IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 26, 2002 Session

CATHY MCCARSON v. AQUA GLASS CORPORATION

Direct Appeal from the Circuit Court for Humphreys County
No. 8844 Leonard W. Martin, Judge

No. M2001-03085-WC-R3-CV - Mailed - October 11, 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. The plaintiff attributed a host of complaints to the rigors of her employment as gradually occurring or occupationally based. The medical proof was varied and indecisive leading the trial judge to conclude that she failed to carry the burden of proof. We affirm.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and JOE C. LOSER, SP. J., joined.

Charles L. Hicks, Camden, Tennessee, for the appellant, Cathy McCarson.

John Lee Williams, Waverly, Tennessee, for the appellee, Aqua Glass Corporation.

MEMORANDUM OPINION

I.

The plaintiff alleged that on August 11, 1998, "through the present" she sustained gradual injuries to "both of her hands, arms, wrists, shoulder, neck, and back and injured her right knee and leg in March 1999 during the course of her employment." She alleged that the defendants had actual notice of these injuries, and that she has sustained permanent disability.

The defendant generally denied the allegations, and affirmatively pleaded lack of notice together with asserting that the plaintiff did not sustain a work related injury.

The trial court ruled that the plaintiff failed to carry the burden of proving an occupational injury arising out of the course and scope of her employment and dismissed the complaint. The plaintiff appeals, and presents for review the issues of whether the evidence preponderates against the findings that (1) the plaintiff did not suffer an injury arising from employment, and (2) that she failed to give the required notice of injury.

II.

Appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The panel is not bound by the trial court's findings but conducts an independent examination of the evidence to determine where the preponderance of the evidence lies. ***Wingert v. Government of Sumner County***, 908 S.W.2d 921, 922 (Tenn. Sp. Workers' Comp. 1995). 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, 177 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. ***Orman v. Sonoma, Inc.***, 803 S.W.2d 672, 676-77 (Tenn. 1991).

III.

As stated in ***Cunningham v. Shelton Sec. Service, Inc.***, 46 S.W.3d 131 (Tenn. 2001)**,**

> In order to be eligible for workers' compensation benefits, an employee must suffer an "injury by accident arising out of and in the course of employment which causes either disablement or death. . . "Tenn. Code Ann. § 50-6-102(12) (1999). The statutory requirements that the injury "arise out of" and occur "in the course of" the employment are not synonymous. *See* ***Sandlin v. Gentry***, 201 Tenn. 509, 300 S.W.2d 897, 901 (1957). An injury occurs "in the course of" employment if it takes place while the employee was performing a duty he or she was employed to perform. ***Fink v. Caudle***, 856 S.W.2d 952, 958 (Tenn. 1993). Put another way, the injury must have substantially originated from the 'time and space' of work, resulting in an injury directly linked to the work environment or work-related activities." ***Harman v. Moore's Quality Snack Foods***, 815 S.W.2d 519, 527 (Tenn. Ct. App. 1991) (citation omitted). Thus, the course of employment requirement focuses on the time, place and circumstances of the injury. ***Hill v. Eagle Bend Mfg., Inc.***, 942 S.W.2d 483, 487 (Tenn. 1997).

> In contrast, "arising out of" employment refers to "cause or origin." ***Id.*** An injury arises out of employment "when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. ***Fink v. Caudle,*** 856 S.W.2d 958 (Tenn. 1993).

IV.

The defendant manufactures fiberglass bathtubs. The plaintiff was hired in 1995 when she was twenty-eight years old and assigned to a job using a roller device to smooth air bubbles from the applied fiberglass. In August 1998 the plaintiff, without giving notice to the employer, saw Dr. Huffnagle in Dickson, Tennessee, complaining of tingling in both hands. Dr. Huffnagle referred her to a neurologist for an EMG which did not reveal carpal tunnel nerve impingement. It was believed that she was experiencing arthritic symptoms. Two months later, and again without notice, she saw Dr. Theodore Pincus, who specializes in the treatment of arthritis. Dr. Pincus ruled out arthritis and diagnosed the plaintiff's condition as chronic pain syndrome. Contemporaneously with seeing these physicians, the plaintiff was also seeing Dr. Denis A. Harlock, a general practitioner, complaining of swollen fingers and wrists. He diagnosed her condition as tendinitis secondary to repetitive work. Dr. Harlock referred her to Dr. William R. Schooley, a neurosurgeon, who believed that the cause of her pain was degenerative disc disease. She saw a host of other physicians, and was frequently absent from work. She was terminated for unexplained absences and applied for unemployment benefits, attesting that she was able and willing to work. This suit was filed about one month later.

V.

Dr. Harlock, a treating physician, testified that he saw the plaintiff on many occasions, and investigated her complaints of hand and wrist pain. All tests were negative, and he ruled out carpal tunnel syndrome and arthritis. He finally diagnosed tendinitis secondary to repetitive work. Later, he suspected carpal tunnel syndrome and referred her to a neurosurgeon. Six months later, he saw her again with complaints of neck pain, and thought she might have cervical disc disease. Still later, he saw her again with complaints of swelling in her lower abdomen. He saw the plaintiff for the last time in December 1999, and concluded that the swelling was caused by an enlarged liver.

The neurosurgeon, Dr. William Schooley, testified that he saw the plaintiff in June 1999 on a referral by Dr. Harlock. He ruled out carpal tunnel syndrome, following extensive diagnostic procedures, and opined that she had a mild, non-traumatic degenerative disc disease.

Dr. John Culclasure, who practices pain management, believed the plaintiff had a small disc herniation with a degenerative arthritic condition of her cervical spine.

Dr. Susan Jacobi, a rheumatologist, saw the plaintiff on June 2000, with complaints of hand pain. Her diagnosis was degenerative arthritis.

Dr. Joseph C. Boals, a retired orthopedic surgeon, testified that the plaintiff had a 17 percent disability to her whole body. Dr. Thomas O'Brien, orthopedic surgeon, testified that she had no disability.

VII.

The trial judge observed:

> "that there was no credible evidence that the plaintiff ever asserted any sort of workers' compensation claim, never sought to be paid from being off from work, never sought to have her medical bills paid, never sought to go to a company doctor . . . She'd been to a host of doctors. I don't doubt that the lady's got a problem. The question becomes what. The medical science is not a precise science, as a matter of fact its very imprecise. You've got, for example, two experts that looked at this lady for evaluation. One says she hasn't got anything wrong. The other says 17 percent to the whole body . . . One ruled out carpal tunnel syndrome. And then you've got doctors who opined that she has a degenerative disc problem, the wear and tear kind of arthritis . . . I simply cannot find any bases to make a workers' compensation award to this lady."

VIII.

The medical testimony varied widely, thus requiring the trial judge to determine which physician likely was correct, based on justifications and all relevant circumstances. *See,* ***Orman v. William***, 803 S.W.2d 672 (Tenn. 1991); ***Hinson v. Wal-Mart Stores, Inc.***, 654 S.W.2d 675 (Tenn. 1983). The trial judge concluded that the plaintiff had failed to carry her burden of proving that she had a compensable injury or condition, and we are unable to find that the evidence preponderates against his judgment. Since the evidence was presented by deposition, we are as well able as the trial judge to assess its weight and worth, *see* ***Cooper v. Ins. Co. of N. Am.***, 884 S.W.2d 446 (Tenn. 1994) and we have done so, finding ourselves in the same position as the trial judge with respect to the basic issue.

The judgment is therefore affirmed at the costs of the appellant. The issue of notice is pretermitted as being unnecessary to a resolution of this appeal.

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WILLIAM H. INMAN, SENIOR JUDGE

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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 appellant, Cathy McCarson, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM