IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 24, 2001 Session

EUGENE L. TINDELL v. TRAVELERS INSURANCE COMPANY

Direct Appeal from the Circuit Court for Jefferson County
No. 16,245 II Richard R. Vance, Judge

No. E2000-01488-WC-R3-CV - Mailed - August 13, 2001
FILED: SEPTEMBER 18, 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 judge found the plaintiff had failed to show he had suffered a compensable injury and dismissed the petition.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J. and WILLIAM H. INMAN, SR. J., joined.

J. Anthony Farmer, Knoxville, Tennessee for the appellant Eugene L. Tindell.

Weldon E. Patterson and Laura Bradley Myers, Knoxville, Tennessee for the appellee Travelers Insurance Company.

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 court in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

The plaintiff alleged he suffered a gradual injury to his back as a result of strenuous work he performed over many years for the defendant.

The trial judge found the plaintiff had failed to show he had suffered a compensable injury and dismissed the petition because there was no showing of a specific injury.

The plaintiff says he does not have to show a specific date of an injury in a gradually occurring injury case.

Facts

The plaintiff was fifty-six years of age at the time of trial; he has an eighth grade education and was divorced from his wife but living with her and her sixteen-year-old son.

The plaintiff began working for the defendant on October 6, 1992. The plaintiff's work required him to put rolls of paper into a press and then remove the dye-cut paper from the press.

There is a divergence in the evidence concerning the weight of the rolls and how often the plaintiff would lift them. There is also a divergence in the evidence on the weight of the rolls when they are removed from the press.

The plaintiff testified the rolls weighted between 95 and 110 and that he would lift these 40 to 60 times a day. A company supervisor estimated the rolls weighted 60 to 65 pounds and that the plaintiff would lift these rolls 10 times onto the press and 10 times off the press in a day. The supervisor testified the rolls would be significantly lighter when lifted off the press because in the progression of the roll through the press where they are cut and trimmed they become lighter.

The record in the case shows the plaintiff was disciplined 18 times for various work policy violations. On July 21, 1998, the plaintiff was terminated by the defendant.

The plaintiff began to be treated by Dr. Randall Allan Greear on April 28, 1998 for problems associated with his back. The plaintiff told his supervisor of a back problem prior to seeing Dr. Greear; however, he did not claim this was work related. The plaintiff did not claim his back problem was work related until July 23, 1998.

Medical Evidence

Dr. Greear testified he saw the plaintiff first for back and leg pain on April 25, 1998. The plaintiff gave a history of back problems going back to age 17. Further the plaintiff told him he had lifted a 100-pound roll of linoleum into a car trunk some two months prior to this and after that incident he experienced increased leg pain.[1]

Dr. Greear diagnosed the plaintiff as having radiculitis with some type of nerve compression. A lumbar scan showed the plaintiff had several bulging discs with the most prominent on the left.

[1]The plaintiff denied he had lifted the linoleum.

Dr. Greear could not determine the cause of the plaintiff's back problem.

When Dr. Greear was asked if the plaintiff's history of lifting rolls of paper that weighed from "one hundred to eleven hundred pounds [sic]," forty to sixty times a day was significant in determining the cause of the plaintiff's complaint, he replied "no not really." In Dr. Greear's opinion there was no way to establish that this activity caused the disc problems; he did testify this kind of activity would be stressful to the spine. Further, Dr. Greear testified that if the plaintiff had a disc problem, the activity (lifting the rolls) would cause increased pain.

Dr. Greear did not make any determination concerning the plaintiff's medical impairment rating.

Dr. Richard P. Boyer, a neurosurgeon, first saw the plaintiff on July 7, 1998. Dr. Boyer testified plaintiff gave him a history of having about six months of leg pain. Dr. Boyer did not relate any further history given by the plaintiff concerning the lifting of a 100-pound roll of linoleum or a history of the type of work he did. Dr. Boyer diagnosed the plaintiff's condition as being bulging disc at the L5-S1 level of his back, which caused lumbar radiculopathy. He was of the opinion the plaintiff would require surgery for the problem.

When asked to assume the plaintiff had lifted rolls of paper that weighted approximately 100 pounds, 40 to 60 times a day and whether this would be a significant contribution factor in the development of the plaintiff's condition, Dr. Boyer replied:

> A. Yeah, I – the findings on his scan are essentially degenerative in nature, and I think that very strenuous activities, and lifting, and stressing of those disc spaces does accelerate that degenerative process which then again contributes to the radiculopathy that he had.

Dr. Boyer testified he could not quantify how much the work contributed to the plaintiff's condition. Further, he testified the degenerative changes in the plaintiff's back occur simply with aging, and to determine whether these conditions were cause by the aging process or work would require him to speculate. Dr. Boyer could not determine the extent of permanent impairment.

Discussion

In all but the most obvious cases, such as the loss of a member, expert testimony is required to establish causation. *Thomas v. Aetna Life & Casualty Co.*, 812 S.W.2d 278 (Tenn. 1991). An award may, however, be based upon medical testimony that a given incident "could be" the cause an employee's disability when such testimony is connected to lay testimony from which it may be inferred the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted); *Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993).

Whether the evidence--expert or lay--has risen above the level of speculation that is sufficient

to justify an award of compensation is, in the first instance, a matter to be determined by the trial judge from the facts presented in the case.

We give great deference to the trial judge's determination of the weight of the evidence and do not reverse such determination unless the record clearly shows the evidence preponderates against the judgment. We do not find it does so in this case.

The evidence about the weight of the paper rolls and the number of times they were lifted, upon which the hypothetical question posed to Dr. Boyer about causation was based, is in dispute. We conclude therefore that this does not raise Dr. Boyer's testimony above the level of speculation.

If the plaintiff's injury was a gradual injury, then a specific date of injury is not required. We find, however, that the trial judge did not find this to be a gradual injury. The evidence supports this finding.

The judgment of the trial court is affirmed.

The cost of this appeal is taxed to the plaintiff.

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JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

EUGENE L. TINDELL VS. TRAVELERS INSURANCE COMPANY
Jefferson County Circuit Court
No. 16,245

No. E2000-001488-WC-R3-CV - Filed: September 18, 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 facts 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, Eugene L. Tindell and J. Anthony Farmer, surety, for which execution may issue if necessary.

09/18/01