IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(November 15, 1999 Session)

BRENT BROWN v. CONTINENTAL BAKING COMPANY

Direct Appeal from the Circuit Court for Shelby County
No. 87221-3 T.D. Karen R. Williams, Judge

No. W1999-02700-SC-WCM-CV - Mailed April 26, 2000; Filed July 7, 2000

This case involves a work-related injury to the plaintiff's left shoulder on August 17, 1992. The trial court heard the evidence on July 2, 1998, and found that the plaintiff sustained a compensable 12.5 percent permanent partial disability to the left shoulder but that the injury he claimed to the right shoulder was not work-related. The trial court also rejected the plaintiff's argument that he did not have a meaningful return to work and found that the two and one-half (2.5) times cap in Tennessee Code Annotated § 50-6-241(a) applied. The plaintiff appealed pro se and raised the following issues for our review: (1) whether the plaintiff's right shoulder injury was work-related; (2) whether the plaintiff should be compensated for a second surgery on the right shoulder and both feet; (3) whether the original complaint was not re-filed properly; (4) whether there should have been a court reporter present at the hearing; and (5) whether evidence was improperly withheld from the court in his case. After careful review, we find that we must affirm the trial court's judgment.

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

TATUM, SR. J., delivered the opinion of the court, in which HOLDER, J., and ELLIS, SP. J., joined.

Brent Brown, Memphis, Tennessee, Pro Se.

Karen R. Cicala, Memphis, Tennessee, for the appellee, Continental Baking Company.

MEMORANDUM OPINION

The standard of review of factual issues in workers' compensation cases is de novo upon the record of the trial court with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (1999); Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993). Under this standard, we are required to conduct an in-depth examination of the trial court's findings of fact and conclusions of law to determine where the preponderance of the evidence lies. See Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 282

(Tenn. 1991) (quoting Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987); King v. Jones Truck Lines, 814 S.W.2d 23, 25 (Tenn. 1991). In making such a determination, this Court must give considerable deference to the trial judge's findings regarding the weight and credibility of any oral testimony received. Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992); Thomas, 812 S.W.2d at 283. However, the determination of factual issues in the present case involves medical testimony derived solely from depositions, so all impressions regarding weight and credibility must be drawn from the contents of the documents, rather than an evaluation of live witnesses. Thomas, 812 S.W.2d at 283. Therefore, this Court may draw its own conclusions about the weight, credibility, and significance of such testimony. Seiber v. Greenbrier Indus., Inc., 906 S.W.2d 444, 446 (Tenn. 1995). With these principles in mind, we turn to the facts of this case.

At the time of trial, the plaintiff, Brent Brown, testified that he was a 40 year old father of two with an eleventh grade education and some data processing training. The plaintiff was first employed by the defendant, Continental Baking Company, as a route salesman in 1990. His duties included delivering bread to a number of stores, requiring the pushing and pulling of bread racks. On August 17, 1992, the plaintiff injured himself when he pulled a bread rack from the company truck and fell. His left arm was jammed between the bars of the bread rack, and the plaintiff felt a sharp pain in his left shoulder. When he grabbed some bars on the rack to keep from hitting his face as he fell, the plaintiff felt pain in the upper portion on both sides of his chest. He reported the accident to his supervisor. He was treated by Dr. Marc Crupie, his personal physician, who prescribed pain medication and put the plaintiff's left arm in a sling. The plaintiff was released from work from August 27 through September 10, 1992. The plaintiff returned to work on light duty for approximately two (2) weeks. When he returned to full duty, he began having pains again and called Dr. Crupie. The plaintiff was released from work a second time and was referred to Dr. Tom Morris by Dr. Crupie. Dr. Morris scheduled an MRI, which revealed a torn ligament in the plaintiff's left shoulder. Surgery was ultimately performed and the plaintiff was released from work until March of 1993. In addition, the plaintiff received treatments at the Orthopedic Therapy Center three (3) days per week for several months. The plaintiff testified that he was also experiencing pain in his right shoulder during this entire period of time and that he told Dr. Morris about his right shoulder pain.

Dr. Morris released the plaintiff to return to light duty and then to full duty, but the plaintiff testified that he continued to have problems with both shoulders and was again released from work. Surgery was ultimately performed on the right shoulder as well, and the plaintiff was released to full duty in January, 1994. The plaintiff stated that he made two attempts to return to work, but pain prevented him from doing the job. According to the plaintiff, he was unable to push the bread racks or turn the steering wheel on the truck with his right arm without experiencing pain. After the second attempt to return to work, the plaintiff called Dr. Morris and was told that there was nothing else the doctor could do for him. However, on cross-examination, the plaintiff admitted that he returned to work for approximately eighteen (18) months from January, 1994, to August, 1995.

The plaintiff testified that he is currently employed as an order puller at Disney Marketing but has problems with lifting on that job. He still has pain, loss of range of motion, and experiences itching of the skin in hot temperatures. He is still taking medication, Voltaren, prescribed by Dr. Crupie.

Carol Johnson, the human resources manager for Interstate Brands Corporation (formerly Continental Baking Company), testified for the defendant. At the time of the accident in 1992, Ms. Johnson was the human resources clerk for the company. She recalled the plaintiff being off work for the left shoulder injury, as well as the right shoulder injury. He returned to work after the left shoulder surgery on March 4, 1993, and worked until May 29, 1993, when he was released from work for his right shoulder surgery. The plaintiff was returned to work on January 7, 1994. Ms. Johnson acknowledged that Dr. Morris made a comment on the return to work form that he recommended less strenuous employment for the plaintiff if he could not do his regular job. When he was released to resume working in January of 1994, the plaintiff worked until August 3, 1995.[1]

The deposition of Dr. J. Tom Morris, the plaintiff's orthopedic surgeon, was introduced into evidence. Dr. Morris first saw the plaintiff ten days after his accident upon referral from Dr. Crupie for a sudden onset of left shoulder pain after lifting bread from a bread truck. Dr. Morris diagnosed the plaintiff with rotator cuff tendonitis and treated him conservatively with an anti-inflammatory drug and physical therapy. Because the plaintiff experienced more pain in his left shoulder when he returned to work, Dr. Morris ordered an MRI, which revealed a partial tear of the rotator cuff.[2] Dr. Morris performed an acromioplasty on October 27, 1992. By January 21, 1993, Dr. Morris felt that the plaintiff's left shoulder was satisfactorily rehabilitated, but it was at that visit that the plaintiff told Dr. Morris for the first time that his right shoulder was hurting. The plaintiff attributed the pain to the fact that he had been forced to use his right shoulder because of the injured left shoulder. The doctor treated the right shoulder with an anti-inflammatory drug.

By March 4, 1993, Dr. Morris felt that the plaintiff was fully recovered and released him to return to regular work. On March 31, the plaintiff returned again complaining of right shoulder pain. An MRI revealed a partially torn rotator cuff on the right, and surgery was performed on the right shoulder on July 13, 1993. By October 20, the plaintiff was back at work with a twenty (20) pound lifting limit, which was increased to thirty (30) pounds a month later. He was released to regular duty January 6, 1994.

Dr. Morris testified that the plaintiff sustained a 20 percent permanent partial impairment to each shoulder as a result of the injuries and surgeries, which translates into 5 percent to the body as a whole. He connected the left shoulder injury with the incident at work. Because the plaintiff had not been working from August, 1992, until he complained about right shoulder pain in January, 1993, Dr. Morris gave the opinion that the plaintiff's right rotator cuff injury was not related to work. He stated that repetitive motion and genetics probably caused the injury on the right.

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[1]Apparently the plaintiff made some sort of complaint to his supervisor in July of 1994 which caused him to be temporarily released from work. This was evidenced by Ms. Johnson's identification of an Employee Records Notification form dated July 28, 1994, signed by the plaintiff's supervisor, that contained the comment that the plaintiff was on sick leave until his doctor released him to work. It is unclear from the testimony how long a period this was.

[2]Dr. Morris explained that the rotator cuff helps the patient raise his arm up to approximately 70 degrees, when the big deltoid muscle takes over.

COMPENSABILITY OF RIGHT ROTATOR CUFF INJURY AND PLAINTIFF'S FEET PROBLEMS

The plaintiff argues that the medical records and other evidence show that the onset of his right shoulder problem occurred at the same time as the left, and, therefore, is compensable as well. He also argues that a second surgery on his right shoulder and both feet are compensable.

The medical records from Dr. Morris's office and the records from the Orthopedic Therapy Center were not made an exhibit at trial but were added to the record upon the plaintiff's and defendant's post-trial motions some three (3) months after the judgment of the trial court was rendered on March 16, 1999.

The court's order adding the records upon the plaintiff's motion states that this evidence was added "as new evidence which was not considered as a part of this Court's Judgment." Tennessee Rule of Appellate Procedure 14 allows us the discretion to consider only post-judgment facts that have occurred *after* a judgment. The medical records mentioned above do not fit this category, and we will not consider supplemented portions of the record that were not considered by the trial court. Kinard v. Kinard, 986 S.W.2d 220, 227 (Tenn. Ct. App. 1998), *perm. app. denied*, (Tenn. 1999).

However, it appears from the trial court's judgment that it considered certain portions of Dr. Morris's records, as well as portions from the Orthopedic Therapy Center records, in making a ruling on the compensability of the plaintiff's right shoulder injury. In granting the defendant's motion to include medical records in the appellate record, the judge stated that these records were considered by the trial court and should be included in the record. Apparently, the attorneys stipulated to the complete set of medical records after the trial was over. This is confusing at best; however, we will review pertinent portions of the medical and physical therapy records that were a part of the trial court's judgment in making our findings.

It is well established that the plaintiff in a workers' compensation case must prove causation and permanency of his injury by a preponderance of the evidence using expert testimony. See Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997); Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991); Roark v. Liberty Mutual Ins. Co., 793 S.W.2d 932, 934 (Tenn. 1990). However, expert testimony must be considered in conjunction with the employee's testimony as to how his injury occurred and his subsequent physical condition. Thomas, 812 S.W.2d at 283.

To be compensable under workers' compensation law, an injury must both "arise out of" as well as be "in the course of" employment. Id. Although absolute certainty is not required to prove causation, the medical testimony connecting the injury with the work-related activity must not be so uncertain or speculative that assigning liability to the employer would be arbitrary or only a mere possibility. Livingston v. Shelby Williams Indus., Inc., 811 S.W.2d 511, 515 (Tenn. 1991) (quoting Tindall v. Waring Park Ass'n., 725 S.W.2d 935, 937 (Tenn. 1987)). Reasonable doubt of causation is to be construed in the employee's favor. Hill, 942 S.W.2d at 487.

Upon our de novo review, we find that the evidence does not preponderate against the trial court's finding that the plaintiff's right shoulder injury was not work-related. The plaintiff's treating physician, Dr. Morris, gave his opinion that the plaintiff's right rotator cuff problem was not work-related, based on the fact that the plaintiff had not worked for several months prior to his first complaint of right shoulder problems in January of 1993, some five (5) months after the accident. In fact, the plaintiff admitted at trial that he did not work at all and was resting at home between the time of his MRI in September of 1992 until he was released to go back to work in March of 1993. Additionally, the plaintiff did not offer the testimony of any expert at trial to prove a connection between work and his right shoulder. Dr. Morris's deposition was the only medical expert evidence presented at trial, and we see no reason to discredit it.

In reviewing the medical and physical therapy records that were added to the record, we find nothing in them that supports the plaintiff's contention that his right shoulder problems were work-related. We agree with the trial court that entries in the physical therapy records indicating that range of motion had been measured on the right shoulder on September 10, 1992, were clerical error. Virtually all of the other forms around that time period show that therapy was only performed on the left shoulder,[3] and Dr. Morris had not ordered therapy for the right shoulder at that time. At the top of the form, a section marked "Patient's Complaints" indicated that the plaintiff was feeling "great" on September 10, 1992, when he claimed he was experiencing right shoulder problems. In addition, the discharge summary from the plaintiff's five (5) therapy visits between August 31 through September 10, 1992, shows the diagnosis as rotator cuff tendonitis of the left shoulder only. As pointed out by the trial judge, the plaintiff's testimony at trial was confusing. It does not convince us that the trial court was in error.

We, therefore, affirm the trial court's finding that the plaintiff's right shoulder injury was not work-related and, thus, not compensable. Because this injury is not compensable, there is no liability on the part of the employer to pay for the plaintiff's second surgery to the right shoulder. Since the plaintiff never raised any issues concerning his feet at the trial level, we decline to address this issue on appeal.

REMAINING ARGUMENTS

The remaining arguments posed by the plaintiff can be disposed of in short order. The plaintiff contends that his attorney did not properly re-file his complaint by excluding Travelers Insurance Company as a defendant and refused to present medical record evidence to the judge. These assertions border on an ineffective assistance of counsel or professional malpractice claim, neither of which are an appropriate part of this lawsuit. In addition, the plaintiff did not object to

[3]The plaintiff points to a notation in the therapy records on November 13, 1992, that he complained of right hand numbness and one on December 7, 1992, that he complained of a knot in his right bicep. This evidence does not preponderate against the trial court's findings, since the bulk of the medical evidence, including Dr. Morris's testimony, failed to connect the right shoulder injury to the accident at work.

the medical evidence at trial in order to preserve the issue for appeal. He also failed to specify in his brief which medical records he claims were not presented to the court. We decline to address these issues.

The plaintiff further complains that there was not a court reporter at the trial. Beside the fact that this issue was never raised at the trial level in order to preserve it for appeal, we are also puzzled by the fact that a trial transcript is present in the record with a certificate signed by Christine A. Arnold, a court reporter. There was in fact a court reporter at the trial; however, this issue was waived by the plaintiff's failure to object to any perceived error at the trial level.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment that the injury to the plaintiff's right shoulder was not compensable. The issues pertaining to the plaintiff's feet, the effectiveness of his trial counsel in filing the suit and in failing to present evidence, as well as the presence of a court reporter at the trial, are waived. The judgment of the trial court is affirmed.

Costs are assessed against the plaintiff.

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JUDGMENT

This case is before the Court upon 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 Brent Brown, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

HOLDER, J. - NOT PARTICIPATING