

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, NOVEMBER 1999 SESSION**

FILED
February 24, 2000
Cecil Crowson, Jr.
Appellate Court
Clerk

| | | |
|--------------------------------------------|---|---------------------------------------|
| ALBERT J. SHELL Plaintiff/Appellant |) | HAMILTON CHANCERY |
| |) | |
| |) | |
| VS. |) | Hon. Howell N. Peoples, Chancellor |
| |) | |
| ABB COMBUSTION ENGINEERING, INC. |) | |
| |) | |
| Defendant/Appellee |) | No. 03S01-9902-CH-00018 |

For the Appellant:

Thomas L. Wyatt
Summers & Wyatt, P.C.
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Chattanooga, Tenn. 37403

For the Appellee:

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Chattanooga, Tenn. 37402-2687

MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Chief Justice
Roger E. Thayer, Special Judge
H. David Cate, Special Judge

AFFIRMED.

THAYER, Special Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The employee, Albert J. Shell, has appealed from the action of the trial court in dismissing his claim for benefits. The court concluded his condition and/or injury was not work-related.

On appeal two questions are presented for review. First, it is contended the evidence preponderates against the trial court's finding on the causation issue and second, it is insisted the court was in error at the close of all proof to require counsel to submit a hypothetical question to one of the expert medical witnesses.

We have carefully reviewed the record with these issues in mind and are of the opinion the judgment of dismissal should be affirmed.

Plaintiff was 54 years of age and is a high school graduate. He has been employed by defendant, ABB Combustion Engineering, Inc., for a long period of time. In 1990 he was involved in a work-related accident which was diagnosed as a disc injury causing back and leg pain. He did not undergo surgery and conservative treatment seemed to heal the injury as he returned to work after a short period of time. He continued to work without any significant problems until March 1995.

On March 21, 1995, he testified he was using a hammer to attempt to disconnect metal that had been previously welded when the blow of the hammer caused a piece of the metal to break free and strike the top of his foot; that he immediately had pain in his foot and felt he had bruised it; several days later he began having pain in his leg calf and foot and some numbness; he saw his wife's family doctor whose medical records were filed in evidence and indicated the examination revealed "Left foot numbness and weakness since Thurs. No cause."

On March 29, 1995 he saw Dr. George Z. Seiters, an orthopedic surgeon, who testified by deposition and stated his examination revealed a foot drop condition; that the patient had indicated he had awakened with the symptoms and that he could not recall any precipitating event other than the hammer incident. Dr. Seiters referred the patient to a neurosurgeon for further evaluation. Dr. Seiters testified he was of the opinion there was no casual connection between the hammer incident and the foot drop condition and later diagnosed disc condition. He felt the disc condition which the neurosurgeon found was probably related to the 1990 work-related accident. He also stated plaintiff never described any twisting movement during the hammer incident nor did he ever complain of having back pain.

The neurosurgeon, Dr. Thomas D. Fulbright, first saw plaintiff on May 1, 1995 and he performed disc surgery on May 10th. He testified by deposition and was also of the opinion the hammer incident did not cause the foot drop condition or the disc condition. He said a bulging disc caused compression of the nerve root which caused the foot drop.

In describing the hammer incident at work on March 21st to the company nurse, an insurance adjuster, his wife's family doctor, Dr. Seiters and Dr. Fulbright,

plaintiff never indicated he had any back pain and during his oral testimony before the trial court, he denied ever having back pain after the incident in question.

On July 18, 1996, which was about sixteen months after the incident in question, plaintiff saw Dr. Richard Donaldson, a semi-retired orthopedic surgeon, at his attorney's request. He testified by deposition and stated plaintiff gave a history of the hammer incident which involved a twisting movement that wrenched his back; that he also complained about the foot drop condition and leg pain. Based on the history, Dr. Donaldson opined that hammer incident at work caused the nerve root damage and the disc difficulty.

The case is to be reviewed *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

In reviewing and weighing evidence which is in conflict, the trial judge has discretion to conclude that the opinion of a particular expert should be accepted over the opinion of another expert and that one expert's testimony contains a more probable explanation than another expert's testimony. *Thoms v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991).

In making this choice between conflicting medical opinions, the trial court is allowed to consider the qualifications of the experts, the circumstances of their examination, the information available to them and the evaluation of the importance of that information by other experts. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

With reference to the first issue, we find the trial court was faced with conflicting medical opinions on the causation issue. The court chose to accept the opinions of Drs. Seiters and Fulbright over the testimony of Dr. Donaldson. It appears plaintiff gave a somewhat different history to Dr. Donaldson which in point of time was at least one year after plaintiff was aware his other doctors were concluding his physical condition was not work-related. We find the preponderance of the evidence supports the trial court's finding on the issue of causation.

Having determined the trial court acted properly in dismissing the claim, the second issue is now a moot question. However, if the claim had been determined to be compensable, we are of the opinion the trial court did not abuse his discretion in requiring the parties to submit a hypothetical question to Dr. Seiters and not to Dr. Fulbright.

The judgment is affirmed. Costs of the appeal are taxed to the plaintiff-employee.

Roger E. Thayer, Special Judge

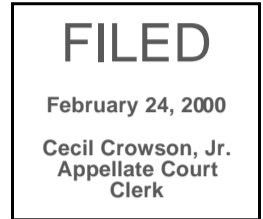
CONCUR:

E. Riley Anderson, Chief Justice

H. David Cate, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

ALBERT J. SHELL,)
Plaintiff/Appellant,)
v.)
HAMILTON CHANCERY)
No. 951139)
No. E 1999-02177-WC-R3 CV)
Hon. Howell N. Peoples,)
Chancellor)
ABB COMBUSTION ENGINEERING,))
INC.)
Defendant-Appellee.)



JUDGMENT ORDER

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.

Costs on appeal are taxed to the plaintiff-appellant, Albert J. Shell and Thomas L. Wyatt, surety, for which execution may issue if necessary.

02/24/00