

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

September 25, 2003 Session

BOBBY L. BLAYLOCK v. DACCO, INC., ET AL.

**Direct Appeal from the Circuit Court for Putnam County
No. 01N0205 John Turnbull, Circuit Court Judge**

**No. M2003-00315-WC-R3-CV - Mailed - December 19, 2003
Filed - January 27, 2004**

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 trial court found that the plaintiff's respiratory conditions did arise out of the scope and course of his employment. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which ADOLPHO BIRCH, J. and ALLEN W. WALLACE, SR. J., joined.

Randolph A. Veazey, Nashville, Tennessee, for the appellants, Dacco Inc., and Zurich Insurance Company

Jon E. Jones, Cookeville, Tennessee, for the appellee, Bobby L. Blaylock

MEMORANDUM OPINION

Review of the findings of fact made by the trial court 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)(25); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

The trial court found that the plaintiff established a direct causal connection between the

conditions under which the plaintiff worked and his respiratory conditions. The defendants/appellants argue that the plaintiff did not show that the plaintiff's respiratory conditions arose out of his scope and course of employment. We agree with the trial court.

Facts

The plaintiff/appellee, Bobby Blaylock, began working at Dacco in 1979, and has not returned to work there since June 2000. Dacco re-manufactures torque converters for use in motor vehicles, and Blaylock's responsibilities there included assembling torque converters, maintenance work, and occasional welding, where he was exposed to some welding smoke. He was also exposed to smoke from other welders in the building. Blaylock has also smoked one to two packs of cigarettes a day for thirty-four years, and now has some respiratory conditions. He never complained of a problem before he left work, but contends now that his conditions arose out of his exposure to the smoke at work.

In the early 1980's, Dacco did not have very good ventilation, and although some improvements were made throughout the years, a major ventilation system was not installed until approximately 1995. In addition, air samples were not taken by OSHA or TOSHA until approximately 1997, and as such, Dacco does not have any air quality records prior to 1997.

Medical Evidence

The medical proof at trial consisted of testimony of three doctors, Dr. David Henson, Dr. John Tumen, and Dr. John McElligott. Drs. Tumen and McElligott testified by deposition, while Dr. Henson testified live. Dr. Henson, a board certified pulmonologist, testified that Blaylock suffers from chronic obstructive pulmonary disease, and that Blaylock's exposure to welding fumes at work, and his prolonged smoking, causally contributed to his respiratory disabilities. Dr. Henson also explained that the two exposures were synergistic, that is, the disability a person suffered from the two was greater than the sum of each exposure individually.

Dr. John Tumen, Blaylock's treating physician testified that Blaylock's twenty-one year exposure to welding fumes at work, as well as his smoking, both contributed to his respiratory impairments. Dr. Tumen testified that Blaylock's exposure to welding fumes on top of his smoking is what caused his chronic obstructive pulmonary disease.

Dr. John McElligott is a board certified internist, and also has a Master's Degree in Occupational Health and Safety. Dr. McElligott relied on a number of sources, including diagrams of the work site that Blaylock worked in, when testifying that Blaylock's respiratory problems were caused solely from Blaylock's cigarette smoking. Dr. McElligott testified that the Dacco facility where Blaylock worked was large enough to accommodate the number of welders and properly ventilate the welding smoke. Dr. McElligott also testified that all of the respiratory conditions from which Blaylock suffers can be caused solely from smoking cigarettes. Dr. McElligott further testified that Drs. Tumen and Henson are incorrect in their assertions that

welding contributed to Blaylock's respiratory problems because they assumed that Blaylock was a full time welder.

Discussion

The trial judge in this case gave more weight to the opinion of Dr. Henson than to that of Dr. McElligott. The trial judge felt that Dr. Henson was better qualified to give the opinions that he made concerning this case, and was impressed with Dr. Henson's live testimony and the credibility of that testimony. Of course, the trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

The trial court was also impressed with the candor of Dr. Henson in telling the court that Blaylock's smoking was the larger factor in Blaylock developing the respiratory problems. However, although the exposure to the welding fumes was the smaller factor, the trial court found that it does "bear a causal relationship and has aggravated the condition and has been a part of the basic cause for it."

The trial judge also gave considerable weight to the testimony of Dr. Tumen, who testified that Blaylock's exposure to the smoke from welding contributed to Blaylock's respiratory problems, and that even if Blaylock did not weld full time and worked four to twenty feet from the other welders, he was still exposed to a significant amount of welding smoke. For the foregoing reasons, the trial judge found that Blaylock's respiratory problems can be "fairly traced to the employment as a proximate cause," and we agree.

Although this Court is able to make its own independent assessment of the medical proof presented by deposition to determine where the preponderance of the evidence lies, *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Firemen's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989), unless there is something inherent in the depositions which undermines their reliability, we do not reach a conclusion different from the trial judge merely because we may do so. Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). Although Drs. Tumen and McElligott testified by deposition only, Dr. Henson testified live as well, and the trial judge gave considerable weight to his testimony over that of Dr. McElligott. We find the evidence does not preponderate against the findings of the trial judge and we affirm the judgment. Costs of the appeal are taxed to the appellants evenly.

JOHN K. BYERS, SENIOR 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 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 the appellants, Dacco, Inc. and Zurich Insurance evenly, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM