

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 31, 2000 Session

**STANLEY R. WILBANKS v. CORRECTIONS CORPORATION OF
AMERICA**

**Direct Appeal from the Circuit Court for Hardin County
No. 3090 C. Creed McGinley, Judge**

No. W1999-01732-WC-R3-CV - Mailed November 27, 2000; Filed January 22, 2001

This workers' compensation appeal was referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tenn. Code Ann. § 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 the presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The appellant presents the following issues for review: (1) Did the trial court err in ruling that the plaintiff gave proper notice of the alleged back injury?; (2) Did the trial court err in ruling that Dr. Frazier related causation of the back injury to the accident which occurred on July 24, 1998?; and (3) Did the trial court err in relying on the testimony of Dr. Joseph C. Boals, III, as competent expert testimony? The 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.

WIL V. DORAN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and J. STEVEN STAFFORD, SP. J., joined.

Tom Anderson, Jackson, Tennessee, for the appellant, Corrections Corporation of America.

Edward L. Martindale, Jackson, Tennessee, for the appellee, Stanley R. Wilbanks.

MEMORANDUM OPINION

FACT EVIDENCE

The plaintiff was injured on July 24, 1998, while at a job for Corrections Corporation of America (referred herein as "CCA"). He was moving a drink machine when it fell on him causing injury to his lower back and left leg. He testified that he told the ambulance personnel that he was experiencing pain from his pelvis down. He advised all medical personnel treating him of his back pain. At the time of trial, the plaintiff was thirty-nine years of age, he has a twelfth (12th) grade education, he completed approximately eighteen (18) months of vocational training, and had a career in the military. The plaintiff testified that he began working for CCA in February 1992. The plaintiff had sustained two prior work injuries but had not filed a lawsuit for either injury. The plaintiff's first work-related injury occurred on August 1, 1992, and he was off from work for twenty-four (24) hours. The second work-related injury occurred on August 27, 1995, which was a rotator cuff injury which required surgery that workers' compensation covered. However, it did not result in any disability.

Kevin Myers, the Warden at CCA, testified on behalf of the defendant and stated that he did receive notice of an accident which occurred on July 24, 1998, in which the plaintiff's leg was injured. However, he did not receive notice of a back injury until he was made aware of the allegations at the Benefit Review Conference held in this matter. Warden Myers further testified that the plaintiff was back at work at the same job making the same wages and that he was an excellent employee.

MEDICAL EVIDENCE

The plaintiff was transported by ambulance to the Wayne County Medical Center where he was x-rayed and received a leg brace for treatment of a fractured fibula near the knee. The following day, July 25, 1998, the plaintiff sought medical treatment at the Hardin County General Hospital, with complaints of foot pain, where it was discovered that he had a fractured metatarsal. The plaintiff was subsequently treated by Dr. Randall Frazier, beginning on July 27, 1998, for the fractures. On October 29, 1998, Dr. Frazier opined that the plaintiff had reached maximum medical improvement and gave a permanent partial impairment rating of 5 percent to the lower extremity as the result of his work-related injury.

The plaintiff was also seen and examined by Dr. Joseph C. Boals, III, an orthopedic surgeon in Memphis, Tennessee. Dr. Boals' deposition was taken on September 30, 1999, at which time he testified that the plaintiff had sustained 10 percent permanent impairment to his left lower extremity, and 5 percent permanent impairment to his back as a result of his July 24, 1998, work injuries. Dr. Boals went on to state that combining these two impairment ratings would give the plaintiff an overall impairment of 9 percent to the body as a whole. With regard to restrictions, Dr. Boals testified that the plaintiff should continue wearing orthotic devices on his left foot, avoid walking on irregular surfaces and prolonged standing, climbing or squatting should be eliminated.

RATIONALE

The defendant contends that the trial court erred in ruling that the plaintiff gave proper notice of the alleged back injury. It is the defendant's position that during the plaintiff's ninth (9th) visit with Dr. Frazier on February 11, 1999, he complained for the first time of back pain and that this was some seven (7) months after Dr. Frazier began treating the plaintiff. The defendant further takes the position that the plaintiff initially denied any back pain. A careful review of the records from the Wayne County Ambulance Service clearly established that the plaintiff complained of pain in both his left lower extremity and pelvis area. In addition, the plaintiff testified at trial that he had been experiencing pain in his lower back since the accident. However, it was not until February 1999, after being released from his leg injury that the pain in his back worsened. His treating physician, Dr. Randall Frazier, testified that on February 17, 1999, the plaintiff advised him that while his foot was doing better his pain seemed to have settled in his lower back. Dr. Frazier went on to state that he questioned the plaintiff about this and he advised Dr. Frazier that he had been having back pain ever since the accident on July 24, 1998. Dr. Frazier testified that it is not unusual for someone who has sustained a significant injury to one part of their body to focus on that more so than an injury to another part of their body.

In Quaker Oats v. Smith, 574 S.W.2d 45, 48 (Tenn. 1978), Justice Cooper, writing for the Court, stated the following:

“On the issue of notice, appellant argues that it never was given notice that appellee had sustained an injury to her back in either of the two falls that notice of accidental injury, when and if given, was limited to notice of injury to appellee's legs. Predicated on this, appellant insists that appellee is not entitled to recover benefits for disability from a back injury. This argument overlooks the fact that appellee testified that she told both Dr. Ballard and Mrs. Peggy Smith that she had injured her back in the falls. **But, even without this knowledge by appellant, we know of no requirement that an employee give notice of each of several injuries he received in an on-the-job accident. He is in compliance with the statutory requirement of notice if he notifies his employer of the accident and the fact that he suffered an injury.** The nature and extent of employee's injuries, and the issue of medical causation, usually come to light in the course of treatment of the employee's injuries.”

In the statement of the evidence filed by the trial judge, it is stated that the plaintiff always consistently complained of pain in the pelvis and that the pelvis constitutes low back. The trial judge further found that all credibility issues were resolved in favor of the plaintiff.

The trial judge who heard and observed the witnesses testify is the arbiter of their credibility, and if there are no compelling reasons to do otherwise, the reviewing court should defer to that

judgment. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). On this issue, it seems to us that the evidence does not preponderate against the judgment of the trial court.

Next, we consider the issue of whether or not Dr. Frazier related causation of the back injury to the accident which occurred on July 24, 1998. The defense counsel asked the plaintiff's treating physician, Dr. Randall Frazier, about the cause of the plaintiff's back injury, and Dr. Frazier testified in the following manner:

- Q. Dr. Frazier, I think one of the things we're all interested in is trying to determine whether Mr. Wilbanks' complaints of back pain arose from the injury that occurred on -- what date was it?
- A. July 24th.
- Q. July 24, 1998. Do you have an opinion in that regard?
- A. His injury could certainly **be consistent** with an injury to the lumbosacral spine. Based on the patient's history given to me, which he had no other injury and there was no other injury to his lower back, I think that would be consistent.

Later in his deposition, defense counsel once again asked Dr. Frazier about the cause of the plaintiff's back injury, to which he stated the following:

- Q. Other than what you have already described to us, is there any way that you can aid us in determining whether the complaints of back pain emanated or resulted from the injury that occurred on July the 24th of 1998?
- A. Again, I think the only thing I can state is that the injury would be consistent with that.

Finally, Dr. Frazier further testified as follows:

- Q. And, Doctor, did I understand you correctly, that based upon the history that this man gave you, in your opinion the back pain and the problems that he was having with his back in February of '99 were consistent, compatible, with the history of injury that he related to you when you initially saw him?
- A. Yes.
- Q. And, I believe, you also said in answer to some of Mr. Anderson's questions on direct examination, that while Mr. Wilbanks had never complained of any back pain when you were treating him for his foot, when he came back in February of '99, he told you that he had been having some back pain since the accident, but it had gotten worse

at this time; is that a fair statement?

A. Yes.

Likewise, Dr. Joseph C. Boals, III, the only other medical doctor to testify in this case stated that in his opinion, based upon a reasonable degree of medical certainty, the cause of the plaintiff's back problems was the injury he sustained on July 24, 1998. The evidence does not preponderate against the judgment of the trial court with regard to causation.

Next, we consider whether or not the trial court erred in relying on the testimony of Dr. Joseph C. Boals, III, as competent expert testimony. In his deposition, Dr. Boals very carefully explained that his impairment was based upon the American Medical Association Guidelines, specifically, Table 75, section II-B at page 113. Dr. Boals went on to state that very seldom would the injury or the DRE model apply because it is so subjective, allows inclusion of certain injuries and does not accurately describe or outline very much. On the other hand, the range of motion model very explicitly gives a diagnosis-based estimate table and allows you to then add additional impairment due to neuropathies, sensation loss, loss of motion and other entities. In his deposition, Dr. Boals was asked the following question:

Q. And do the A.M.A. Guidelines give you any recommendations on which model to use in a case like this?

A. They state simply to use the model that best describes the injury that is present.

The trial court found that, even though Dr. Frazier opined a 0 percent impairment, he attempted to refer the plaintiff to a neurosurgeon, the referral was not approved for payment, and the plaintiff was, therefore, deprived of a rating to his back. Dr. Boals' independent medical evaluation reveals a 10 percent anatomical impairment to the leg and 5 percent anatomical impairment to the back or 9 percent anatomical impairment to the body as a whole. Because the plaintiff is working at the same job, the caps apply, limiting him to an award of 2.5 times the anatomical rating. Tenn. Code Ann. § 50-6-241. The trial court found the plaintiff's vocational impairment to be 20 percent to the body as a whole and further awarded future medical expenses as to the injuries to the back and leg.

The evidence does not preponderate against the findings of the trial judge with regard to any of the issues presented for review. The judgment of the trial court is affirmed. Costs are assessed against the defendant.

WIL V. DORAN, 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 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, Corrections Corporation of America, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM