

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 25, 2011 Session

SEAN L. JOHNSON v. RANDSTAD NORTH AMERICA, L.P. ET AL.

**Appeal from the Chancery Court for Lawrence County
No. 13713-08 Jim T. Hamilton, Judge**

**No. M2010-01562-WC-R3-WC - Mailed: August 5, 2011
Filed - September 8, 2011**

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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. The employee suffered an episode of serious breathing difficulty after work while at home. He was transported by ambulance to a hospital where an emergency tracheotomy was performed to allow him to breathe. He alleged that this episode was caused by exposure to airborne contaminants in his workplace. His employer denied the claim. The trial court found that the employee had sustained a compensable injury and awarded permanent total disability benefits. The employer has appealed, contending that the trial court erred by finding that employee had a compensable injury, and by finding him to be permanently and totally disabled. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C. J., and DONALD P. HARRIS, SR. J., joined.

Cole B. Stinson, Knoxville, Tennessee, for the appellants, Randstad North America, L. P. and Ace American Insurance Company.

Ben Boston and Ryan Durham, Lawrenceburg, Tennessee, for the appellee, Sean L. Johnson.

MEMORANDUM OPINION

Factual and Procedural Background

On March 13, 2007 while at home, after the work day at Hughes Parker, Sean Johnson began to experience serious difficulty with breathing. He was transported by ambulance to Crockett General Hospital in Lawrenceburg, Tennessee, where Dr. Raja Atiyah, a head and neck surgeon, performed an emergency tracheotomy to allow him to breathe. Johnson filed a workers' compensation action in which he alleged that this episode was caused by exposure to airborne irritants in the course of his employment by Randstad North America. Randstad is a staffing services company that places temporary and permanent employees with various businesses. Johnson was placed with Hughes Parker, a manufacturer of parts for trucks and heavy equipment, in February 2007. His job at Hughes Parker primarily consisted of hanging metal parts on a conveyor line. The parts were delivered to his work area by forklift trucks after which he placed them on the conveyor line which moved the parts through a booth where they were sprayed with paint powder, then through ovens where they were "cured." Johnson then lifted the metal parts from the conveyor line, which were later removed from his work area by forklift trucks. At trial in May of 2010 Johnson testified that his work area was dusty, and that the forklift trucks produced fumes.

Johnson further testified that he began having breathing problems shortly after going to work at Hughes Parker in February of 2007. He described those problems as difficulty breathing, chest pains and congestion which worsened during the weeks prior to March 13, 2007 resulting in two visits to the emergency room. He denied that he had ever experienced similar problems prior to that time.

The emergency tracheotomy performed by Dr. Atiyah on March 13, 2007 consisted of surgically opening a hole in Mr. Johnson's windpipe below his larynx and inserting a tube to permit him to breathe. The tube in his windpipe still remained in place at the time of trial. Johnson testified that he had not worked since the surgery and did not think himself capable of doing so. Johnson also testified that he had consulted Dr. James Netterville, who had recommended surgery to remove his tracheotomy tube, which he hoped to have performed at some point in the future.

Several treating physicians and one non-treating physician testified by deposition at trial. Dr. Atiyah, the primary treating physician, performed the emergency tracheotomy on Johnson. He testified that, by the time he arrived at the operating room, Johnson was on the table, the airway was lost and he had stopped breathing. Because the airway was obstructed, Dr. Atiyah said he had to perform a crash tracheotomy through a previous scar to save his life. He testified that the vocal cords had been partially paralyzed as a result of thyroid surgery in 2001 and that because of this paralysis, the open airway at

Johnson's larynx was very small and a lot more prone to obstruct because of limited leeway to allow the membranes to swell. He said that exposure to chemical fumes at Hughes Parker had caused swelling of the vocal cords, resulting in a complete blockage of the airway although he could not identify the chemicals. He also testified that exposure to dust and fumes in the work place could also cause the obstruction of the airway. He said that "even the most minimum amount of exposure can cause a patient with vocal cord paralysis to be tipped over into obstruction that could cause either an emergency room visit or a tracheotomy." He based his opinion on the history given to him that Johnson had breathing difficulties on days and nights after he worked at Hughes Parker but did not have those problems on non-working days. Dr. Atiyah also stated that, because of his vocal cord paralysis and narrow airway, Johnson's ability to breathe could be impaired by levels of irritants that would be safe for the general population. He conceded that his notes at the time concerning Johnson did not contain any reference to a possible connection between the March 13, 2007 episode and workplace exposure, but that he later expressed that opinion. He explained that he did not include this information because he was lazy about keeping records, but that he had a very good memory of Johnson's case. Dr. Atiyah testified that Johnson would be unable "to do any kind of physical work that would expose [him] to contaminants" as long as he had an open tracheotomy tube.

Dr. Daniel Oxley, a past treating physician and general surgeon, performed the thyroidectomy on Johnson in 2001. He testified that Johnson had initially given a history of shortness of breath among other problems associated with his thyroid. He described Johnson's thyroid gland as extremely large and stated that the enlargement had occurred over a long period of time. As a result of the pressure from the enlarged thyroid, the trachea had become soft, a condition known as tracheomalacia which is a permanent condition that can lead to "chronic shortness of breath." Dr. Oxley agreed that Johnson had partial paralysis of the vocal cords and that Johnson was more susceptible to breathing problems caused by exposure to irritants because of his conditions.

Dr. Moataz Toban, a treating physician and pulmonary specialist, treated Johnson for his symptoms in the latter part of 2007 after his emergency surgery in March 2007. His diagnosis was obstructive sleep apnea. Based upon the history given to him by Johnson and his wife, Dr. Toban testified that the condition had existed prior to March 2007, and was unrelated to work. It was Dr. Toban's opinion that Johnson had an anatomical impairment of 25% to the body as a whole based upon pulmonary function studies, but he did not express an opinion as to the causation of the impairment.

Dr. Jonas Kalnas, a non-treating physician who was an occupational and environmental medicine specialist, conducted an independent medical examination of Johnson at the request of the defendant Randstad two and one-half years after the breathing episode of March 2007. He testified, by deposition, that the episode was

unrelated to Johnson's work at Hughes Parker. It was his opinion that the breathing difficulties which led to Johnson being taken to the hospital and resulted in his emergency tracheotomy were caused by his obstructive sleep apnea, which was diagnosed by Dr. Toban several months after Johnson's March 2007 breathing emergency. He testified that Johnson's symptoms were consistent with sleep apnea. He also considered it significant that Johnson reported that he did not regularly take his thyroid medication and had taken oxycodone shortly before the March 13 incident, because each of these factors can worsen sleep apnea. In addition, because Johnson had been diagnosed with an upper respiratory infection on February 25, 2007, he felt the infection could cause breathing difficulties. Finally, Dr. Kalnas suggested that the tracheotomy surgery would not have been necessary had Dr. Atiyah known of the sleep apnea diagnosis. He said that the patient should have been woken up, made to sit upright and a positive pressure breathing machine should have been used to improve the airflow.

Dr. Kalnas disagreed with Dr. Atiyah's opinion that the March breathing incident was related to swollen vocal cords secondary to exposure to airborne irritants at work. He pointed out that Dr. Atiyah did not note in the medical record swollen vocal cords or any other swelling in the throat, although Dr. Atiyah testified that there were swollen vocal cords and the airway was obstructed. According to Dr. Kalnas, at least one of the chemicals used in the painting process at Hughes Parker, zinc phosphate, was a known airway irritant but he did not consider this to be a likely cause of the March 13, 2007 event. Dr. Kalnas further testified that exposure to "general dust" in the workplace was also not a likely cause of the March 13 event because Johnson did not report irritation of the eyes, coughing or sneezing at work which symptoms would normally result from high dust exposure. On cross-examination, he agreed that Johnson was more susceptible to an airway blockage than the general population because of his pre-existing vocal cord paralysis and also agreed that exposure to fumes or dust could cause swelling that would result in such a blockage. In addition, he confirmed that Johnson had a 25% anatomical impairment as a result of the tracheotomy.

Patsy Bramlett, a vocational consultant, also testified at trial. It was her opinion that Johnson was totally disabled, based upon activity restrictions suggested by Dr. Atiyah. She administered tests which showed that Johnson was only able to read and write at an eighth grade level and able to perform arithmetic at a sixth grade level.

George Emery, who was production manager for the Hughes Parker plant at the time Johnson worked there, testified that Johnson's work station was approximately eighty-five feet from the "paint booth," an enclosed area in which dry paint was sprayed onto metal parts and also testified that only authorized personnel were allowed in the paint booth but that Johnson was not authorized to be there. He denied that the environment around Johnson's work area was dusty.

Daniel Lawrence, who was the plant supervisor and Johnson's supervisor during the time he worked at Hughes Parker, testified that Johnson never complained to him of breathing problems, or concerns with dust or fumes, while at Hughes Parker. He also denied that Johnson's work area was dusty and said that Johnson was not authorized to be in the paint booth.

Chad Cothran, who was Johnson's coworker, testified on direct examination that Johnson's work area was more than one hundred feet from the paint booth and that there was a small amount of dust, if any, in the work area. He said that during the time they worked together, Johnson told him about sleeping difficulties, but he did not recall any complaint about breathing problems. On cross-examination, Cothran conceded that some dust was present, but it was not major and did not bother him. He agreed that the forklift trucks emitted hot exhaust fumes and stirred up dust in the workplace. He also agreed that dust blew in from outside doors forty or fifty feet from the workplace. He also conceded that his clothes were dirty at the end of the work shift and that air hoses were used to clean their clothes and the worksite, which also stirred up dust.

At the conclusion of the proof the trial court found that Johnson sustained a compensable injury and awarded permanent total disability benefits. As part of its ruling, the trial court specifically accredited Johnson's testimony and found the testimony of Dr. Atiyah to be more persuasive than that of Dr. Kalnas. It made an alternative ruling that Johnson had sustained a 95% permanent partial disability; that amount was ordered to be paid, if awarded, in a lump sum. The defendant employer, Randstad, has appealed, contending that the trial court erred by finding that Johnson sustained a compensable injury and that the trial court erred by awarding permanent total disability benefits. In the alternative, it argues that the trial court erred by making an award because Johnson had not reached maximum medical improvement.

Standard of Review

Issues of fact are reviewed "de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). "When the issues involve expert medical testimony that is contained 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 the reviewing court may draw its own conclusions with regard to those issues." Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). 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).

Analysis

Causation

Randstad contends that that the evidence preponderates against the trial court's finding that Johnson's airway obstruction arose out of and during the course of his employment. Specifically, Randstad argues that Dr. Kalnas's testimony is more persuasive than that of Dr. Atiyah. It contends that Dr. Kalnas is better qualified than Dr. Atiyah because Dr. Kalnas specializes in occupational medicine, which encompasses the effects upon workers of exposure to various substances in the workplace. Randstad also asserts that Dr. Kalnas has a background in toxicology and chemical engineering, that he had a more complete medical history than Dr. Atiyah, and that he had greater knowledge concerning the substances present at Hughes Parker.

Randstad also argues that Dr. Atiyah's opinion was based upon a premise not supported by the medical records, i.e. that Johnson's vocal cords were swollen on March 13, 2007. It further argues that Dr. Atiyah did not know what substances were present at Hughes Parker, and did not make any reference in his records to causation or Johnson's employment until months after the fact, when he was asked for an opinion by Johnson's attorney.

In response, Johnson argues that the evidence does not preponderate against the trial court's finding that Johnson's airway obstruction arose out of and during the course of his employment. He contends that Dr. Atiyah is board certified in his speciality as an otolaryngologist and therefore more qualified to treat and discuss his tracheal problem. Dr. Atiyah was furnished Johnson's medical history which stated that he had breathing problems on days and nights after he worked at Hughes Parker but did not have these problems on non-working days; that these problems began and worsened during his employment at Hughes Parker; and he had not experienced similar problems before that time. Johnson contends that Dr. Atiyah performed the emergency tracheotomy on him at the time the airway obstruction occurred, and that the vocal cords were partially paralyzed and swollen. It was Dr. Atiyah's opinion that, because of the paralysis and the very limited airway, Johnson was much more prone to obstruction than a person with a normal airway. In addition, Johnson asserts that his own lay testimony supports Dr. Atiyah's assumptions concerning exposure to dust and fumes in the workplace. Finally, Johnson charges that Dr. Kalnas is an expensive "hired gun" who examined Johnson on only one occasion two and one-half years after the March 2007 emergency. In addition, he notes that Dr. Kalnas was often unwilling to answer questions based on hypothetical facts

during cross-examination, stating that the assumed facts were not consistent with his information.

Our Supreme Court has recently reviewed the applicable standard for evaluating evidence concerning the issue of causation in workers' compensation cases:

Generally speaking, a workers' compensation claimant must establish by expert medical evidence the causal relationship between the alleged injury and the claimant's employment activity, '[e]xcept in the most obvious, simple and routine cases.' Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008) (quoting Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991)). The claimant must establish causation by the preponderance of the expert medical testimony, as supplemented by the evidence of lay witnesses. Id. As we observed in Cloyd, the claimant is granted the benefit of all reasonable doubts regarding causation of his or her injury:

“Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain. . . .” Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004); see also Glisson v. Mohon Int'l, Inc./ Campbell Ray, 185 S.W.3d 348, 354 (Tenn. 2006). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004).

Id.; see also Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). The trial court may properly award benefits based upon medical testimony that the employment “could or might have been the cause” of the employee's injury when there is also lay testimony supporting a reasonable inference of causation. Fritts, 163 S.W.3d at 678.

Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274-275 (Tenn. 2009).

In this case both sides have presented credible expert testimony on the issue. It is generally within a trial court's discretion to choose which expert to accredit when there is a conflict of expert opinions. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). Randstad's position is that Dr. Kalnas's has impressive credentials, examined more background information, and articulated a plausible theory based upon that information and therefore

is more credible than Dr. Atiyah. We agree that Dr. Kalnas offered credible expert testimony. Dr. Atiyah, however, also presented credible expert testimony. Dr. Atiyah was a board certified otolaryngologist, i.e. a head and neck surgeon, who was well qualified. He examined Johnson in a dire emergency and performed the tracheotomy. His theory was consistent with the facts in the record: Johnson was more susceptible to airborne irritants because of his pre-existing paralysis of his vocal cords; he began seeking medical treatment for breathing problems after he began working at Hughes Parker; and both airborne dust and exhaust fumes were present in his work area.

Having closely examined the record, we are convinced that reasonable minds could reach differing conclusions upon the evidence presented. In light of that, we conclude that the trial court did not abuse its discretion by giving greater weight to Dr. Atiyah's testimony and that the evidence as a whole does not preponderate against its finding on the issue of causation.

Maximum Medical Improvement

Randstad also contends that the trial court erred by awarding permanent disability benefits "without proof establishing that Mr. Johnson has reached maximum medical improvement." The premise of this argument is that Dr. Netterville had recommended a surgical procedure to remove Mr. Johnson's tracheotomy tube and that Johnson testified that he planned to have that procedure at some point in the future. Randstad suggests that after that procedure takes place Johnson would no longer be disabled. The record contains very little information about the proposed procedure. When the trial occurred in May 2010, the tracheotomy tube had been in place for over three years. Dr. Atiyah testified that Johnson had a permanent impairment. Dr. Kalnas testified that he had a permanent impairment unless the additional surgery took place. Viewing the record as a whole, we are unable to conclude that the trial court erred by determining that Johnson sustained a permanent impairment. Further, because Johnson has been awarded permanent total disability benefits, his status is subject to review pursuant to Tennessee Code Annotated section 50-6-207(4)(C) (2008 & Supp. 2010). In the event that Johnson ceases to be totally disabled, Randstad may seek reconsideration of his status in accordance with the procedures set out in that statute.

Extent of Disability

Randstad's final contention is that the evidence preponderates against the trial court's finding that Johnson is totally disabled. It points out that he is only thirty-five years old, is a high-school graduate, and once worked as an assistant manager at a Pizza Hut store.

Notwithstanding his experience as an assistant manager, nearly all of Johnson's work experience is relatively unskilled. Ms. Bramlett's testing revealed that his ability to read and write was at the eighth grade level, and his ability to perform arithmetic was at the sixth grade level. Randstad introduced no evidence to the contrary. Dr. Atiyah testified that he should avoid "any kind of physical work that would expose [him] to contaminants." We conclude that the trial court did not err in awarding permanent total disability benefits in this case.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Randstad North America, L. P. and Ace American Insurance Company and their surety, for which execution may issue if necessary.

E. RILEY ANDERSON, SPECIAL JUDGE

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**Chancery Court for Lawrence County
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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 Randstad North America, L.P. and Ace American Insurance Company and their surety, for which execution may issue if necessary.

PER CURIAM