IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
MAY 22, 2003

MAHLE, INC. V. TERRY LEE REESE

Direct Appeal from the Hamblen County Chancery Court
No. 2000-178 Thomas Frierson, II, Chancellor

Filed September 30, 2003

No. E2002-1199-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The issues are the amount of the award and whether the trial court erroneously applied the doctrine of intervening cause. We affirm.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and ROGER E. THAYER, Sp. J., joined.

J. Eric Harrison, Morristown, Tennessee, for the Appellant, Terry Lee Reese.

Joseph J. Doherty, Wimberly, Lawson, Seale, Wright & Daves, PLLC, Morristown, Tennessee, for the Appellee, MAHLE, Inc.

MEMORANDUM OPINION

Facts

Terry Reese worked for twenty-three years as an employee of Mahle, Inc. He sustained a work-injury to his right knee on March 3, 1999. Dr. Michael W. Bratton, an orthopedic surgeon, treated him until February 2000. Dr. Bratton performed an arthroscopy and found a tear of the medial meniscus, but he felt surgery was not necessary. Mr. Reese requested a second opinion and was referred to Dr. Russell Betcher, a board certified orthopedic surgeon. Dr. Betcher performed a repair of the right medial meniscus on August 8, 2000, and he performed another surgery on the medial meniscus on July 5, 2001. Dr. Betcher assigned a permanent medical impairment of 13 percent to the right leg and restricted Mr. Reese from repetitive twisting. Dr. William E. Kennedy reviewed the medical records and gave an opinion concerning causation of Mr. Reese's complaints.

The trial judge filed a very thorough Memorandum Opinion with detailed findings of fact and conclusions of law. The trial court awarded 15 percent permanent partial disability benefits to the right leg. The trial court also found the medical problems of Mr. Reese following the August 8, 2000 surgery to be the result of an independent intervening cause and that Mr. Reese was not entitled to recover benefits for treatment of the deteriorating physical condition and resulting surgery of July 5, 2001.

Standard of Review

Review of the findings of fact made by the trial court is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Tucker v. Foamex*, L.P., 31 S.W.3d 241, 242 (Tenn. 2000). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (2002). "When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings." *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). However, this Court is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Id*.

Issues

1. Is the employee entitled to permanent partial disability benefits greater than the 15 percent awarded by the trial court?

2. Did the trial court err in finding that the doctrine of independent intervening cause applied to bar the employee from medical and temporary disability benefits, and future medical benefits connected with the surgery on July 5, 2001?

3. Did the trial court err in failing to apply the doctrine of independent intervening cause to the employee's second knee surgery on August 8, 2002?

Discussion

I.

Mr. Reese contends that 15 percent disability to the right leg is an inadequate award. The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Cleek v. Walmart Stores, Inc.*, 19 S.W.3d 770, 773 (Tenn. 2000); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). While a worker does not have to show a loss of earning capacity to recover for the loss of use of a scheduled member, the trial court should consider such factors as age, education, training, work history and job opportunities available to the injured worker. *Duncan v. Boeing Tennessee, Inc.*, 825 S.W.2d 416 (Tenn. 1992). In his Memorandum Opinion, the trial judge discussed the medical proof and the restrictions placed by the doctors. He discussed the testimony of Mr. Reese concerning the impact on his work for Mahle, Inc. and other activities. He considered Mr. Reese's age, education and work history, and his job skills. Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). We do not find that the evidence in the record outweighs the presumption of correctness of the trial court's findings.

II.

The second and third issues relate to the application of the doctrine of independent intervening cause. The trial court found that outside activities, including laying tile, were new and additional stresses, which advanced the pre-existing weakness of the medial meniscus and broke the chain of causation. Mr. Reese contends that the doctrine does not apply to the facts of his case. On the other hand, the employer contends that the trial court should have applied the doctrine to bar any liability for problems with the knee after Mr. Reese was treated and released by Dr. Bratton.

Mr. Reese described the work he did in his free time such as installing tile floors and building wood decks. The work involved such things as removing a linoleum rug, moving furniture, insuring there were no nails or floorboards sticking up, chalking the floor to mark where the tile was to be placed, placing adhesive on the floor with a trowel, cutting tile and placing grout between the tiles. He testified that the whole time he was on the floor, he was on his knees. The sideline jobs required bending and flexion of the knees. On November 18, 1999, Mr. Reese reported to Dr. Bratton that he "had a difficult time doing his tile work because he couldn't flex his knee down that far. He did not have any pain with moving his leg to the inside or outside and again denied any new injury." Dr. Bratton testified:

> Any type of flexion injury or any type of flexion activity in which his knee is bent easily can aggravate a medial meniscus tear. Most surgeons after they repair a medial meniscus will tell people not to – I tell people specifically not to squat for three months and again that's because when you squat or when you bend your knee back that far you put a lot of stress on that part of the meniscus potentially causing a re-tear.
>
> Could the tile or all this other stuff cause him to get worse? Yes, it could have. Could just normal everyday activities cause it to get worse? It's unlikely unless you have an injury. Most people that are doing fairly well like Mr. Reese was doing either something's going on that's aggravated it or I'm not getting the whole story or – I would say it's unlikely in my experience and practice that it's going to get worse without some type of aggravating problem.

Dr. Kennedy did not personally examine Mr. Reese, but reviewed his medical records and interrogatory answers. He testified that "more likely than not the activity of laying tile would have placed him in a vulnerable position of advancing the underlying condition of the previously healed posterior horn of the medial meniscus in the right knee."

In a worker's compensation case, the employee has the burden of proving every element of his claim by a preponderance of the evidence. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992). An accidental injury arises out of one's employment when there is apparent to the rational mind, upon a 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 when an employee is performing a duty he was employed to do. *Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993). An intervening cause will preclude a worker's compensation award. *Guill v. Aetna Life & Cas. Co.*, 660 S.W.2d 42, 43 (Tenn. 1983); *Simpson v. H.D. Lee Co.*, 793 S.W.2d 929, 931 (Tenn. 1990). The evidence supports a finding that Mr. Reese obtained no permanent relief and continued to complain after Dr. Bratton released him in February 2000. He was then seen by Dr. Betcher who performed a repair of the right medial meniscus on August 8, 2000. Mr. Reese was released to return to work on October 3, 2000, and he had no further complaints until June 11, 2001. The evidence also establishes that Mr. Reese did three tile jobs and one deck job in the spring of 2001 and a tile/install tub job in June 2001 before he went to Dr. Betcher on June 11, 2001 complaining of pain in his right knee.

The evidence does not preponderate against the conclusion of the trial court that:

(a) Mr. Reese did <u>not</u> obtain complete relief of his work-injury from the treatment by Dr. Bratton;

(b) he <u>did</u> obtain complete relief as a result of the surgery performed by Dr. Betcher on August 8, 2000; and

(c) the subsequent problems and surgery on July 5, 2001 were caused by the outside activities of laying tile floors and building decks.

We find the trial court correctly applied the doctrine of independent intervening cause to terminate the employer's liability following the August 8, 2000 surgery.

Conclusion

The judgment of the trial court is affirmed and this case is remanded for any necessary further proceedings. Costs of this appeal are taxed against the appellant, Terry Lee Reese, and his surety.

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Howell N. Peoples, Special 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Terry Lee Reese, and his surety, for which execution may issue if necessary.