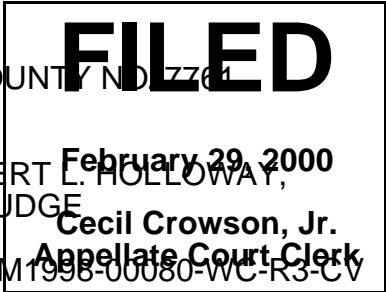


AT NASHVILLE

FLORA RICHARDSON,
PLAINTIFF/APPELLEE,
v.
SATURN CORPORATION,
DEFENDANT/APPELLANT.

) MAURY COUNTY NO. 7764
)
) HON. ROBERT L. HOLLOWAY,
) JUDGE
) S. CT. NO. M1998-00080-WC-R3-CV
) AFFIRMED



JUDGMENT

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well taken and should be denied; 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 plaintiff, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

BIRCH, J. NOT PARTICIPATING

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(September 23, 1999 Session)

FILED
February 29, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

FLORA RICHARDSON,)
)
Plaintiff/Appellee,)
COUNTY)
v.)
)
WC-R3-CV)
SATURN CORPORATION,)
)
Defendant/Appellant.)

MAURY
NO. 7761
M1998-00080-

)
) HON. ROBERT L. HOLLOWAY,
) JUDGE
)

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MEMORANDUM OPINION

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge F. Lloyd Tatum
Special Judge Carol L. McCoy

REVERSED AND DISMISSED

F. LLOYD TATUM, SENIOR JUDGE

OPINION

This workers' compensation appeal was referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

In this workers' compensation case the defendant employee appeals from the judgment of the trial court awarding workers' compensation benefits to the plaintiff based upon a finding that the plaintiff suffered thirteen and one-half (13½) percent permanent partial disability to the body as a whole. The judgment was based upon a finding that plaintiff sustained a work-related injury that caused plaintiff's pre-existing arthritic condition to become more severe. In the only issue, the defendant says that the Court erred in finding that plaintiff sustained a compensable "injury by accident" under the Tennessee Workers' Compensation Act. We find merit in this issue and reverse the judgment of the trial court.

We are mindful of certain standards by which we are bound. The standard of review of factual issues in worker's compensation cases is de novo upon the record of the trial court with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2)(1991 and Supp. 1998); Henson v. Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993). Under this standard, we are required to conduct an in depth examination of the trial court's findings of fact and conclusions of law to determine where the preponderance of the evidence lies. See Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 282 (Tenn. 1991). In making such determination, this Court must give considerable deference to the trial judge's findings regarding the weight and credibility of any oral testimony received. All of the medical proof was taken by deposition or was documentary, so that all impressions of weight and credibility must be drawn from the contents thereof, and not from the appearance of witnesses on oral testimony at trial. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). The plaintiff in a workers' compensation suit has the burden of proving every element of the case by a preponderance of the evidence. Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989).

The plaintiff testified in open court. She stated that she had difficulty with her left shoulder beginning in 1993 which resulted in surgery to the left shoulder in June, 1994. She had no difficulty with the right shoulder until October, 1996, except for bursitis in 1991 or 1992. The bursitis pain was eliminated by treatment. After she began having trouble with her left shoulder, she began using her right shoulder and arm almost exclusively. In her work for the defendant, Saturn, she was required to use her arms extensively in doing various jobs, such as tightening screws and plugging.

She testified that in October, 1996, she began noticing pain in her right shoulder. The

pain symptoms were the same as those she had previously experienced in her left shoulder before surgery. At first she attempted to treat herself for the pain in her right shoulder, but she reported her difficulty to Saturn and began receiving treatment in November, 1996. On December 7, 1996, she was placed on the following restrictions:

“No at or above shoulder work with right arm, no extended reaching with right arm, no lifting over 10 pounds.”

These restrictions were continued until January 30, 1997, when she was restricted by her doctor from performing any work at all with her right arm.

She testified that the Saturn plant closed for a two-week period during Christmas season 1996, and the pain subsided during this time. On May 22, 1997, Dr. W. Gregory Cook performed surgery on her right shoulder. She testified that from the time she began having pain in October, 1996, to the time of the surgery, the pain and impairment of her right shoulder and arm became progressively worse. After she was placed on the restrictions, her shoulder continued to grow worse, and it would hurt with activity of the arm and shoulder when she was at home.

She testified that after her surgery, she returned to work on July 17, 1997, and has since worked without restrictions. She can now do all of her job duties without pain, but she had “sensations” in both shoulders. The “sensations” subside when she is not using her shoulder.

She specified no accident, event or occurrence that caused her to begin having pain and other difficulty with her right arm and shoulder. The onset of the pain was at work while she was using the right arm and shoulder extensively. However, she had full range of motion.

Dr. W. Gregory Cook, an orthopedic surgeon, testified by deposition. He stated that he first saw the plaintiff on January 27, 1997, and determined that she had acromioclavicular (AC) joint arthritis, a “wear and tear” type arthritis. The arthritis removed the smoothness of the joint, and the wear phenomenon caused pains because the joint was no longer smooth. Dr. Cook first attempted conservative treatment without success and performed surgery on May 22, 1997. Surgery consisted of removing one centimeter of the distal end of the clavicle, which is where clavicle joins the shoulder joint.

Dr. Cook testified that the surgery was successful, and the plaintiff was permitted to return to work on July 16, 1997, without restriction. The surgery was solely for the purpose of pain relief. He testified that the plaintiff’s work did not cause her to have the arthritis and that her work did not advance the arthritis although it might have caused her to experience pain from the arthritis. However, she could have had pain without work. Dr. Cook testified that “she had enough arthritis that I would expect her to be symptomatic at least intermittently the rest of her life.” He testified that activity affects the degree of pain that

one feels but that because the plaintiff happened to be at work when she first experienced pain does not mean that her joint has arthritis because of the work.

Dr. Cook testified that according to AMA Guides, the plaintiff had 10 percent impairment to the right arm and six (6) percent impairment to the whole body. This impairment rating was based solely upon the surgical procedure of removing the clavicle.

Dr. David W. Gaw, an orthopedic surgeon, testified that he examined the plaintiff and saw her on one occasion. He testified that she had left shoulder surgery, according to her history, on February 12, 1995, and returned to work, using her right arm extensively. She began having aching and pain in the shoulder after returning to work. He testified that "she said the pain did not bother her that much until October, 1996, when the pain increased, and it became more severe in November, at which time she went to Saturn medical office."

The trial judge, in his memorandum opinion, cited the following portions of Dr. Gaw's testimony as the basis for his conclusion:

Well, I said her degenerative arthritis certainly would have predated her surgeries. And if her history is accurate regarding the position of her extremities while at work, that the vast majority of her time was spent with the arms outstretched, then these work activities would be most likely the cause of her present condition, that aggravated the pre-existing degenerative arthritis.

In this connection, Dr. Gaw also testified:

Q. And, secondly, you cannot state that the work at Saturn of Flora Richardson advanced the severity of her osteoarthritis on a permanent basis. Is that correct?

A. That's a very difficult question to answer. I don't think it advanced it where you could measure it, such as you look at an x-ray before and after.

Q. Okay.

A. I don't think you could say that that happened.

Q. Clearly it's your opinion that the work that she was doing aggravated it, aggravated the condition and made it painful to her?

A. Well, if she did the type of work that she said she did, that is the way that stress is applied to that joint, so that -- I know from experience that what causes pain in that joint is overhead, outstretched usage of it.

Q. Okay. But you can't state that that aggravation caused by that work is something of a permanent nature? In other words, if she stopped doing that work, are you saying she would stop having all the pain?

A. Yes. I think certainly that her pain would be in proportion to the amount of position -- of that position.

Q. Okay. And so if she testified that once she began having pain with this problem in her shoulder, that she had pain no matter what she did, does that -- does that indicate to you that whatever she was doing at home also aggravated -- or outside of the work, also aggravated her problem?

A. Yes, I would assume that, based upon that.

Q. And you're saying that the reason she had surgery was because of pain --

A. That's correct.

Dr. Gaw stated that the plaintiff should avoid continuous use of the arm in an overhead or outstretched position. He concurred with Dr. Cook as to the extent of her disability.

In Sweat v. Superior Indus. Inc., 966 S.W.2d 31 (Tenn. 1998), the rule governing this case is stated:

The general rule is that aggravation of a pre-existing condition may be compensable under the workers' compensation laws of Tennessee, but it is not compensable if it results only in increased pain or other symptoms caused by the underlying condition. See *Cunningham v. Goodyear*, 811 S.W.2d 888, 890 (Tenn. 1991); *Smith v. Smith's Transfer Corp.*, 735 S.W.2d 221, 225-226 (Tenn. 1987); *Boling v. Raytheon Co.*, 223 Tenn. 528, 448 S.W.2d 405, 408 (1969); *Conner v. Rite Aid*, 1995 WL 274486, 1995 Lexis 220 (W. Comp. Appeals Panel). It has been otherwise stated that, to be compensable, the pre-existing condition must be "advanced" (*Springfield v. Eden*, 1995 WL 595602), 1995 Lexis 67 (W. Comp. Appeals Panel), or there must be an "anatomical change" in the pre-existing condition (*Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587, 591 (Tenn. 1989)), or the employment must cause "an actual progression ... of the underlying disease." *Cunningham*, *supra* at 890.

Unlike the evidence in Sweat, the preponderance of the evidence does not establish that the plaintiff's work activities advanced or resulted in actual progression of the plaintiff's underlying arthritis. There was no anatomical change in the pre-existing arthritic condition. The work did not result in limitation of motion or otherwise place further restrictions on her that had not been placed there by the arthritis. Dr. Gaw advised her to avoid continuous use of the right arm in an overhead or outstretched position. Dr. Gaw was of the opinion that this type of activity is what brought on the plaintiff's pain from the arthritis.

This case is factually analogous to Boling v. Raytheon Co., 223 Tenn. 528, 448 S.W.2d 405, 408 (1969). The statement made by the Court in Boling is applicable to this case:

In substance, what we have here is an employee with a disabling injury or disease not related to employment, but the employment does aggravate the disabling injury or disease by making the pain worse. This situation does not constitute an "accident" as this word is used in our workmen's compensation statutes.

The evidence preponderates against the findings of the trial judge. It results that the judgment of the trial court is reversed and the case is dismissed. Costs are adjudged against plaintiff.

F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

ADOLPHO A. BIRCH, JR., JUSTICE

CAROL L. MCCOY, SPECIAL JUDGE

