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

LUKE KEELING v. FLORIDA STEEL, now known as AMERISTEEL

Direct Appeal from the Chancery Court for Madison County
No. 53268 Joe C. Morris, Chancellor

No. W1999-00433-WC-R3-CV - Mailed December 12, 2000; Filed February 8, 2001

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 appeals from the trial judge's finding that: the plaintiff sustained an injury within the course and scope of his employment; that he suffered a thirty-five percent vocational disability; and that he did not have a meaningful return to work. The defendant also appeals the trial court's holding that it was not entitled to a set off for funds paid to the plaintiff under a self-insurance plan. We affirm the judgment of the trial court.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and DON R. ASH, S. J., joined.

Christopher Crain and W. Timothy Hayes, Memphis, Tennessee, for the appellant Florida Steel, now known as Ameristeel.

Ricky L. Boren, Jackson, Tennessee, for appellee, Luke Keeling.

OPINION

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.

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). *Stone v. City of McMinnville,* 896

S.W.2d 548, 550 (Tenn. 1995).

The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

The plaintiff, thirty-two years of age at the time of trial, has a work history of manual labor including farming, refinishing furniture, loading trucks and stacking lumber. He began working for the defendant in 1990. The work the plaintiff did for the defendant was that of a melt-shop attendant, which included lifting from thirty to fifty pounds of weight on a regular basis. The plaintiff was given a pre-employment physical which cleared him for the work.

The plaintiff did not have any problems with his back until December 21, 1995, when he rolled over on a couch at home and heard a pop in his back and felt pain. Thereafter, the plaintiff continued to have back and leg pain and ultimately left the employment of the defendant, after, according to the plaintiff, he could not perform work for the defendant within his medical restrictions. Eventually, the plaintiff did return to work and was assigned to operating a fork lift. During the course of his duties, the plaintiff ran over a hose. When he bent to pick up the hose, he again felt a pop in his back. The plaintiff also testified that operating the fork lift caused his back to hurt.

Medical Evidence

The significant medical evidence in the case was given by Dr. Karl Misulis, a neurologist, and by Dr. Melvin Law, an orthopedic surgeon.[1] Dr. Misulis found the plaintiff suffered from radiculopathy and damage to the nerve roots. Dr. Misulis did not attribute the condition to the plaintiff's work but did testify the repetitive lifting could have played a significant role in contributing to the radiculopathy. Further Dr. Misulis was of the opinion the pop the plaintiff heard when he attempted to pick up the hose (during the incident that occurred after he had retumed to work following the previous incident) indicated an exacerbation of the condition. Dr. Misulis did not do a specific evaluation of the medical impairment of the plaintiff but stated it would likely be five percent to the body as a whole. Dr. Misulis said the plaintiff should lift thirty pounds only occasionally but could lift ten pounds repetitively.

Dr. Law, a specialist in spine problems, saw and treated the plaintiff upon referral of Dr. Misulis. Dr. Law found the plaintiff had a congenital fusion of the L5-S1 level of his back. This caused the plaintiff have a sway-back at the L4-5 segment of his back and hyper mobility at that level. Dr. Law testified a person with this condition is more like to sustain back injury than a person without the condition.

[1] Dr. James G. Warmbrod Jr., an orthopedic surgeon, saw the plaintiff also; however, his testimony did not add to or detract from the main cause in the case.

Dr. Law did not believe the incident of turning over on the couch caused the plaintiff's problem. He opined that the repetitive lifting the plaintiff did at work caused the problem. Dr. Law testified the plaintiff should avoid bending, lifting, twisting, pulling and pushing. He found the plaintiff suffered a ten percent permanent partial medical impairment to the body as a whole.

Trial Court Ruling on Disability

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." TENN. CODE ANN. § 50-6-102(a)(5). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted); *Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993). Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted).

Further, an employer is responsible for workers' compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, if employment causes an actual progression or aggravation of the prior disabling condition or disease which produces increased pain that is disabling. *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483 (Tenn. 1997), citing *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993); *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992); *Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587, 591 (Tenn. 1989) ("There is no doubt that pain is considered a disabling injury, compensable when occurring as the result of a work-related injury."). It is true that an employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the pre-existing conditions; but if work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident. *Sweat v. Superior Indus., Inc.*, 966 S.W.2d 31, 32 (Tenn. 1998). To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. *Id.* at 33.

The trial judge found the plaintiff had sustained a repetitive gradually occurring injury to his back because the lifting, etc. he was required to do aggravated the pre-existing congenital condition of the plaintiff's back.

The material evidence supports the finding of the trial court on causation in this case, and also supports the award of thirty-five percent permanent partial disability to the body as a whole.

Return to Work

The defendant contends the plaintiff made no reasonable attempt to return to work and argues

the award should be limited to two to five percent times the impairment rating or twenty-five percent. The evidence on this issue was pro and con. The plaintiff maintained he could not do the work offered and witnesses for the defense testified the plaintiff's restrictions could be met. The trial judge saw and heard them testify. He believed the plaintiff; hence the issue as to the matter of which evidence the trial judge credited is settled.

Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

Off-set of Payment from Insurance Plan

The plaintiff's injury occurred prior to July 1, 1996, the date of enactment of Tennessee Code Annotated. § 50-6-114(b). The statute provides for a set-off in accordance with set-off terms provided in a policy. The defendant agrees the policy under which the plaintiff was paid does not contain a set-off provision.

The defendant takes the position that it would be inequitable to require it to pay temporary total benefits when the plaintiff had received long term benefits under the insurance coverage provided by the defendant, a self-insurer of the disability policy.

In *McCaleb v. Saturn Corp.*, 910 S.W.2d 412 (Tenn 1995) the Court held that no set off was permissible under a lost-work policy. This holding was prior to the enactment of Tennessee Code Annotated § 50-6-114(b).

The Supreme Court held in *Nutt v. Champion International Corp.*, 987 S.W.2d 365 (Tenn. 1998) that set-off was not applicable to injuries which occur prior to the effective date of the Act - July 1, 1996. The plaintiff's injury was prior to the date, and the trial judge properly denied set-off for payment under the policy.[2]

The cost of this appeal is taxed to the defendant

JOHN K. BYERS, SENIOR JUDGE

[2]The plaintiff was awarded $24,298.69 in temporary total benefits.

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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 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/Appellant, Florida Steel, now known as Ameristeel, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM