IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 28, 2000 Session

ALLEN SERATT v. NEO PRODUCTS CORPORATION, ET AL.

Direct Appeal from the Chancery Court for Chester County
No. 9226 Honorable Joe C. Morris, Chancellor

No. W1999-01246-WC-R3-CV - Mailed February 21, 2001; Filed May 2, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendants Neo Products Corporation and State Auto Insurance Company appeal the judgment of the Chancery Court of Chester County awarding plaintiff permanent partial disability of ten (10%) percent to the body as a whole. For the reasons stated in the opinion we affirm the judgment.

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

HENRY D. BELL, SP. J., the opinion of the court, in which JANICE M. HOLDER, J., and W. MICHAEL MALOAN, SP. J., joined.

Stephen Craig Kennedy, Selmer, Tennessee, for the appellants, Neo Products Corporation and State Auto Ins. Co.

David Hardee, Jackson, Tennessee, for the appellee, Allen Seratt.

MEMORANDUM OPINION

The plaintiff, Allen Seratt, was thirty-two (32) years old at the time of trial. He graduated from high school and attended vocational school where he received a certificate to be an electrician. He began working at Neo Products in 1986 as machine operator and began to drive a bob truck in 1990. On November 19, 1996, he raised a rollup door and felt a "catch" in his low back. Dr. Gilbert Woodall saw plaintiff on four occasions, the last visit on December 20, 1996. Dr. Woodall diagnosed a chronic low back strain.

Plaintiff had previous back strains in 1986 or 1987, 1992, and 1994. Dr. James King treated him since 1986 for low back pain. Dr. John Everett treated plaintiff for the 1992 injury. Drs. King, James Merriwether, and Joseph Rowland treated for an August, 1994, low back strain. Dr. Rowland saw him September 12 and 22, 1994, April 24, 1995, and December 2, 1998, for an evaluation of the November 19, 1996, injury. Dr. Rowland did not assess any anatomical impairment from a neurological basis.

After being released form Dr. Woodall, Seratt continued to work for Neo until May 12, 1998, when he quit because his back "was hurting so bad he could not stand it anymore." He tried to manage a convenience store but sold it in August , 1998, because he was not making any money and to get off the concrete. He also tried to operate a back hoe but could not run it for more than a few hours due to back pain. Chris Hatch hired Seratt in April, 1999, as a "cutman" to cut boards to frame houses for twenty to twenty-five hours per week. Hatch testified that Seratt "some days is good and some days is bad. He works good when he can come and, of course, other times he's not worth a flip."

Dr. Robert Barnett saw Seratt for an independent medical evaluation on June 25, 1997. Dr. Barnett agreed with Dr. Woodall that plaintiff had a chronic lumbar sacral strain. Dr. Barnett assessed a five percent (5%) permanent impairment due to the work injury of November 19, 1996.

Plaintiff testified he never missed any work form his prior injuries and he "could hurt and then get over it." Since the November 19, 1996, injury, his back hurts a lot worse and he was unable to continue to work at Neo.

At trial on July 15, 1999, the parties stipulated the November 19, 1996, injury was compensable and the only issue was the amount of permanent partial disability, if any. The trial court awarded ten percent (10%) permanent partial disability to the body. The sole issue on appeal is whether the trial court erred in finding that the plaintiff sustained a permanent disability.

ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). *Lollar v Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility

from the contents of the depositions. *Overman v Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

The general rule is that an employee's work that aggravates a pre-existing injury or condition by merely increasing the amount of pain, but does not otherwise "injure or advance the severity" of the employee's injury or condition, is not compensable. *Sweat v Superior Industries, Inc.*, 966 S.W.2d 32 (Tenn. 1998), *Cunningham v Goodyear Tire & Rubber Co.*, 811 S.W.2d 891 (Tenn. 1991). However, increased pain may be disabling and compensable when expert medical and the injured employee's testimony establish an advancement of the severity of the pre-existing condition which increases the percentage of permanent impairment. *Hill v Eagle Bend Mfg., Inc. et al.*, 942 S.W.2d 483, 488 (Tenn. 1997); *Fink v Caudle*, 856 S.W.2d 952, 959 (Tenn. 1993).

Defendants contend plaintiff did not suffer any permanent disability as a result of the November 19, 1996, injury because he only experienced an increase in pain and no anatomical change. Defendants rely on the deposition of Dr. Joseph Rowland who stated he could not find any anatomical change in plaintiff's condition from an April 1995 visit to his last examination of December, 1998.

Dr. Robert Barnett testified plaintiff suffered a permanent injury to his back due to the November 19, 1996, injury. When asked if plaintiff's prior back strains would affect his opinion as to causation, he said it would not.

When confronted with conflicting expert medical testimony as to causation and the extent of impairment, the trial court has the discretion to accept the testimony of one medical expert over the testimony of another medical expert(s). *Johnson v Midwesco, Inc.*, 801 S.W.2d 804, 813 (Tenn. 1990); *Hinson v Wal-Mart Stores, Inc.*, 654 S.W.2d 675 (Tenn. 1983).

The plaintiff testified he was able to work before his last injury. Since then, the pain has gotten much worse to the extent his employment is limited. The trial court apparently found the plaintiff's testimony to be credible, and we are required to give great deference to the factual findings of the trial court unless the evidence preponderates otherwise. *McIlvain v Russell Stover Candies, Inc.*, 996 S.W.2d 179, 183 (Tenn. 1999).

The evidence in this case does support a finding of increased pain and no anatomical change as stated by the defendants, but the injury of November 19, 1996, also advanced the severity of plaintiff's condition and increased his anatomical impairment.

CONCLUSION

We find the evidence does not preponderate against the judgment of the trial court and we, therefore, affirm the award of ten percent (10%) permanent partial disability to the body as a whole.

Defendants, Neo Products Corporation and State Auto Insurance Company, are taxed with the cost of this cause.

_____

HENRY D. BELL, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 28, 2000

ALLEN SERATT v. NEO PRODUCTS CORPORATION, et al.

Chancery Court for Chester County
No. 9226

No. W1999-01246-WC-R3-CV - Filed May 2, 2001

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 Defendants/Appellants, Neo Products Corporation and State Auto Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM