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

Decided - April 11, 2000

ANNETTE BURNETT,	)	KNOX COUNTY
	)	
Plaintiff/Appellee	)	
	)	
V.	)	HON. DALE C. WORKMAN
	)	Circuit Judge
GOODY'S FAMILY CLOTHING, INC.,	)	
	)	
Defendant/Appellant	)	No. 03S01-9904-CV-00044

For the Appellant:

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M E M O R A N D U M O P I N I O N

Members of Panel:

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

REVERSED and DISMISSED.

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 employer, Goody's Family Clothing, Inc., has appealed from the action of the trial court in awarding the employee, Annette Burnett, 60% permanent partial disability to the body as a whole.

The employer raises several issues on appeal. The primary issue is whether the expert medical evidence is sufficient to establish that plaintiff's physical condition resulted from an incident or activity at work. Other issues are whether the trial court was in error in holding proper notice of injury was rendered and whether the court properly exceeded the 2 ½ times cap under T.C.A. § 50-6-241(a)(1).

Plaintiff was 49 years of age and had completed the 9th grade. She later obtained a G.E.D. certificate. She became employed by Goody's in 1996 and was employed as a "tagger" which involved placing price tags on clothing for retail sale.

On May 12, 1997, she was standing on a stool tagging clothing when she unintentionally stepped off of the stool. She testified she attempted to grab a pole but missed it and she immediately felt pain in her left leg from the groin down.[1] She described the pain as mild something like a cramp. She reported the incident to her supervisor and helped complete an accident report. She declined to seek medical attention thinking it was unnecessary. She continued to work and said the pain would leave and return over the next two months. She stated that during July 1997 the pain became more severe and began to spread into her hip and down her leg to her ankle. She saw her family doctor during August and received a cortisone shot which did not relieve her symptoms. Arrangements were made by her doctor to see an orthopedic surgeon. She continued to work until surgery was later performed during November 1997.

On September 18, 1997, she was seen and examined by Dr. Paul H. Johnson, an orthopedic surgeon. He operated on her on November 12th and did a

[1]This is the only description of the incident at work. It is not clear whether she fell to the floor or caught herself and landed on her feet.

decompression to relieve the nerve root pressure and a fusion of L5 S1. Plaintiff had therapy treatments after surgery and into December. On one visit she testified her therapist told her the incident at work on May 12th probably caused her problems. She was off work for about four months and resumed working during March 1998. She testified she was terminated from employment on April 1, 1998 because she had failed to list a previous employer on her application for work.

On cross-examination, plaintiff admitted she had sustained a shoulder injury at a point in time near the May 12th incident at work. She said she hurt her shoulder while playing volleyball (away from employment). She contended the injury occurred on Easter Sunday which was in April before the alleged work-related injury. However, several documents filed as exhibits indicated the incident occurred after the May 12th incident. Her application for a leave of absence, application for short term disability benefits and a physician's statement of injury all indicated the volleyball incident occurred on May 25, 1997. She had a rotator cuff tear which was treated without surgery.

The only witnesses to testify before the trial court was the plaintiff-employee and Dr. Paul H. Johnson. Dr. Johnson, the orthopedic surgeon, testified by deposition. He stated that when he first saw her during September 1997 she was complaining of low back and leg pain; that she told him it began about one month earlier and she could not recall any particular injury or activity which might have caused her complaints.

Dr. Johnson testified a M.R.I. examination revealed: (1) degenerative changes (2) disc bulg L4-5 and (3) pars interarticularis defect L5. He opined she had a 10% medical impairment but was of the opinion her condition was not caused by any work-related activity and this was based upon the history he had been given. He further stated the pars defect was a stress fracture (somewhat common) dating back to early childhood or teenage years; and that she had a spondylolisthesis condition which was a forward slippage of the vertebrae in conjunction with the pars defect.

Dr. Johnson stated unequivocally several times during his testimony that he was of the opinion plaintiff's back problem was not work-related. On page 17, line 23 of his deposition, the following appears:

> "It's important to note that, in this condition, symptoms tend to flare up, sometimes for no reason, sometimes are

> precipitated by bending or lifting; oftentimes, patients have symptoms for no apparent reason. There are two peak times to see patients with this problem, in their teenage years or in middle adulthood."

On examination by Plaintiff's counsel (pages 16 & 17), the doctor was told about plaintiff's version of the events at work on May 12th and was asked if that could aggravate her condition. His reply was: "It is conceivable, yes." Counsel for plaintiff pressed the doctor again (pages 19 & 20) on the casuation question and asked if it was "likely" that the facts of the May 12th incident caused an aggravation of her condition. The doctor replied:

> "Well, I would tell you it's conceivable that it could have, but I wouldn't say that it was in this particular case. . . . . ."

In reviewing the evidence, and finding the claim to be compensable, the trial judge relied on the ruling in *McCaleb v. Saturn Corporation*, 910 S.W.2d 412 (Tenn. 1995) where an award was upheld based on testimony an event at work "could" cause an injury when coupled with lay evidence indicating the event in fact did cause the injury.

Appellate review is *de novo*, accompanied by a presumption of the correctness of the findings of the trial court, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The general rule is that causation and permanency of a work-related injury must be shown in most cases by expert medical evidence. *Tindall v. Waring Park Ass'n,* 725 S.W.2d 935 (Tenn. 1987)*; Seay v., Town of Greeneville,* 587 S.W.2d 381 (Tenn. 1979)*; Cortrim Manufacturing Co. v. Smith,* 570 S.W.2d 854, 855 (Tenn. 1978)*; American Enka Corp. v. Sutton,* 391 S.W.2d 643 (Tenn. 1965). Although absolute certainty is not required, the medical proof must not be speculative or so uncertain regarding the cause of the injury that attributing it to the plaintiff's employment would be an arbitrary determination or a mere possibility. *Patterson v. Tucker Steel Co.,* 584 S.W.2d 792 (Tenn. 1979).

Generally, if upon undisputed proof, it is conjectural whether disability resulted from a cause operating within the employee's employment or a cause operating without employment, there can be no award. *Tibbals Flooring Co. v. Stanfill*, 410 S.W.2d 892, 897 (Tenn. 1967). However, if equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may

nevertheless be drawn by the trial court under the case law. *Seay v. Town of Greeneville*, *supra; Patterson v. Tucker Steel Co., supra; Owens Illinois, Inc. v. Lane*, 576 S.W.2d 348 (Tenn. 1978); *P & L Construction Co. Inc. v. Lankford,* 559 S.W.2d 793 (Tenn. 1978).

In the case of *McCaleb v. Saturn Corporation, supra,* the employee injured his knee at work and an issue later arose as to whether the incident at work caused a ruptured disc. The trial court found the disc condition was caused by the incident at work and the Special Workers' Compensation Appeals Panel upheld the award of disability finding the medical evidence was equivocal and it was proper for the trial court to predicate an award on medical testimony to the effect a given incident "could" be the cause of the claimant's injury where other evidence reasonably inferred the incident at work was in fact the cause of the injury.

The facts in the present appeal are different. We find the issue of causation is controlled by expert testimony as lay individuals would have no expertise to conclude beyond sheer speculation as to whether plaintiff's medical condition was related to any work activity. Dr. Johnson was the only expert medical witness to testify and his testimony would have to be classified as "unequivocal' since he never departed from the opinion her condition was not work-related and consistently supported his opinion throughout the deposition.

Often expert medical witnesses do not hold strong opinions regarding causation of an injury and will only say certain events at work could have caused the injury in question while also agreeing the injury could have resulted from non work-related events. Or one expert witness may hold an opinion that the incident at work could have caused the injury while another expert witness contends it could not have caused the injury. Under these circumstances, the expert medical testimony is deemed "equivocal"[2] and the rule discussed in the *McCaleb* case would apply.

Therefore, our analysis of the record and case law leads us to conclude the record was insufficient to support an award of disability as the only expert medical proof established the injury in question was not work-related.

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[2]*The American Heritage Dictionary, New College Edition*, *1978*, defines the work "equivocal" as (1) capable of two interpretations (2) of uncertain outcome, origin or worth (3) of doubtful nature.

The judgment entered by the trial court is reversed and the case is dismissed. Costs of the appeal are taxed to the plaintiff

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Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
H. David Cate, Special Judge

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

ANNETTE BURNETT v. GOODY'S FAMILY CLOTHING, INC.

Circuit Court for Knox County
No. 1-223-98

No. E1999-02175-WC-R3-CV - Decided April 11, 2000

JUDGMENT ORDER

This case is before the Court upon defendants' motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be DENIED; 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 plaintiff/appellee, for which execution may issue if necessary.

PER CURIAM

Anderson, C.J., not participating