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

JAMES BECTON v. GRISHAM CORPORATION

Direct Appeal from the Chancery Court for Shelby County
No. 107007-2 Floyd Peete, Jr., Chancellor

No. W1999-00183-SC-WCM-CV - Mailed August 2, 2000; Filed November 14, 2000

This is an appeal by James E. Becton of a decision by the trial court that Becton did not show by a preponderance of the evidence that he had sustained an injury by accident arising out of and in the scope of his employment with Grisham Corporation. He presents three (3) issues for review: 1) whether the Chancellor erred in excluding from consideration the testimony of the claimant's treating physician.; 2) whether the opinion of the treating physician is entitled to greater weight than that of a consultant; and 3) whether the evidence of vocational disability preponderates in favor of an award of permanent partial disability and medical payments in this case.

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

GEORGE R. ELLIS, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and F. LLOYD TATUM, SP. J., joined.

Karen P. Dennis and Steven D. Hawks, of Memphis, Tennessee, for the appellant, James Becton.

Robin H. Rasmussen, of Cordova, Tennessee, for the appellee, Grisham Corporation.

MEMORANDUM OPINION

This workers' compensation appeal was referred to the special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tennessee Code Annotated 50-6-225(e)(3) (1999) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This case involves a claim for workers' compensation arising out of an incident on January 30, 1995. The trial court heard the evidence on October 8, 1998. On October 26, 1998 the Chancellor ruled that the plaintiff had failed to show causation. He further ruled that the testimony of the treating physician was unreliable and should be discounted. The plaintiff appealed and raised the following issues for our review: (1) whether the chancellor erred in completely excluding testimony of the claimant's treating physician from consideration; (2) whether the opinion of a

treating physician, who performed surgery and observed the extent of anatomical injury fully, is entitled to greater weight than that of a consultant who saw the claimant once, and had no opportunity to directly observe the surgical procedure; (3) whether the evidence of vocational disability preponderates in favor of an award of permanent partial disability and medical payments in this case. After careful review, we find that we must affirm the trial court's judgment.

STANDARD OF REVIEW

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 314 (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 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 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 evaluation of live witnesses. Thomas, 812 S.W.2d at 283. 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.

On January 30, 1995 at 10:32 a.m., plaintiff was at the Baptist Minor Medical Center with complaints of a laceration on his arm. Plaintiff testified that the alleged accidental injury, which is the subject of this law suit, occurred sometime between 9:00 a.m. and 10:00 a.m. on the morning of January 30, 1995, and that he worked the rest of the day. The proof showed that plaintiff did not work on January 31, 1995. On February 1, 1995, at 7:15 a.m., he reported to his employer that he had strained his back lifting a box of screws. At 8:20 a.m., on that same day, plaintiff went to the Baptist Minor Medical Center complaining of severe pain in his back. On February 4, 1995, he went back to the Baptist Minor Medical Center and stated that he was injured on February 1, 1995.

Plaintiff was seen by Dr. Robert H. Miller on February 6, 1995, and stated that the back injury was sustained on January 29, 1995. The plant was closed on January 29, 1995. An MRI was performed on February 20, 1995, which showed degenerative disc disease at L3-4, L4-5 and L5-S1, but no signs of a recurrent disc. A bone scan, performed on March 30, 1995, was negative. On April 12, 1995, a diagnosis was made by Dr. George Woods at the Campbell Clinic of "back pain, etiology undetermined, due to arthritis, lumbar spine and post laminectomy syndrome." Plaintiff was referred to Dr. Keith Atkins, Ph.D. on June 13, 1995, who diagnosed somatoform pain disorder with evidence

of symptom amplification. After making an additional diagnosis of possible arachnoiditis on June 20, 1995, Dr. Woods referred plaintiff to Dr. James R. Feild, neurosurgeon.

Plaintiff was seen by Dr. Feild on June 22, 1995, and he rendered an opinion that Plaintiff had "aging of the joint of his back." On October 31, 1995, a myelogram was performed and a small spinal canal was found and he "did not see a definite ruptured disc." Electrical tests performed on November 6, 1995, showed evidence of diabetic neuritis. On November 6, 1995, Dr. Feild "could not make a definitive diagnosis" and recommended surgery or the option of a second opinion.

A second opinion was performed by Dr. Feridoon Parsioon who found no compressive lesion, no nerve damage, and no ruptured disc or tumor.

On December 26, 1995, Dr. Feild performed exploratory surgery which revealed growth of bone over one of the nerve roots and degenerative lumbar disc disease.

EXCLUSION OF THE TESTIMONY OF THE TREATING PHYSICIAN

The plaintiff argues that the Chancellor erred in finding that Dr. Feild's deposition was unreliable even though, in his three hour long, extremely combative deposition, Dr. Feild admitted to purposely filing an inaccurate report. In this deposition, he stated that the form that he filled out was, in his own opinion, inaccurate. His justification for this was because

> the insurance company you represent failed to take the responsibility that was necessary and incumbent upon them to provide this person medical care which he deserved and which is the subject of this lawsuit. That's the reason all of this is done, is because of the irresponsibility of your company and your insurance company that hires someone like you, a lawyer, to come in here to try to beat this poor ignorant man out of his money. That's exactly why we're here, and this document is an example of it.

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 deposition of Dr. Feild was not objective and unbiased and does not preponderate against the chancellor's finding that it was unreliable and should be discounted. We may make our own independent assessment of the medical evidence when it is presented by deposition or written reports, as it is in this case. Cooper v. Insurance Co. of N. Am., 884 S.W.2d 446, 451 (Tenn. 1994); Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356

(Tenn. 1989). In doing so, we should not ignore the conclusion reached by the trial judge upon the assessment of the conflicting medical opinions. We find that there is reason in the record to demonstrate the unreliability of the testimony and written reports of the examining physician.

REMAINING ARGUMENTS

The employee has the burden of proving every element of the case, including causation and permanency by a preponderance of the evidence. Tindall v. Waring Park Assn., 725 S.W.2d 935, 937 (Tenn. 1987). To be compensable under workers' compensation law, an injury must both "arise out of" as well as be "in the course of" employment. 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). Reasonable doubt of causation is to be construed in the employee's favor. The record is replete with inconsistencies as to when the accident occurred.

Upon our de novo review, we find that the evidence does not preponderate against the trial court's finding that the plaintiff did not show by a preponderance of the evidence that plaintiff suffered an injury by accident arising out of and in the scope of employer's employment and such accidental injury has caused substantial permanent physical impairment and vocational disability.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Costs are assessed against the plaintiff.

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GEORGE R. ELLIS, Special Judge

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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 will be paid by James E. Becton, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM