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

WILLIAM CRAIG BROWNING v. JAMES RIVER CORPORATION

Direct Appeal from the Chancery Court for Madison County
No. 55033 Joe C. Morris, Chancellor

No. W1999-01799-WC-R3-CV - Mailed June 11, 2001; Filed July 17, 2001

This worker's 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 determined that the plaintiff suffered a 50% vocational impairment to each leg. The defendant asserts that the plaintiff failed to provide proper notice of his injuries; that he failed to prove that the injuries arose out of and within the course and scope of his employment; and that the evidence does not support the amount of vocational disability awarded. For the reasons set forth below, 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.

J. STEVEN STAFFORD, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., joined. WIL V. DORAN, SP. J., filed a dissenting opinion.

D. Scott Turner and Thomas F. Preston, Memphis, Tennessee, for the appellant, James River Corporation.

Lewis L. Cobb, Jackson, Tennessee, for the appellee, William Craig Browning.

OPINION

The plaintiff is a forty-three-year-old man. He graduated from high school in 1975 and subsequently earned a college degree from Lambuth University. Prior to beginning work for the defendant, he worked on a survey crew, operated his own business selling water beds and served for a period of time in the United States Army as a Ranger. While in the Army, he injured his right shoulder and was required to undergo surgery. Periodically, he would injure his feet and ankles but

was never required to have surgery. Because of the difficulties he experienced with his shoulder injury, he left the Army in 1992. At that time, he was able to run five miles daily, play sports and lead an active lifestyle.

In August 1992, the plaintiff went to work for the defendant. Prior to his employment, he was required to undergo a pre-employment physical. The plaintiff testified that he informed the examining doctor of all the physical problems he was experiencing at the time. He did not tell the doctor about his feet because they were not bothering him.

The plaintiff went to work for the defendant in its Blown Film Division. In the beginning, he had no problems doing his job. He worked twelve-hour shifts wearing safety shoes and standing on concrete. At times, he was required to climb a fifty-foot tower using stairs as part of his job. The number of times the plaintiff would have to climb the stairs during his shift depended on the process being run and the problems encountered in the process. He testified that there was very little time to sit down during a shift.

After a period of time, the plaintiff's feet and ankles began to hurt. Because of these problems, the plaintiff requested a transfer to another department where he could sit more often. The plaintiff was subsequently transferred to the Flexigraphic Film Division. During this time, the plaintiff's feet and ankles became very painful. In the mornings, he would be very stiff and sore and would have difficulty walking.

The plaintiff was being seen by a doctor at the Veterans Administration during this time. He was unable to obtain any relief and was subsequently seen by Dr. Fly and Dr. Warmbrod at the Jackson Clinic. In an effort to relieve the pain, his foot was placed in a cast. This did not alleviate the problem.

After meeting with his Veterans Administration counselor, the plaintiff decided that it would be in his best interest to apply for his Veterans Administration benefits and return to school to complete his degree. The plaintiff last worked for the defendant on December 28, 1995, at which time he requested a medical leave of absence because of the cast on his foot. During this time, he was being paid from his short term disability policy.

The plaintiff's employment with the defendant was terminated when he did not return to work as directed by the defendant. He subsequently enrolled at Lambuth University and completed his degree in computer information systems. While completing his degree, he worked for a CPA for twenty to thirty-five hours per week doing basic accounting. At the time of the hearing, he was employed as an account representative for Met Life earning $525 per week. The plaintiff testified he can perform his current job since it is in an office setting and he can sit a large part of the time. He also stated that he could not do the job he did for the defendant since it requires him to stand for long periods of time and to walk up and down stairs.

The plaintiff admitted that he did not specifically inform the defendant that he was making a worker's compensation claim prior to April or May 1996 and that he relied upon his attorney to do that. However, he also testified that he notified the defendant well before April or May 1996 that his injuries were work related and that he was having problems with his feet and ankles. He explained that initially he did not know his problems were work related and that he was simply trying to collect his disability benefits and be retrained for another job.

Willy Bond worked for the defendant at the same time as the plaintiff. He is currently employed as a quality supervisor for the defendant's successor, Printpack. He never worked with the plaintiff but was familiar with the requirements of his job. Mr. Bond testified that a person would have to climb the tower at most two to three times per shift and that the responsibility for climbing the tower would be rotated among the team members. He also stated that the plaintiff could sit for four to five hours during a twelve-hour shift.

Neal Mueller also worked for the defendant and now works for Printpack. He worked with the plaintiff and testified that on a normal day a person would be required to climb the tower once. However, when problems occurred on the line, a person might be required to climb the tower six or seven times. He also testified that the responsibility for climbing the tower would be rotated among team members. Mr. Mueller stated that because the plaintiff was an operator, he would normally stay on the ground rather than climb the tower. It was his opinion that during a twelve-hour shift, a person could sit one half of the time.

MEDICAL EVIDENCE

The testimony of Dr. James Warmbrod and Dr. Joseph Boals was presented by deposition. Dr. Warmbrod first saw the plaintiff on February 7, 1996, for bilateral foot and ankle pain. He was informed by the plaintiff that he had been having this pain for about ten years. X-rays were taken which revealed a plantar spur off of both heel bones. Dr. Warmbrod believed that the plaintiff had chronic tendinitis on the medial side of his ankle and chronic plantar fascitis. He also thought the plaintiff was overweight. He informed the plaintiff that he had no treatment to offer him but advised him to lose weight and to get a job where he would not be on his feet all day.

Dr. Warmbrod did not think the plaintiff's work with the defendant caused his problems. However, he did opine that the work did cause the plaintiff additional pain and that it would not be realistic for the plaintiff to continue to work for the defendant. He did not award the plaintiff any impairment.

The plaintiff was seen by Dr. Boals on July 6, 1998, for purposes of an independent medical evaluation. After examining the plaintiff, Dr. Boals diagnosed the plaintiff with congenital pes cavus deformity of the foot bilaterally. He also stated that the plaintiff suffered from chronic plantar fascitis and arthritis at the medial malleolar talar interface bilaterally. Dr. Boals testified that the plaintiff's work with the defendant aggravated the problem that the plaintiff previously had with his

feet and ankles. He also testified that the pain that the plaintiff suffers from his heel spur decreases the plaintiff's function. Dr. Boals opined that the plaintiff suffered a 25% anatomical impairment to each leg.

NOTICE OF INJURY

Tennessee Code Annotated § 50-6-201 requires an employee to immediately notify an employer in writing of the occurrence of an injury. The notice must be given within thirty days after the injury occurs unless the employee has a reasonable excuse for failure to give the notice or unless the employee has actual notice of the injury.

> Under the terms of T.C.A., § 50-6-201, the 30-day notice period is tolled by "reasonable excuse for failure to give such notice." An employee's reasonable lack of knowledge of the nature and seriousness of his injury has been held to excuse his failure to give notice within the 30-day period. Likewise, an employee's lack of knowledge that his injury is work-related, if reasonable under the circumstances, must also excuse his failure to give notice within 30 days that he is claiming a work-related injury. It is enough that the employee notifies the employer of the facts concerning his injury of which he is aware or reasonably should be aware.

Pentecost v. Anchor Wire Corp., 695 S.W.2d 183, 185 (Tenn. 1985). See also *Livingston v. Shelby Williams Indus., Inc.*, 811 S.W.2d 511, 514 (Tenn. 1991) and *Powers v. Beasley*, 197 Tenn. 549, 551-52, 276 S.W.2d 720, 721 (1955).

It is undisputed that the plaintiff did not specifically inform the defendant that he was making a worker's compensation claim until, at the earliest, April or May 1996. It is also undisputed that the plaintiff informed the defendant of his problem with his feet and ankles as soon as it developed.

It is disingenuous for the defendant to assert that it was not aware of the plaintiff's physical problems. Specifically, the plaintiff utilized the defendant's medical insurance to obtain treatment for his feet and ankles. The plaintiff requested and was granted a medical leave of absence when his foot was placed in a cast. The medical leave continued for a period of months up and until the time the plaintiff was terminated for not returning to work. It defies both logic and reason for the defendant to now assert that it was not aware of the plaintiff's physical problems.

The defendant asserts that because the plaintiff did not initially advise it that he was making a worker's compensation claim that it should be denied pursuant to Tenn. Code Ann. § 50-6-201. We do not read the statute to mandate this result. A review of the record reveals that the defendant had ample actual notice of the plaintiff's injury. Additionally, the defendant has failed to prove it

has suffered any prejudice by the plaintiff failing to provide it with written notice of the injury. We find this issue to be without merit.

INJURY ARISING OUT OF AND WITHIN THE COURSE AND SCOPE OF EMPLOYMENT

The plaintiff testified that he left the Army because he could no longer meet the physical demands placed on him because of his shoulder injury. He admitted that at times his feet and ankles caused him problems but that he was never required to have surgery. When he was released from the Army in 1992, he was able to run five miles per day, play sports and lead an active lifestyle.

The plaintiff underwent a pre-employment physical which revealed that he was physically capable of performing his job with the defendant. He testified that when he first began work for the defendant he had no difficulty complying with the physical demands of his job. However, this began to change after a few months on the job.

Dr. Warmbrod testified that the plaintiff's job with the defendant did not cause his problems. It was his opinion that the plaintiff already had the condition and that his work with the defendant only caused him additional pain. Dr. Boals testified that the plaintiff's work with the defendant aggravated the plaintiff's condition with his feet and ankles and caused an anatomical impairment.

> The phrase, "in the course of," refers to time and place, and "arising out of," to cause or origin; and an injury by accident to an employee is "in the course of" employment if it occurred while he was performing a duty he was employed to do; and it is an injury "arising out of" employment if caused by a hazard incident to such employment."

Legions v. Liberty Mut. Ins. Co., 703 S.W.2d 620, 622 (Tenn. 1986).

After reviewing the record, we find that the evidence does not preponderate against the judgment of the trial court.

VOCATIONAL DISABILITY

The trial court determined that the plaintiff suffered a 50% vocational impairment to each leg. The defendant asserts that these awards are excessive and are not supported by the evidence.

When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Sp. Workers Comp.1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

> [W]here the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge. With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); see also *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992) (when testimony is presented by deposition, this Court is in just as good a position as the trial court to judge the credibility of those witnesses.)

The extent of an injured worker's disability is an issue of fact. *Jaske v. Murray Ohio Mfg. Co., Inc.*, 750 S.W.2d 150, 151 (Tenn. 1988). In *Walker v. Saturn Corp.*, 986 S.W.2d 204 (Tenn. 1998), the Supreme Court discussed the factors to utilize in determining vocational disability and stated in pertinent part:

> The Panel correctly held that a vocational impairment is measured not by whether the employee can return to her former job, but whether she has suffered a decrease in her ability to eam a living. This Court stated in *Corcoran* that a vocational disability results when "the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury."
>
> In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition. Further, the claimant's own assessment of her physical condition and resulting disabilities cannot be disregarded. The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability.

Walker, 986 S.W.2d at 208.

The plaintiff testified that he could no longer do the job he had with the defendant or any job that requires him to stand for long periods of time or to walk up and down stairs. Both Dr. Warmbrod and Dr. Boals advised him to find different employment due to the problems that he had with his feet and ankles. Dr. Warmbrod opined that the plaintiff had not suffered any impairment.

Dr. Boals opined that the plaintiff had suffered a 25% anatomical impairment to each leg as the result of his employment with the defendant.

We find that the trial court properly applied the relevant factors in determining the extent of the plaintiff's vocational disability. We are to presume the correctness of the trial court's findings unless the preponderance of the evidence is otherwise. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). We find that the evidence does not preponderate against the trial court's judgment.

We note that the trial court made separate awards to each leg. Tennessee Code Annotated § 50-6-207(3)(A)(ii)(y) provides scheduled benefits for the loss of two (2) legs. We therefore modify the award to fifty percent (50%) permanent partial disability to both legs which will neither increase nor decrease the award but will conform the trial court's judgment to the statute. See *Drennon v. Gen. Elec. Co.*, 897 S.W.2d 243, 247 (Tenn. Sp. Workers Comp. 1994) (Averaging the disabilities to each arm to arrive at a single disability for both arms "is a proper method of calculating plaintiff's disability.").

The judgment of the trial court is affirmed and the costs are taxed to the defendant, James River Corporation.

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J. STEVEN STAFFORD, 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 on appeal are taxed to the Defendant/Appellant, James River Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM