did not demonstrate entitlement to relief on appeal, the rationale there fails, because the "broad language" in Schafrath and Johnson does in fact hold that where a claimant comes forward with evidence that *could support* a finding in a claimant's favor, the JCC could not require more

evidence sufficient to disprove an equally likely "logical cause." This is especially clear in Schafrath.

Notwithstanding this court's decision in Schafrath, it is inescapable that the legislature, by eliminating the presumptions in favor of claimants in effect prior to 1990, and requiring that a claimant prove his or her case "on the merits," intended to require claimants to prove entitlement to relief by a preponderance of the evidence, or a greater weight of the evidence, a standard which represents the lowest burden of persuasion in the law. See Allstate Ins. Co. v. Vanater, 297 So. 2d 293, 295 (Fla. 1974) (describing three basic standards of proof); see also Black's Law Dictionary 196-97 (6th ed. 1990) (defining burden of proof, and stating "burden of establishing" a fact means burden of persuading the trier of fact that existence of the fact is more probable than its non-existence); State v. Edwards, 536 So. 2d 288, 292-93 (Fla. 1988) (explaining that substantial evidence standard is used for preliminary rulings on admissibility of evidence, not for adjudication of ultimate facts); Fla. Std. Jury Instr. (Civ.) 401.3 ("Greater weight of the evidence" means more persuasive and convincing force and effect of entire evidence in case.); Fla. Std. Jury Instr. (Civ.) 601.1 (explaining jury may use reason and common sense to make factual findings and may draw reasonable inferences from the evidence in determining facts); § 90.301(3), Fla. Stat.

(explaining nothing in Florida Evidence Code prevents drawing of appropriate inference).

It should be axiomatic that competent, substantial evidence is a standard of appellate review relating to the legal sufficiency of evidence, and not a standard of proof by which a claimant must persuade the finder of fact.[*] Conceptually, "competent, substantial evidence" is not a burden of persuasion at all, as such would eviscerate the essential role of the JCC as the finder of fact. In other words, if a JCC is required to find facts on less than 50% plus one iota of evidence, this means that superior proof must be rejected.

The majority correctly concludes that discussion of the proper standard of proof in workers' compensation cases is unnecessary to the disposition of the issue presented here, as the JCC incorrectly concluded that Claimant failed to introduce competent or substantial evidence establishing an occupational causation of death, preventing the award of benefits as a matter of law. The best course, however, would be for this court to explicitly hold that Schafrath was in error, and conclude that a claimant's burden of persuasion is by the greater weight of the evidence, in

[*] See Pic N' Save Cent. Fla., Inc. v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 601 So. 2d 245, 249-50 (Fla. 2d DCA 1992); Fla. Dep't of Health & Rehabilitative Servs. v. Career Serv. Comm'n of Dep't of Admin., 289 So. 2d 412, 415 n.2 (Fla. 4th DCA 1974); see also Douglas N. Higgins, Inc. v. Fla. Keys Aqueduct Auth., 565 F.Supp. 126, 129-30 (S.D. Fla. 1983) (recognizing distinction between preponderance of the evidence standard of proof applicable in an administrative hearing and competent, substantial evidence standard of review).

light of the 1990 legislation eliminating any presumption in favor of claimants or employers and requiring that "worker's compensation cases shall be decided on their merits." § 440.015, Fla. Stat. (Supp. 1990).