IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 25, 2002 Session

SYDNEY COUCH v. BELL SOUTH TELECOMMUNICATIONS, INC., ETC.

Direct Appeal from the Circuit Court for Shelby County
No. CT-002251-00 George H. Brown, Jr., Judge

No. W2001-02216-SC-WCM-CV - Mailed June 11, 2002; Filed October 10, 2002

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employee questions the trial court's disallowance of benefits. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2001 Supp.) Appeal as of Right; Judgment of the Circuit Court Affirmed.

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and HAMILTON V. GAYDEN, JR., SP. J., joined.

Steve Taylor, Memphis, Tennessee, for the appellant, Sydney Couch

J. Mark Griffee and Robert B. C. Hale, Memphis, Tennessee, for the appellee, Bell South Telecommunications, Inc., d/b/a South Central Bell

MEMORANDUM OPINION

The employee or claimant, Sydney Couch, initiated this civil action on May 5, 2000 seeking an award of worker's compensation benefits for an injury to her elbow allegedly resulting from repetitive use of her arm at work. After a trial on the merits on July 17, 2001, the trial court dismissed the complaint for failure to establish causation by a preponderance of the evidence. By this appeal, the claimant seeks a reversal of that judgment and an award of benefits.

For injuries occurring on or after July 1, 1985, appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 62 (Tenn. 2001). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998).

It is undisputed that the claimant was employed by the employer, Bell South, as a customer service representative. The claimant's testimony concerning when, where and how her injury occurred is, at best, confusing, including the following exchange on direct examination by her own attorney.

> Q. Okay, Ma'am, when did you first start having problems with your elbow?
> A. Well, I can't give the exact day - pinpoint that. I noticed that I was having soreness and stiffness in my elbow and it would come and go, and I just tried to deal with it, work around it, whatever. And around the holidays, I was -
> Q. Of what year, ma'm?
> A. I believe it was 99.
> Q. 98?
> A. Yes. thank you. You know, I was doing things that I normally didn't do, and I noticed that, you know, I think I was cooking and I noticed that when I went to pick up a skillet, it caused me a lot of problems. You know, an intense kind of sharp pain that I normally didn't experience. At work, it would just be, you know, a dull constant, just a stiffness, soreness. You can kind of work around that.

She went on to describe intense pain while cooking, picking up a basket of wet clothes and wrapping presents. Without ever missing time from work, although her work involved repetitive use of the arms, she sought medical attention and was referred to Dr. Mark T. Jobe, a board certified

orthopedic surgeon.

The claimant told Dr. Jobe that she had not suffered any specific injury, but had started noticing right elbow pain while performing household chores. The doctor diagnosed right lateral epicondylitis, which he treated with injections, exercise and a tennis elbow brace. Dr. Jobe eventually performed corrective surgery. She had what Dr. Jobe described in his deposition as an "acceptable recovery." She returned to work without restrictions. When asked about the cause of the injury, Dr. Jobe conceded, in response to a hypothetical question, that the claimant's work could have caused or aggravated the condition, but probably did not.

Dr. Joseph Boals saw the claimant on November 29, 2000 for thirty minutes. The claimant told him that her worked caused soreness in her elbow, which gradually worsened. However, Dr. Boals also said the determination of causation would depend on the claimant "coming forthright with the honest statement of what happened." Dr. Boals testified twice, but the thrust of his testimony was that there probably was a causal connection to the claimant's activities at work. The claimant testified that her work at Bell South required her to use a computer, telephone and telephone book.

The trial judge gave greater weight to the opinion of Dr. Jobe that there was probably no causal connection between the claimant's work for the employer and her injury. The party claiming the benefits of the Act has the burden of proof to establish his claim by a preponderance of all the evidence. An award may not be based on conjecture; it must be based on material evidence and the rules of evidence are applicable. Testimony of witnesses is evaluated on the basis of reasonableness and unreasonableness of the testimony given, the interest, bias, prejudice or lack thereof on the part of the witnesses, their general credibility, their opportunity to see and observe, and all of the other standards and criteria applicable to factual decisions in a nonjury civil action. Parker v. Ryder Truck Lines, Inc., 591 S.W.2d 755, 759 (Tenn. 1979). Unless admitted by the employer, the employee or claimant has the burden of proving, by competent evidence, every essential element of his claim. See Oster v. Yates, 845 S.W.2d 215 (Tenn. 1992). The claimant must prove that he is an employee, that he suffered an injury by accident, and that such injury by accident arose out of and in the course of his employment by the employer. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999).

An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Thomas v. Aetna Life and Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court 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 by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d

675, 676-7 (Tenn. 1983).

From a consideration of the above principles and our independent examination of the record, giving due deference to the findings of the trial court, we cannot say the evidence preponderates against the trial court's finding that the evidence failed to establish the required causal connection. The judgment of the trial court is affirmed. Costs are taxed to the appellant.

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JOE C. LOSER, JR.

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JUDGMENT

This case is before the Court upon Applicant's 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 will be assessed to Sydney Couch for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating