

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

JAMES WALTER YOUNG v. NASHVILLE ELECTRIC SERVICE

**Direct Appeal from the Chancery Court for Davidson County
No. 99-192-III Ellen Hobbs Lyle, Chancellor**

**No. M2003-00020-WC-R3-CV - Mailed - February 27, 2004
Filed - July 6, 2004**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeal Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. James Walter Young ("Employee") has appealed the trial court's decision in this case which held that Employee had failed to carry his burden of proof as to causation. The trial court denied workers' compensation benefits. As discussed below, the panel has concluded that the judgment of the Chancery Court should be affirmed.

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

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., joined. JOHN K. BYERS, SR. J., not participating.

Catherine Hughes and Joseph M. Dalton, Nashville, Tennessee, for Appellant James Walter Young

Cyrus Lucius Booker, Nashville, Tennessee, for Appellee Nashville Electric Service

MEMORANDUM OPINION

FACTS

Employee claims two work-related injuries for which he seeks workers' compensation benefits: an injury to his left thumb which occurred on May 9, 1993; and a knee injury which occurred in August 1997. The following evidence was presented regarding the injuries.

Thumb Injury:

Employee testified that on May 9, 1993, he injured his left thumb while at work as a lineman

for NES. He stated that the injury occurred while he was replacing a disconnect on a pole. Employee recalled that the wind from a storm knocked the disconnect off of the pole, and the disconnect hit his thumb. NES sent Employee to its company physician.

Employee testified that he suffered a second injury to his thumb on May 11, 1993. He acknowledged that in the work report prepared by NES, he reported that he was “picking up material, didn’t have a good hold causing to injure thumb when almost dropped material.” Employee testified that after the injuries occurred in 1993, his thumb got better with the use of Aleve. He stated, however, that he injured his thumb again approximately a year later. Employee maintained that after the third injury, the pain was no longer relieved by Aleve, and he had to get a brace.

Employee testified that he did not have any trouble with his left hand prior to 1993. He stated that whenever his thumb would cause him discomfort, he would see the company nurse, Ms. Bradford, who would “send [him] to another doctor.” He claimed that surgery had been suggested for his thumb, but he did not want to miss time from work. Employee maintained that any injury subsequent to the one on May 9, 1993 simply served to aggravated the first injury.

Dr. Gavigan treated Employee on August 20, 1997. He opined that Employee’s condition was related to the arthritis process. Dr. Gavigan did not give Employee an impairment rating for his thumb.

Dr. McInnis testified that he first treated Employee on November 2, 1994. He stated that the work accidents had not done any serious damage to Employee’s thumb. He placed no restrictions on Employee’s activities. Dr. McInnis also testified that the complaints that Employee expressed on March 15, 1995 were different from those expressed previously. Thus, he opined that there had been an intervening injury. Dr. McInnis testified that Employee’s thumb injury did not require surgery. He further testified that the surgery that Dr. Chengler performed resulted from the intervening injury.

Employee’s expert witness, Dr. Joseph Chengler, testified that he began treating Employee in January 1999. According to Dr. Chengler, Employee sought a second opinion regarding his thumb and his hand. Dr. Chengler diagnosed Employee with degenerative arthritis, and he performed an arthroplasty of the CMC joint at the base of Employee’s thumb. He stated that the injuries were consistent with Employee’s history of work-related injuries.

On cross-examination, Dr. Chengler stated that Employee did not inform him of any intervening injuries following the May 9, 1993 incident. Thus, Dr. Chengler testified that he could not comment about causation. He maintained that there is no way to apportion the impairment rating that he assigned to Employee among the different injuries that Employee sustained to his thumb.

Knee Injury:

On August 4, 1997, Employee was working during a storm. When he got out of his truck, he slipped onto the concrete and injured his right knee. Following the injury, Employee reported the

incident to his supervisor and filled out the appropriate paperwork. Employee saw both Dr. McInnis and Dr. Gavigan for his knee injury, and both doctors treated him with Aleve and Tylenol.

Employee acknowledged that prior to the injury alleged in this case, he suffered an injury to his right knee when 13,800 volts of electricity put a hole in his knee. Employee has a scar from the injury.

Dr. Gavigan opined that Employee's problems with his right knee did not relate to the fall at work. He did not assign an impairment rating to Employee regarding the knee and stated that he believed Employee could do his regular work.

Several years later, Employee saw Dr. Chengler, who performed surgery on Employee's left thumb, wrist, and both knees. He testified that the condition of Employee's right knee could have resulted from wear and tear over time. He performed the same surgery on Employees right and left knees, and he assigned an impairment rating to both.

ANALYSIS

Employee argues that sufficient evidence was presented to show causation between his medical conditions and his work-related injuries. NES argues that Employee did not offer any expert medical evidence that the work injury caused the damage to his thumb and that Employee's injuries are not compensable because they resulted from the natural progression of arthritis.

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). This tribunal is not bound by the trial court's findings, but instead conducts an independent examination of the record to determine where the preponderance lies. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). Considerable deference must be given to the trial court's findings of fact, especially where issues of credibility are involved. *Collins v. Howmet*, 970 S.W.2d 941, 943 (Tenn. 1998).

Review of the trial court's decision requires a determination of whether the preponderance of the evidence favors the trial court's judgment. The decision of the trial court will be upheld unless upon review it is determined that the evidence preponderates against the trial court's judgment. *Wingert v. Government of Sumner County*, 908 S.W.2d 921, 922 (Tenn. 1995).

The employee has the burden of proving every essential element of his claim. *White*, 824 S.W.2d at 159. An employee in a workers' compensation case must establish causation and permanency of an injury by testimony from medical experts. *Thomas v. Aetna Life and Cas. Co.*, 812, S.W.2d 278, 283 (Tenn. 1991). The existence of a prior disabling condition does not preclude a worker's compensation award where a work-related injury aggravates the pre-existing condition. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992). In cases involving a pre-existing condition, the employee is entitled to recover if the employment causes an actual progression or

aggravation of a pre-existing condition which produces disabling pain. *Hill v. Eagle Bend Mfg. Inc.*, 942 S.W.2d 483 (Tenn.1997).

The finding of causation and permanency must be based on competent medical testimony. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335-36 (Tenn. 1996). When the medical testimony is presented by depositions, 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. Insurance Company of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

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). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to work. *Reeser v. Yellow Freight System, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997).

Although causation cannot be based on speculative or conjectural proof, absolute medical certainty is not required, and reasonable doubt is to be construed in favor of the employee. *White*, 824 S.W.2d at 159. 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 Systems, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted.)

The trial court, after hearing testimony, reviewing trial exhibits, and weighing the evidence, determined that the employee had failed to prove his injuries arose out of the course and scope of his employment as he is so required. Further, the trial court found that Employee also failed to establish that the injuries aggravated a pre-existing condition. After a careful review of the record before us, we conclude that the trial court did not err by finding that Employee failed to carry his burden of establishing that his medical conditions resulted from his injuries of May 9, 1993, and August 1997.

CONCLUSION

The judgment of the trial court is, therefore, affirmed. Costs of this appeal are taxed to the employee-appellant, James Walter Young.

ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JAMES WALTER YOUNG v. NASHVILLE ELECTRIC SERVICE

[FOR PUBLICATION]

No. M2003-00020-SC-WCM-CV - June 9, 2004

ORDER

In this workers' compensation appeal, the Special Workers' Compensation Appeals Panel ("Appeals Panel") affirmed the trial court's judgment, finding that the employee failed to carry his burden of proof as to causation. The employee has filed a motion for review pursuant to Section 50-6-225(e)(5)(B), Tennessee Code Annotated (Supp. 2003). That statute requires that a motion for review be filed within fifteen days of the issuance of the Appeals Panel's decision.

The Appeals Panel's decision was issued on February 27, 2004. The parties therefore had fifteen days from February 27 within which to file a motion for review, making Monday, March 15, 2004, the last day upon which such a motion could be filed. The employee's motion for review was not filed until March 18, 2004.

In the motion for review, counsel for the employee concede that the motion was not timely filed. They ask the Court, however, to "waive" the fifteen-day requirement because they had relocated their law office in September 2003 and, "through oversight, failed to notify the Supreme Court Clerk's Office of this move." Counsel therefore did not immediately receive the Panel's opinion because it had to be forwarded by the postal service. In addition, one of the employee's attorneys states in an affidavit attached to the motion for review that both he and his associate were "out-of-town from March 3, 2004 until March 14, 2004, and counsel did not actually receive the Panel's Decision until Monday, March 15, 2004." On these factual grounds, counsel for the employee ask the court to "waive the 15 day rule as to the filing of this motion."

The employer, Nashville Electric Service ("NES"), has filed a response in opposition to the employee's motion for review. In pertinent part, NES argues that the fifteen-day period for filing a motion for review is jurisdictional. Thus, NES asserts that the fifteen-day period may not be "waived" and that the motion for review therefore should be dismissed.

The issue presented in this case is whether this Court may extend the fifteen-day limitation period imposed by Section 50-6-225(e)(5). That statute provides, in pertinent part:

The decision of the panel shall become the judgment of the supreme court thirty (30) days after it is issued unless: . . .(B) Any party to the appeal files a motion requesting review by the entire supreme court within fifteen (15) days after issuance of the decision by the panel, in which event a final judgment will not be entered: (i) Until the motion is denied; or (ii) If the motion is granted, until the supreme court enters final judgment after its consideration of the case.

For purposes of this subsection, a decision of the panel shall be deemed to be issued on the day it is mailed to the parties, which date shall be noted on the decision by the clerk.

This Court previously has addressed the issue of whether the Court may consider an untimely motion for review. In Pittman v. Lasco Industries, Inc., 908 S.W.2d 932 (Tenn. 1995), we held that “Tenn.R.App.P. 21(b),¹ does not operate to extend the fifteen-day filing period established by the statute”; as a result, we held that the court is without jurisdiction to consider an untimely motion for review. Id. at 933. See also, Whitney v. A.O. Smith Corp., No. 02S01-9301-CV-00004, 1994 WL 902785, at *1 (Tenn. July 14, 1994) (wherein the Court dismissed an untimely motion for review); U.T.C. Carrier Corp. v. Woodard No. 02S01-9208-CV-00050, 1993 WL 835599, *1 (Tenn. June 25, 1993) (wherein the Court dismissed an untimely motion for review).

Consistent with our ruling in Pittman, we hold that the fifteen-day limitation period imposed by Section 50-6-225(e)(5)(B) is jurisdictional and may not be waived or extended by the Court. As a result, the employee’s motion to waive the fifteen-day requirement is denied, and the employee’s motion for review is dismissed as untimely. 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.

The costs are taxed to the plaintiff-appellant, James Walter Young, for which execution may issue, if necessary.

IT IS SO ORDERED.

PER CURIAM

BIRCH, J., NOT PARTICIPATING

¹Rule 21(b) provides: “Extension of Time. For good cause shown the appellate court may enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal prescribed in rule 4, an application for permission to appeal prescribed in rule 11, or a petition for review prescribed in rule 12.”

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AT NASHVILLE

JAMES WALTER YOUNG v. NASHVILLE ELECTRIC SERVICE

Chancery Court for Davidson County
No. 99-192-III

No. M2003-00020-SC-WCM-CV - July 6, 2004

JUDGMENT ORDER

This case is before the Court upon: a motion for review filed pursuant to Section 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 finding of facts and conclusions of law, which are incorporated herein by reference. The Court finds that the motion for review was not timely filed and should be dismissed.

Accordingly, the motion for review filed on behalf of the plaintiff, James Walter Young, is **DISMISSED**. The Court hereby adopts and affirms the findings of fact and conclusions of law of the Appeals Panel, and the decision of the Panel is made the judgment of the Court.

The costs on appeal are taxed to the movant, James Walter Young, for which execution may issue if necessary.

PER CURIAM

Birch, J. - Not Participating.