

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

(January 27, 2000 Session)

REX TAYLOR v. EMERSON MOTOR COMPANY

**Direct Appeal from the Circuit Court for Decatur County
No. 2428 Creed McGinley, Judge**

No. W1999-00497-SC-WCM -CV - Mailed May 8, 2000; Filed September 1, 2000

This workers' compensation appeal has been referred to 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, Emerson Motor Company (Emerson), appeals the judgment of the Circuit Court of Decatur County, where the trial court found: (1) an injury by accident, (2) the plaintiff, Rex Taylor (Taylor), did not have a meaningful return to work, and (3) awarded the maximum benefits of two hundred sixty (260) weeks of benefits under *Tennessee Code Annotated*, §50-6-207(4). For the reasons stated in this opinion, we affirm the judgment of the trial court.

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

MALOAN, SP. J., delivered the opinion of the court, in which HOLDER, J., and WEATHERFORD, SR. J., joined.

P. Allen Phillips and B. Duane Willis, Jackson, Tennessee, for the appellant, Emerson Motor Company.

Gayden Drew IV, Jackson, Tennessee, for the appellee, Rex Taylor

MEMORANDUM OPINION

At the trial of this case, Taylor was sixty-two (62) years old and completed the fifth (5th) grade in school. He testified he can only read or write "little stuff" and would be unable to read a newspaper. He does not have any vocational training. Taylor began working at age fifteen (15) in his uncle's garage. He worked for United Foods on a production line for five (5) years. He then farmed and drove tractors for a few years and worked in a service station for nine (9) or ten (10) years. He worked at Standard Oil for eleven (11) years doing machinery maintenance before he began to work for Emerson in the maintenance department.

On November 20, 1997, Taylor injured his back while using a sledge hammer to loosen a frozen bearing on a lathe shaft. He felt a “pop” and pain in his low back and left leg. Prior to this injury, Taylor did not have any back problems.

Taylor continued to work for Emerson at the same wage as before his injury until he retired in May 1999. He testified fellow workers assisted him; he sat down when necessary; he limited his lifting and climbing; and he obtained a parking card so he would not have to walk across the parking lot. He stated, “I kept dragging around with everybody’s help, helping me out.” During this time, he experienced a lot of back pain and finally retired due to the back pain and his limited ability to work.

Dr. Glenn Barnett, a neurosurgeon in Jackson, Tennessee, was Taylor’s treating physician. He first saw Taylor on July 20, 1998. A CT scan of Taylor’s back showed significant degenerative joint disease in his lumbar spine, spondylolisthesis at L4 and L5, and evidence of an acutely herniated L4 disc. An EMG disclosed mild early peripheral neuropathy in his legs. Dr. Barnett was of the opinion the spondylolisthesis was not caused by his work, but could have been aggravated by his work injury, and the herniated L4 disc “certainly could have been caused by work injury or other injuries in his life.” Dr. Barnett last saw Taylor on February 1, 1999. He felt Taylor should limit his lifting and be careful in how he lifts. Dr. Barnett assigned a ten percent (10%) permanent impairment to the body as a whole for his back condition and recommended Taylor work toward early retirement-- “get out of the plant and take it easy.”

Dr. John Brophy, a neurosurgeon in Memphis, saw Taylor on October 14, 1998, for a second opinion. Dr. Brophy diagnosed lumbar radiculopathy and back pain associated with lumbar spondylolisthesis. Although Dr. Brophy did not find any relationship between the work injury and the spondylolisthesis, he agreed the lumbar radiculopathy was aggravated by the injury. Dr. Brophy assigned an eight percent (8%) permanent impairment to the body as a whole.

Taylor was examined by Dr. Joseph Boals, an orthopedic surgeon in Memphis, for an independent medical evaluation on November 11, 1998. Dr. Boals diagnosed spondylolisthesis at L4-5, degenerative disc disease at L4-5 and L5-S1, a ruptured L4 disc and severe loss of motion secondary to these conditions. Dr. Boals stated the injury aggravated Taylor’s preexisting back problems. Dr. Boals assigned a twenty-four percent (24%) permanent impairment to the body as a whole and placed permanent restrictions of no prolonged walking, standing, squatting, lifting of more than five (5) pounds at a time, or any type of rotary or bending activities with his back.

ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. *Tennessee Code Annotated* §50-6-225(e)(2). *Lollar v Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded

the trial court's factual findings. *Humphrey v David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Overman v Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

Emerson has presented three issues in this appeal:

- I) Plaintiff has not suffered an injury by accident within the meaning of the Workers' Compensation Act.
- II) The plaintiff is not permanently and totally disabled under the Workers' Compensation Act.
- III) If plaintiff is entitled to an award, it should be subject to the 2-1/2 times cap, as set forth in *Tennessee Code Annotated*, §50-6-241(a)(1).

Taylor has presented as an additional issue:

- IV) Was the defendant's appeal frivolous?

I. Has Taylor suffered a compensable injury by accident?

The plaintiff in a worker's compensation case has the burden of proving every element of his case by a preponderance of the evidence. *Elmore v. Traveler's Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992). An accidental injury arises out of one's employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and occurs in the course of one's employment if it occurs when an employee is performing a duty he was employed to do. *Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993). As to causation, our Supreme Court stated in *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987) as follows:

This Court has consistently held that causation and permanency of a work-related injury must be shown in most cases by expert medical evidence. Furthermore, by "causal connection" is meant not 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 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 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. If, upon undisputed proof, it is conjectural whether disability resulted from a cause operating within employment, there can be no award. 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 under the case law.

The medical evidence in this case is conflicting, a common occurrence in workers' compensation cases. The trial court has the discretion to accept the opinion of one medical expert over the opinion of another medical expert. *Johnson v Midwesco, Inc.*, 801 S.W.2d 804, 813 (Tenn. 1990).

Dr. Glenn Barnett testified Taylor's herniated L4 disc "certainly could have been caused by work injury or other injuries in his life" and his preexisting spondylolisthesis could have been aggravated by his work injury. Dr. Brophy did not find any relationship between Taylor's spondylolisthesis and his work injury, but stated the injury aggravated his lumbar radiculopathy. Dr. Boals was of the opinion the injury "more likely" caused the L4 disc and aggravated his other back conditions. Dr. Boals placed severe permanent restrictions on him. Each physician assigned varying degrees of permanent impairment.

Absolute certainty of medical evidence as to causation is not required. *Stratton-Warren Hardware v Parker*, 557 S.W.2d 494, 497 (Tenn. 1977). It is sufficient for the medical evidence to indicate the worker's injury "could have" caused the worker's condition if other credible evidence supports causation. *Hinson v Wal-Mart Stores, Inc.*, 644 S.W.2d 675, 677 (Tenn. 1983); *Thomas v Aetna Life & Casualty Co.*, 812 S.W.2d 278 (Tenn. 1991). Any reasonable doubt as to whether an injury arose out of the employment is to be resolved in favor of the employee. *Legions v Liberty Mutual Ins. Co.*, 703 S.W.2d 620, 622 (Tenn. 1986).

Further, the law in Tennessee is clear that an employer takes an employee as he finds him and assumes the risk of having a preexisting condition aggravated or accelerated by his employment. *Hill v Eagle Bend Manufacturing Co.*, 942 S.W.2d 483, 488 (Tenn. 1997).

The panel finds the evidence in the case fully supports the trial court's finding of an injury by accident.

II. Did the trial court err in finding Taylor permanently and totally disabled?

In assessing vocational disability, the trial court is required to consider all pertinent facts, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition in determining the extent of an injured worker's permanent disability. *Tennessee Code Annotated*, §50-6-241(2)(1). *Worthington v Modine Manuf. Co.*, 298 S.W.2d 232, 234 (Tenn. 1990).

At the close of this trial, the trial court did not specifically find Taylor to be "permanently and totally disabled," but stated he was limited to a maximum of 260 weeks of benefits due to Taylor being over the age of 60 at the time of the injury. *Tennessee Code Annotated*, §50-6-207(4). The trial court stated Taylor had "very, very significant anatomical problems," and a higher award would

be appropriate, but that Taylor was limited in his award by statute.

After considering all of the relevant statutory factors, we find the evidence does not preponderate against the trial court's award of sixty-five percent (65%) permanent partial disability to the body as a whole or two hundred sixty (260) weeks of benefits, the maximum permitted by *Tennessee Code Annotated*, §50-6-207(4).

III. Did the trial court err in finding Taylor did not have a meaningful return to work?

Tennessee Code Annotated, §50-6-241(a)(1) provides as follows:

(a)(1) For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to §50-6-207(3)(A)(I) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 ½) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

If the injured worker returns to his former employer at a wage equal to or greater than the wage at the time of the accident, his award of permanent partial disability is capped at a maximum of two and one-half (2 ½) times the medical impairment rating if the injured worker has a "meaningful return" to work. Whether the worker has made a meaningful return to work depends on numerous relevant factors for the trial court to consider: (1) the reasonableness of an employer's offer to return an employee to work; (2) the nature of the work to be performed, and restrictions, if any, placed on an employee; (3) whether an employee's refusal to return to work is reasonable in light of the nature of work and restrictions; and (4) the reasonableness of an employee's decision to discontinue working if he returned to work for a period of time. *Newton v Scott Health Care Center*, 914 S.W.2d 884, 886 (Tenn. 1995).

The proof in this case is that Taylor did return to his former employer and worked at the same or greater wage for eighteen (18) months before he voluntarily retired. However, Taylor testified he "kept dragging around" and was assisted by fellow employees. Taylor was allowed by his employer to "just do what I had to do" and rest whenever he needed to. Dr. Boals placed severe limitations on Taylor's ability to work and Dr. Barnett advised Taylor to retire. Taylor was clearly unable to

perform his job at this pre-injury level and his return to work was not meaningful.

The trial court found Taylor had not made a meaningful return to work and, therefore, was not limited by the provisions of *Tennessee Code Annotated* §50-6-241. The proof does not preponderate against this finding.

IV. Was Emerson's appeal frivolous?

After considering all the facts of this case, this panel cannot say the appeal was without any merit and frivolous. Taylor's motion for this panel to find this appeal frivolous is denied.

CONCLUSION

The judgment of the trial court awarding plaintiff, Rex Taylor, sixty-five percent (65%) permanent partial disability to the body as a whole or two hundred sixty (260) weeks of benefits is affirmed. The defendant, Emerson Motor Company, is taxed with the cost of this appeal.

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ORDER

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 on appeal are taxed to the defendant.

IT IS SO ORDERED this 1st day of September, 2000.

PER CURIAM

Holder, J. - Not participating.