IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 22, 2001 Session

JOHN SANDS v. MURRAY OUTDOOR PRODUCTS, INC.

Direct Appeal from the Circuit Court for Carroll County
No. 3881 Julian P. Guinn, Judge

No. W2000-00468-SC-WCM-CV - Mailed March 21, 2001; Filed June 27, 2001

This workers' compensation appeal has been referred to the Special Worker's Compensation Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e) for a hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The plaintiff has appealed contending that the trial court erred in granting the defendant a motion to dismiss his complaint pursuant to Rule 41, Tennessee Rules of Civil Procedure, for a work-related injury occurring on October 6, 1998. After a review of the entire record, briefs of the parties and applicable law, judgment of the trial court is reversed and remanded.

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

L. TERRY LAFFERTY, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, JR., SP. J., joined.

Ricky L. Boren, Jackson, Tennessee, for the appellant, John Sands.

J. Arthur Crews, II and Michael A. Carter, for the appellee, Murray Outdoor Products, Inc.

MEMORANDUM OPINION

The plaintiff, age forty (40), testified that on April 29, 1997, while pulling a load of engines, he twisted his back and it popped. The plaintiff reported his injury and he was treated by Dr. John Holancin, but Workers' Compensation sent the plaintiff to see Dr. David Johnson who ran an MRI. The plaintiff lost no work and was on light duty for six (6) weeks. Between his return to work and October 1998, the plaintiff's back would lock up and his legs would tingle from prolonged standing about three to four times a month. The plaintiff stated that on October 6, 1998, he was picking up a unit off the floor to set it on the line, when his back went out and he hit the floor in pain. The plaintiff saw Dr. Holancin, who ordered a CT scan. At the request of the defendant, the plaintiff was

referred to Dr. John Brophy. The plaintiff stated that he was restricted in his ability to do any lifting or bending while on light duty. The plaintiff testified that he saw Dr. Robert Barnett and that Dr. Barnett's nurse took down his history. When asked if he told the nurse about the October 1998 injury, the plaintiff stated, "I believe I did." In several parts of his testimony, the plaintiff is sure that he told the nurse about his October injury and cannot explain why such event is not recorded in her intake notes. The plaintiff admitted that while talking to Dr. Barnett he did not tell Dr. Barnett about the October injury.

In his deposition, Dr. John D. Brophy, a neurosurgeon, testified that he first saw the plaintiff on January 6, 1999. Dr. Brophy obtained the plaintiff's history in which the plaintiff injured his back in April 1997, while pulling a load of engines at work. An MRI was within normal limits. After conservative treatment, the plaintiff described approximately a twenty percent (20%) improvement from his injury. In October 1998, the plaintiff re-injured his back from lifting a lawn mower. Dr. Brophy reviewed the films of a CAT scan which revealed a bulging disc at L-5 S-1. Dr. Brophy would not call this bulge a "ruptured disc." It was Dr. Brophy's opinion that the clinical exam of the plaintiff was a myofascial pain syndrome, with no evidence of radiculopathy. Dr. Brophy permitted the plaintiff to return to work full time without any restrictions on January 18, 1999. Dr. Brophy recommended to the plaintiff that he commence a physical exercise program, which consisted of walking and other activities. Dr. Brophy saw the plaintiff on March 17, 1999, with a complaint of no improvement in his pain syndrome. Dr. Brophy recommended that he continue his walking exercises. An evaluation of AP and lateral spine thoracic films demonstrated multi-level spondylosis. On October 6, 1999, the plaintiff returned with a complaint of continuing pain to his back and leg. Dr. Brophy's physical overall exam found the plaintiff's strength, gait, sensory, and symmetric reflexes normal. As of October 6, 1999, Dr. Brophy opined that the plaintiff had a zero permanent partial impairment rating, with no permanent restrictions.

When asked about the differences in the MRI of 1997 and the CAT scan of 1998, the question was:

Q. Doctor, certainly a lifting incident is capable of causing a bulging disc, is that correct?

A. Yes.

Q. And - -

A. - - And the most common history I get is I just woke up with it, Doctor, I don't understand.

Q. But that's not the history you got in this case?

A. No.

Q. And you would certainly -- certainly it's a likely cause is that the -- since we have a baseline MRI, a bulge 18 months later right after a reported traumatic event, certainly it's a likely cause that that event contributed to the bulge?

A. It's possible, but not necessarily. Again, he had early changes, a spondylosis at that level, disc degeneration. And the natural history of that is losing water content and a disc bulge. That's the natural history. That's when -- anybody that saw that would have predicted what we saw on the CT later.

At the request of counsel, the plaintiff was examined by Dr. Robert Barnett on May 3, 1999. In Dr. Barnett's deposition, he testified that the plaintiff gave him a history of "that on April 29, 1997, he was pulling a load of engines and injured his back." Dr. Barnett reviewed the report concerning an MRI made in September 1997, which reflected a disc herniation at L-5, S-1, without a herniation or bulge. Dr. Barnett acknowledged that he received a letter from counsel which contained a copy of history dated October 27, 1998, concerning the plaintiff, given to Dr. John Holancin. Further questioning regarding the history was set out as follows:

Q. And would you set out what that history was?

A. Dated October the 27th of '98 from (Dr.) John Holancin, 'About ten days ago this thirty-nine year old gentleman was working at Nestaway. He was on a regular (sic) job and was bending over to pick up a lawn mower and suffered an acute back strain. He had tingling along the -- down the right lateral leg and sometimes occasionally to his toes. Aggravated by certain movement.'

. . . .

Q. Did you also review a Baptist Hospital CT scan dated December 1st, 1998?

A. Yes, sir.

Q. And would you tell us what showed on that?

A. Asymmetrical bulging disk at the L5 with small left paracentral herniated nucleus pulposus.

Q. Would you explain what that means in layman's terms?

A. Well, he's got a ruptured disk.

Q. Okay. How would you compare that finding to the finding on the MRI taken in -- on September 4th, 1997?

A. Well, it -- No ruptured disk was found on the MRI.

. . . .

Q. Doctor, based upon the history you were given and the medical records you have reviewed, do you have an opinion, based upon a reasonable degree of medical certainty, as to the relationship between the bulging disk shown on the December CT scan and the October injury that was related in Dr. Holancin's records?

A. Well, from the medical records, if he had a second injury and it showed a ruptured disk after the second one and didn't show it after the first one, I'd have to assume the second injury caused the ruptured disk.

Further, Dr. Barnett opined that the ruptured disc fits radiculopathy, the radiation of pain in the ruptured disc. With a degenerative and even herniated disc, Dr. Barnett opined that the plaintiff sustained a seven percent (7%) permanent partial impairment to the body as a whole. Coupled with his radiculopathy, the plaintiff would be restricted to not lifting over thirty (30) to forty (40) pounds on a repetitive basis.

During cross-examination, Dr. Barnett acknowledged that the plaintiff only complained of an injury occurring in April 1997, and informed Dr. Barnett and his staff that the duration of his pain was for two (2) years. Dr. Barnett agreed that if this were true and the plaintiff had pain over this period, he would have sustained a seven percent (7%) permanent partial impairment to the body as a whole.

At the conclusion of the plaintiff's testimony and submission of the depositions of Drs. Brophy and Barnett, the trial court granted the defendant's motion for a Rule 41.02 judgment.[1]

Appellate review of the findings of fact by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of those findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires the panel to examine in depth a trial court's factual findings and conclusions. The reviewing tribunal is not bound by the trial court's factual findings but instead conducts an independent examination of the record to determine where the preponderance lies. *Galloway v. Memphis Drum Service,* 822 S.W.2d 584 (Tenn. 1991). The trial court made no findings of fact. Therefore there is nothing in the record upon which a presumption of correctness can be based and review is *de novo* without any presumption of correctness. *Devorak v. Patterson*, 907 S.W.2d 815, 818 (Tenn. 1995).

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[1]The granting of a Rule 41.02 judgment are usually rare in workers' compensation lawsuits. The appellate courts urge trial courts to settle all issues to avoid the possibility of remands for further considerations. In the future, we urge trial courts to assess all issues, although directed verdicts or Rule 41.02 motions are applicable. In this case, if the trial court had found any permanent disability and/or the appropriate percentage, such decision could avoid the necessity of a reverse or remand.

The sole issue in this appeal is whether the plaintiff has established through the deposition of Dr. Robert Barnett, coupled with the testimony of the plaintiff, medical causation for the plaintiff's injury. Where issues involve medical testimony, all of which is presented by deposition, which it is in this case, this Court on appeal may draw its own conclusions with regard to the weight and credibility of those witnesses, for the appellate courts rests in the same posture as the trial court. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997).

