

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

January 25, 2001 Session

DONALD FERRELL v. YORK TRUCKING, INC., ET AL.

**Direct Appeal from the Chancery Court for Franklin County
No. 15,273 Jeffery Stewart, Chancellor**

**No. M2000-01350-WC-R3-CV - Mailed - April 9, 2001
Filed - June 26, 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 trial court found the plaintiff had suffered an assault during the course and scope of his employment, which resulted in a permanent disability of 40 percent to the body as a whole as a result of a psychiatric injury. The trial judge also awarded the plaintiff temporary total disability, future medical benefits and other costs. 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 FRANK F. DROWOTA, III, J. and JOSEPH C. LOSER, JR., SP. J., joined.

Robert J. Uhorchuk, Chattanooga, Tennessee, for the appellants, York Trucking, Inc. et al.

H. Thomas Parsons, Manchester, Tennessee, for the appellee, Donald Ferrell.

MEMORANDUM OPINION

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 findings, 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).

Plaintiff's Biography

The plaintiff was age fifty at the time of the trial. He had not completed the eighth grade in school. His work history consisted almost entirely of being a truck driver and tow-motor operator. He is married and does not have any children.

History of Previous Injuries

The plaintiff had a workers' compensation claim in 1982 and another in 1991. Each of these was settled.

The 1991 injury occurred when the plaintiff fell from a truck of a previous employer. The plaintiff injured his neck, shoulder and lower back in that accident.

Approximately nine months after the 1991 incident, the plaintiff developed a condition known as syncope, which is a fainting episode that results from coughing that causes restricted blood flow to a person's heart. In addition to the syncope, the plaintiff developed blurred vision, dizziness, headaches and depression. The episodes of fainting diminished somewhat prior to the injury in this case. The plaintiff testified the other symptoms he suffered never stopped bothering him.

Discussion of Current Case

This case arose out of an occurrence on July 15, 1997. The plaintiff and his wife, who drove with him because of his history of fainting, were in the course of their employment with the defendant employer. They stopped at a restaurant in Murfreesboro at approximately 3:00 a.m. The plaintiff and his wife went into the restaurant and got food to go. When they returned to the truck, the plaintiff's wife got into the truck and took the passenger's seat. The plaintiff testified he heard a noise at the back of the truck and went in that direction to investigate. The plaintiff said he heard something and turned and saw a man in a blue shirt. Then said the plaintiff, "my lights went out in Georgia."

The plaintiff's wife did not see or hear anything occurring, but she became concerned when the plaintiff did not come into the truck. She testified she looked out toward the back of the truck and saw the plaintiff lying on the ground about half way down the length of the truck. She went to the plaintiff and held him in her lap. She got the attention of another truck driver who summoned aid from the restaurant. This driver left the area without being identified.

An employee of the restaurant came out to help with the plaintiff and verified that the plaintiff was lying on the ground in an unconscious state. The only difference between the witness' testimony and that of the plaintiff's wife was that the restaurant employee said the plaintiff was lying much nearer the driver door than did the wife.

The plaintiff was taken to the emergency room at a local hospital where he was treated and released. Two days later he was seen by Dr. Brahm D. Sethi, an internal medical specialist.

Medical Evidence

Five medical doctors of various specialties testified in the case. In addition to these expert witnesses, a psychiatrist, Dr. Morris Lester Lovejoy, testified.

The testimony of the medical doctors has little weight in the case except to show the plaintiff's previous medical problems and, more significantly, to exclude any medical disability as a result of the injury of July 15, 1997, or the aggravation of any prior medical condition suffered by the plaintiff.

Dr. Lovejoy testified the plaintiff was suffering from depression as a result of being struck by the unknown assailant. In his opinion the plaintiff was depressed because he felt less of a man because he was unable to support his wife. Dr. Lovejoy opined the depression was caused by the assault.

The plaintiff told Dr. Lovejoy he suffered depression after the 1991 injury, but he was able to work.

Dr. Lovejoy was of the opinion that the plaintiff was not able to work now because of the current depression from which he did not believe the plaintiff would recover. He found the plaintiff had reached maximum medical improvement on November 11, 1998.

The defendants do not claim the incident alleged by the plaintiff did not arise out of and in the course of the plaintiff's employment. The defendants take the position that no assault occurred and further contend the plaintiff sustained no compensable injury as a result of the assault, if it did occur.

The defendants raise various other issues which are discussed herein.

The first issue raised by the defendants is: "[d]oes the evidence preponderate against the finding of the trial judge that the plaintiff was the victim of an assault?" The answer is no. The evidence does not preponderate against the finding.

The plaintiff testified he was assaulted. The plaintiff's wife testified she found him lying on the ground unconscious. An employee of the restaurant testified the plaintiff was on the ground and unconscious. The plaintiff was treated for a head injury at a local hospital within approximately thirty minutes from the time of the alleged assault.

The trial judge found the plaintiff and other witnesses to be credible. The finding of an assault was based upon their oral testimony.

When the trial judge has made a finding based upon the testimony of eye witnesses whom he has seen testify, we are bound by such findings unless there are compelling reasons to show the testimony is patently false—a rare occurrence. *See Humphrey v. David Witherspoon Inc.*, 734 S.W.2d 315 (Tenn. 1987). The evidence does not preponderate against the finding of the trial judge on this issue.

The second issue is: “[d]id the trial court err in finding the plaintiff had sustained a compensable injury that was causally related to the injury of July 15, 1997?” We find the trial judge did not err in finding a compensable injury.

The defendants argue, with support in the record, that the plaintiff was suffering depression prior to the incident of July 15, 1997. The record reflects the plaintiff’s family history, which shows depression was a part of his and his relatives’ past. The record further shows the plaintiff suffered depression after the 1991 injury.

The defendants take the position that the plaintiff has failed to show, as he must, that his disability arose out of the work-related injury. *See Parker v. Ryder Truck Lines*, 591 S.W.2d 755 (Tenn. 1979); *see also Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587 (Tenn. 1989).

Further, the defendants contend the testimony of Dr. Lovejoy is not sufficient to support causation because the testimony is speculative and not based upon reasonable medical probability.

Another claim made in this regard by the defendants is that, at most, the plaintiff’s claim is an aggravation of a pre-existing condition, and no medical evidence shows an aggravation of a pre-existing condition as required by *Sweat v. Superior Indus., Inc.*, 966 S.W.2d 31 (Tenn. 1998).

We find none of the assertions are supported in the record. Dr. Lovejoy testified he was made aware of the plaintiff’s previous psychiatric and medical problems. Dr. Lovejoy made no attempt to assert the plaintiff had sustained any aggravation of his physical impairment as a result of the injury. Dr. Lovejoy testified that, on the matter of depression, the plaintiff was able to work during the time of the previous depression but was now too disabled by reason of the depression triggered by the assault to work.

We view the testimony, which is unrefuted in this case, as showing the plaintiff suffered, as a result of the assault, depression that was disabling and, if nothing else, an aggravation of the pre-existing condition.

In evaluating the testimony as to speculation and medical certainty, the Court has held that in cases of reasonable doubt in the matter, the doubt must be resolved in favor of the plaintiff. *Long v. Tri-Con LTD, and Hartford*, 996 S.W.2d 173 (Tenn. 1999).

We find the medical evidence supports the finding of the trial judge.

Issue three is: “[d]id the trial judge err in awarding the plaintiff total temporary benefits because there was no proof that the plaintiff was not able to work prior to reaching maximum medical benefits?” We find the answer to be no.

The only evidence of the plaintiff’s inability to work from the time of the injury suffered by the plaintiff was the testimony of his treating doctors. Dr. Sethi testified that when he saw the plaintiff he was not able to work on a consistent basis; Dr. Lovejoy testified the plaintiff was unable to work because of his depression and other ailments. The defendants, who from the inception of the case, denied compensation offered no proof to show the plaintiff could return to work or that any offer was made to the plaintiff to return to any type of work.

Dr. Lovejoy testified the plaintiff reached maximum improvement on November 11, 1998.

The termination of temporary total benefits occurs when an injured worker is able to return to work or when the injured worker reaches maximum medical improvement. *Cleek v. Wal-Mart Stores Inc.*, 19 S.W.3d 770 (Tenn. 2000). The evidence in this case does not show the plaintiff was able to return to work; therefore, the trial court properly awarded temporary total benefits from the date of the injury until the time of maximum medical recovery.

The defendants’ issue number four is somewhat a reiteration of previous assertions that the plaintiff’s symptoms were no different after the assault in the case than they were before it occurred. The trial judge found the plaintiff had not sustained any physical injury as the result of the accident that entitled the plaintiff to be compensated. Rather, the trial judge found the plaintiff had sustained a psychiatric injury as a result of the incident. There is evidence in the record to support such a finding.

The trial judge found the plaintiff’s injury was 40 percent to the body as a whole. In *Ivey v Transglobal Gas and Oil*, 3 S.W.3d 441 (Tenn. 1999) the Court held that under the Worker’s Compensation Act a mental injury is an injury to a scheduled member under Tennessee Code Annotated 50-6-207 (A)(ff).¹ For the permanent loss of mental facilities this section provides compensation for 400 weeks at 66 ⅔ percent of the average weekly wage. The plaintiff is therefore entitled to be compensated for 160 weeks at the rate of 66 ⅔ percent of his average weekly wage.

¹ A worker does not have to show vocational disability or loss of earning capacity to be entitled to the benefits for the loss of use of a scheduled member. *Duncan v. Boeing Tenn., Inc.*, 825 S.W.2d 416 (Tenn. 1992).

The defendants' issue number seven is: "[s]hould the trial court have ordered payment of the award in a lump sum?"

After reviewing the history and facts of this case, we conclude the trial court did not abuse its discretion with regard to the issue.

The judgment of the trial court is affirmed.

The cost of the appeal is taxed to the defendants.

JOHN K. BYERS, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon York Trucking, Inc.'s motion of 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 York Trucking, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.