IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 22, 2017 Session

SHEILA HOLBERT v. JBM INCORPORATED, ET AL.

Appeal from the Chancery Court for Knox County
No. 188830-3 Michael W. Moyers, Chancellor

No. E2017-00324-SC-R3-WC

Sheila Holbert filed this action seeking workers' compensation benefits for the death of her husband, Dennis Holbert ("Decedent"). Ms. Holbert alleged Decedent died as a result of an inhalational exposure to dust in the course of his job for JBM, Incorporated ("Employer"). After hearing the evidence, the trial court ruled Ms. Holbert had sustained her burden of proof as to causation. It awarded death benefits and ordered Employer to pay Decedent's medical expenses into the registry of the court. It further ruled medical expenses were governed by the Tennessee workers' compensation schedule. Employer appeals, claiming the trial court erred in finding work-related causation and in ordering medical expenses to be paid into the treasury of the court. Ms. Holbert challenges application of the Tennessee medical payment schedule. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment in part, reverse in part, vacate in part, and remand the case to the trial court.

Tenn. Code Ann. § 50-6-225(a) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Chancery Court Affirmed in Part; Reversed in Part; Vacated in Part; and Remanded

DON R. ASH, SR.J., delivered the opinion of the court, in which SHARON G. LEE, J., and THOMAS R. FRIERSON, II, J., joined.

Jeffrey M. Cranford, Morristown, Tennessee, for the appellants, JBM, Incorporated, and Praetorian Insurance Company.

Frank Q. Vettori and Gary M. Prince, Knoxville, Tennessee, for the appellee, Sheila Holbert.

OPINION

Factual and Procedural Background

JBM, Incorporated ("Employer") manufactures and installs steel structures throughout the United States. Dennis Holbert ("Decedent") worked for Employer as a mechanic, which, among other things, required him to "lay[] out the steel, cut[] the steel and fit[] the steel up."

On or about August 12, 2012, Employer sent Decedent to Stockertown, Pennsylvania, to act as project foreman during the installation of a synthetic gypsum system at a cement plant. Decedent shared a motel room with co-worker Enos McLain. At trial, Mr. McLain described the progression of Decedent's illness. He explained, after leaving a casino on August 20 or 21, Decedent became "chilly" and sat in the truck while the other crew members dined at a restaurant. According to Mr. McLain, Decedent "got sicker as the time went on," sometimes requiring Decedent to return to the motel after driving the crew members to the job site.

On August 27, 2012, Decedent presented to a Pennsylvania walk-in clinic with a chief complaint of cough—"onset 3 days, since 8/23 and worsening"—congestion, postnasal drip, headache, fatigue and chills. He "denied nausea, vomiting, diarrhea and abdominal pain. On physical examination, the chest and lungs were noted to be normal. Abdomen exam was also noted to be normal." Decedent was diagnosed with sinusitis and prescribed antibiotics. According to his crewmates, Decedent did not improve after the clinic visit.

On August 30, 2012, Decedent laid on a bench at the job site until approximately 2:30 p.m., when he finally allowed Mr. McLain to transport him to the hospital. Deborah Stahlnecker, D.O., examined Decedent on August 30. She found him "hypoxemic" in "significant respiratory distress," ultimately requiring intubation.

The following day, Jeffrey Jahre, M.D., examined Decedent, finding him in "extremely critical condition." On August 31, Decedent was in a coma on life support and thus unable to provide any medical history to Dr. Jahre. Dr. Jahre presumptively diagnosed Decedent with bilateral pneumonia and septic shock.

At some point, Decedent was transferred from the initial, outlying hospital to a main hospital in Bethlehem, Pennsylvania. During transfer, he suffered a cardiac arrest.

Decedent briefly emerged from the coma on October 10 but died on October 12, 2012. The Final Autopsy Report listed two immediate causes of death: "[a]cute gastric hemorrhage" of a gastric ulcer and "[d]isseminated systemic Aspergillosis"—a fungal infection, typically found in patients with suppressed immune systems or lung diseases.

At trial, three physicians testified by deposition concerning the conditions that led to Decedent's death. Deborah Stahlnecker, D.O., a physician board-certified in internal medicine, pulmonary medicine, and critical care, examined Decedent a single time on August 30. However, she remained aware of Decedent's situation through critical case conferences with other members of her practice. On August 30, Decedent relayed to Dr. Stahlnecker a history of high blood pressure and high cholesterol. He indicated he was in the area for work, but due to his "degree of respiratory distress," was "[un]able to give . . . a detailed history of what he had been exposed to." Dr. Stahlnecker performed a bronchoscopy and lavage, which yielded "negative" cultures. She conceded, though, antibiotic use can produce a false negative.

Dr. Stahlnecker was questioned regarding the autopsy report. She acknowledged sufficiently-advanced widespread aspergillosis can be fatal; however, she stated "it didn't cause his lung problem." Additionally, she opined the finding of bacterial infection at autopsy was likely the result of Decedent's hospitalization and not "the inciting event," explaining "we commonly see patients get secondary, whether it's infections, complications or organ failure."

She further testified sudden toxic exposure does "not always immediate[ly]" cause a health response. Instead, she explained, "it can progress over a period of hours to days." She also explained no test exists to identify specific particles to which someone has been exposed. Instead, inhalation injuries require ruling out other causes "such as infection, bleeding in the lung." She opined, "[b]ecause we

didn't identify any pathogens, infectious pathogens, it is reasonable to attribute the cause of [Decedent's] pulmonary process to his environmental exposures that he encountered while he was working here locally." When asked whether she could state with a reasonable degree of medical certainty Decedent's work exposure led to his death, Dr. Stahlnecker responded, "I believe it like -- more likely did."

Jeffrey Jahre, M.D., an infectious disease specialist, first saw Decedent on August 31, 2012, and continued to treat him until two days before his death. Dr. Jahre described his contact with Decedent as "pretty intensive," stating he "wouldn't be surprised if [he] saw him virtually almost every . . . day." Like Dr. Stahlnecker, Dr. Jahre opined Decedent's illness and death were precipitated by occupational inhalation. He stated Decedent "had a number of different bronchoscopies," as well as "other studies to look for viruses," but he was "unable to come up with any positives that would indicate . . . he had a definite infectious etiology." In finding occupational causation, Dr. Jahre cited Decedent's October 10, 2012 statement to him indicating he "has been breathing in g[r]out and epoxy type substances at his work prior to the onset of symptoms."

Dr. Jahre suggested autopsy findings such as aspergillosis and abdominal infection had resulted from Decedent's treatment for the underlying serious pulmonary issue. Dr. Jahre opined, had Decedent been suffering from an infectious disease, he would "have had a much more robust rapid response to the . . . anti-infective[]" medications administered. He acknowledged Decedent was diagnosed with gall bladder inflammation shortly after entering the hospital, but he stated Decedent's "main problem, though, was not his gallbladder." Instead, the inflammation could be attributed to lack of eating and Decedent's "fulminant[] ill[ness]."

Dr. Jahre also stated an inflammatory reaction in the lungs could result without a massive inhalation. He explained, "[i]t just has to be something that triggers off an inflammatory response in you. And that can . . . lower your resistance to the point where then you become susceptible to other things . . . ." He acknowledged he could not identify the exact components of the grout or epoxy allegedly inhaled, but he insisted Decedent's "main problem that brought him in was pulmonary; and that he works in a job where he had pulmonary exposure. You would have to be almost imbecilic not to think that that had no relationship to . . . his illness . . . and course."

Paul David Banick, M.D., a physician board-certified in internal medicine, pulmonary diseases, and critical care medicine, reviewed Decedent's medical records at the request of Employer. He characterized the case as "very complex" but opined "the most likely triggering event was an intra-abdominal process," which then affected other organ systems, leading to "kidney failure, respiratory failure, [and] cardiac arrest." Dr. Banick noted Decedent's chest and lungs were "normal" during his August 27 visit to the walk-in clinic. Three days later, at the emergency room, he presented with, among other things, abdominal pain, "a very high white blood count," and potentially "Dohle bodies to suggest an infection." He stated negative cultures could not rule out infection because the test results could be skewed by Decedent's antibiotic use. Likewise, he explained, viral infections might not be identified unless a laboratory was expressly instructed to test for such.

Dr. Banick further described the different types of inhalational exposures: high-level exposures such as smoke inhalation, which could have acute effects; and low-level exposures, which could have delayed effects, such as silicosis or asbestosis. He characterized Employee's symptoms on August 30 as more consistent with an acute, high-level exposure. However, he pointed out the autopsy report showed no evidence of inhalational injury. Likewise, he stated there was no history of a large-volume inhalational exposure to explain Employee's condition.

Decedent's widow, Ms. Holbert, and his two adult children living at home each testified Decedent had no cough or other observable sinus problems during the weeks before he left for Pennsylvania. Decedent visited his primary care physician for an annual physical on July 23, 2012; Decedent reported no fever, cough, dyspnea, chest pain, nausea, vomiting or abdominal pain.

Mike Lane, a structural designer for Employer, testified, approximately one month prior to leaving for Pennsylvania, Decedent "seemed to be a little under the weather, kind of had a nagging cough. . . . like allergies."

Mr. Lane was questioned regarding two photographs of the Pennsylvania project: a photo Decedent sent to him on August 20, 2012, and a second photo Mr. Lane took on September 2, 2012. The August 20 photo depicts posts bolted to the concrete floor; Mr. Lane explained the installation process. First, holes are drilled into the floor and the posts bolted into place. Next, a grout mixture is poured into a form underneath the post. After the mixture cures for two days, the forms are

removed and the excess grout is removed with hammers, chisels or grinders. Mr. Lane testified the grouting material used on the Pennsylvania project is the same product used by Employer since at least 2008. The September 2 photo depicts installed grout pads. Mr. Lane testified, as of September 2, the project was approximately 50% complete.

Mac Stiles, co-owner of Employer, testified Decedent "seemed to be under the weather" with "generally sinus related" issues before he left for Pennsylvania. Mr. Stiles offered to replace Decedent on the Pennsylvania trip, but Decedent "responded that he was fine and he would be okay to go on the trip."

Enos McLain, Decedent's roommate in Pennsylvania, testified he noticed Decedent occasionally coughing and sneezing during the trip. However, his condition worsened after the casino visit on August 20 or 21. According to Mr. McLain, concrete drilling and steel and paint grinding occurred before Decedent's hospitalization. When questioned regarding dust exposure, Mr. McLain responded, "Well, it was a cement plant, you know, it was dusty at times almost, it was nothing unusual."

Skaljic Sukrija, a welder on Decedent's Pennsylvania crew, testified. He first noticed Decedent's symptoms after visiting the casino and thereafter, according to Mr. Sukrija, "[d]ay by day, [Decedent] looked [] more sick every day." He testified the cement plant—located approximately seventy yards from the job site—was operating while the crew worked to install the synthetic gypsum system. Mr. Sukrija did not observe Decedent "blasted or his mouth [] filled with dust or anything from the construction site." In fact, he agreed Decedent "was already sick and off the job" before concrete drilling began.

Following trial, the court announced its decision from the bench. It found Ms. Holbert had proven Decedent's death was causally related to his employment; it awarded workers' compensation death benefits and directed Employer to pay Decedent's medical expenses. The final judgment ordered Employer, using Tennessee's statutory schedule, to calculate the medical expenses owed and to deposit such amount in the registry of the court where medical providers could seek payment. It further awarded Ms. Holbert's attorneys 20% of the common fund with $64,480 to be subtracted from the bi-weekly payment to Ms. Holbert.

Employer appeals, contending the evidence preponderates against the trial court's finding of causation and claiming the trial court erred in ordering medical

expenses deposited into the registry of the court. Ms. Holbert argues the trial court erred in utilizing the Tennessee medical payment schedule when Decedent's illness and death occurred in Pennsylvania.

Analysis

In workers' compensation cases, issues of fact are reviewed de novo upon the record with a presumption of correctness unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225 (e)(2) (2008 and Supp. 2012) (now codified as Tenn. Code Ann. § 50-6-225(a)(2)). When the trial court had the opportunity to observe and hear witness testimony first-hand, its rulings regarding credibility and weight to be given to testimony are afforded considerable deference. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008) (citing Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002)). When the issues involve expert medical testimony in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and a reviewing court may draw its own conclusions regarding those issues. Id. (citing Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006)). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009) (citing Goodman v. HBD Indus., Inc., 208 S.W.3d 373, 376 (Tenn. 2006); Layman v. Vanguard Contractors, Inc., 183 S.W.3d 310, 314 (Tenn. 2006)).

Causation

Under Tennessee's workers' compensation law, employers shall compensate employees "for personal injury or death by accident arising out of and in the course of employment." Tenn. Code Ann. § 50-6-103(a) (2008 & Supp. 2013). An employee seeking to recover workers' compensation benefits bears the burden of proof. Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008) (citing Tenn. Code Ann. 50-6-102(12) (2008)). "An injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." Id. (citing Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005)). Expert medical evidence is required "[e]xcept in the most obvious cases." Id. (citing Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 354 (Tenn. 2006)). Proof of the causal connection may not be speculative, conjectural, or uncertain. Clark v. Nashville Mach. Elevator Co., Inc., 129 S.W.3d 42, 47 (Tenn. 2004); Simpson v.

H.D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990); Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). Absolute certainty with respect to causation is not required, however, and "'reasonable doubt must be resolved in favor of the employee.'"[1] Trosper, 273 S.W.3d at 604 (quoting Glisson, 185 S.W.3d at 354). "'[B]enefits may be properly awarded to an employee who presents medical evidence showing . . . the employment could or might have been the cause of his or her injury when lay testimony reasonably suggests causation.'" Id. (quoting Glisson, 185 S.W.3d at 354). "The causal connection may be established by expert opinion combined with lay testimony." White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992) (citation omitted).

The testimonies of Drs. Stahlnecker, Jahre and Banick and the medical records upon which they relied, as well as the lay testimony, guide our analysis. As the trial court observed, a dispute exists concerning the presence of any symptoms prior to Decedent's departure for Pennsylvania on August 12, 2012. According to his primary care physician's record, Decedent had no sinus or lung problems as of July 23, 2012. Decedent's family members and a co-worker testified Decedent exhibited no signs of any illness prior to traveling to Pennsylvania. However, two witnesses described Decedent as experiencing allergy or sinus-related symptoms prior to the trip.

Upon arrival in Pennsylvania, Decedent's co-workers described occasional sneezing or coughing, but he did not display signs of serious illness until August 20 or 21. By August 30, Decedent, completely unable to work, presented to the hospital in critical condition. He was placed on life support and largely remained in a coma until his death on October 12, 2012.

An autopsy found no evidence of chronic lung disease; all medical witnesses agreed to such finding. Citing the testimonies of Drs. Stahlnecker and Jahre, Ms. Holbert contends Decedent's medical decline was triggered by an acute inhalational exposure in the workplace. As outlined above, Dr. Stahlnecker opined Decedent had sustained a "toxic inhalational exposure," although she could not specifically identify the substances to which Decedent had been exposed.

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[1] Because the injury and death in this matter occurred prior to July 1, 2014, we are required to construe the workers' compensation law liberally in favor of an injured employee. Tenn. Code Ann. § 50-6-116 (2008 & Supp. 2013) (applicable to injuries occurring prior to July 1, 2014); Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (citing Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991)).

Relying, at least in part, on Decedent's statement to him indicating workplace exposure, Dr. Jahre similarly opined Decedent's illness was triggered by occupational inhalation. Like Dr. Stahlnecker, Dr. Jahre could not specifically identify the inhaled substances, but he explained a reaction can occur without a massive inhalation. Instead, exposure to any substance which causes an inflammatory response can lower resistance and snowball into a fulminant illness.

As stated above, on October 10, 2012, during a brief awakening from his coma, Decedent stated he had "been breathing in g[r]out and epoxy type substances at his work." Although it appears no one witnessed the alleged incident, Decedent's co-workers confirmed Decedent was likely exposed to "epoxy," "grout," and/or concrete dust while working in Pennsylvania. However, no evidence was presented regarding the specific ingredients or potential toxicity of such substances, and the same grout had been used by Employer several years, ostensibly without incident.

Dr. Banick did not treat Decedent; his opinions were based solely on his review of Decedent's medical record. Dr. Banick stated Decedent's condition was consistent with a high-volume acute exposure to a toxic substance. However, because the autopsy revealed no lung damage, he considered a bacterial infection a more likely trigger. Noting Decedent presented on August 30 with a swollen abdomen and stomach tenderness, he concluded the "most likely . . . triggering event was an intra-abdominal process." According to Dr. Banick, negative cultures could not rule out infection, as Decedent's use of antibiotics in the days preceding August 30 could complicate subsequent testing. In sum, Dr. Banick found nothing in Decedent's medical record to connect his illness and ultimate death to an occupational exposure.

As evidenced above, this case involves conflicting testimony—both lay and expert. Decedent was described by some co-workers as experiencing mild sinus symptoms one month prior to traveling to Pennsylvania and, conversely, by other co-workers and family members as exhibiting no symptoms prior to August 20. Crew members disagreed as to whether Decedent remained present at the Pennsylvania job site during drilling.

Likewise, the expert witness opinions diverged. Confronted with limited information regarding exposure, Drs. Stahlnecker and Jahre, noting Decedent's inhalation report and negative infectious disease cultures, opined Decedent had suffered an acute inhalational exposure to an unknown toxic or inflammatory

substance. However, finding no lung damage at autopsy, Dr. Banick opined no harmful inhalation had occurred and suggested Decedent's illness and death resulted from infection.

In its oral findings, the court carefully outlined the sometimes conflicting evidence presented. The court found Decedent's work environment "could reasonably have included concrete dust, gypsum or at least pseudo-gypsum," and it took "into account the report from [Decedent's] family physician who found that he had no symptomology a month before [the Pennsylvania] trip around the time that his fellow employees state . . . he was showing signs of sickness." It expressed doubt regarding Dr. Banick's causation testimony observing he, unlike Drs. Jahre and Stahlnecker, did not treat Decedent and merely reviewed his medical record. It further highlighted Dr. Jahre's testimony indicating if Decedent suffered from infection, his body should have responded to the broad, anti-infective medications given. Ultimately, the trial court looked to the then-in-effect statutory directive to liberally construe the workers' compensation law, Tennessee Code Annotated 50-6-116 (2008 & Supp. 2013), and the judicial directive to resolve reasonable doubts in favor of the employee. Crew, 259 S.W.3d at 665. Although the court found "no direct evidence of a single event that lead to the symptoms that [Decedent] suffered," it concluded, nonetheless, Decedent's "death was caused by workplace inhalation of some chemical that caused an allergic reaction that lead to the spiraling effect that lead to his death."

In its brief, Employer contends the trial court should have credited the testimony of board-certified pulmonologist Dr. Banick, who they claim is more experienced in diagnosing and treating occupational exposures and who performed a more complete review of the medical records. Employer claims the opinions of Drs. Jahre and Stahlnecker are speculative because there exists no proof of an exposure event or lung injury and because the opinions were formed without specific information, i.e., substance types, toxicity, and work environment.

As stated above, "absolute medical certainty is not required" to establish causation in workers' compensation cases. Trosper, 273 S.W.3d at 604 (quoting Glisson, 185 S.W.3d at 354). Here, the treating physicians—specialists in infectious disease, internal medicine, pulmonary medicine and critical care—opined Decedent's death, more likely than not, was due to workplace exposure. Decedent himself reported "breathing in g[r]out and epoxy type substances" at work prior to his illness, and lay witnesses confirmed dusty work conditions and a rapid decline in Decedent's health. From the evidence presented and construing

reasonable doubt in favor of Decedent, this Court finds Ms. Holbert has successfully demonstrated Decedent's illness and death arose out of his employment. The evidence does not preponderate against the trial court's decision.

Medical Expenses

Employer next argues the trial court erred in ordering it to pay Decedent's medical expenses into the registry of the court, from which medical providers could seek payment, with Ms. Holbert's attorneys collecting twenty percent of said fund. Such an arrangement is impermissible under existing law.

"Tennessee Code Annotated [s]ection 50-6-226(a) subjects attorney's fees in workers' compensation cases to the approval of the court, and limits such fees to twenty percent of 'the amount of the recovery or award.'" Wilkes v. Res. Auth. of Sumner Cnty., 932 S.W.2d 458, 463 (Tenn. 1996) (citing Tenn. Code Ann. § 50-6-226(a) (1991)). Contested medical expenses constitute a workers' compensation "recovery or award" on which attorney fees may be assessed. Langford v. Liberty Mut. Ins. Co., 854 S.W.2d 100, 102 (Tenn. 1993). However, section 50-6-226(a) expressly provides the attorney fees are "to be paid by the party employing the attorney." Tenn. Code Ann. § 50-6-226(a) (2008 & Supp. 2013). Accordingly, the portion of the final order requiring Decedent's medical expenses to be deposited into court is reversed, and the case is remanded for entry of an order consistent with this opinion and existing law.

Application of Tennessee Fee Schedule

Finally, Ms. Holbert argues the trial court erred in utilizing the *Tennessee* medical payment schedule when Decedent's illness and death occurred in *Pennsylvania*. It appears this issue concerns a potential dispute not yet ripe for adjudication. See Freeman v. Integral Ins. Co., No. 01A01-9401-CH-00023, 1994 WL 279762, at *3 (Tenn. Ct. App. June 24, 1994) (citing Story v. Walker, 404 S.W.2d 803 (Tenn. 1966)) ("Courts will decline to render a declaratory judgment where the question to be determined is based upon a contingency which may never occur."). Moreover, given this Court's reversal of the portion of the final order requiring Decedent's medical expenses to be deposited into the court, any medical bill dispute now involves Defendant and the individual providers. Ms. Holbert lacks standing to challenge the medical payment schedule applied. The portion of the judgment applying the Tennessee medical payment schedule is vacated.

Conclusion

The portion of the judgment directing Employer to deposit medical expenses into the registry of the trial court is reversed and the portion of the judgment applying the Tennessee medical payment schedule is vacated. The remainder of the judgment is affirmed. Costs are taxed one-half to JBM, Incorporated and Praetorian Insurance Company and their surety, and one-half to Sheila Holbert, for which execution may issue, if necessary.

DON R. ASH, SENIOR JUDGE