The general rule is that causation and permanency of a work-related injury must be shown in most cases by expert medical evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935 (Tenn. 1987); *Seay v. Town of Greeneville*, 587 S.W.2d 381 (Tenn. 1979). Although absolute certainty is not required, the medical proof 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. *Patterson v. Tucker Steel Co.*, 584 S.W.2d 792 (Tenn. 1979). If 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. *Seay v. Town of Greeneville, supra.*

It is undisputed that the plaintiff suffered two back injuries, which are work-related, the first on April 29, 1997, and the second on October 6, 1998. It is undisputed that the plaintiff sought and received medical treatment for each injury. Thus, the plaintiff asserts that Dr. Barnett's deposition, taken as a whole, would suggest that the plaintiff's condition was contributed by both injuries at work. Further, the plaintiff would argue that expert medical witnesses may base an opinion upon other records and facts as long as such records are introduced into evidence. Citing *Pentecost v. Archer Wire Corp.*, 662 S.W.2d 327 (Tenn 1983). The defendant counters that the plaintiff's suit for workers' compensation benefits were limited to the date of October 6, 1998, as set forth in the complaint. Since the plaintiff has failed to establish any medical causation for his injury of October 6, 1998, the trial court's granting of a Rule 41.02 was proper.

The plaintiff insists that he told Dr. Barnett about the injury of October 6, 1998, as well as Dr. Barnett's nurse. However, Dr. Barnett's testimony, his report of May 6, 1999, and the nurse's intake note indicates otherwise. The record reflects that on April 23, 1999, plaintiff's counsel furnished Dr. Barnett a medical history of both injuries sustained on April 29, 1997 and October 6, 1998. Dr. Barnett acknowledged that he may have overlooked the information in his file as to the plaintiff's injury of October 6, 1998. When asked to give his medical opinion Dr. Barnett replied:

> Q. Doctor, based upon the history that you were given and the medical records you reviewed, do you have an opinion, based upon a reasonable degree of medical certainty as to the relationship between the bulging disc shown on the December CT scan and the October injury?
>
> A. Well, it was certainly medically documented. He had been to doctors and had necessary testing. And he had degenerative and even a herniated disc. And according to table 75, page 113, it's 7 percent of the whole body.

The defendant contends that Dr. Barnett's response to the causation question presented to him demonstrates that Dr. Barnett based his opinion on a hypothetical situation that the evidence does not support. Citing *Hamilton v. Danka Industries, Inc.*, No. 02S01-9806-CH-00051H, 1999 WL 562094 (Tenn. Sp. Workers Comp. Jul. 30, 1999). We must respectfully disagree with the defendant.

We find that the facts in this case are more analogous to the facts in *Pentecost v. Anchor Wire Corp.*, 662 S.W.2d 327 (Tenn. 1983). In this case, a dispute arose over whether the plaintiff could lift spools of wire weighing thirty (30) to thirty-five (35) pounds over head. A vice president of the employer testified that the employee was required to lift a spool that averaged twenty-three (23) to twenty-seven (27) pounds and a spindle of a scale model of the electric fence was fifty-eight (58) inches tall. The hypothetical question presented to Dr. Cushman, a medical expert, only mentioned the spools and not the height of the spindle containing the spools. Sua Sponte, the trial court found that the hypothetical question was not at all similar to the conditions that were out there. He then dismissed the case. In reversing this finding, the Supreme Court held:

> It is well settled that "it is not proper for a hypothetical question to assume facts that are not supported by evidence at trial." *Cortrim Manufacturing Co. v. Smith*, 570 S.W.2d 854, 856 (Tenn. 1978). In determining the propriety of a hypothetical question, the issue should not be resolved by searching an entire record to determine whether every possible fact was listed in the question. Nor should the hypothetical question be tested solely against the evidence presented by the opposing party as appears to be the situation in the instant case. Rather, the issue should be resolved by determining whether the question contained enough facts, supported by evidence, to permit an expert to give a reasonable opinion which is not based on mere speculation or conjecture and which is not misleading to a trier of fact.

We are convinced that the record supports the hypothetical question as to the plaintiff's causation for his injury of October 1998. The medical expert found that the plaintiff sustained a 7 percent permanent partial impairment to the body as a whole. We find that the evidence preponderates against the trial court's finding and granting a Rule 41.02 motion on behalf of the defendant. We reverse and remand to the trial court for a proper determination of the workers' compensation benefits due to the plaintiff. Costs on appeal are taxed to defendant.

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L. TERRY LAFFERTY, SENIOR JUDGE

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No. W2000-00468-SC-WCM-CV - Filed June 27, 2001

ORDER

This case is before the Court upon motion for review filed by Murray Outdoor Products, Inc., 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 Murray Outdoor Products, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

HOLDER, J. - NOT PARTICIPATING