IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
(December 14, 2000 Session)

RON MARTIN v. BLOUNT COUNTY, TENNESSEE

Direct Appeal from the Circuit Court for Blount County
No. E-16724 W. Dale Young, Circuit Court Judge

No. E2000-01138-WC-R3-CV - Mailed - August 27, 2001
FILED: DECEMBER 3, 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 and contends the trial court erred in finding the employee to be 100 percent disabled because no expert medical proof established permanency of the disability. We sustain the contention of the employer and reverse the award of permanent disability.

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

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

Michael K. Atkins, Knoxville, Tennessee, for the Appellant Blount County, Tennessee
Kevin Shepherd, Maryville, Tennessee, for the Appellee Ron Martin

MEMORANDUM OPINION

Background Facts

Plaintiff, Ron Martin (Martin) was employed by the Blount County Sheriff's Department as a criminal investigator on June 16, 1993. That day, Martin, in the course and scope of his employment, investigated a fire scene at Pope's Plant Farm. There is no

indication that Martin had any health problems prior to this time. While investigating the fire scene, Martin became ill. He also found evidence that Malathion and other pesticides were present in the building at the time of the fire.

Martin returned to work the next day but went home after becoming sick at work. Martin first sought treatment from his family physician, Dr. Kim Cline. Later, Martin was seen by Dr. Marek Pienkowski, an immunologist. In the course of his treatment, Martin was also seen by Drs. Hargrove, Porter and Warwick, though no proof was submitted regarding either the treatment provided or the opinions formed by these physicians. An independent medical examination was performed by Dr. Arnold Hudson, Jr., a pulmonologist

On November 8, 1993, according to Dr. Pienkowski, Martin reached maximum medical improvement. Martin returned to work with the only restriction being that "it is absolutely essential that he avoid all chemical exposure." This prevented Martin from resuming his duties as an arson investigator. For approximately one year, Martin remained with the Blount County Sheriff's department primarily performing clerical duties. From January 1995 through July 1997, Martin worked in various positions with the Blount County Court Clerk's office. Martin was employed by Blount County for almost four years after he reached maximum medical improvement before he was placed on disability retirement.

From the date of exposure, Martin complained of joint pain, lethargy, and fatigue. These symptoms caused Martin to be unable to perform the light clerical duties he was assigned upon his return to the Sheriff's Department and resulted in him being placed in the Court Clerk's office. Despite being moved to another position, Martin remained unable to perform the tasks assigned to him.

The parties stipulated the June 16, 1993 injury was compensable and agreed upon the appropriate compensation rate. No outstanding medical bills were left unpaid, nor were there any issues regarding the payment or non-payment of temporary total disability benefits. The only issue at trial was whether Martin suffers from a permanent vocational disability. As proof on this issue, the depositions of three physicians, Drs. Cline, Pienkowski, and Hudson, and two vocational experts, Drs. Nadolsky and Caldwell, were submitted, and the testimony of Martin and Dale Gorley, chief of detectives of the Blount County Sheriff's Department was heard.

The trial court found that Martin suffers from a 100% total vocational disability. Blount County appeals this finding.

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) (1999). 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 still 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

The determination of whether a person suffers from a vocational disability is based upon numerous factors, including the employee's skills, training, education, age, local job opportunities, his or her capacity to work at the kinds of employment available, the rating of anatomical disability by a medical expert, the employee's own assessment of his or her physical condition and resulting disability, and employment after the injury. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774-5 (Tenn. 2000). "Except where permanent disability is obvious to a layman, a finding of permanency must be based on competent medical evidence that there is a medical probability of permanency or that permanency is reasonably certain to be permanent." Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335-6) (citing Singleton v. Procon Products, 788 S.W.2d 809 (Tenn. 1990)); Henley v. Roadway Exp., 699 S.W.2d 150 (Tenn.1985). The plaintiff in a workers' compensation case has the burden of proving every element of the claim. Tindall v. Waring Park Ass'n, 725 S.W.2d 935 (Tenn. 1987). If the claim is for permanent disability benefits, permanency must be proved. Thomas v. Aetna Life and Casualty Insurance Company, 812 S.W.2d 278 (Tenn. 1991). Any expert medical witness presented must give testimony that preponderates in favor of permanency to qualify as having probative value on that issue. Johnson v. Midwesco, Inc., 801 S.W.2d 804 (Tenn. 1990); Owens Illinois, Inc. v. Lane, 576 S.W.2d 348 (Tenn. 1978).

In this case, Martin offered the testimony of two physicians. Dr. Arnold Hudson, Jr., whose practice is limited to pulmonary and occupational medicine, saw Martin one time on November 8, 1993, and testified that he (1) was unable to identify any specific limitations in Martin's future work environment, (2) could not state within a reasonable degree of medical certainty whether the condition he was evaluating was permanent in nature, and (3) placed no restrictions on Martin. Marek M. Pienkowski, M.D., Ph.D., testified he had been an immunology specialist for twelve years. He began treating Martin on July 29, 1993 and saw him on August 10, August 24, September 21, October 19, November 16 1993, and February 15 and April 5, 1994. Dr. Pienkowski did not state that Martin had a work-related percentage of permanent impairment. He testified that

Martin could return to work on September 15, 1994 with the limitation that he avoid chemical exposure. He was not asked whether that limitation was permanent. He also testified:

> "I always, when I advise patient there is some questionable, question of hypersensitivity reaction, to avoid chemical exposure. Because that's going to potentially precipitant (sic) more problems in the future. And, you know Ron's clinical setting here, clinical situation on my, as I saw him on last visit was essentially, he was in remission."

Julian M. Nadolsky, Ed.D., a vocational expert, testified that he interviewed and tested Martin and reviewed his medical records and opined that Martin is 100 percent disabled for work and will be unable to engage in employment in the future. Dr. Nadolsky is not a medical doctor, thus, he is not qualified to give an opinion as to permanent disability.

The employer offered the testimony of Dr. Kim Cline, board certified in internal medicine, who saw Martin one time and testified that she found no association between the chemical exposure and his condition. Rodney E. Caldwell, Ph.D., testified, for the employer as a vocational expert, that he found no medical testimony establishing permanent impairment or limitations related to Martin's chemical exposure. Martin's attorney asked Dr. Caldwell to "assume that we have a report from a doctor, such as Dr. Pienkowski, which leaves some unanswered questions. Very broadly talks about hypersensitivity." Dr. Caldwell ultimately responded: "Frankly, it's unfortunate questions were not asked of Dr. Pienkowski which would clarify this."

Conclusion

Because Martin failed to produce medical evidence that he has a permanent impairment or permanent limitations that are work-related, his claim for permanent disability must be denied. The judgment of the trial court awarding Martin permanent total disability benefits is reversed. Costs of the appeal are taxed against the Appellee.

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Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

RON MARTIN v. BLOUNT COUNTY, TENNESSEE

No. E2000-01138-SC-WCM-CV

ORDER
Filed December 3, 2001

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied 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 APPELLEE.

IT IS SO ORDERED this ____ day of _____, 2001.

PER CURIAM

Barker, J. - Not participating.