IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 30, 2000 Session

STEPHEN BENKER v.WILLIAMS TELECOMMUNICATIONS SERVICE, INC., ET AL.

Direct Appeal from the Circuit Court for Sevier County
No. 98-665-I Ben W. Hooper II, Circuit Judge

No. E1999-01967-WC-R3-CV- Mailed - October 20, 2000
Filed: November 27, 2000

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 has appealed from the trial court's ruling the employee is totally disabled raising issues concerning compensability of the claim and the apportionment of the award. Judgment of the trial court is affirmed.

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

THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, C. J. and BYERS, SR. J., joined.

Robert W. Knolton, of Oak Ridge, Tennessee, for the Appellants, William Telecommunications Service, Inc. and Insurance Company of the State of Pennsylvania.

Paul G. Summers, Attorney General and Reporter, and E. Blaine Sprouse, Assistant Attorney General, of Nashville, Tennessee, for the Appellee, State Second Injury Fund.

J. Anthony Farmer, of Knoxville, Tennessee, for the Appellee, Stephen Benker.

OPINION

The employer, Williams Telecommunications Service, Inc., and the Insurance Company of the State of Pennsylvania, have appealed from the trial court's ruling finding the employee, Stephen Benker, to be totally disabled.

Facts

Employee Benker was 51 years of age and was a high school graduate with some vocational training. His prior work history was a laborer, maintenance worker, construction worker and carpenter. He was employed as a telephone computer service system installer on September 23, 1997, when he tripped on some phone cords and fell. When this occurred, he testified he twisted his back, felt sharp pain down his leg and some numbness in his low back.

Prior to this accident, he had disc surgery in 1975 or 1976 and returned to work. In 1990 he had another disc operation and returned to work. He had complaints from back problems for several years prior to the incident in question and had missed work at different times between 1990 and the accident in 1997. He has not worked since the September 23rd incident and states he is not able to work at any of the jobs he has held. His wife, Lisa Benker, testified as to his physical limitations and testified that she does everything both inside and outside their home and that "our entire life has changed, everything is different."

Dr. John T. Purvis, a neurosurgeon, performed the second surgery in 1990 which involved a ruptured disc. He saw the employee again after the incident in question and stated that he had severe osteoarthritis in his low back and with his prior history of having disc surgery twice, he would be very sensitive to any type of injury to the back. He concluded that Benker sustained an aggravation and acceleration of his lumbar spondylosis to such an extent that he was unable to work; that there was some anatomical change and he was surprised that he had worked as long as he did. He gave impairments of 10 percent due to the 1976 surgery, 15 percent due to the 1990 surgery and 10 percent due to the September 1997 accident.

Opposing this medical testimony was the written medical report of Dr. Archer Bishop. He performed an independent medical examination on November 1, 1998 and was of the opinion the accident had only increased his pain and that there was no additional impairment.

Witness, Julian Nadolsky, a vocational consultant, testified the employee had "no capacity to earn a living in any occupation" based on the opinion of Dr. Purvis. He admitted that there would be no vocational disability under Dr. Bishop's conclusion.

The trial court found the accident of September 23, 1997 rendered the employee totally disabled and apportioned the award of permanent total disability pursuant to subsection (a)(1) of Tenn. Code Ann. § 50-6-208. The court ordered the employer to pay 60 percent of the award and the state second injury fund to pay the remaining 40 percent.

Issues on Appeal

The employer and insurance company contend: (1) the accident in question did not cause any anatomical change in the employee's pre-existing condition, (2) the employee was not totally disabled as a result of the last accident and (3) the court was in error in apportioning a greater portion

of the award to the employer.

Standard of Review

In a workers' compensation case, the review on appeal is *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2). Where there is conflicting medical testimony, the trial judge has discretion to conclude that the opinion of a particular expert should be accepted over that of another expert. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990).

Issue of Compensability

It is insisted that the September 23rd incident has only resulted in the employee suffering more pain and this alone is not sufficient to render the claim compensable.

An employer is responsible for workers' compensation benefits, even though the claimant may have been suffering from a pre-existing condition or disability, if the employment causes an actual progression or aggravation of the prior disabling condition or disease, which produces increased pain that is disabling, or there is an anatomical or physiological change in the pre-existing condition. *Sweat v. Superior Indus.*, 966 S.W.2d 31 (Tenn. 1998); *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 488 (Tenn. 1997).

We find the testimony of Dr. John T. Purvis was within this last mentioned rule as he testified there was anatomical and physiological changes that caused increased inflammation. The trial court chose to accept this evidence and we cannot say the remaining evidence preponderates against this conclusion.

Award of Total Disability

From our examination of the record, we do not find this to be a viable issue. The State Fund agrees with the employee that the evidence does not preponderate against the trial court's conclusion that the employee is totally disabled. During opening statements at the trial court level, counsel for the employer conceded that if the claim was found to be compensable, the State Fund would be responsible for most of the award of permanent disability. Additionally, we find the lay and expert evidence supports the trial court in awarding permanent total disability.

Apportionment of Award

It is argued that under the proof of prior disabilities, the trial court was in error in apportioning a greater part of the award to the employer. The court directed the employer to pay 60 percent and the State Fund to pay 40 percent. Tenn. Code Ann. § 50-6-208(a)(1) provides that the employer is only liable for the disability that results from subsequent injury that rendered the

employee permanently and totally disabled, without consideration of any disability caused by prior injuries. The Second Injury Fund points our that employee Benker returned to work after both prior surgical procedures and was physically able to participate in many non-work activities that he could no longer do after the last injury.

The apportionment of the award of total disability is primarily a question of fact for the trial court to resolve. From our independent review of the record, we cannot say the evidence preponderates against the apportionment ordered.

Conclusion

There is ample evidence in the record to support the trial court on the various issues presented by the case. The evidence does not preponderate against the court's various rulings. The judgment is affirmed. Costs of the appeal are taxed to the employer and insurance company.

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ROGER E. THAYER, SPECIAL JUDGE

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JUDGMENT

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 Judgement of the Court.

Costs on appeal are taxed to the William Telecommunications systems, Inc. and Insurance Company of the State of Pennsylvania and Robert W. Knolton, surety, for which execution issue if necessary.

11/27/00