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

ROBERT R. ROBERTSON v. BRIDGESTONE/FIRESTONE, INC.

Direct Appeal from the Chancery Court for Rutherford County
No. 04-9226WC Robert E. Corlew, Chancellor

No. M2006-00515-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 § 50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Defendant contends that the trial court erred in finding that plaintiff sustained a compensable work-related injury to his right shoulder, in awarding plaintiff temporary total disability benefits for work missed due to surgery, in awarding him a 12% disability to the body as a whole as to each shoulder, and in commuting the entire award into a lump sum payment. Plaintiff asks this court to find the Defendant's appeal in this case to be frivolous. We find the chancellor's rulings as to all these issues to be correct and affirm the trial court's decision. Finally, Plaintiff contends that the award is insufficient and that the trial court also erred in allowing Defendant to set-off benefits paid under the Defendant company's sickness and accident policy. Because we are unable to determine from the record the nature of the benefits paid by Defendant, we remand the case to the trial court for further proceedings consistent with this opinion..

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court Affirmed in Part; Case Remanded

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

Terry L. Hill and Stacey Billingslely Cason, Nashville, Tennessee, for the appellant.

John D. Drake, Murfreesboro, Tennessee, for the appellee.

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff, Robert R. Robertson, was a forty-four-year-old male employee of Defendant, Bridgestone/Firestone, Inc. At the time of the trial of this action, he had worked there approximately nine and one-half years. He is a high school graduate and has completed one year of technical school. Prior to accepting employment with Defendant, Plaintiff had managed fast food restaurants, owned two different janitorial businesses, and had worked at various skilled labor jobs. Additionally, he has owned, and still does own, several rental houses which he maintains.

In December of 2000, four years prior to the incident that led to the filing of the claim that is the subject of this case, Plaintiff was injured on the job while working for Defendant when he was struck by a golf cart being driven by a supervisor. Plaintiff was in the process of mounting a "tow motor" he was operating, and he was trapped between the tow motor and the golf cart. He immediately complained of pain, ringing in his left ear, and soreness on the right side of his face. He was treated at the job site nurse's station after which he returned to work.

Later in the work shift, however, he complained to company officials that he was experiencing shoulder pain. Subsequently, Defendant offered him the opportunity to choose from among three physicians for treatment.

He chose Dr. Deborah Doyle, who ordered an MRI of his left shoulder on December 29, 2000. The MRI revealed that Plaintiff had suffered a partial thickness tear on the undersurface of the supraspinatus tendon, or rotator cuff. Dr. Doyle then referred Plaintiff to Dr. Malcolm Baxter, who reviewed the MRI and examined Plaintiff. In addition to the rotator cuff tear, Dr. Baxter also found degenerative changes in Plaintiff's AC joint, that being between the left clavicle and the acromion of his left shoulder. Dr. Baxter recommended arthroscopic surgery.

Plaintiff sought a second opinion, however, consulting with Dr. Sean Kaminsky. Dr. Kaminsky's findings confirmed the earlier evaluations by Dr. Doyle and Dr. Baxter. Specifically, Dr. Kaminsky diagnosed a left shoulder injury with a partial thickness rotator cuff tear, impingement syndrome, and AC joint degenerative changes. He also recommended arthroscopic surgery.

Defendant chose not to have surgery at that time. He testified at trial that he did so to avoid missing work during recovery. Instead, he returned to work at Bridgestone and was working there on January 15, 2004, when, after working three straight 12-hour shifts operating a tow truck like apparatus known as a track cart, he felt pain in his right shoulder. Thinking he had pulled a muscle, he consulted with his family physician, who performed an MRI and advised him that he had a torn rotator cuff. At that time, approximately three weeks after the incident, Plaintiff filed a report of injury.

He then returned to Dr. Kaminsky who recommended surgery on both Plaintiff's shoulders. Plaintiff consented, and Dr. Kaminsky performed arthroscopic surgery on his right shoulder on April

8, 2004, and then on his left shoulder on June 9, 2004. On November 9, 2004, Dr. Kaminsky found that Plaintiff had achieved maximum medical improvement and cleared him to return to work. This he did, assuming his pre-injury duties of driving a fork lift truck.

Altogether, Plaintiff was off the job seven months because of his injury. During that time he was paid under the employer funded accident and sickness policy for the time he was away from work.

The case sub judice was filed in August of 2004. It was heard in the Chancery Court for Rutherford County on December 19, 2005.

During the trial, Plaintiff testified that after the injury in 2000 he continued to work full-time. He believed his January 2004 injury was caused by favoring his left shoulder at work during the years between the two incidents. He said that he had no other injury to his shoulder, but he did acknowledge that during a lay-off period of four months, which was sometime after the 2000 incident, he performed carpentry services. He claimed, however, that he worked mainly in a supervisory capacity while doing so.

He also acknowledged that in February 2002 he was treated during a two-week period by a chiropractor for back injuries he sustained after having fallen on a wet kitchen floor.

He testified that he had returned to work after his surgeries and had been driving a fork lift for approximately a year and one-half.

Dr. Sean Kaminsky's deposition was read into evidence. He said that he had recommended surgery on Plaintiff's left shoulder in March 2001 but that Plaintiff did not return to his office to schedule the surgery or for further treatment until 2004. Dr. Kaminsky said that Plaintiff's primary concern was the pain he was experiencing in his right shoulder, although Dr. Kaminsky said he did not recall Plaintiff mentioning a specific acute injury to that shoulder.

Plaintiff did tell him, however, that he had been experiencing pain in his right shoulder since mid-January 2004 due to overhead, or outstretched, activity. But Plaintiff did not at that time attribute the pain to a specific work-related incident or to repetitive work routines.

Following Plaintiff's right shoulder surgery, he reported to Dr. Kaminsky that the pain in that shoulder was resolving. Upon examination, Dr. Kaminsky noted that the Plaintiff's right shoulder had excellent range of motion and that Plaintiff had minimal discomfort. On June 9, 2004, Dr. Kaminsky performed the same surgery on Plaintiff's left shoulder.

In August 2004, Plaintiff reported to Dr. Kaminsky that he felt improvement in both shoulders and that he was satisfied with both outcomes. In November 2004, Dr. Kaminsky measured active and passive ranges of motion for both shoulders and found them to be normal. He rated Plaintiff "five over five" for strength on both shoulders and noted only residual weakness.

Plaintiff reported to Dr. Kaminsky that he felt able to do all his regular job activities but did report continuing weakness with overhead use of his arms.

Based on his findings, Dr. Kaminsky assigned a 3% impairment to Plaintiff's body as a whole for each shoulder, that is, a 6% impairment to the body as a whole for both. He placed no work restrictions on Plaintiff. Dr. Kaminsky specfically testified that he saw no need for Plaintiff to avoid overhead lifting or repetitive use of his arms and shoulders.

Dr. Kaminsky said Plaintiff never reported to him that his right shoulder condition was work-related. Dr. Kaminsky further stated that it was unclear to him what had caused this condition. Shoulder pain, he said, could be from any number of causes, including use, activity, repetitive motion, and injury. He could not state a cause of Plaintiff's impairment with medical certainty.

He also said that it would be reasonable to conclude that favoring one shoulder over another could cause injury to the opposite shoulder. He said this was a common finding when a person injured one shoulder and continued work while relying more heavily on the opposite shoulder.

Dr. Walter Wheelhouse also testified by deposition. He said he saw Plaintiff a single time for an independent medical evaluation and had examined the records of all of Plaintiff's treating physicians. He measured Plaintiff's range of motion with an instrument known as a goniometer. In contrast to Dr. Kaminsky, he found Plaintiff to have significant diminution of range of motion in both shoulders. Based upon this evaluation, he opined that Plaintiff had a 12% permanent impairment to the body as a whole for each shoulder and a total of a 23% impairment to the body as a whole for both shoulders. His impairment rating included a component for the surgery to each shoulder of 6% to the body as a whole and an additional component for range of motion deficits of 6% to the body as a whole for each shoulder. He acknowledged, however, that Plaintiff had functional range of motion in both shoulders.

Based upon the history Plaintiff had given him, Dr. Wheelhouse testified that Plaintiff's prior left shoulder injury caused him to rely more heavily on his right arm. He noted that Plaintiff's job required a significant amount of repetitive overhead lifting, reaching, and pulling This, Dr. Wheelhouse said, could have led to the pain in Plaintiff's right shoulder. Because Plaintiff had denied any other injuries or problems with his shoulder, other than those incurred at work for Defendant, Wheelhouse concluded that the injury to Plaintiff's right shoulder was a gradual injury caused by repetitive use, overhead reaching, lifting, and pulling at work.

After hearing all the proof, the trial court found that Plaintiff had sustained a compensable injury to both shoulders and that he retained a 6% anatomical impairment to the body as a whole for each shoulder The trial court awarded Plaintiff a 12% permanent partial disability to the body as a whole for each shoulder. The trial court also found that Plaintiff could wisely manage the award and therefore commuted it to a lump sum.

In addition, the trial court awarded Plaintiff temporary disability benefits for the period from January 19, 2004, through September 9, 2004, but ordered that those funds be reduced by the amount Plaintiff received in the form of employer funded sickness and accident benefits.

Defendant has appealed to this court, claiming that the trial court erred in finding the Plaintiff's right shoulder injury to be work-related and also arguing that the court's award of 12% permanent partial disability to the body as a whole for each shoulder is excessive. Defendant also contends that Plaintiff is not entitled to a lump sum payment beyond the benefits that have accrued.

In his brief, Plaintiff maintains that the trial court erred in failing to adopt the higher of the two impairment ratings, in failing to utilize a multiplier of two and one-half times, and in allowing Defendant to set off employer-funded sickness and accident benefits paid to Plaintiff. Finally, Plaintiff asks this court to find Defendant Bridgestone's appeal to be frivolous and to award attorney fees to Plaintiff for the cost of the appeal.

ANALYSIS

In examining the trial court's decision, we begin by acknowledging that for injuries occurring after July 1, 1985, the standard for appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The application of this standard requires that a reviewing court weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case to determine where the preponderance lies. Cleek v. Wal-Mart Stores, 19 S.W.3d 770, 773 (Tenn. 2000).

This court, however, is in the same position as the trial judge in evaluating medical proof submitted by deposition and may assess independently the weight and credibility to be afforded to such expert testimony. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 732 (Tenn. 2002).

We note further, that under Tennessee law, 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 (a)(5). The phrase "arising out of" refers to causation, which requires that the injury have a rational, causal connection to the work. Braden v. Sears, Roebuck, 833 S.W.2d 496, 498 (1992). An accident arises out of employment when, upon consideration of all the circumstances, a causal connection exists between the conditions under which the work is required to be performed and the resulting injury. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993).

"Causal connection" does not mean proximate cause as used in the law of negligence, but cause in the sense that the accident had its origin in the hazards to which the employment exposed the employee while doing his or her work. Although absolute certainty is not required for proof of causation, medical proof that the injury was caused in the course of the employee's work must not be so speculative or so uncertain regarding the cause of the injury that attributing it to Plaintiff's employment would be an arbitrary determination or a mere possibility. Bolton v. CNA Ins. Co., 821

S.W.2d 932, 935 (Tenn. 1991). "If upon undisputed proof it is conjectural whether disability resulted from a cause operating within petitioner's employment, or a cause operating without employment, there can be no award." Woodlaw Mem'l Park v. Keith, 70 S.W.3d 691, 696 (Tenn. 2002). If, however, equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn by the trial court. Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987).

The burden of proving every element of his or her case by a preponderance of evidence in a workers' compensation case, of course, lies upon the Plaintiff. Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

After considering these principles and evaluating the proof in this case, we conclude that the evidence does not preponderate against the trial court's decision. It is uncontested that Plaintiff suffered an injury to his left shoulder while working, during the performance of his job duties, at the Defendant's job site. In determining whether the subsequent injury to his right shoulder is compensable, the court heard deposition testimony from two physicians and testimony from both Plaintiff and his wife.

Plaintiff testified that as a result of his weakened left shoulder he favored his right arm and that he used that arm when he had to reach, pull, or lift. He said he had not suffered any off-the-job injuries to his shoulder.

Dr. Wheelhouse testified that he examined Plaintiff and reviewed the medical records of all Plaintiff's previous treating physicians. His medical opinion was that it is reasonable to conclude that such a situation as that in which Plaintiff was working would, over time, injure the other shoulder.

Dr. Kaminsky acknowledged that Defendant's job activities could have caused his injury, but that due to the lack of a traumatic event, he could not state a cause with medical certainty.

Because of Dr. Kaminsky's testimony, Defendant maintains that the weight of evidence does not preponderate in favor of the court's ruling. Absolute certainty, however, is not required for proof of causation. If equivocal medical evidence, combined with other evidence, suggests a finding of causation, such an inference may be drawn by the trial court. Orman v. Williams-Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn.1991).

The trial court, after having heard all the proof, including the testimony of the Plaintiff, found that he had suffered a compensable injury to both shoulders and awarded 12% permanent partial disability for each shoulder. It also awarded Plaintiff temporary disability benefits for the period he was unable to work. Based upon our independent review of the record, we find that the evidence does not preponderate against those findings.

Next, we address Defendant's contention that the court erred in commuting the permanent partial disability award to a lump sum payment. A court may commute a permanent partial

disability award to one or more lump sum payments when, in the opinion of the court, commutation will be in the best interest of the employee. Tenn. Code Ann. § 50-6-229(a). In making this decision, the court is to consider the ability of the employee to wisely manage and control the award irrespective of whether there exist special needs. Id. The employee has the burden of proving that he or she is entitled to a lump sum award. Flowers v. S. Cent. Bell Tel. Co., 672 S.W.2d 769, 772 (Tenn. 1984) (quoting Fowler v. Consol. Aluminum Corp., 665 S.W.2d 713, 715 (Tenn. 1984)). In this case, the employee owns four rental units; he has managed restaurants and both he and his wife expressed a desire to use the settlement to normalize their financial situation, made unstable by his injury. On the basis of this evidence, we find that the evidence preponderates in favor of the trial court's commutation of the award.

We next turn to the questions raised in Plaintiff's brief. For reasons heretofore discussed, our review of the proof convinces us that the trial court's decision regarding the Plaintiff's vocational disability was correct.

Plaintiff also contends that the appeal in this case is frivolous. When it appears to a reviewing court that an appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal. Tenn. Code Ann. § 27-1-122. With regard to workers' compensation cases, when a reviewing court determines, pursuant to motion or of its own motion, that an appeal of an employer or insurer if frivolous, or taken for purposes of delay, a penalty may be assessed by such court, without remand, against the appellant for a liquidated amount. Tenn. Code Ann. § 50-6-225(h).

A frivolous appeal is one that is "devoid of merit," or one in which there is little prospect that an appeal can ever succeed. Morton v. Morton, 182 S.W.3d 821, 838 (Tenn. Ct. App. 2005), (quoting Indus. Dev. Bd. of the City of Tullahoma v. Hancock, 901 S.W.2d 382, 385 (Tenn Ct. App. 1995)), but the statute regarding frivolous appeals "must be interpreted and applied strictly so as not to discourage legitimate appeals." Davis v. Gulf Ins. Group, 546 S.W.2d 583, 586 (Tenn. 1977). We find that this appeal is not devoid of merit and is not frivolous. Accordingly, we decline to award damages or attorney fees.

Plaintiff also argues that the trial court improperly allowed Defendant to set off funds that Defendant paid to Plaintiff as "employer-funded sickness and accident benefits." Plaintiff contends that by paying these funds to Plaintiff, Defendant "knowingly, willfully, and intentionally cause[d] a medical or wage loss claim to be paid under health or sickness and accident insurance" and that accordingly Defendant is prohibited from setting off such payments. Tenn. Code Ann. § 50-6-128 (2005). It is not clear from the record, however, the nature of the benefits that were ordered to be set-off. If the benefits were paid to Plaintiff under an employer funded disability plan, Defendant would be entitled to set off under Tennessee Code Annotated section 50-6-114 (2005). Because we are unable to determine from the record whether the benefits in question were paid to Plaintiff under an employer funded disability plan or were provided under health or sickness and accident insurance to pay a medical or wage loss claim, we are unable determine whether Defendant is entitled to set

off the benefits. We therefore remand the case to the trial court for a determination of the nature of the benefits paid to Plaintiff.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed in part and the case is remanded to the trial court for further proceedings consistent with this opinion. The costs of the appeal are taxed to Bridgestone/Firestone, Inc., and its surety, for which execution may issue if necessary.

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CLAYBURN PEEPLES, SPECIAL JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JANUARY 29, 2007 SESSION

ROBERT R. ROBERTSON v. BRIDGESTONE/FIRESTONE, INC.

Chancery Court for Rutherford County
No. 04-9226WC

No. M2006-00515-WC-R3-CV - Filed - August 24, 2007

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 of the appeal are taxed to Bridgestone/Firestone, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM