IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 2003 Session

EMILY P. BOWEN v. FRITO-LAY, INC., ET AL.

Direct Appeal from the Chancery Court for Giles County
No. 1539 Robert L. Jones, Chancellor

No. M2002-02552-WC-R3-CV - Mailed - January 28, 2004
Filed - April 30, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel 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 employee in this case sustained 2 separate work-related injuries and one back injury at home. She is now totally disabled and draws Social Security Disability benefits. The employee argues that the trial court erred: (1) in finding that the employee did not sustain a compensable back injury in the course and scope of her employment in March 1999; and (2) in dismissing her complaint against the Second Injury Fund. Additionally, the employer contends that the trial court erred when it held that the employee's February 1998 back injury that occurred while working for this employer was not barred by the statute of limitations. The panel has concluded that the judgment of the trial court should be affirmed.

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

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

Gene Hallworth, Columbia, Tennessee, for the appellant, Emily P. Bowen.

Edward A. Hadley, Nashville, Tennessee, for the appellees, Frito-Lay, Inc., and RSKCo.

Paul G. Summers, Attorney General; E. Blaine Sprouse, Assistant Attorney General; James G. Davis, for the appellee James Farmer, Director of Tennessee Department of Labor and Workforce Development, Workers' Compensation Division, Second Injury Fund.

MEMORANDUM OPINION

Ms. Emily P. Bowen was 50 years old at the time of trial, has a seventh-grade education, and has no special skills or training. She worked as a packer for Frito-Lay, Inc., from June 30, 1980, until May 17, 1999.

On February 4, 1998, Ms. Bowen was working on a wrapper line when she picked up a 35 pound roll of cellophane and immediately felt sharp pain in her back. Dr. Gregory Lanford, a neurosurgeon and her long-time treating physician, took her off work and treated her conservatively with medication and physical therapy. A myelogram revealed nerve root impingement and on May 19, 1998, Dr. Lanford performed a lumbar diskectomy and nerve root decompression at L5-S1.

Dr. Lanford released her to return to light duty work in July of 1998. In November of 1998, he released Ms. Bowen to return to work full-time at Frito-Lay with a 25 pound lifting restriction. He assigned a 1% additional impairment rating for the February 1998 injury.[1] Ms. Bowen continued taking medication. At her January 14, 1999 appointment, Dr. Lanford scheduled a follow-up appointment for April 15, 1999.

In March of 1999, Ms. Bowen was on a temporary assignment packing cookies in tins and placing trays of cookie tins weighing approximately 18 pounds on a bakers' rack. She started having lower back and leg pain, right arm and shoulder pain caused by "leaning over the tray and reaching over the belt in that awkward [bent-over] position for so long." She reported this injury to her employer but continued to work.

On April 15, 1999, Ms. Bowen went to see Dr. Lanford for her previously scheduled follow-up appointment for the 1998 surgery. His notes indicate that she had a new problem and "had re-injured her back" while lifting cookie trays at work. Dr. Lanford found diminished range of motion but x-rays were "unrevealing." He diagnosed low back strain but stated her main complaint was the shoulder pain and that she did not complain of radicular leg pain at this point. He prescribed physical therapy and scheduled a follow-up appointment for May 20, 1999. The physical therapist prescribed a TENS unit, heat therapy, and a back support for Ms. Bowen to wear while at work. Physical therapy was provided at the plant and Ms. Bowen did not miss any work because of this injury.

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[1] While working for Frito-Lay, Ms. Bowen had a series of injuries for which she underwent 2 lumbar surgeries and 1 cervical spine surgery. In 1997 Ms. Bowen and Frito-Lay reached a settlement agreement for these injuries. The settlement agreement does not assign percentages of disability but cites a physician's impairment rating of 10% for the lumbar spine and 15% for the cervical spine. Ms. Bowen continued to work for Frito-Lay after the 1997 settlement and none of these earlier injuries is the subject of this litigation.

On May 17, 1999, Ms. Bowen stepped out of the shower at home and reached for her towel. She coughed and instantly felt an extreme pain in her back. Even though she was unable to bend down to tie her shoes, she reported to work and told a supervisor that she had injured her back at home. Ms. Carol Rutledge, human resource manager at Frito-Lay, told Ms. Bowen that she had to go home because she had injured herself at home. Ms. Bowen admitted that she probably would not have been able to perform her job.

On her May 20, 1999 appointment with Dr. Lanford she reported severe back pain but no leg pain. He took her off work and prescribed physical therapy. When she continued to have back pain and developed left leg pain MRI's and myelograms were ordered which indicated a ruptured disc at L4-5 on the left. In July of 1999, Ms. Bowen had another lumbar diskectomy. When she remained incapacitated with back pain after this surgery, she underwent a two-level lumbar fusion in March of 2000.[2] Dr. Lanford put her on restrictions that include lifting a maximum of 10 pounds, no twisting, bending or stooping. In Dr. Lanford's opinion, Ms. Bowen is disabled.

Dr. Lanford, board-certified in neurological surgery, performed five of Bowen's back surgeries. He testified that the 1998 lumbar disc surgery was the result of the February 4, 1998 injury caused by lifting the cellophane at work. He assessed a 1% additional impairment for this injury and found that she had reached maximum medical improvement by January 14, 1999.

Dr. Lanford found that her shoulder problems had resolved with conservative treatment. He did not assign an impairment rating for the March 1999 injury. He testified that, since there were no objective radiographic studies to compare between the two incidents, he could only "surmise" as to whether the March 1999 incident at work or the May 17, 1999 incident at home was the cause of her back injury that resulted in her July 1999 diskectomy:

> We have two injuries that are fairly close together in time. She did not complain of left leg pain until after the shower incident. But without an objective radiograph between the two, it's difficult for me to, you know, state with certainty this is exactly what caused that. But her symptoms would suggest that it occurred after her shower incident.

On April 25, 2002, Dr. Richard Fishbein, board-certified orthopedic surgeon, conducted a medical examination of Ms. Bowen. He found weakness and atrophy of her left leg, a severe foot drop due to permanent nerve damage and a markedly altered gait. He assigned a 23% anatomical impairment to the body as a whole based on multilevel disc pathology and the lumbar fusion

[2]Dr. Lanford assessed a 28% whole person impairment from her lumbar injuries after her March 2000 fusion surgery. He stated that prior to this surgery her impairment rating was in the range of 15%.

performed in March 2000. He did not assign an impairment rating for the February 1998 injury. He characterized Ms. Bowen as severely disabled due to multiple back surgeries and unable to return to the work force in even a light to sedentary role due to severe pain from multi-level disc pathology.

Dr. Fishbein testified that lifting repeatedly 18-pound cookie trays would be more than enough to herniate a disc for someone in Ms. Bowen's condition; and that this activity was much more likely to rupture a disc than the coughing incident. In his opinion the cookie tray incident "precipitated the problem and the final blow was the coughing." He agreed that there was no evidence of anatomic change caused by the cookie tray injury since an MRI or myelogram was not performed and that his opinion was based upon patient history.

Both vocational experts who testified in this case found Ms. Bowen 100% disabled for work. She receives Social Security disability benefits. She has not worked since the injury in the shower. Ms. Bowen continues to suffer chronic pain in her back and has numbness in her left foot. Ms. Bowen takes four medications and a sleeping pill every day. She is not able to drive, sit, walk or stand for long periods of time.

Ms. Rutledge testified that she did not realize that the 4/15/99 office visit was a new claim and thought it was a continuation of "the previous problems." She also stated that notes in her file indicate she relayed information from the workers' compensation carrier to Ms. Bowen that they would pay for the May 20, 1999 office visit. Ms. Bowen testified that Ms. Rutledge told her Frito-Lay would pay for the office visit, but it would not pay for any x-rays done that day because the injury occurred at home. Mr. Mark Miller, custodian of the billing records, testified that Frito-Lay's workers' compensation carrier paid for medical services incurred on May 20, 1999 and June 24, 1999. Frito-Lay did not pay for either of the surgeries.

On May 8, 2000, Ms. Bowen filed this workers' compensation action alleging that she was totally and permanently disabled due to the injuries of February 4, 1998 and March of 1999. The trial court found that the employee's claim for the injury of February 1998 was not barred because the employer provided medical services within one year of the filing of the complaint. The trial court found that Ms. Bowen sustained a 1% to the body as a whole for the February 1998 injury, applied the 2½ multiplier pursuant to *Tenn. Code Ann.* § 50-6-241(a)(1) and awarded $2,322.72 in benefits. The trial court found: 1) that Ms. Bowen recovered from and was not entitled to compensation for the March 1999 injury; and 2) that the May 1999 injury at home was not compensable and dismissed the complaint against the Second Injury Fund.

ANALYSIS

Review of findings of fact by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). 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. *Corcoran*

v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988).

When the medical testimony is presented by deposition, as it was in this case, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Ins. Co. of N. Am.*, 884 S.W.2d 446, 451 (Tenn. 1994).

The employee raises the following issue:

I. Whether the evidence preponderates against the trial court's finding that the plaintiff did not sustain a compensable injury arising out of and in the course of her employment in March 1999.

The trial court found she had recovered from the March 1999 injury and it was therefore not compensable. The employer concedes in its brief that the March 1999 injury was work-related. It is undisputed that the severe onset of back pain on May 17,1999, occurred at home while getting out of the shower. The vocational expert testimony established that Ms. Bowen is 100% disabled for work. The issue is which event caused the disc rupture which led to her permanent and total disability.

In a workers' compensation case, the plaintiff has the burden of proving every element by a preponderance of the evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987). This court has consistently held that causation and permanency of a work-related injury must be shown in most cases by expert medical testimony. Although absolute certainty is not required for proof of causation, medical proof that the injury was caused in the course of the employee's work must not be speculative or so uncertain regarding the cause of the injury that attributing it to the plaintiff's employment would be an arbitrary determination or a mere possibility. *Id.*

Dr. Lanford testified that he could only "surmise" what was the cause of the resulting surgery because there were no objective radiographic studies to compare the injury in March and the home injury in May. He stated that the shower incident "was the more likely culprit" since her left leg pain did not develop until after this incident. Dr. Fishbein attributed her disc rupture to her work activities.

The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Kellerman v. Food Lion, Inc.,* 929 S.W.2d 333, 335 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690,

692 (Tenn. 1997).

Ms. Bowen did not miss work due to the March 1999 injury and was treated with physical therapy. There is no medical proof of permanent injury. Dr. Lanford and Dr. Fishbein did not assign any impairment to Ms. Bowen's lower back or shoulder due to this injury. Immediately after the home injury in May she was unable to bend down to tie her shoes. While she did report to work that day, she admitted that she probably would not have been able to perform her job.

After reviewing the record in this case, we find that the evidence does not preponderate against a finding that the March 1999 work-related injury did not cause the ruptured disc which led to Ms. Bowen's total and permanent disability. We also find that the evidence does not preponderate against the finding of the trial court Ms. Bowen was not entitled to workers' compensation benefits for the March 1999 injury. The evidence supports the trial court's dismissal of the complaint against the Second Injury Fund.

The employer raises the following issue:

II. Whether the trial court erred in finding that the plaintiff's claim for permanent partial disability benefits for her February 1998 injury was not barred by the statute of limitations.

Tennessee Code Annotated § 50-6-203 provides:

> The right to compensation under the Workers' Compensation Law shall be forever barred, unless, within one (1) year after the accident resulting in injury or death occurred, the notice required by § 50-6-202 is given the employer and a claim for compensation under the provisions of this chapter is filed with the tribunal having jurisdiction to hear and determine the matter; provided, that if within the one-year period voluntary payments of compensation are paid to the injured person or the injured person's dependents, an action to recover any unpaid portion of the compensation, payable under this chapter, may be instituted within one (1) year from the latter of the date of the last authorized treatment or the time the employer shall cease making such payments, except in those cases provided for by § 50-6-230.

Tenn. Code Ann. § 50-6-203.

"Voluntary payments of compensation" by the employer or his insurer which will toll the running of the statute of limitations under the savings proviso of the statute may consist of the furnishing of medical services through physicians or others employed by the employer or his insurer and that, in such cases, the statute will not begin to run until such medical services are terminated, i.e., the date of the last services thus furnished, rather than the date of payment for such services. *Norton Co. v. Coffin*, 553 S.W.2d 751, 752-53 (Tenn. 1977); *Crowder v. Klopman*

Mills, 627 S.W.2d 930 (Tenn. 1982); *Tenn. Code Ann.* § 50-6-203.

In *Blocker v. Regional Medical Center at Memphis*, 722 S.W.2d 660, 662-63, (Tenn. 1987), the Tennessee Supreme Court reviewed the case law on this issue and concluded that the factual issue involves when or whether the employer or insurer effectively ceased providing voluntary compensation.[3] The Court stated:

> More importantly, while actual knowledge that voluntary payments have been terminated is not necessarily required, the cases consistently depend upon the conduct of the parties and what the employee knew or should have known in the circumstances.
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> Not only must an employee know or have reason to know the nature and extent of the injury to be able to make a claim for benefits under the Worker's Compensation Act, but the employee must also know or have reason to know whether the employer or insurer is refusing to make any voluntary provision of compensation to be able to protect his rights under the act. Until the employee knows or has reason to know these things, the statute of limitations does not begin to run on the claim.
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> *Id.*

While treating Ms. Bowen for her 1998 injury during her January 14, 1999 office visit, Dr. Lanford scheduled her to come back on April 15, 1999. This was scheduled as a continuation of treatment and should have been paid for by the workers' compensation carrier.[4] Dr. Lanford referred to her condition as a re-injury and a new problem but does not specifically state that the treatment she received at that appointment was only for the more recent March 1999 injury. He scheduled a follow-up appointment on May 20, 1999, and Ms. Bowen received therapy for her back and shoulder at the plant.

The human resources manager thought that this treatment was for a "continuation of her previous problems" and informed Ms. Bowen that they would pay for the May 20 office visit. The custodian of billing records testified that the workers' compensation carrier paid for medical services incurred on May 20, 1999, and on June 24, 1999. Based on all of the above, we find that Ms. Bowen did not know or have reason to know that the insurer was terminating voluntary

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[3] The employer cites *Bradshaw v. Claridy*, 375 S.W.2d 852, 855-56 (Tenn. 1964), as authority that the employee bears the burden of producing evidence to prove that a payment was made within one year of the filing of the complaint and that the payment was made for treatment of the initial compensable injury rather than some other injury. We find the *Blocker* case to be more in line with the remedial purposes of the Workers' Compensation Act.

[4] It is unclear from the record whether the workers' compensation carrier paid for this visit. Mr. Mark Miller, custodian of the billing records, only testifies about payments made for office visits on or after May 20, 1999.

furnishing of medical services for the February 1998 injury.

We find that the evidence does not preponderate against the trial court's finding that the employee's claim for the injury of February 1998 was not barred by the statute of limitations because the employer provided medical services within one year of the filing of the complaint.

CONCLUSION

The judgment of the trial court is affirmed in all respects. Costs of appeal are taxed to the appellant, Emily Bowen.

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JAMES L. WEATHERFORD, SR.J.

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AT NASHVILLE

EMILY P. BOWEN v. FRITO-LAY

Chancery Court for Giles County
No. 1539

No. M2002-02552-WC-R3-CV - Filed - April 30, 2004

ORDER

This case is before the Court upon the motion for review filed by Emily P. Bowen 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Emily P. Bowen, for which execution may issue if necessary.

PER CURIAM

Holder, J. - Not Participating