IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 27, 2002 Session

RUDY OCHOA v. PETERBILT MOTOR COMPANY

Direct Appeal from the Criminal Court for Wilson County
No. 01-0115 J. O. Bond, Judge

No. M2002-00410-WC-R3-CV - Mailed - February 6, 2003
Filed - March 11, 2003

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 questions the trial court's findings as to compensability and extent of vocational disability. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Criminal Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JOHN K. BYERS, SR. J., joined.

Terry L. Hill and Stacey Billingsley Cason, Nashville, Tennessee, for the appellant, Peterbilt Motors Company

William Joseph Butler and E. Guy Holliman, Lafayette, Tennessee, for the appellee, Rudy Ochoa, Jr.

MEMORANDUM OPINION

The employee or claimant, Mr. Ochoa, initiated this civil action to recover workers' compensation benefits for an allegedly work related injury by accident. The employer denied liability. After a trial on the merits, the trial court awarded, among other things, permanent partial disability benefits based on 40 percent to the body as a whole. The employer has appealed.

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) (2002 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). 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 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).

The claimant is approximately fifty years old and has a high school education. He has worked for the employer, Peterbilt, since 1993, following the loss of his previous employment because of a layoff. He has experience as a production worker. He first injured his low back in 1993 but continued working while receiving conservative medical care from Dr. Jack Miller, who found no permanent impairment and prescribed no permanent restrictions. He suffered another low back injury in 1995, for which he was treated by Dr. Robert Hoover. After four to six weeks of conservative care, Dr. Hoover released him to full duty with no permanent restrictions and a zero impairment rating. His claim was settled for $4,000.00, the functional equivalent of 2.33 percent permanent partial disability to the body as a whole, although an independent medical examiner, Dr. David Gaw, estimated his permanent medical impairment from the injury to be 10 percent to the whole person and prescribed lifting restrictions. The claimant returned to his regular job and was released from Dr. Hoover's care in early 1996.

In November 2000, the claimant was assigned to a job which required him to lift and install sheets of floor metal weighing twenty to forty pounds each and required him to spend much of his time in a bent over position. He complained of low back pain but received no sympathy from the employer. On December 4, 2000, while so working, he felt a pop in his lower back and a burning sensation in his low back and legs, primarily his left leg. When he reported the injury to the employer, he was assigned to a different job, drilling holes in heavy sheet metal. He continued to have pain in his low back and legs. His request to be sent to a doctor was denied by the employer's workers' compensation administrator.

He visited Dr. Robert Landsberg and continued trying to work until the doctor prescribed restrictions. He has not worked for Peterbilt since January 12, 2001. Dr. Landsberg estimated the claimant's permanent medical impairment to be 9 percent to the whole body and opined that the injury was causally related to his work for the employer. The doctor permanently restricted the claimant from lifting over thirty pounds and recommended that he alternatively sit and stand while working. Dr. Gaw did not increase his earlier medical impairment estimate of 10 percent to the whole body, but testified that the later injury could have aggravated a pre-existing condition, considering changes noted in a diagnostic test after the later injury.

At the time of the trial, the claimant was not working. He testified that his pain had moderated in recent months but that he continued to have disabling pain. His testimony was corroborated by his wife.

The employer contends the employee has not suffered a compensable injury. Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment, which cause either disablement or death of the employee are compensable. Tenn. Code Ann. § 50-6-103(a).

An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances. It is the resulting injury which must be unexpected in order for the injury to qualify as one by accident. "Injury" has been defined as including "whatever lesion or change to any part of the system (that) produces harm or pain or lessened facility of the natural use of any bodily activity or capability." Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993).

An accidental injury arises out of one's 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, and occurs in the course of one's employment if it occurs while an employee is performing a duty he was employed to do. Id. In order to establish that an injury was one arising out of the employment, the cause of the death or injury must be proved; and if the claim is for permanent disability benefits, permanency must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873, 877 (Tenn. 1996). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony, Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (1991), but an injured employee is competent to testify as to his own assessment of his physical condition and such testimony should not be disregarded. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999). In a workers' compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given incident "could be" the cause of a claimant's injury, when, from other evidence, it may reasonably be inferred that the incident was in fact the cause of the injury. McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995). Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award, for expert opinion must always be more or less uncertain and speculative; Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996) and, where equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn under the case law. Tindall v. Waring Park Assoc., 725 S.W.2d 935, 937 (Tenn. 1987). Any reasonable doubt as to whether such an injury arises out of the employment should be resolved in favor of the employee. Reeser v. Yellow Freight System, Inc., 938 S.W.2d 690, 692 (Tenn. 1997).

The employer further contends the award of permanent partial disability benefits is excessive because his medical impairment has not increased since the earlier injury for which he received an award of $4,000.00. In fact, that court approved settlement included a finding that the employee had no permanent impairment. Moreover, once the causation and permanency of an injury have been

established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. § 50-6-241(b).

From a consideration of the above authorities and giving due deference to the findings of the trial court, we are unable to say that the preponderance of the evidence is otherwise. The judgment is affirmed. Costs are taxed to the appellant.

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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 appellant, Peterbilt Motor Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM