

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
December 2001 Session

EUGENE OSBORNE v. STATE INDUSTRIES, INC.

**Direct Appeal from the Circuit Court for Cheatham County
No. 5188 Allen W. Wallace, Judge**

**No. M2001-01288-WC-R3-CV - Mailed - May 9, 2002
Filed - June 12, 2002**

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 plaintiff, who claimed that he injured his back at work while painting traffic lines with a line striker, appeals the judgment of the trial court dismissing the case after finding that the plaintiff failed to prove he suffered an accident or injury arising out of and in the course and scope of his employment. We hold that the evidence does not preponderate against the trial court's findings. Accordingly, the judgment of the trial court is affirmed.

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

JAMES L. WEATHERFORD, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J., and JOE C. LOSER, SP.J., joined.

D. Andrew Saulters, Nashville, Tennessee, for the appellant, Eugene Osborne.

John Thomas Feeney and Cynthia DeBula Baines, Nashville, Tennessee, for the appellee, State Industries, Inc.

MEMORANDUM OPINION

At the time of trial held on April 30, 2001, Mr. Eugene Ray Osborne, was 48 years old.¹ He had a highschool education. Mr. Osborne was an industrial painter by trade and had worked for the

¹ Mr. Osborne died on October 28, 2001, and the co-administrators of his estate have been substituted as plaintiffs/appellants in this case by this panel's order entered January 22, 2002.

defendant, State Industries, Inc., for 16 years at the time of the accident.

On Monday, April 26, 1999, Mr. Osborne, equipment paint leader, was working at State Industries painting traffic lines while walking up a fairly steep uphill grade. Mr. Osborne testified:

And when I was painting the lines I got up to the top and I still had my right hand on my line stripper, so I was still on the grade, and I turned around to the left to see if my line was straight and that's when a pain hit me on my hip and it went down my left leg.

Thinking he had just pulled a muscle,² he completed his shift and did not report the injury to his employer. When the pain did not resolve after 2 days, he went to his personal physician, Dr. Reggie Anderson, M.D. According to Mr. Osborne, "they ran a CAT scan on me and that's when they found out what kind of shape my back was in." Dr. Anderson informed him that he had "some bulging disk[s]." Mr. Osborne stated that after talking with Dr. Anderson he was scared and worried.

On Friday, April 30, 1999, Mr. Osborne reported a work-related injury to the defendant, who referred him to Dr. John C. McInnis, M.D. Dr. McInnis' notes reflect that Mr. Osborne reported back pain when he turned to look at some paint lines at the defendant's, as well as an occurrence of back pain the following day when he bent over to pick up something at home.

Dr. McInnis diagnosed low back strain, prescribed physical therapy and excused him from work for 3 weeks. Dr. McInnis reviewed the CT scan which revealed some disc bulging from L3 to S1 with generalized spinal stenosis which he explained to Mr Osborne "would appear to be preexisting any injury." Mr. Osborne continued to complain of moderate left leg pain and had a positive straight-leg test on the left. Dr. McInnis reported:

His MRI did show moderate disc degeneration at multiple levels in his low back. His most impressive finding was a disc herniation at L5-S1 to the left with some compression of the left S1 nerve root. He also had some disc protrusion at L4-5 predominately to the right.

Because Mr. Osborne had not significantly improved, Dr. McInnis recommended referring him to a neurosurgeon to perhaps consider surgery particularly for the L5-S1 disc rupture.

On May 26, 1999, Mr. Osborne saw Dr. M. Robert Weiss, M.D., neurosurgeon, who reported

² While working for a previous employer Mr. Osborne had received workers' compensation benefits for a back injury which he described as a pulled muscle. Prior to April 26, 1999, he had also sought treatment for muscle pulls or spasms in his back and received pain medication.

the following:

Physical examination reveals a jerking, almost myoclonic movement from time to time while he is sitting or standing, which he claims is secondary to his back pain. Range of motion at the waist is restricted in all spheres and his gait is markedly exaggerated, with a hobbling, antalgic shuffling, mincing gait, punctuated by these almost myoclonic total body jerks. There is no obvious palpable lumbosacral spasm. Stretch maneuvers are entirely negative to ninety degrees, rather interestingly.

Dr. Weiss found that the MRI revealed: “multilevel degenerative changes, most pronounced at L4-5. There, he has a hard disc, calcified, with some protrusion centrally and to the right. There is bilateral neural foraminal encroachment, but certainly nothing that would provide him with myoclonic jerking movements that he demonstrates.”

After reviewing the MRI, Dr. Weiss stated: “I do not think he is a candidate for surgical intervention and I certainly can see no obvious structural change here that I would ascribe to any particular trauma.”

Dr. Weiss noted “marked elements of symptom magnification... and paucity of radicular findings and/or complaints.” Dr. Weiss suggested he remain at work without any specific restrictions and did not find impairment.

After Dr. Weiss released him to return to work the defendant discontinued temporary total disability benefits. Mr. Osborne testified that he was unable to return to work at that point.

On July 2, 1999, Dr. Jeffrey E. Hazlewood, M.D., performed an independent medical evaluation and diagnosed “lumbar pain with a strong suggestion of symptom magnification.” He noted that Mr. Osborne had a very exaggerated gait pattern, positive Waddell’s signs, and inconsistent pain behavior despite excellent muscle tone, and no signs of atrophy. He also reported that Mr. Osborne’s Functional Capacity Evaluation indicated a “lack of full and consistent effort” and that “several inconsistencies were seen.”

Dr. Hazlewood concluded that there was “no objective evidence of pathology related to work injury itself - he has significant pre-existing degenerative disease.” He did not find any permanent impairment regarding his workers’ compensation injury and did not assign any restrictions.

On May 20, 2000, Dr. David Gaw, M.D., evaluated Mr. Osborne and diagnosed degenerative disc disease (which was extensive at the lower 3 levels), facet joint arthritis, spinal stenosis, and chronic pain syndrome. Dr. Gaw testified as follows:

Well, I thought the degenerative disk disease certainly predated this incident at work. I mean, that had been there for a good while, but based on this gentleman’s

history and his medical records, it was, at least to me, it was obvious that his condition was aggravated by the incident of April of '99. I think if his history is correct and that he had no problems prior to April of '99, the incident in April has led to the chronic pain syndrome that he has.

Dr. Gaw found that he had definite spasm in the paralumbar muscles on both sides of his back and characterized this as an objective finding. Dr. Gaw concluded that "based upon his history he was asymptomatic and I thought that incident did aggravate those degenerative changes."

He assigned restrictions of lifting no more than 20 pounds and stated he would have to have these restrictions to return to his job with the defendant.

Dr. Gaw found that Mr. Osborne had a "full-blown chronic pain syndrome." He didn't feel that his prognosis was good and chances were not good that Mr. Osborne would return to gainful activities. However, he did encourage Mr. Osborne to continue with physical activities; and thought that it would be best for him to get into some type of work activity within his restrictions.

Dr. Gaw assigned 8% permanent partial impairment to the body as a whole according to the Fifth Edition of the AMA Guides.

In August of 2000, Mr. Osborne was diagnosed with lung cancer and eventually had surgery to remove his left lung. Based on this diagnosis, his doctors restricted him from most activity. In his pre-trial deposition, Mr. Osborne testified that he would not be able to work again because of his lung condition.

At trial, he maintained that his back problems were the only health issues preventing him from working. Mr. Osborne maintained he never went back to work for the defendant or any other employer because of his back condition and that as of the time of trial he was still having disabling back pain that radiated into his legs. He testified that he was physically unable to perform his job at the defendant's because of his work-related injury on April 26, 1999.

Ms. Patsy Bramlett, vocational rehabilitation counselor, testified that Mr. Osborne read on a 3rd grade reading level and had no transferable skills or local job opportunities. She found that he was 100% vocationally disabled as a result of his injury on April 26, 1999.

At the conclusion of the trial, the trial court dismissed the case finding that Mr. Osborne had failed to prove he suffered an accident or injury arising out of the course and scope of his employment.

ANALYSIS

Review of findings of fact by the trial court shall be *de novo* upon the record of the trial court, 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). *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 courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition or c-32 forms, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

Fairly stated, the first issue raised by the plaintiff is as follows:

Whether the evidence preponderates against the trial court's finding that the plaintiff did not sustain a compensable accident in the course and scope of his employment?

The employee has the burden of proving every essential element of his claim. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992).

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(12). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Systems, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997).

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also say testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Systems, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997)(citations omitted.)

After reviewing the record in this case, it is clear that the trial court based its decision on its assessment of the plaintiff's credibility. While acknowledging that the Workers' Compensation Act is a remedial act, the trial court stated at the conclusion of the trial: "In this case, I cannot consciously overlook the fact that two doctors thought Mr. Osborne was magnifying his pain." The trial court also pointed out that the vocational experts' opinion was based on what Mr. Osborne said.

The trial court went on to conclude:

I just don't think the man had an accident. That's the bottom line. He's got a bad back. It got sore on him when – either that or somewhere else. When he finds out he had it, he goes and has to find an incident. There's been a whole lot of the facts in this to determine whether he's had an injury or not. To even to have an accident is based so much upon his credibility and his credibility has been questioned by two doctors,

Although the trial court did not make an express finding regarding Mr. Osborne's credibility, we think the fact that the trial court did not find him to be credible can be inferred from its statements and decision in this case. *Richards v. Liberty Mutual Insurance Co.*, _____, S.W.3d _____(Tenn. 2002).

The medical proof consisted of c-32 forms of Dr. Weiss and Dr. Hazlewood and the deposition of Dr. Gaw. The trial court accepted the opinions of Dr. Weiss and Dr. Hazlewood over that of Dr. Gaw.

The trial court has the discretion to accept the opinion of one medical expert over another medical expert *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

After reviewing the medical testimony and hearing Mr. Osborne testify at trial, the trial court did not believe that an accident occurred and dismissed the case on that basis.³

We find that the evidence does not preponderate against the finding of the trial court; and therefore the remaining issues raised by the plaintiff/appellant are pretermitted.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to the plaintiff/appellant.

JAMES L. WEATHERFORD, SR. J.

³Although it did not reach the issue, the trial court also questioned whether there had been sufficient medical proof that Mr. Osborne had sustained an anatomical change in his preexisting back condition.

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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 plaintiff/appellant, Eugene Osborne, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM