IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE

December 14, 2000 Session

DONALD MONSON v. UNITED PARCEL SERVICES, INC., AND JAMES FARMER, DIRECTOR, DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND

Direct Appeal from the Chancery Court for Knox County
No. 131652-2 Daryl R. Fansler, Chancellor

No. E2000-00593-WC-R3-CV - Mailed - September 5, 2001
Filed: October 9, 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 of findings of fact and conclusions of law. The employer appeals the trial court award of sixty percent permanent vocational disability benefits. We affirm.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, SR. J., joined.

James T. Shea, IV, Knoxville, Tennessee for the Appellant United Parcel Service, Inc.

Jess D. Campbell, Knoxville, Tennessee for the Appellee Donald Monson

MEMORANDUM OPINION

Factual Background

Donald Monson (Monson) is a forty-two year old male who has been employed by United Parcel Service, Inc. (UPS) since age 19. Monson has the equivalent of three years of college education at the University of Tennessee at Knoxville. He has a work history of driving a truck and sorting packages.

This case concerns work-related injuries Monson suffered in September 1994 and February 1997. Monson had suffered a prior work-related injury in 1987.

The 1987 injury was to Monson's neck. A C6-7 left laminectomy was performed by William Tyler, M.D. in 1987. In February 1991, Monson underwent an additional surgery involving an anterior cervical discectomy and an anterior interbody fusion to the C5-6 vertebrae joint. Dr. Tyler described Monson as having a 15 percent medical impairment after the second surgery. Later in 1991, the parties entered into a workers' compensation settlement regarding the 1987 injury in which Monson received the equivalent of 33.86 percent permanent partial disability to the body and the right to future medical treatment..

On September 10, 1994, Monson reported suffering another injury while working on a tractor-trailer dolly, the connecting device between the tractor and the trailer. This work involved lifting and pulling significant weight. Monson described the injury saying that while he was maneuvering the dolly, he felt a sharp pain in his shoulder and down his arm and that his head began to hurt. Monson reported his injury to UPS, which sent him back to Dr. Tyler for treatment.

On August 22, 1995, Dr. Tyler performed another surgery that in essence was a repeat of the 1991 surgery. This third surgery was necessary because Monson's body had re-absorbed a bone plug that was used in the 1991 surgery. This time, Dr. Tyler utilized metal plates and screws to fuse Monson's spine at levels C5-6 through C6-7. Dr. Tyler opined that as of February 1996, after the third surgery, Monson had 6 percent "new impairment." Also in 1996, Monson began to experience shoulder difficulties and saw Paul Naylor, M.D., an orthopedic surgeon on February 19, 1996. Upon the recommendation of Dr. Naylor, Monson elected to undergo a fourth surgery. On August 29, 1996, Dr. Naylor performed a left shoulder arthroscopy with debridment of superior labral fraying, open arcomioplasts, and CA ligament release. After this surgery, Dr. Naylor, limiting his opinion solely to the left shoulder, opined that Monson had a three percent impairment to the body as a whole. Further, Dr. Naylor stated that Monson's work at UPS could have caused Monson's injuries. Dr. Naylor could not draw any causal connection between Monson's 1987 back and neck injuries and his 1996 shoulder injury.

In February 1997, Monson claims to have been injured, yet again, in the process of moving a tractor-trailer dolly. According to Monson, this injury occurred because another UPS employee failed to 'bleed the brakes' of the trailer which increases the difficulty of moving the dolly. Monson reported this injury to UPS. Dr. Tyler saw Monson for treatment of this injury

and in the course of Dr. Tyler's treatments for his newest injury, Monson described having severe pain on the left side of his neck and experiencing abnormal sensations in his left hand. These were new symptoms. In June 1997, Dr. Tyler ordered a Magnetic Resonance Imaging (MRI) for Monson which showed a protruding disc at C4-5 that had not been present previously.

Also in 1997, Dr. Tyler came to feel that Monson was developing chronic pain syndrome and referred Monson to Donald Catron, M.D., a psychiatrist specializing in pain management. Dr. Catron first saw Monson December 30, 1997. Dr. Catron found Monson's chronic neck pain consistent with the injuries Monson described suffering in September 1994 and February 1997. Dr. Catron diagnosed Monson with anxiety and depression resulting from the injuries and Monson's inability to return to work. Based on Monson's prior medical history, Dr. Catron did note that it would be reasonable to conclude that Monson suffered from some degree of anxiety in 1992 but did not offer an opinion as to whether Monson also experienced depression at that time. Consistent with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th Edition, Dr. Catron stated Monson had a Class II permanent impairment which is equivalent to 10 to 25 percent impairment under previous editions of the Guides.

At the conclusion of the trial, the trial court issued an oral ruling from the bench. He specifically found Monson to be a credible witness. He thoroughly reviewed the facts of the case and noted the absence of clear medical evidence on the issue of causation. In reviewing the facts, the trial court stated that Dr. Tyler "did not say to my satisfaction that the additional 6 percent was not related" to the 1987 injuries. In summarizing his findings later in the opinion, the trial court used similar language in expressing causation in a negative sense.

Standard of Review

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). Our review of the trial court's finding in this case is de novo upon the record, "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. §50-6-225(e)(2). We are obliged to review the record on our own to determine where the preponderance of the evidence lies. *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 446 (Tenn. 1999); *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988). Although deference must be given to the trial judge when issues of credibility and weight of oral testimony are involved, *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999); *Jones v. Hartford Accident & Indem. Co.*, 811 S.W.2d 516, 521 (Tenn. 1991), this Court is able to make its own independent assessment of the medical proof when the medical testimony is presented by deposition. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989); *Henson v. City of Lawrenceburg*, 851 S.W.2d 809, 812 (Tenn. 1993).

Discussion

Exactly as stated by United Parcel Service, the issues to be addressed are:

> "I. Is United Parcel Service entitled to a judgment at a matter of law pursuant to the order approving workers' compensation settlement agreement entered October 28, 1991, as to all complaints of neck pain, shoulder pain, arm pain, hand pain and numbness, and plaintiff's claimed for mental depression, arising from plaintiff's 1987 neck injury and arising from the degenerative disc disease caused by such injury?
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> II. Is United Parcel Service entitled to dismissal of Plaintiff's action for permanent disability arising from his claimed injuries of 1994 and 1997 to his neck, shoulder, arm and fingers when the great preponderance of the evidence demonstrates that Plaintiff's claimed events did not permanently advance or exacerbate the physical condition of Plaintiff's 1987 neck injury and the symptoms arising from the original injury?
>
> a. Did the Court commit an error of law in shifting the burden of proof to defendants to demonstrate that Plaintiff's permanent impairment was not caused by the 1994 or 1997 events when Tennessee Law clearly places the burden proving causation upon Plaintiff?
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> b. Should the Court have dismissed Plaintiff's claim for permanent disability arising from the 1994 and 1997 events when Dr. Tyler, the neurosurgeon whom continuously treated Plaintiff beginning with is 1987 injury, and the only physician who has seem Plaintiff's physical condition and recorded Plaintiff's complaints of pain from 1987 to present testified that both the 1994 and 1997 events merely exacerbated Plaintiff's symptoms on a temporary basis and that Plaintiff subsequently returned to his prior physical state arising from his original 1987 injury?
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> c. Did the trial Court commit an error in holding that Plaintiff was entitled to recover for permanent impairment arising from his shoulder pain when the only physician testifying as to a permanent impairment for shoulder pain. Dr. Paul Naylor, an orthopedic physician who treated Plaintiff for his shoulder pain beginning in February of 1996, stated it was highly speculative or a "guess" as to whether Plaintiff's shoulder pain was related to his original 1987 injury or to his claimed 1994 event?

d. Did the evidence preponderate against any award to Plaintiff based upon the testimony of Dr. Catron, a Psychiatrist who began treating Plaintiff at the end of 1997 at Plaintiff's counsel request, when Dr. Catron testified that he could only speculate as to the cause of Plaintiff's mental difficulties, and when Plaintiff affirmatively testified that his mental stress and psychological problems began when he was told by United Parcel Service that he could not return to work with the restrictions placed upon him?"

In summary, United Parcel Service contends (1) Monson's claims are barred as a mere progression of the 1987 injury previously settled, (2) the trial judge erred in placing on UPS the burden of proving that the additional impairment was caused by the 1987 injury, and (3) the trial court erred in considering and weighing the testimony of Drs. Tyler, Naylor and Catron.

Did the Order entered October 28, 1991 settling Monson's complaints of neck, shoulder, arm, hand pain and numbness, and mental depression bar Monson's present claims for partial disability?

If Monson's complaints were caused by a mere progression of the 1987 injuries, then UPS would be correct in arguing that the final settlement entered October 28, 1991 would bar a new disability award. The evidence shows that Monson suffered subsequent injuries unrelated to the 1987 injuries. While the 1987 injuries made Monson more susceptible to re-injury, it must be remembered that an employer cannot escape liability when an employee, upon suffering a work-related injury, incurs disability far greater than if the employee had not had pre-existing medical conditions. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1992); *Rogers v. Shaw*, 813 S.W.2d 397 (Tenn. 1991).

Dr. Tyler testified that Monson's impairment is the 15 percent impairment existing after the 1987 injuries plus six percent new impairment after the 1994 injury and subsequent surgery. On February 24, 1997, Monson complained of severe neck pain in the left side of his neck and of abnormal sensations in his hand, which were new symptoms. He complained of greater pain than he had in the past. A June 1997 MRI showed a protruding intervertebral disc at C4-5 with narrowing of the spinal canal and slight deformation of the spinal cord that Dr. Tyler said were new findings. In June 1997, Dr. Tyler also noted that Monson was developing chronic pain syndrome and depression. Because of the different medical problems, Dr. Tyler felt he had developed an even greater medical impairment that should be evaluated by a physical medicine rehabilitation specialist. On cross-examination, Dr. Tyler testified concerning Monson's complaints of an injury at work in September 1994: "I think he had an event at work which caused him new symptoms but didn't basically alter in a substantial way the underlying structures of his body . . ." Finally, Dr. Tyler was asked to assume that the word "injury" is defined as "a change in the physical structure of Mr. Monson's, in this case, cervical spine." He responded:

> "And, in order to make the opinion, which in short, is that I think he had an injury - - understandable, I'll say that the structures of the neck aren't all visible on an x-ray. They also contain soft tissue, spinal cord, discs, none of which are visible on an x-ray. So historically, it was - - his history was consistent with an injury to the soft tissues of the neck which is what I thought he probably had and I think that's what he did have."

Dr. Naylor treated Monson in 1996 for impingement syndrome of his shoulder and did arthroscopic surgery, and released him to return to work on August 29, 1996, with an impairment rating of three percent to the body and a restriction of no repetitive overhead work. Dr. Naylor testified that he relied on the history given by Monson that the 1994 incident with the hand truck or dolly was the etiology of the shoulder impingement.

Concerning the depression developed by Monson, Donald Catron, M.D., testified, "when a person has a health problem that in their mind, they feel cannot be resolved, then I think the issue of hopelessness enters the picture and can make the stress symptoms worse." The evidence established that Monson was not allowed to return to work after the 1994 injury, and was informed by his doctors that nothing more could be done for him medically.

Unlike *Nails v. Aetna Ins. Co.*, 834 S.W.2d 289 (Tenn. 1992), this is not a case in which previous injuries grew worse over time without re-injury. A worker with prior injuries that are settled under the Workers' Compensation Act maintains the right to pursue a claim for additional benefits when that employee suffers a second work-related accident that causes additional injury. Kellerman, 929 S.W.2d at 335. The 1994 and 1997 injuries each gave rise to separate workers' compensation claims, completely independent of the 1991 settlement.

Did the trial court err in placing the burden on UPS to prove that the additional impairment was caused by the 1987 injury?

The employee in a workers' compensation case has the burden of proving every element of the claim, including a causal connection to the employment by a preponderance of the evidence. *Thomas v Aetna Life and Casualty* Company, 812 S.W.2d 278, 283 (Tenn. 1991); *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987). In ruling on this case, the trial judge discussed the testimony of Dr. Tyler in two separate places as follows:

> (1) "I guess it would have been too simple to actually ask Dr. Tyler, are you saying the 6 percent impairment that you think he has is not related to the accident of September 1, 1994. But he did not to my satisfaction state that the additional 6 percent was not related, although I think it is clear that he says there was no additional impact to the cervical spine or the bony portions of the spine itself."
>
> (2) "This is a close question on the causation issue and in some instances, but the confusion really is whether Dr. Tyler is giving a 6 percent, well, he

> doesn't really say what he is giving a 6 percent for. He says he gave 6 percent after he performed the subsequent surgery and after the injury in September 1994. He never says that the additional 6 percent, is not related to the September 1st, 1994."

UPS concedes in its brief that reasonable doubt as to causation is to be resolved in favor of the employee. *Hill v. Eagle Bend Mf'g Inc.* 942 S.W.2d 483, 487 (Tenn. 1997); *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992). Taken in context, the statements of the trial judge indicate that, in this case, he finds any doubt about whether a new injury occurred in 1994 must be resolved in favor of Monson. He is merely pointing out that counsel for UPS had the opportunity to ask Dr. Tyler the question that could eliminate any perceived doubt and failed to do so. We do not find that trial court improperly placed the burden of proof as to causation.

Did the trial court err in its consideration of the testimony of Drs. Tyler, Naylor, and Catron?

When the medical testimony differs, the trial judge must choose which view to believe. In doing so, the trial judge is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information. *Orman v Williams Sonoma, Inc.*, 803 S.W.2d 672 (Tenn. 1991). It is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts. *Hinson v. Wal-Mart Stores*, 654 S.W.2d 675 (Tenn. 1983). The testimony of expert witnesses must be considered in conjunction with the employee's testimony as a lay witness. *Thomas v Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991). In this case, the trial judge specifically commented that he found Monson to be truthful. The doctors who testified in this case also relied on Monson for information concerning the neck and shoulder injuries and the subsequent depression. We find no error in the trial court's consideration of the medical evidence.

Conclusion

For the reasons stated herein, the judgment of the trial court is affirmed. Costs of the appeal are taxed to the Appellant.

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Howell N. Peoples, 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 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 appellant, United Parcel Service, Inc., and James T. Shea, IV surety, for which execution may issue if necessary.

10/09/01