IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 15, 2006 Session

RODNEY L. MARLOWE v. TOWN OF OLIVER SPRINGS

Direct Appeal from the Circuit Court for Anderson County
No. A4LA0150 – Honorable Donald R. Elledge, Judge
Filed January 31, 2007

E2006-00026-WC-R3-WC - Mailed December 21, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance to Tenn. Code Ann. § 50-6-225 (e)(3) (2005) for hearing and reporting of findings of fact and conclusions of law. The employee appeals a finding of non-compensability due to a lack of causation. We affirm.

Tenn. Code Ann. § 50-6-225(e)(3) (2005) Appeal as of Right; Judgment of the Anderson County Circuit Court is Affirmed.

T. E. FORGETY, JR., Special Judge, delivered the Opinion of the Court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and THOMAS R. FRIERSON, II, Special Judge, joined.

Jennifer L. Chadwell, Knoxville Tennessee, for the Appellant, Rodney L. Marlowe.

Hanson R. Tipton, Knoxville, Tennessee, for the Appellee, Town of Oliver Springs.

MEMORANDUM OPINION

Facts

The Employee, Rodney L. Marlowe, filed his complaint seeking worker's compensation benefits on March 5, 2004. He alleged he suffered an on-the-job injury on February 5, 2004. The Town of Oliver Springs denied that Mr. Marlowe's injury arose out of his employment, and denied that he was entitled to any benefits. The trial court heard the case on November 28, 2005, and found that the Plaintiff's injury was not compensable. Mr. Marlowe has appealed.

The Plaintiff was a laborer/machinery operator for the Town of Oliver Springs. At trial, he testified that on February 5, 2004, he was re-setting a road sign when he twisted and sneezed. He then felt pain in his ribcage on the left side. The Employer has not taken issue with Mr. Marlowe's account of these events. Mr. Marlowe sought medical treatment on February 6, 2004, from his family physician, Dr. Scott Davis. Dr. Davis took an X-Ray of the Plaintiff's chest at that time, and found it to be normal. His diagnosis was that Mr. Marlowe had suffered a strain of the rib cage. Dr. Davis continued to treat the Plaintiff during the month of February, and on March 2, Mr. Marlowe related that his chest pain had essentially resolved. Then, on March 23, the Plaintiff went back to Dr. Davis complaining of possible pneumonia. Dr. Davis took another X-Ray, and this time found a lesion or spot of fluid, in the left lung. Mr. Marlowe was referred to Dr. William M. Hall, a thoracic surgeon, who performed surgery on March 24, to drain the lung. Dr. Davis opined that the fluid on the Plaintiff's lung, and his surgery, were caused by the February 5 incident. Dr. Dennis Harris, a pain management specialist, conducted an independent medical exam of the Plaintiff. He had reviewed the notes of Dr. Hall, the surgeon, as well as those of Dr. Hughes, who had admitted Mr. Marlowe to the hospital. Dr. Harris noted that the surgeon had related Mr. Marlowe's lung infection to poor dentition (infection of teeth and/or gums), rather than the work incident of February 5. According to Dr. Harris, patients with infected teeth run a very high risk of lung infections. In any event, it was Dr. Harris' opinion that Mr. Marlowe's lung infection, surgery, and lingering chest pain were not connected to the February 5 incident. Rather, they were caused by his poor dentition/infected teeth.

The Trial Judge noted some "very troubling" inconsistencies in the Plaintiff's testimony, but ultimately decided the case upon the medical proof. The court found Dr. Davis' testimony to be speculative, and accepted Dr. Harris' opinion – i.e., that Plaintiff's lung infection was not work related. Accordingly, the complaint was dismissed.

Standard of Review

We review the factual findings of the trial court *de novo* upon the record, and those findings are presumed correct, unless the evidence preponderates against them. Tenn. Code Ann. 50-6-225(e)(2) (2005); *Clark v. Nashville Machine Elevator Co.*, 129 S.W.3d 42, 46 (Tenn. 2004); *Houser v. BiLo, Inc.*, 36 S.W.3d 68, 70-71 (Tenn. 2001).

And, we review the record independently to determine where the preponderance lies. *Cleek v. Wal-Mart Stores, Inc*., 19 S.W.3d 773-74 (Tenn. 2000); *Williams v. Tecumseh Products Co.*, 978 S.W.2d 932, 935 (Tenn. 1998). Conclusions of law are reviewed without any presumption of correctness. *Watt v. Lumbermen's Mut. Cas. Co*., 62 S.W.3d 123, 127 (Tenn. 2001); *Tucker v. Foamex, LP*, 31 S.W.3d 241, 242 (Tenn. 2000). Where the trial court has seen and heard the witnesses, and credibility and the weight of the testimony are at issue, we must give considerable deference to the lower court's findings. *Seal v. Charles Blalock & Sons, Inc*., 90 S.W.3d 609, 612-13 (Tenn. 2002); *Gray v. Cullom Machine, Tool & Die, Inc*., 152 S.W.3d 439, 442 (Tenn. 2004). When medical testimony is presented by deposition, we may draw our own conclusions as to the credibility and weight to be given to the witness. *Richards v. Liberty Mut. Ins. Co*., 70 S.W.3d 729, 732 (Tenn. 2002). In the event of a conflict in the medical/expert testimony, the trial court may accept the opinion of one expert over another, unless the evidence preponderates otherwise. *Bohanan v. Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004); *Kellerman v. Food Lion, Inc*., 929 S.W.2d 333, 335 (Tenn. 1996).

Issues

As stated by the Employee/Appellant, the issues are as follows:

(1) Whether the trial court erred in applying the incorrect standard to the medical proof needed by claimant . . .

(2) Whether the trial court erred in weighing the medical evidence.

(3) Whether the trial court erred in assigning too much weight to the surgeon's notes attached to the deposition of Dr. Scott Davis.

Discussion

At the outset, we note that the critical question here is whether the Plaintiff's lung infection was caused by the on-the-job incident of February 5, 2004. It is of course settled law that medical complications which arise directly and without intervening cause from the treatment of a compensable injury are themselves compensable. *McAlister v. Meth. Hosp. of Memphis*, 550 S.W.2d 240, 242 (Tenn. 1977).

In his first issue, Plaintiff complains that the trial court applied an incorrect standard of proof when it weighed the medical evidence. In reviewing Plaintiff's Brief, it appears that the substance of his argument goes not to the proper standard of proof – which is without question, a preponderance of the evidence – but rather to whether his evidence met that standard. Since the Plaintiff's second issue also addresses the preponderance of the medical evidence, we will discuss these issues together.

Mr. Marlowe correctly cites case law which holds that in a worker's compensation case, medical testimony to the effect that an incident "could be" the cause of an injury can be sufficient to support an award of benefits. *See, e.g., Reeser v. Yellow Freight System, Inc*., 938 S.W.2d 690, 692 (Tenn. 1997). He also cites authorities holding that, on causation, it is appropriate for the court to consider the claimant's own testimony as to how the injury occurred. *Thomas v. Aetna Life & Cas. Co*., 812 S.W.2d 278, 283 (Tenn. 1991). Finally, and again correctly, Plaintiff recites that any reasonable doubt as to the compensability of the injury must be resolved in favor of the Employee. *See, Reeser, 938* S.W.2d at 692. While we have no quarrel with these authorities, the fact remains that we must make an independent review of the record to determine whether the evidence preponderates in favor of compensability. *Williams*, 978 S.W.2d at 935; *Cleek*, 19 S.W.3d at 773.

In the first instance, we note that the trial court referred to certain inconsistencies in Mr. Marlowe's testimony and found them to be "very troubling." Indeed, the court stated, as to Plaintiff:

> "I hope you're not intentionally misleading this Court, but it (the inconsistencies) causes me to reflect adversely on your testimony and your credibility."

As noted above, we must accord considerable deference to this finding, since the trial court saw and heard Mr. Marlowe. *Seal*, 90 S.W.3d at 612-13; *Gray*, 152 S.W.3d at 442. This is especially significant here, since Plaintiff relies on his own testimony in conjunction with the medical proof to establish a preponderance of the evidence. Applying the "considerable deference" standard to the trial court's findings on credibility, we are unable to say that the evidence preponderates against those findings.

In considering the medical proof, we do note that Dr. Scott Davis opined that Plaintiff's surgical complications were related to the February 4, work incident. However, the trial court observed that Mr. Marlowe visited Dr. Davis several times between the incident and February 23, when he told the doctor for the first time that the incident was work related. Moreover, Dr. Davis conducted no diagnostic studies, and based all of his findings upon subjective matters. Perhaps most importantly, the court referred to the fact that Dr. Davis's notes show that Mr. Marlowe's chest complaints were "essentially resolved" by March 2nd. In any event, the court ultimately concluded that Dr. Davis' deposition, taken as a whole, was speculative. On the other hand, the Court noted that Dr. Harris testified that he simply could not connect Plaintiff's work incident to his subsequent chest surgery. Rather, it was his opinion that the chest infection, more likely than not, resulted from Mr. Marlowe's poor dentition. Of course, where there is a conflict in the testimony of experts, the trial court has the discretion to accept one expert over another. *Bohanan*, 136 S.W.3d at 624; *Kellerman*, 929 S.W.2d at 335. Having examined the record, we are unable to conclude that the Trial Judge erred in accepting Dr. Harris's opinion and rejecting that of Dr. Davis.

In his third issue, the Plaintiff argues that the trial court placed too much weight upon the notes of the surgeon, Dr. Hall. In effect then, this issue is also aimed at the preponderance of the evidence. Dr. Hall did not testify, but his treatment notes were made an exhibit – by the Plaintiff himself – to Dr. Davis's deposition. The significance of the notes is that Dr. Hall apparently felt that Mr. Marlowe's chest infection was caused by his poor dentition. Under Tenn. R. Evid. 703, an expert may base his opinion upon facts or data which are not necessarily admissible into evidence. However, that does not render the underlying facts, data, or opinions admissible as independent evidence of the matters therein asserted. After all, those facts/opinions are clearly hearsay under Tenn. R. Evid. 801. The Trial Judge did refer in his memorandum opinion to the treatment notes of Dr. Hall, and for that matter Dr. Hughes, the physician who had admitted Mr. Marlowe to the hospital. Leaving aside the fact that it was Plaintiff who offered these notes as exhibits to Dr. Davis's deposition, we cannot conclude that Mr. Marlowe is entitled to relief upon this basis. Given our findings as to the credibility of Mr. Marlowe, and the preponderance of the medical evidence, the actions of the Trial Judge are, if error at all, harmless. Tenn. R. App. Proc. 36(b).

Conclusion

For the foregoing reasons, we AFFIRM the judgment of the trial court, and REMAND this cause for any further proceedings which may be appropriate. Costs on appeal are adjudged against Rodney L. Marlowe and his surety.

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TELFORD E. FORGETY., JR., 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, Rodney L. Marlowe, for which execution may issue if necessary.