IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 25, 2002 Session

GEORGE THOMAS ARGO v. BRENTWOOD SERVICES ADMINISTRATORS, INC., ET AL.

Direct Appeal from the Circuit Court for Warren County
No. 7346 Charles D. Haston, Judge

No. M2001-02821-WC-R3-CV - Mailed - October 10, 2002
Filed - November 12, 2002

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. In this appeal, the employer insists (1) the trial court erred in failing to dismiss the claim based on the "last injurious injury doctrine," (2) the award of permanent partial disability benefits based on 37.5 percent to the body as a whole is excessive, and (3) the trial court erred in commuting the award to a lump sum. The employee insists he is entitled to receive benefits from one insurer or the other. As discussed below, the panel has concluded the judgment should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (2001 Supp.) Appeal as of Right; Judgment of the Circuit Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JAMES L. WEATHERFORD, SR. J., joined.

Stacey Billingsley Cason, Nashville, Tennessee, for the appellant, Local Government Workers' Compensation Fund

Barry H. Medley, McMinnville, Tennessee, for the appellee, George Thomas Argo

MEMORANDUM OPINION

The employee or claimant, Argo, initiated this civil action to recover workers' compensation benefits for an alleged work related injury occurring on June 2, 1999, while he was working for the

employer, Warren County Sanitation Department.[1] [2] The cause was dismissed as to Warren County's workers' compensation administrator, Brentwood Services Administrators, Inc. Local Government Workers' Compensation Fund, Warren County's insurer in June 1999, was added as a third party defendant. Local Government Workers' Compensation Fund contended the accident occurred after its coverage lapsed on July 1, 1999. On that issue, summary judgment was issued in favor of Warren County, there being undisputed proof that the accident happened in June, before coverage lapsed. The propriety of that order is not directly questioned in this appeal.

After a trial of the remaining issues on October 22, 2001, the trial court, finding the injury to have occurred on June 2, 1999, as alleged, awarded, among other things, permanent partial disability benefits based on 37.5 percent to the body as a whole. Local Government Workers' Compensation Fund has appealed.

For injuries occurring on or after July 1, 1985, appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2001 Supp.). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). The extent of an injured worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 915 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002).

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[1] The named defendant, Brentwood Services Administrator, Inc., was dismissed from the case.

[2] The complaint also alleged, "Due to Plaintiff's work with and for the above named Defendant/Employers, Plaintiff received a new injury or injuries and/or cumulative, consecutive, exacerbations and/or aggravation of injuries and/or conditions, and that due to Plaintiff's work with said Defendant/Employers, Plaintiff continues to receive new injuries and/or conditions and/or is sustaining cumulative, consecutive, exacerbation and/or aggravation of injuries and/or condition all caused by his employment and work for the aforementioned Defendant/Employers."

Mr. Argo is 53 years old with a tenth grade education and no special skills or training. He has worked for the Warren County Sanitation Department since 1995. While at work on June 2, 1999, he climbed on top of an open top container box for the purpose of rolling a tarp across it. His feet slipped and he fell on his right side across a dryer, injuring his back and right shoulder. He went to an emergency room the following weekend. The emergency room physician attending him testified that his complaints were consistent with lumbar strain, for which that doctor prescribed a muscle relaxant.

On June 22, 1999, the claimant reported to Dr. Donald Arms, an orthopedic surgeon in McMinnville. Dr. Arms provided conservative care until January 13, 2000, when he released the claimant with no permanent impairment and no restrictions. When his symptoms persisted, his attorney referred him to Dr. Robert Landsberg.

Dr. Landsberg examined the claimant on one occasion, September 18, 2000. The claimant related to this doctor a history of having injured his back and right shoulder on June 2, 1999, as alleged in his complaint. After examining the claimant, Dr. Landsberg opined that, as a result of that accident, Mr. Argo was permanently impaired, which impairment he rated at 18 percent to the whole person for the back injury and 7 percent to the whole body for the shoulder injury using appropriate guidelines. The shoulder injury was diagnosed as one which caused nerve impingement.

The claimant, who testified his injuries occurred on June 2, 1999, continues to work for Warren County Sanitation as a truck driver, but work causes an increase of his symptoms. He testified that he is able to manage money and that his house and car are paid for. His testimony was corroborated by his wife.

The appellant contends the trial court should have dismissed the complaint because of the "last injurious injury rule." Where an employee is permanently disabled as a result of a combination of two or more accidents occurring at different times and while the employee was working for different employers, the employer for whom the employee was working at the time of the most recent accident is generally liable for permanent disability benefits. See Baxter v. Smith, 211 Tenn. 347, 364 S.W.2d 936 (1962) and its progeny. The same doctrine applies where the employee's permanent disability results from successive injuries while the employee is working for the same employer, but the employer has changed insurance carriers. The carrier which provided coverage at the time of the last injury is liable for the payment of permanent disability benefits. See Globe Co. v. Hughes, 223 Tenn. 37, 442 S.W.2d 253 (1969) and its progeny. Where, however, work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996). Giving due deference to the findings of the trial court, we cannot say the evidence preponderates against the trial court's finding that the claimant's injuries occurred on June 2, 1999.

The appellant further contends the award of permanent partial disability benefits is excessive. The extent of an injured worker's permanent vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). In making such determinations, the trial courts

are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). Considering the pertinent factors, to the extent they were established by the proof, and giving due deference to the findings of the trial court, we cannot say the evidence preponderates against the trial court's award.

The appellant finally contends the trial court erred in commuting the award to a lump sum. Permanent disability benefits are normally paid periodically but may be commuted to one or more lump sum payment(s) on motion of any party subject to the approval of the court having jurisdiction of the case. Lump sum payments shall, in the aggregate, amount to a sum of all future installments of compensation. In determining whether to commute an award, the courts must consider (1) whether the commutation will be in the best interest of the employee, and (2) the ability of the employee to wisely manage and control the commuted award. Tenn. Code Ann. § 50-6-229(a). Whether to commute a workers' compensation award to a lump sum is discretionary with the trial court, and the trial court's decision will not be disturbed on appeal unless the trial court's decision amounted to an abuse of discretion. Edmonds v. Wilson County, 9 S.W.3d 106, 109 (Tenn. 1999). From our independent examination of the record, we cannot say the trial court abused its discretion by commuting the award to a lump sum.

For the above reasons, the judgment of the trial court is affirmed. Costs on appeal are taxed to The Local Government Workers' Compensation Fund.

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JOE C. LOSER, JR.

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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 Local Government Workers' Compensation Fund, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM