IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
December 15, 2005 Session

ROBERT R. OATES, SR. v. PINKERTON GOVERNMENT SERVICES, INC.

Direct Appeal from the Chancery Court for Hamilton County
No. 03-1070 Howell N. Peoples, Chancellor

Filed April 24, 2006

No. E2004-02671-WC-R3-CV - Mailed February 15, 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 trial court awarded Plaintiff 100 percent permanent disability. Defendant contends that Plaintiff's pre-existing cancer and not a work-related event was the cause of his disability. Plaintiff argues the trial court was in error in failing to provide that all medical expenses be paid directly to the Plaintiff. Judgment of the trial court is affirmed.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and THOMAS R. FRIERSON II, SP. J., joined.

F. R. Evans, Chattanooga, Tennessee, for Appellant, Pinkerton Government Services, Inc.

George Lane Foster, Chattanooga, Tennessee, for Appellee, Robert R. Oakes, Sr.

MEMORANDUM OPINION

This appeal has been perfected by the Employer, Pinkerton Government Services, Inc., from a ruling of the Chancery Court awarding the Employee, Robert R. Oates, Sr., total permanent disability.

Plaintiff, a fifty-eight year old high school graduate, was employed as a security agent or guard assigned to work at the Sequoyah Nuclear Plant in Hamilton County. When working he was

required to carry armor and other protective equipment which weighed approximately 53 pounds. On February 19, 2003, he was in the process of getting off a dump truck he had escorted and had to jump because the step had been damaged and pushed under the truck. As he jumped, he said his body twisted and he hit the ground causing his back to hurt. He saw a chiropractor on February 25 and for several other visits thinking he had just sprained his back. He continued to work and while assigned to light duty on April 3, 2003 he was asked by the security manager to move a board that had the I.D. cards on it and as he lifted the object which weighed about 45 to 50 pounds, a brilliant flash of light went off in his eyes and he lost all strength in arms. He entered the hospital on May 15, 2003 for tests and it was discovered he had cancer in his back which had spread to his hips and was the result of prostate cancer.

At the time of the trial, he said he could not sit or stand for any length of time; that he had no strength; and that bed rest was his only relief. He said he was unable to work and had been told he may have twelve to eighteen months left if he had the best possible results.

His total medical expenses were $194,496.70 and there was evidence to support the expenses as being reasonable in amount and for necessary treatment.

The only other evidence was the expert medical testimony of Dr. Richard G. Pearce, an orthopedic surgeon, who testified by deposition twice. During his first deposition, he stated Plaintiff had a fracture of the eighth thoracic vertebra and that a spinal fusion was performed on May 16, 2003; the procedure resulted in a 28 percent impairment under the AMA Guides, Fifth Edition, and his activity from the fusion would be restricted to sedentary work.

The doctor said Plaintiff's cancer had existed for some period of time and that it resulted in weakening the vertebra. He described the fracture as of a "burst" nature and that a burst fracture "goes in all directions or kind of bursts apart" and usually results from pressure coming down from the top of the vertebra; that when he was preparing to remove the vertebra, he found "pieces of bone there, but there was also tumor material there. It's kind of all intermixed among itself." When the doctor was told that Plaintiff had continued to work up until about one week before he saw him for the first time on May 2, 2003, and also that Plaintiff had worked 81 to 88 hours the last week, Dr. Pearce replied that the severity of the fracture he observed during surgery would have resulted in his not being able to work and that the event which occurred on the date in question (February 19, 2003) did not immediately result in the condition of the fracture he saw during the surgical procedure.

The second deposition was taken by Defendant and after the doctor had been furnished with medical records not available to him at the first deposition. In this deposition, the doctor testified that an April 24, 2003 CT Scan (requested by other doctors) indicated that there was no fracture line in the vertebra as of that date and that the collapse of the vertebra must have occurred between that date and the May 15, 2003 date of the hospital MRI Scan. The doctor was then asked what was the most likely cause of the burst fracture. The reply was rather lengthy but the essence of his answer was that the vertebra was being eaten away by the cancer and that something else must have occurred. He said he saw no evidence on the CT Scan that a fracture actually occurred as a result

of the February 19 incident. On cross-examination, Dr. Pearce testified that the April 3 incident could have caused a fracture but the entire chain of events from February 19 to his hospitalization by history was all involved in the collapse of the bone.

Standard of Review

The standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Analysis of Issues

The Employer contends the expert medical evidence indicates that pre-existing cancer was the cause of the eventual fracture of the vertebra and that the evidence was not sufficient to support a finding that a work-related event was a causative factor.

It is well established that the Plaintiff in a workers' compensation suit bears the burden of proving every element of the case by a preponderance of the evidence, including the existence of a work-related injury by accident. *Talley v. Virginia Ins. Reciprocal***,** 775 S.W.2d 587, 591 (Tenn. 1989). Generally, the claimant must establish causation by expert medical evidence. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991). Although causation cannot be based upon speculation or conjectural proof, absolute certainty is not required and reasonable doubt is to be construed in favor of the employee. *Hill v. Eagle Bend Mfg.*, 942 S.W.2d 483 (Tenn. 1997); *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992).

An employer is responsible for workers' compensation benefits even though the claimant may have been suffering from a serious pre-existing condition or disability if the employment causes an actual progression or aggravation of the prior condition or disease. *Hill v. Eagle Bend Mfg.*, *Id*. So an employer takes an employee as he or she is and assumes the responsibility of having a pre-existing condition aggravated by a work-related injury which might not affect a normal person and an injury is compensable if a work-related accident can be fairly said to be a contributing cause of the injury. *Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993).

In *Boyd v, Young*, 246 S.W.2d 10 (Tenn. 1951) the employee was working at a grocery store and picked up a box of cheese weighing about 40 pounds when he suddenly felt something snap or pop in his back. He was eventually hospitalized and during surgery, it was discovered he had a cancerous condition in his back about the size of a grapefruit which had spread into surrounding tissue and muscles. In affirming an award of death benefits, the supreme court held that the medical evidence was sufficient to support the trial court's conclusion that the accident was a contributing cause of the employee's death.

In the present case, the Employee testified about two specific work events which caused his condition to worsen and considering the nature of his work and the gear he had to wear, we find this

evidence supporting the doctor's conclusion that all of these events contributed to the fracture of his vertebra.

The Employee has also raised an issue in regard to the payment of medical expenses. Counsel prepared a final judgment providing that medical expenses would be paid directly to the Plaintiff with the understanding that Plaintiff would satisfy all subrogation interests, etc. and hold Defendant harmless from any subrogation claims. The Chancellor struck out this language and wrote in its place that "the defendant shall pay medical bills attached to the deposition of Dr. Richard G. Pearce either by paying the provider directly or reimbursing plaintiff or plaintiff's health insurer."

On appeal counsel states that he has also been employed to protect the subrogation interest of Blue Cross Blue Shield and that the Chancellor's alteration of the language in the final judgment prevents Plaintiff from issuing an execution to satisfy a judgment for medical expenses. We find the decision in *State Auto Mut. Ins. Co. v. Hurley*, 31 S.W.3d 562 (Tenn. W.C. Panel 2000) controls the issue. In *Hurley* the court held that Tennessee Code Annotated section 50-6-204(a)(1) requires the employer to furnish free of charge to the employee reasonable and necessary medical treatment and the employer is not required to pay the employee the costs of medical treatment unless the employee has personally paid such expenses. The trial court altered the language to conform with the *Hurley* decision. If the Employer fails to comply with this portion of the judgment, Plaintiff has a remedy for enforcement.

Conclusion

The evidence does not preponderate against the judgment and it is affirmed. Costs of the appeal are taxed to Defendant-Employer.

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ROGER E. THAYER, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Pinkerton Government Services, Inc., 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 Appellant, Pinkerton Government Services, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

E. Riley Anderson, J., not participating.