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

ARLANDA HAYNES v. STEEL FABRICATORS, INC., ET AL.

Direct Appeal from the Chancery Court for Madison County
No. 54944 Joe C. Morris, Chancellor

No. W2000-00329-SC-WCM-CV - Mailed February 7, 2001; Filed May 11, 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)(1999) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The appellant presents the following issues for review: (1) Does the evidence preponderate against the trial court's ruling that the plaintiff failed to give proper notice to his employer of his gradually occurring injury to his right arm and back?; (2) Does the evidence preponderate against the trial court's ruling that the plaintiff has no permanent disability? After a review of the entire record, briefs of the parties and applicable law, we affirm the trial court's judgment.

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

WIL V. DORAN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ROBERT L. CHILDERS, SP. J., joined.

Gayden Drew, IV, Jackson, Tennessee, for the appellant, Arlanda Haynes.

William F. Kendall, III and B. Duane Willis, Jackson, Tennessee, for the appellee, Steel Fabricators, Inc.

Paul G. Summers, Attorney General and Reporter and E. Blaine Sprouse, Assistant Attorney General, for the appellee, James Farmer, Director of the Division of Workers' Compensation, Tennessee Department of Labor, Second Injury Fund.

MEMORANDUM OPINION

FACTUAL EVIDENCE

The plaintiff has an eleventh (11th) grade education. Prior to beginning work for the defendant, the plaintiff had worked in pallet making, had cleaned floors and done janitorial work, and had washed trucks, handled material and operated a forklift. He began working for the defendant in May of 1995. He never had any prior problems with his arms or back. Prior to the plaintiff's problems which were the basis of this lawsuit, he sustained an injury to his left index finger while working for the defendant on June 28, 1996. As a result of that injury, the plaintiff underwent two surgical procedures and returned to work for the defendant on May 1, 1997. When he returned to work, his employer was aware that the plaintiff continued to have problems with his left arm. The plaintiff testified that he was having no problems with his right arm or back when he returned to work and that he returned as a welder's helper which required him to lift steel weighing up to two hundred (200) pounds, weld beams and pipes, drag eight feet (8') logs and four by fours, load trucks, paint and use a grinder. He stated that he was unable to use his left hand and that he worked only using his right hand. The plaintiff testified that he gradually developed problems with his right arm and back caused by picking up and dragging steel and pushing and pulling beams at work. He stated that these problems began in the middle part of September 1997 and that he reported the problems immediately to both his supervisor, Ron Massey, and the company president, Charlie Mueller. He further stated that he reported his problems with his right arm and back on more than one occasion and that after having reported his problems he continued working for the defendant for a period of time but his job was not changed.

The plaintiff's testimony regarding what his duties were when he returned to work was strongly disputed by Charles Mueller, President of the company. Mueller testified that he had hired the plaintiff on two occasions. He had let him go once when the plaintiff failed to deliver a load of steel and then refused to drive a truck. Mueller stated that the plaintiff called him up later and apologized and wanted to come back to work so Mueller told him "come on back." He was hired back as a helper in the shop. Helpers would mostly clean the iron before it was painted, take wire brushes and scrub the rust off the steel prior to it getting a primer. They would also help unload trucks. They would help drill holes, punch plate, shear plate, anything that did not require knowledge of reading blueprints. Mueller testified that the plaintiff missed probably six (6) consecutive months of work for the left hand injury and when he came back to work after that left hand injury he came back to light duty. Mueller required the plaintiff to sweep floors and empty trash, and Mueller made it very clear to the shop foreman that the plaintiff should not lift steel. Mueller stated that the plaintiff would empty all the trash cans in the office, sweep the floors, carry the trash cans to the dumpster and that when he came back he would only come to work at about 10:00 a.m. and work about two or three hours and then complain and go home. He would only work two or three days a week, two or three hours a day because of the problems he was having with his left arm and that he was using his right arm only.

Mueller also testified that the plaintiff never notified him that his arm and back problems were work-related. Although the plaintiff complained about his physical health, Mueller stated that the plaintiff indicated that his problems were related to his left finger injury. He never suggested to Mueller that the problems were caused by the nature of the work he performed after returning to his job in May of 1997.

MEDICAL EVIDENCE

The plaintiff was first seen by Dr. John G. Sparrow, because Dr. Sparrow was the physician that had treated plaintiff for the injury to his left arm. Dr. Sparrow first thought that the plaintiff might have some tendinitis in his right arm, but frankly admitted that he could not connect any of plaintiff's complaints to any specific injury and felt that this matter was possibly beyond his area of expertise. Dr. Sparrow testified that the plaintiff made vague complaints of dizziness, weakness in his lower extremities, and several different complaints over different parts of his body. However, the plaintiff had a normal sensory exam and a normal motor exam, and Dr. Sparrow could not really detect any tendinitis. Dr. Sparrow also noted that the plaintiff was unable to attribute his complaints to his work.

The plaintiff was also seen by Dr. Dirk G. Franzen, a neurosurgeon. Dr. Franzen saw the plaintiff on November 20, 1997, December 18, 1997, January 5, 1998, January 13, 1998, and finally on January 21, 1998. Dr. Franzen had all of the usual and necessary tests performed including an MRI of his lumbar spine as well as EMG and nerve conduction study on the upper extremity. Dr. Franzen could find no definitive reason for the plaintiff's complaints and opined that he did not have any impairment of his right side or his low back.

The plaintiff was also seen by Dr. Leon H. Ensalada, who limits his practice to two specialties, pain medicine and occupational medicine. Dr. Ensalada's curriculum vitae is impressive. He testified that the plaintiff exhibited three of the five “Waddell’s non-organic signs” on his physical examination. The “Waddell’s non-organic signs” are used to assess the validity of a patient’s symptoms. Based upon his examination of the plaintiff, Dr. Ensalada concluded that the plaintiff was exaggerating his symptoms. Dr. Ensalada found a 25 percent impairment to the plaintiff’s left index finger equating to a 5 percent impairment of his left hand. In Dr. Ensalada’s opinion, the plaintiff had no impairment to his right arm, lower back, or any other part of his body. He recommended no further medical treatment for the plaintiff, but did recommend that he undergo a functional capacity evaluation.

The plaintiff was examined by Dr. Joseph Boals, an orthopedic surgeon, on September 24, 1998. Dr. Boals testified that the plaintiff had overuse syndrome of his right upper extremity with secondary reflex sympathetic dystrophy (RSD) and a chronic lumbar sprain. He testified that the causation of those problems was the plaintiff's work at the steel company which involved primarily using his right arm which placed excessive strain on that arm. Dr. Boals testified that the plaintiff had a 20 percent permanent physical impairment to his right arm for his RSD and a 5 percent permanent physical impairment rating to the body as a whole for his back problems. According to

the most recent edition of the AMA Guidelines, Dr. Boals testified that the plaintiff's overall impairment rating was 16 percent to the body as a whole. Dr. Boals opined that the plaintiff's prognosis was poor and he probably was not employable in any type of work. He testified that he did not think the plaintiff was malingering or exaggerating his symptoms in any way. He was critical of Dr. Ensalada's methods and testified that functional capacity evaluations should never be used except to evaluate muscular injuries.

The plaintiff was seen by Dr. Robert Barnett, an orthopedic surgeon, on June 28, 1999. Dr. Barnett's evaluation revealed that the plaintiff had limited motion of his back. He tested the plaintiff's grip strength by use of the Jamar Dynamometer. He testified that the plaintiff only had a grip strength of fifteen (15) pounds in his right hand. Dr. Barnett testified that the plaintiff had RSD of his right upper extremity, limited motion of his right shoulder/hand syndrome and a chronic lumbar strain. He testified that those problems were precipitated by the plaintiff's work for the defendant. He also testified that he thought the plaintiff's physical examination revealed that he had RSD of his right upper extremity because of the stiffness in his hand, coldness of his hand, loss of strength in his hand and limitation of motion in his shoulder. Dr. Barnett testified that the plaintiff had a 30 percent impairment rating to his right upper extremity for his RSD and 5 percent permanent physical impairment to the body as a whole for his chronic lumbar strain. According to the most recent edition of the AMA Guidelines, Dr. Barnett testified that the plaintiff's overall impairment rating was 22 percent to the body as a whole. He further testified that the plaintiff should not use his right hand except with very light objects and should do no appreciable lifting or overhead work.

The plaintiff was also seen by Dr. Robert Kennon, a psychologist licensed to practice in Tennessee. Dr. Kennon conducted a vocational evaluation of the plaintiff at his attorney's request on January 21, 1999.

ANALYSIS

The trial judge is the arbiter of the credibility of the several witnesses and unless there are persuasive reasons to do otherwise, the reviewing court should defer to the trial judge's perception of credibility. See Story v. Legion Ins. Co., 3 S.W.3d 450, 451 (Tenn. 1999); McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999); Advo, Inc. v. Phillips, 989 S.W.2d 693, 693-94 (Tenn. 1998). Oral testimony is not received in a vacuum. The trial judge has the opportunity to see the witness first hand, to observe his demeanor and attitude and whether or not the witness has the overall expression of credibility. See id. The trial judge does not just consider the words of the witness alone, but all of the facts and circumstances in the case. In this matter, the trial judge could have found the testimony of Mr. Mueller to be forthright and credible. Moreover, the attitude of the plaintiff with regard to his job responsibilities and his apparent exaggeration of his injuries as testified to by Dr. Ensalada could easily have affected the trial judge's perception of the plaintiff's credibility. We are mindful of the fact that in workers' compensation cases, all doubts, especially as to notice, should be resolved in favor of the worker. See Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 148-49 (Tenn. 1989). However, considering all of the testimony and all of the facts and circumstances based in this case, we cannot say that the evidence preponderates against

the judgment of the trial court when it credited the testimony of Mr. Mueller as opposed to plaintiff. The evidence does not preponderate against the judgment of the trial court on the issue of notice.

We next consider whether or not the evidence preponderates against the trial court's ruling that the plaintiff has no permanent disability. Dr. Sparrow, Dr. Franzen and Dr. Ensalada were all of the opinion that the plaintiff sustained no permanent disability. Two of these doctors, Drs. Sparrow and Franzen, were treating physicians and their testimony should be given at least as much weight as the evaluating physicians. Dr. Ensalada, on the other hand, is a physician who specializes in matters of this nature. He was unwavering in his opinion that the plaintiff, Arlanda Haynes, exaggerated his symptoms and was not cooperative or forthright when Dr. Ensalada was attempting to diagnose the plaintiff's problems.

An in-depth investigation of all of the facts and circumstances together with all of the testimony in this case has not convinced us that the trial judge was in error in holding that the plaintiff sustained no permanent disability. Therefore, the evidence does not preponderate against the trial court's ruling in this regard.

It results that the judgment of the trial court is, in all things, affirmed. Costs are assessed against the plaintiff.

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WIL V. DORAN, SPECIAL JUDGE

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ORDER

This case is before the Court upon motion 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 on appeal are taxed to the PLAINTIFF.

IT IS SO ORDERED this 11th day of May, 2001.

PER CURIAM

Holder, J. - Not participating.