IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 29, 2007 Session

EDWARD PULLIAM v. WHITE CONSOLIDATED INDUSTRIES, INC. d/b/a ELECTROLUX HOME PRODUCTS, INC. ET AL.

Direct Appeal from the Circuit Court for Robertson County
No. 10634 Ross H. Hicks, Judge

No. M2006-00435-WC-R3-CV - Mailed - July 24, 2007
Filed - August 24, 2007

This is a workers' compensation appeal referred to and heard by the Special Workers' Compensation Appeals 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. The Plaintiff contends that the preponderance of evidence is contrary to the trial court's finding that the Plaintiff did not sustain a compensable work-related injury. We believe the trial court was correct, and therefore we affirm the trial court's decision.

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

CLAYBURN PEEPLES, SP.J., delivered the opinion of the court, in which JANICE HOLDER, J., and LAURENCE M. MCMILLAN, JR., SP.J., joined.

Aubrey T. Givins and Phil Gombar, Nashville, Tennessee, for the appellant, Edward Pulliam.

Terry L. Hill and Heather E. Hardt, Nashville, Tennessee, for the appellee, White Consolidated Industries, Inc., d/b/a Electrolux Home Products, Inc. individually, Old Republic Insurance Company.

MEMORANDUM OPINION

FACTUAL BACKGROUND

At the time of trial, the Plaintiff, Edward Pulliam, was forty-five years old. He was a high school graduate with two years vocational training and seventeen years training in the United States Army National Guard. Previous to his employment with Defendant, White Consolidated Industries, d/b/a as Electrolux Home Products, he worked at various blue collar jobs, including a previous employment with Defendant. His second employment with Defendant began in the year 2000. While there, Plaintiff worked primarily in the enamel department.

On October 29, 2000, Plaintiff suffered an injury to his lower back when he was struck by a tow motor. As a result, he was diagnosed as having significant lumbar stenosis with disc protrusion and herniation. A laminectomy was performed by Dr. Robert Weiss to address these issues. That injury led to a workers' compensation claim, which was settled based upon a 20% permanent partial disability to the body as a whole, with Plaintiff retaining the right to lifetime future medical benefits.

In September 2003, while participating in a mandatory in-house exercise program, Plaintiff claimed he reinjured his back. Defendant took the position that Plaintiff did not suffer a new injury but rather was simply experiencing pain related to his prior injury. Consequently, Defendant denied Plaintiff's claim.

A hearing was held on the matter on December 7, 2005, in the Circuit Court of Robertson County, at the conclusion of which the court found that Plaintiff had not sustained a work-related injury.

Plaintiff testified that Defendant required employees to participate in a mandatory exercise program. While participating in this program in late September 2003, he felt a sharp pain in his back and legs. Previous participation in the exercise program had caused him no difficulty other than "tingling." Plaintiff claimed that he reported this incident to Dale Selph, his superisor, and that he completed an accident form in the office of Mary Sue Baker, the nurse responsible for submitting reports of injury to the company's insurance carrier. He eventually was referred back to Dr. Weiss, who had treated his previous job-related injury in the year 2000. Dr. Weiss's treatment was provided in accordance with the open medical provision of his prior settlement.

Following his examination, Dr. Weiss excused Plaintiff from future participation in the company's exercise program. Plaintiff testified that he returned to work and attempted to perform his customary work duties for a time. He was sent home by Defendant on February 14, 2004, due to his pain symptoms and required medication use. He acknowledged, on cross-examination, that he had continued to experience pain, numbness, tingling, and loss of range of motion of his left leg after his first surgery in the year 2000.

Dale Selph, Plaintiff's supervisor at the time of the exercising incident, testified that Plaintiff did not report an injury during or after the exercise session in question. Selph testified that Plaintiff merely complained that "the exercises were being done wrong." Selph said he replied that Plaintiff would either have to participate in the exercises or get a doctor's excuse for not doing so.

Mary Sue Baker testified that she had worked for Defendant for thirty-three years as an industrial nurse but was no longer in their employ at the time of trial. Plaintiff told her that he was unable to do the exercises because they hurt his back but that he did not report an injury to her and did not request that she initiate a workers' compensation claim for him.

Brad Graham testified that he was Dale Selph's supervisor. He spoke to Plaintiff regarding his refusal to participate in the exercise program. Graham testified that Plaintiff told him that he had a childhood disability and that he thought the exercises were not going to work out for him. Plaintiff

also told Graham that the exercises were hurting him. Some time later, Plaintiff brought a doctor's excuse regarding the exercises, but at no time did Plaintiff report an injury. Graham testified that he had never seen a first report of injury regarding the September exercise incident.

James Northington testified that he was a supervisor in the press department and that Plaintiff worked under his direction at times. He stated that the exercises required on the day of the incident in question were simple stretching exercises. He said that on one occasion he noted that Plaintiff was not performing an exercise. He asked Plaintiff why he was not participating. Plaintiff replied that his back was hurting from a previous incident and that he could not perform the exercise. Northington said that Plaintiff also said he had a doctor's excuse exempting him from exercising. He also testified that Plaintiff never reported any injury to him.

Dr. Robert Weiss's deposition was introduced into evidence. He testified that Plaintiff reported that he had been experiencing pain while performing mandatory exercises at work. He examined Plaintiff but found no physical abnormality. He did, however, excuse Plaintiff from the exercise program because of Plaintiff's statement regarding the exercises causing pain.

Dr. Weiss testified that he was wary of performing surgery on Plaintiff because Plaintiff presented with various social issues and had a poor attitude. He referred to Plaintiff's office visits with him as "difficult" and said he felt Plaintiff was "busy trying to convince me that he had a pain syndrome." Ultimately, however, Dr. Weiss did perform a second laminectomy. He assigned a 3% impairment to the body as a whole to Plaintiff as a result of that second surgery. He opined that the September 2003 exercise incident caused Plaintiff's symptoms to flare up, but that the development of stenosis in Plaintiff's back was progressive in nature. He further testified that Plaintiff's back had not changed structurally and thus his condition was related to daily use and activities. During his last consultation with Plaintiff, on July 12, 2004, he found Plaintiff's main problem to be psychological, not physical. He released Plaintiff at MMI on that date, with essentially the same restrictions he had assigned following the first surgery in 2000.

Dr. David Gaw's deposition was also read into evidence. Dr.Gaw testified that he examined Plaintiff a single time and assigned a 22% impairment to the body as a whole, 13% of which he attributed to the second injury. Dr. Gaw said the exercise activity reported to him by Plaintiff was "more likely than not" the cause of Plaintiff's problem in that it aggravated the pre-existing degenerative condition in Plaintiff's back.

The deposition of Dr. Walter Wheelhouse was also read into evidence. Dr. Wheelhouse testified that he had seen Plaintiff on two occasions, once in June and then again in July of 2005. He performed an independent evaluation of Plaintiff. He assigned a 31% impairment to the the body as a whole, of which he assigned 21% to Plaintiff's second injury and surgery. He opined that the exercises Plaintiff was doing at the time of the September 2003 incident caused his back condition to worsen.

The trial court, after hearing all the proof, concluded that the Plaintiff did not sustain a compensable work related injury, but rather experienced additional residual pain from Plaintiff's

previous on-the-job injury and dismissed the Plaintiff's claim. Plaintiff contends that the evidence preponderates against that decision.

STANDARD OF REVIEW

In evaluating the trial court's findings, we must begin by noting that under current Tennessee law the appellate review must be de novo, upon the record, accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e).

Thus, in reviewing the evidence, we are required to conduct an independent examination of the record to determine where the preponderance lies. Wingert v. Gov't of Sumner County, 908 S.W.2d 921, 922 (Tenn. Workers' Comp. Panel 1995). Where the trial court judge has seen and heard the witnesses, however, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because of the trial court's opportunity to observe witnesses' demeanor and to hear their testimony. Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999).

With regard to medical testimony presented by deposition, as it was in this case, however, the standard is different. In such situations the reviewing 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). Even so, when medical testimony differs, it is in the discretion of the trial court to determine which expert testimony to accept. Story v. Legion Ins. Co., 3 S.W.3d 450, 455 (Tenn. Workers' Comp. Panel 1999).

ANALYSIS

In every workers' compensation action the burden of proof rests upon the plaintiff to establish by a preponderance of the evidence that his or her disability was due to an injury or illness that arose out of his or her employment and that it occurred within the course of that employment. Parker v. Ryder Truck Lines, Inc., 591 S.W.2d 755, 759 (Tenn. 1979).

An aggravation of a pre-existing condition is not compensable if it only results in increased pain or other symptoms caused by the underlying condition. Sweat v. Superior Indus., Inc., 966 S.W.2d 31, 32 (Tenn. Workers' Comp. Panel 1998). A pre-existing condition must be advanced, there must be an anatomical change in the pre-existing condition, or the employment must cause an actual progression of the pre-existing condition before it can be considered a compensable injury. Id.

Except in the most obvious, simple, and routine cases, proof of a compensble injury must be shown by the presentation of expert medical evidence that establishes the causal relationship between the disability complained of and the employment activity or condition. Talley v. Va. Ins. Reciprocal, 775 S.W.2d 587, 589 (Tenn. 1989). Medical proof, however, that an injury was caused in the course of an employee's work cannot be so speculative and uncertain regarding causation that attributing it to plaintiff's employment would be an arbitrary determination or a mere possibility. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

When medical testimony differs, the trial judge must choose what view to believe, and in doing so, he or she is allowed to consider, among other things, the qualifications of the experts testifying, the circumstances of their examinations, the information available to them and the evaluation of the importance of that information by other experts. Id.

The trial court, which had the advantage of viewing the written medical proof through the prism of the testimony of several lay witnesses, including that of Plaintiff, whose demeanor and credibility he was able to observe and evaluate, came to the conclusion that the opinions of both Dr. Gaw and Dr. Wheelhouse relied heavily upon the Plaintiff's recitation of his history and that neither physician was aware of the numerous inconsistencies between Plaintiff's assertions and the testimony of other witnesses, whose testimony the court chose to believe rather than the that of the Plaintiff.

The trial court concluded that Dr. Weiss's opinion, based upon his extensive history of having treated Plaintiff, coupled with Plaintiff's statements and actions at the time of, and after, the incident was more persuasive than the opinions of Dr. Gaw and Dr. Wheelhouse, and held that the Plaintiff had not met his burden of proof.

After reviewing the entire record, we cannot say the evidence preponderates against the trial court's findings. Therefore we affirm the judgment of the trial court. Costs on appeal are taxed to the Plaintiff.

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CLAYBURN PEEPLES, SPECIAL JUSTICE

IN THE SUPREME COURT OF TENNESSEE
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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, Edward Pulliam, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM