IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 30, 2005 Session

CHAD CONATSER v. METRO READY MIX, ET AL.

Direct Appeal from the Chancery Court for Coffee County
No. 01-110 Royce Taylor, Judge

No. M2005-00814-WC-R3-CV - Mailed - April 6, 2006
Filed - May 9, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee 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. The Plaintiff alleged a cervical injury apparently owing to two separate events, including an injury sustained while exercising on the job, and another injury occurring when the truck he was driving ran into a hole and bounced him upward, jamming his neck. A number of medical physicians found no basis for his complaint. A chiropractic physician, by a range of motion study, opined that he retained a 26 percent impairment. The trial court found that the Plaintiff retained 0 percent disability as a result of his work related injury on July 22, 2000, and we affirm.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and ROBERT E. CORLEW III, SP. J., joined.

Robert L. Huskey, Manchester, Tennessee, attorney for Appellant, Chad Conatser.

Bree A. Taylor, Nashville, Tennessee, attorney for Appellee, Metro Ready Mix and Lumberman's Underwriting Alliance.

MEMORANDUM OPINION

This complaint was filed on March 15, 2001, alleging that the Plaintiff sustained a compensable injury to his neck and cervical spine on or about April 1, 2000 during the course and scope of his employment as a truck driver. It appears that the Plaintiff first injured his neck while doing on-the-job exercises at a gym provided by the Employer. The Plaintiff was not treated for any injuries occurring as a result of this incident. Testimony revealed that while driving a ready-mix

concrete truck on July 22, 2000, the Plaintiff ran into a depression which jolted him vertically, with his head striking the roof of the cab resulting in a cervical injury[1] of a disputed nature. A supervisor took the Plaintiff to the emergency room immediately following this incident, where he was treated and released.

About six weeks after the described incident occurred, the Plaintiff sought medical attention from Dr. Thomas O'Brien, an employer-approved orthopedic specialist[2]. Dr. O'Brien sent the Plaintiff to physical therapy and placed him on light duty from October 23, 2000 until November 1, 2000, when he was released at maximum medical improvement. Dr. O'Brien opined that the Plaintiff retained a 0 percent permanent partial impairment rating. He saw Dr. O'Brien a total of three times, and asked to see a different physician. He then saw Dr. J. Keith Nichols, also an orthopedic specialist, on two occasions. Dr. Nichols treated the Plaintiff with injections and physical therapy, but declined to impose any work restrictions on him. Dr. Nichols released the Plaintiff on December 5, 2000, noting subjective complaints with no objective findings of abnormality. He released the Plaintiff at maximum medical improvement, gave him a permanent partial impairment rating of 0 percent, and testified that he could continue in his normal job activities. Both doctors indicated that the Plaintiff's neurological exams were normal, and that any problem he was having would resolve over time.

The Plaintiff continued to drive a concrete redi-mix truck, and began to have "little accidents" as he described, like backing into a guy wire and into a tree because he was unable to turn his head, owing to stiffness in his neck. He was fired on August 1, 2001, apparently due to his inability to continue to drive a concrete truck safely.

The Plaintiff, of his own volition, then saw Dr. Jeffrey McKinley, a chiropractor, on February 28, 2001. He performed a range of motion study on the Plaintiff, using the Fourth Edition of the Guidelines, because he did not have the Fifth Edition, which was then current.[3] Dr. McKinley testified that the Plaintiff never mentioned the July 2000 or July 2001 injuries during the course of his treatment, that his opinion was based exclusively on the April 1, 2000 incident, and has nothing to do with subsequent injuries. He admitted that had he known about the subsequent injuries, it would have "had an impact". He last saw the Plaintiff on September 13, 2001. Dr. McKinley opined

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[1] The Plaintiff filed another complaint, docket 02-302, which is not in the record. We are able to deduce, however, that he alleged back injuries sustained in an accident which occurred in July 2001, four months after the complaint was filed in the case at bar. The cases were consolidated for trial. Judgment was entered in docket 02-302, dismissing the complaint and holding that the Plaintiff was not newly injured, and suffered no aggravation of a pre-existing injury. The judgment was not appealed. In point of fact, the Plaintiff testified that he was not injured, and the record does not explain why the suit was filed. See, Tenn. R. Civil P. Rule 11.

[2] Although the Plaintiff contends that he was not afforded the opportunity to choose from a panel of physicians, his signature appears on a page listing three authorized physicians from which to choose, including Dr. O'Brien.

[3] Dr. McKinley later compared the Fourth and Fifth Editions, and concluded that there is no difference in the ratings assigned based upon the range of motion model between the two editions of the AMA guides.

that, based solely upon a decreased range of motion, the Plaintiff had an anatomical impairment of 26 percent.[4]

He was also seen by Dr. Philip Megison, a neurological surgeon, who opined that his cervical spine was normal. He was seen by Dr. Gary Stevens, an orthopedic specialist, who had treated the Plaintiff for a cervical spine injury, of at least two years in duration, in March 2002. Dr. Stevens assessed a permanent partial impairment rating of 5 percent to the cervical spine, but could not attribute this rating to the injury at issue in this case with any degree of medical certainty.

The trial judge concluded that the Plaintiff should be examined by an independent medical examiner, orthopedist Dr. David Gaw, who met with the Plaintiff, but declined to examine him for unrevealed reason(s). The trial court thereafter reviewed the available evidence and found that there was no credible proof in the record indicating that the Plaintiff's problems are the result of the July 22, 2000 injury. The trial court held that the Plaintiff retained a 0 percent disability rating from this work-related accident, and was not entitled to an award of permanent disability benefits.

The Plaintiff appeals, and presents for review the issue of whether the trial court erred in finding that he sustained no disability as a result of the July 22, 2000 injury. Our review is de novo on the record with the presumption that the judgment of the trial court is correct unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); Tenn. Code Ann. § 50-6-225(e)(2); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). Conclusions of law established by the trial court come to us without any presumption of correctness. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825 (Tenn. 2003).

When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998); *Hill v. Eagle Bend Mfg. Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997); *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). In making an award of permanent impairment, the trial court considers both the anatomical impairment considered by the experts and also lay testimony. *Collins*, 970 S.W.2d at 943. The Employee's assessment of his physical condition and resulting disability is therefore generally considered. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991).

In this case, we note that the credibility of the Plaintiff is a significant issue. The trial judge had the opportunity to determine whether or not the Plaintiff's account is believable, and found "no credible proof" that his problems are the result of the July 22, 2000 accident. See *Long v. Tri-Con Indus.*, 996 S.W.2d 173, 177 (Tenn. 1999). It would not be inappropriate to observe that a careful study of the Plaintiff's testimony on appeal reveals a myriad of inconsistent and improbable statements.

[4] He also agreed that a certified independent medical examiner would be in a better position than he to accurately assess a patient's permanent partial impairment.

The trial court also has the discretion to accept the testimony of one expert over that of another. See *Kellerman v. Food Lion*, 929 S.W.2d 333, 335 (Tenn. 1996); *Humphrey v. David Witherspoon Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987); *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676 (Tenn. 1983). Only one expert in this case assigned *any* impairment rating to the Plaintiff within a degree of medical (or chiropractic) certainty, and this expert testimony does not appear to be as credible as the others, for various reasons explored herein. The trial court concluded that the Plaintiff's problems are not the result of his July 22, 2000 injury, and that he retained a 0 percent permanent partial impairment rating. The preponderance of the expert testimony in this case therefore clearly supports the judgment.

We have made a careful review of the evidence and the exhaustive analysis of the proof by the trial judge. We conclude that we can neither substitute our judgment for that of the trial judge, nor find that the evidence preponderates against his findings. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). The judgment is affirmed, with costs taxed to Plaintiff.

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WILLIAM H. INMAN, SENIOR JUDGE

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NOVEMBER 30, 2005 SESSION

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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 appeals 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 Plaintiff/Appellant, Chad Conatser, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM