FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-3814

CITY OF TITUSVILLE and JOHNS EASTERN COMPANY, INC.,

Appellants,

v.

ROBERT TAYLOR,

Appellee.

On appeal from an order of the Judge of Compensation Claims. Robert L. Dietz, Judge.

Date of Accident: August 3, 2015.

November 27, 2019

M.K. THOMAS, J.

This workers' compensation appeal presents another test of the heightened standard of proof for toxic exposure claims under sections 440.02(1) and 440.09(1), Florida Statutes (2015). The employer/carrier (E/C) does not dispute that Claimant was exposed to *Cryptococcus gattii* (*C. gattii*), which resulted in his diagnosis of fungal meningitis; rather, it argues the JCC erred in excusing Claimant from establishing by clear and convincing evidence, that the exposure was work-related, and providing quantifiable proof of the level of exposure. Because we find Claimant failed to satisfy

his burden of proof regarding occupational causation, the order on appeal is reversed.

I. Facts

In the several years leading up to August 3, 2015, the date of accident used for this exposure claim, Claimant was employed as an Operator II for the Employer, the City of Titusville. Claimant described his job duties to include operating heavy equipment as well as manual tasks that included busting up and replacing sidewalks—using everything from a backhoe to a shovel. To acquire more work hours, Claimant also spent time working for the solid waste and storm water departments.

In April 2015, Claimant and crew were instructed to clear land for the site of a new training facility. Claimant testified this was his first experience working in a wooded environment. The work included cutting down trees, pulling roots, hauling fill dirt, and otherwise preparing the site for installation of a concrete pad. Claimant worked on and off in this environment between April and August 2015. During this time period, he began suffering from headaches. On August 3, Claimant was admitted to the hospital and diagnosed with fungal meningitis.

A petition for benefits was filed asserting that "digging and hauling dirt over a three-month period" resulted in Claimant's fungal meningitis condition. He sought, among other claims, a determination that his illness was compensable. In its response, the E/C denied the claim in its entirety. In pretrial stipulations, the E/C asserted an absence of medical evidence to substantiate that Claimant contracted the fungal meningitis at his place of employment; no causal connection existed between Claimant's condition and his employment; the condition was personal to Claimant; and that Claimant failed to give timely notice of his accident/injury.

Medical Testimony

Dr. Robert Harrison, Claimant's independent medical examiner (IME), is a specialist in occupational and environmental medicine. He testified that he did not personally examine Claimant; rather, he participated in a phone conference with him,

reviewed medical records relating to his treatment, and reviewed the transcript of Claimant's deposition. He agreed that the work Claimant performed in the woods could create an environment in which he inhaled the *C. gattii* spores. According to Dr. Harrison, an individual may become ill from inhalation of only one spore of *C. gattii*. Dr. Harrison questioned Claimant about his activities in his non-working hours. The doctor found no convincing evidence that Claimant may have been exposed to *C. gattii* anywhere other than the workplace.

According to Dr. Harrison, there would have been no purpose in testing the soil at the work site for the presence of *C. gattii* after Claimant was diagnosed because the exposure occurred in the several weeks or several months prior to his diagnosis. By the time of diagnosis, the environmental conditions on the ground were markedly different than the conditions during which Claimant may have been exposed. Dr. Harrison testified that Claimant's "positive blood serum for *C. gattii* and the fact that he had meningitis and . . . other physical manifestations of *C. gattii*, are . . . alone sufficient . . . to reach a medical opinion that [Claimant] was exposed to *C. gattii* at a sufficient level to cause his injuries." Regarding the site of exposure, Dr. Harrison believed the workplace was the "most likely" source. He acknowledged that studies demonstrated numerous means of disbursal of *C. gattii* and that in studies where its presence was related to trees and/or soil, infected individuals had not been cutting trees or disrupting the soil but were walking through an area where *C. gattii* was present. Agreeing that he could not reach this conclusion with 100% certainty, it was nevertheless Dr. Harrison's opinion, within a reasonable degree of medical certainty, that Claimant's workplace was the site of the exposure resulting in infection. He acknowledged that "it is theoretically possible that [Claimant] inhaled *C. gattii* somewhere else outside of work." However, he based his opinion of workplace exposure on the most likely source.

Dr. Carmelo Licitra, the E/C's IME, is board certified in internal medicine and infectious diseases. He testified that *C. gattii* is not a ubiquitous fungus and is not endemic to this geographical area. *C. gattii* is usually found in wooded areas in tropical or sub-tropical regions. His investigation and research revealed a wide range of possibilities regarding the incubation

period for *C. gattii*, from two months to years. However, an individual can inhale a spore or spores and be unaffected for long periods until suffering a compromise of the immune system. He noted that although testing could have been performed on the area in which Claimant worked, no testing was performed. He could not reach a conclusion within a reasonable degree of medical certainty as to where Claimant was most likely exposed to *C. gattii*. Dr. Licitra explained there were too many unknowns, and the literature did not provide additional insight. He emphasized that Florida has no track record of patients acquiring this *C. gattii* infection, noting there was only one known case previously reported in Florida. According to Dr. Licitra, there was no clear and convincing evidence to prove Claimant was exposed to *C. gattii* while at work.

Merits Hearing and Final Order

At hearing, the parties introduced the depositions of the medical experts and Claimant. The only live witness was the risk manager for the E/C. Claimant argued that clear and convincing evidence had been introduced of his exposure to *C. gattii* while working for the Employer, and there was no evidence of any other identifiable rational or reasonable sources of exposure to this rare fungus outside of work. Furthermore, he argued that the clear and convincing evidence standard does not require 100% certainty, that it can be met by evidence that is wholly circumstantial, and that he otherwise satisfied the required burden. Claimant asserted that it is undisputed that he was exposed to *C. gattii* spores which resulted in fungal meningitis and that *C. gattii* spores are found in soils and up to fifty different species of trees, including oak. Finally, Claimant argued there was no additional evidence he could reasonably be expected to acquire that could provide additional proof.

The E/C argued that Dr. Harrison's testimony that Claimant "likely acquired" the exposure at the workplace did not constitute clear and convincing evidence sufficient to satisfy Claimant's burden of proof under section 440.02(1). Specifically, Claimant failed to introduce clear and convincing evidence of the presence of *C. gattii* fungus at the work site and the level to which he was exposed.

In the final order, the JCC concluded that Claimant met his burden of proof under section 440.02(1). He found persuasive that fungal meningitis results from inhaling the *C. gattii* fungus found in soil, trees, and decomposing wood, after the spores are disturbed and become airborne. The JCC acknowledged, "It cannot be determined exactly when or where [Claimant] inhaled the fungus, the amount he inhaled, or whether such inhalation was on one or more occasions."

Regarding the Claimant's burden to prove workplace exposure, the JCC considered the following circumstantial evidence: Claimant's daily work activities over the six months prior to his medical diagnosis placed him in the very environment where he may potentially be exposed to the *C. gatti* fungus; there was no evidence that Claimant was in this type of environment other than performing work duties; Claimant's non-work activities did not include gardening or lawn work; and Claimant's only outdoor non-work activity was fishing on a bridge or dock, and no evidence was admitted that water is a potential pathway for exposure to *C. gattii*. The JCC noted that Dr. Harrison's opinion that the exposure occurred in the workplace was based on his inability to identify any non-work-related risk. He also found persuasive the testimony of Dr. Licitra that digging in soil, operating a chain saw while cutting down trees, and pulling up roots was an ideal environment for exposure to *C. gattii* spores.

Regarding the presence of the specific fungus at the workplace, the JCC detailed:

> [T]he statutory language does not provide direction as to how exposure to mold in a specific outdoor environment is to be measured when by definition the mold to which the Claimant inhaled may not be present in the environment moments after the exposure, let alone months later for the purposes of the litigation process in order to determine whether it meets a legislatively defined standard.

Noting that the experts could not specify the level of Claimant's actual exposure, the JCC determined that a quantifiable measurement was immaterial because both experts were unequivocal that inhalation of any level of *C. gattii,* even one spore,

could result in fungal meningitis. The JCC found testing for presence and proof of quantitative levels of the fungus to be pointless. He reasoned that once the nature of the environment has changed, there is no opportunity to perform testing to determine if the fungus is in the specific environment where an employee worked and to what degree.

II. Legal Analysis

To the extent resolution of this issue requires statutory interpretation, review is de novo. *See Bellsouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 1st DCA 2003). A JCC's finding of clear and convincing evidence will be affirmed if supported by competent substantial evidence (CSE). *See McKesson Drug Co. v. Williams*, 706 So. 2d 352, 354 (Fla. 1st DCA 1998).

In 2003, the Legislature specifically amended the definition of "accident" to create a rebuttable presumption that injuries caused by exposure to a toxic substance are not compensable unless "there is clear and convincing evidence establishing that exposure to the specific substance involved, at the levels to which the employee was exposed, can cause the injury or disease sustained by the employee." *See* § 440.02(1), Fla. Stat. Occupational causation must also be proven by clear and convincing evidence. *See* § 440.09(1), Fla. Stat. "Clear and convincing evidence" has been defined as an "intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." *In re Davey,* 645 So. 2d 398, 404 (Fla.1994).

This Court has recently analyzed the burden of proof required of a compensable workplace toxic exposure. *See Sch. Dist. of Indian River Cty. v. Cruce*, No. 1D17-3342, (Fla. 1st DCA Nov. 27, 2019). Section 440.02(1) does not provide an exception for toxic substances that are ubiquitous, rare, or for those capable of causing injury or disease as a result of minimal exposure. To the contrary, the statute emphasizes that "toxic substance" includes, but is not limited to, "fungus or mold."

According to the JCC, the lack of testing in this case "should not be held against" the Claimant without consideration of other evidence to determine if the requirements of section 440.02(1) can be met. He ultimately determined:

> While the expert testimony in the instant matter indicates there is no means or manner sufficient to establish exactly when, where or how often Claimant was exposed, I find Claimant has presented clear and convincing evidence as required by Section 440.09(1), Fla. Stat. (2014) of a single dose exposure at work sufficient to satisfy the burden of proof in such regard.

The JCC erroneously applied the alternative theory of prolonged exposure under *Festa v. Telefex, Inc.*, 382 So. 2d 122, 123 (Fla. 1st DCA 1980), to determine if Claimant provided sufficient proof of workplace causation. *See Cruce*, No. 1D17-3342; *Altman Contractors v. Gibson*, 63 So. 3d 802, 803 (Fla. 1st DCA 2011) (holding that the *Festa* causation test cannot substitute for the more exacting standard imposed by section 440.02(1)).

The JCC attempted to distinguish this Court's opinion in *Gibson* by emphasizing the mold in that case was quantifiable, and because some levels of the mold were not necessarily toxic, it was paramount to determine the levels present. Here, because only one spore of *C. gatti* was sufficient to cause Claimant's infection, the JCC excused the lack of evidence regarding specific levels and shifted the burden of proof to the E/C. As in *Cruce*, this was error. It is the employee's burden to establish the existence of a causal connection between the employment and the alleged injuries. *See Cruce*, 1D17-3342; *Matrix Emp. Leasing v. Pierce*, 985 So. 2d 631, 634 (Fla. 1st DCA 2008) (citing *Wausau Ins. Co. v. Tillman*, 765 So. 2d 123, 124 (Fla 1st DCA 2000)). Proof of causation is wholly the employees and the employer/carrier is under no obligation to produce evidence to disprove the claim. *Id.* (citing *Tillman*,765 at 124).

This Court has previously recognized that the requirements of section 440.02(1) cannot be satisfied with evidence that only minimal exposure to a toxic substance can cause harm and that it is possible the toxic substance was present on the work site. *See Cruce*, No. 1D17-3342; *Crown Diversified Indus. Corp. v.*

Prendiville, 263 So. 3d 103, 106 (Fla. 1st DCA 2018); *Gibson*, 63 So. 3d at 802. To hold otherwise, would be to ignore the heightened causation standard implemented by the Legislature and that the burden of proof would be met in every case in which evidence showed the employee is sick and exposure was possible. Here, Dr. Harrison's testimony that Claimant "most likely" acquired the fungus in the course and scope of employment, without more, was not sufficient to satisfy the heightened evidentiary standard of 440.09(1).

This case addresses a non-ubiquitous fungus which is extremely rare to Florida and which thrives in a certain environment. Medical testing confirms Claimant was infected with the *C. gattii* fungus and diagnosed with fungal meningitis. This infection can result from inhalation of only one *C. gattii* spore. This undisputed medical evidence satisfies requirements of section 440.02(1) regarding confirmation that the exposure to the specific substance (*C. gattii*), at levels to which the Claimant was exposed (single spore or more), can cause the injury or disease sustained (fungal meningitis). Accordingly, the only remaining factual issue for the JCC to resolve was whether Claimant satisfied his burden of proof regarding occupational causation. The JCC determined that expert testimony that Claimant "most likely" acquired the fungus in the course of his employment was sufficient to satisfy the heightened evidentiary standard in this case. We cannot agree. Pursuant to the unambiguous language of sections 440.02(1) and 440.09(1) and controlling precedent of this Court, the award of compensability must be reversed. *See Gibson*, 63 So. 3d 802. CSE does not exist to support the JCC's determination that Claimant introduced clear and convincing evidence of occupational causation.

III. Conclusion

The Legislature amended Chapter 440.02(1) to establish a rebuttable presumption that injuries caused by exposure to a toxic substance are not an injury by accident arising out of employment unless certain criteria are met by clear and convincing evidence. The proof required may entail both quantitative and quantifiable standards.

This Court has and continues to recognize that workers' compensation is a statutory matter and the Legislature has broad discretion in crafting the parameters of benefits due. In reaching this decision, we readily acknowledge the Herculean task created by the heightened burden of proof for toxic exposure claims. However, in deference to the Legislature we will not craft, in derogation of the plain text of sections 440.02(1) and 440.09(1), a lesser burden of proof. The order on appeal is REVERSED.

RAY, C.J., concurs in result only; WOLF, J., concurs in result only with written opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WOLF, J., concurring.

I am constrained to concur because of this court's interpretation of section 440.02(1), Florida Statutes, in *Altman Contractors v. Gibson*, 63 So. 3d 802 (Fla. 1st DCA 2011). This case and *Gibson* reject the use of overwhelming circumstantial evidence to prove the statutory requirements of clear and convincing evidence in toxic exposure cases. Direct proof of the level of exposure to the toxic substance is simply not available in a great number of toxic exposure cases.[*]

I am, therefore, not convinced that workers' compensation is a viable alternative to the tort system for workers that are injured

[*] For instance, not being aware of an injury until the incubation period for the disease has culminated which delay causes many exposure sites to have been altered either naturally or by construction activities thereby making direct proof unobtainable.

by toxic exposure at the work place. Either the court system or the Legislature must deal with this problem.

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