

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NASHVILLE
JUNE 2001 SESSION**

JAMES MORRIS v. ZURICH AMERICAN INS. CO., ET AL.

**Direct appeal from the Criminal Court for Macon County
No. 99-228, Hon. J. O. Bond, Judge**

**No. M2000-02090-WC-R3-CV - Mailed - July 16, 2001
Filed - August 20, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. The issues on appeal are (1) whether the trial court erred in determining that the employee suffered a compensable work-related shoulder injury, and (2) whether the vocational disability ratings as awarded were excessive. The panel has concluded that the judgment of the trial court should be affirmed.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Criminal Court Affirmed

Frank G. Clement, Jr., Sp.J., delivered the opinion of the court, in which Frank F. Drowota, III, J., and Ben Cantrell, Sp.J., joined.

George H. Rieger, II, Leitner, Williams, Dooley & Napolitan, PLLC, Nashville, TN, for the appellants, Zurich American Insurance Co., and The Gap, Inc.

William Joseph Butler, Farrar & Holliman, Lafayette, TN, for the appellee, James Morris.

MEMORANDUM OPINION

James Morris (Morris), the employee-appellee, was employed by The Gap, which is insured by Zurich American Insurance Company ("Zurich"), the appellant, during the period Morris claims to have sustained two separate work-related injuries. The first incident occurred on August 5, 1999 when Morris was struck by a forklift. Morris claims to have received injuries to his neck and left shoulder as a result of this incident. The second incident occurred on August 12, 1999, when Morris caught his leg between two colliding forklifts. He claims to have received injuries to his left leg, knee, and foot as a result of the second incident.

In 1993, six years prior to the incidents at issue, Morris sustained injuries as the result of a motor vehicle accident. The 1993 injuries involved his shoulder, left arm, neck, left knee, along with a broken scapula and clavicle. Morris also sustained an injury to an artery, which required immediate surgery. A year later, in 1994, Morris underwent surgery to repair damage to his left knee (lateral meniscetomy).

Between 1994 and 1997, Morris visited his family physician, Dr. Bachstein, ten times for shoulder and neck pain. After 1997, Morris expressed no complaints of neck, shoulder or knee pain until the incidents at The Gap in August of 1999. This history was confirmed by Dr. Bachstein's testimony.

Morris continued to experience mild pain in his left knee in 1997. Consequently, he was seen by Dr. Roy Terry, a board-certified orthopaedic surgeon. The record suggests he received conservative care from Dr. Terry. The record further suggests that Morris was never rated for a permanent impairment for any injuries resulting from the 1993 accident.

Dr. Terry indicated that from April 8, 1997 until the incidents at The Gap in August of 1999, there was nothing in his record to indicate that Morris was not doing fine. Furthermore, Dr. Bachstein's records do not reveal any problems with the shoulder or knee between 1997 and 1999.

Following the incidents at The Gap in August of 1999, Morris again elected to be treated by Dr. Terry though Dr. Terry was not recommended by

the employer. In October 1999, Dr. Terry performed knee surgery on Morris' left knee to repair a meniscal tear.

Dr. Terry placed Morris on light duty restrictions on Dec. 20, 1999 and again on Feb. 9, 2000. Specifically, Dr. Terry restricted Morris from walking or standing more than four hours, occasional lifting and carrying up to 20 pounds, and only occasional squatting, climbing and reaching above shoulder level with the left arm.

Dr. Terry testified via deposition that Morris should avoid climbing stairs and avoid using his left arm above shoulder level, that he keep his left leg extended, and avoid turning and twisting of his neck from side to side and flexion of the neck, if he experienced pain with these activities.

Dr. Terry assessed a 2% whole body impairment for the knee injury and a 5% impairment for the neck injury, for a combined impairment rating for The Gap injuries of 7% to the whole person.

In March of 2000, Dr. John McInnis, a board-certified orthopaedic surgeon selected by the employer, found mild swelling in Morris' left leg, yet full range of motion with the left knee. Though he placed no restrictions on Morris, Dr. McInnis assigned an impairment rating to the left leg of 5%.

An Independent Medical Examination was conducted in April of 2000, by Dr. S. M. Smith. Dr. Smith testified that causation of Morris' medical problems was the result of and due to The Gap injuries. This finding was apparently based upon the conclusion that Morris was having no problems immediately prior to the date of the incidents at The Gap; therefore, the resulting problems were not old ones, they were new ones. Dr. Smith assigned a 22% impairment rating to the leg (9% whole body), 18% for the upper extremity (11% whole body), and 14% whole body impairment for the neck, for a total whole body impairment of 31%.¹

¹The appellant suggests that Dr. Smith was rude and argumentative toward its counsel, arguing that his conduct evidenced bias. While the conduct of Dr. Smith was unfortunate and indeed inappropriate, for which Dr. Smith was admonished by the Trial Court, we are unwilling to conclude from his "attitude" that he was biased.

Morris is a forty-three year-old man with a tenth grade education who later passed the GED exam. He has no special skills or training, nor has he ever been a supervisor, foreman, or member of management. He has worked primarily as an industrial painter for most of his life, in addition to other jobs involving manual labor and construction.

The trial court found that Morris sustained compensable injuries on August 5 and 12, 1999 while employed by The Gap. The Court awarded 50% permanent partial disability to the body for the neck and shoulder injuries, and 50% to the left leg for the leg injury.

Our review of findings of fact by the trial court is de novo upon the record of the trial court with a presumption of the correctness of those findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989). Furthermore, when the trial judge has seen and heard witnesses, considerable deference must be accorded to the trial court's factual findings on issues related to the credibility of witnesses and the weight to be given to their testimony. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. §50-6-102(a)(5). The phrase "arising out of" refers to causation, which has a requirement that is satisfied if the injury has a rational, causal connection to the work. Braden v. Sears, Roebuck and Co., 833 S.W.2d 496, 498 (Tenn. 1992). While causation cannot be based upon merely speculative or conjectural proof, Simpson v. H.D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990), absolute certainty is not required. Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). Any reasonable doubt as to whether an injury arises out of the employment should be resolved in favor of the employee. Reeser v. Yellow Freight Systems, Inc., 938 S.W.2d 690, 692 (Tenn. 1997).

A trial judge may properly base an award on medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that

the incident was in fact the cause of the injury. P & L Construction Co. v. Lankford, 559 S.W.2d 793, 794 (Tenn. 1978).

Zurich asserts that Morris suffered no compensable shoulder injury as a result of either incident at The Gap. Zurich claims that there is no causal connection between the accidents at The Gap and Morris' shoulder pain because Morris injured his shoulder in 1993 and complained of shoulder pain for years thereafter.

Our review of the record reveals there was sufficient lay testimony from which one could reasonably infer that Morris' shoulder injury resulted from the August 5, 1999 incident at The Gap. Although the evidence as to causation is not overwhelming, we cannot conclude that the evidence preponderates against the trial court's conclusion that the employee made the required showing that this injury arose out of his employment. Furthermore, while inconsistencies exist between Morris' depositions and his testimony at trial, we find the record does not preponderate against the trial court's finding that Morris was a credible witness.

As a separate issue on appeal, Zurich asserts that the trial court erroneously determined Morris' vocational disability ratings. When making determinations as to the extent of vocational disability, courts consider the following factors: lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). Furthermore, this Court has noted that "a vocational impairment is measured not by whether the employee can return to [his] former job, but whether [he] has suffered a decrease in [his] ability to earn a living." Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). See also Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 458 (Tenn. 1988).

Given Morris' limited education and experience in fields other than industrial labor, coupled with the fact that his injuries limit his work as a laborer, the evidence does not preponderate against the trial court's award. Accordingly, we affirm the trial court's calculation of Morris' vocational disability ratings.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Zurich Insurance Company.

Frank G. Clement Jr., 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 will be paid by the appellant, Zurich Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM