

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 16, 2002 Session

JEFF GASTON v. RSKCo and LOVE'S COUNTRY STORES, INC.

**Direct Appeal from the Chancery Court for Madison County
No. 58312 Joe C. Morris, Chancellor**

No. W2001-02787-WC-R3-CV - Mailed October 31, 2002; Filed December 5, 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. §50-6-285(e)(3) for hearing and reporting to the Supreme Court of findings and fact and conclusions of law. The defendant employer contends the plaintiff employee failed to give proper notice of a back injury and the evidence preponderates against the trial court's award of twelve percent (12%) to the body as a whole. For the reasons stated in this opinion, we affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1998 and Supp. 2001) Appeal as of Right; Judgment of the Chancery Court Affirmed

W. MICHAEL MALOAN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and JOE C. LOSER, JR., SP. J., joined.

B. Duane Willis, Jackson, Tennessee, for appellant, RSKCo and Love's Country Stores, Inc.

Gayden Drew IV, Jackson, Tennessee, for appellee, Jeff Gaston

MEMORANDUM OPINION

The plaintiff, Jeff Gaston (Gaston), was thirty-seven (37) years old at the time of trial. He graduated from high school, obtained a bachelor's degree in organizational leadership and is pursuing a master's degree in business administration. Prior to working for Love's County Stores as a general manager of a Hardee's Restaurant in 1999, Gaston was a manager or food and beverage director for numerous restaurants.

On May 27, 2000, Gaston was carrying an urn of coffee when he slipped and fell to both knees. He sustained first and second degree burns to his face and received treatment at a local emergency room. Some two to four weeks later, Gaston developed numbness in his left leg. He notified his employer and in July 2000 was referred to Dr. David Garey at the Jackson Clinic. On a December 8, 2000 visit to Dr. Garey, he reported numbness in his right leg, but denied any back or hip pain. Dr. Garey referred Gaston to Dr. Joseph Rowland, a neurosurgeon at Semmes-Murphey Clinic in Jackson.

Gaston saw Dr. Rowland on January 8, 2001, with complaints of low back pain and numbness in his right hip and knee. He gave a history of a May 2000 fall at work with back pain ever since. An MRI showed mild disc bulging at L4 and L5 but nothing requiring surgery. On his last visit of March 7, 2001, Gaston continued to complain of back and right leg pain.

Dr. Rowland referred Gaston to Dr. Edward Hockaday for a lumbar epidural steroid injection which was performed on February 23, 2001. Dr. Hockaday's impressions were "low back pain, right lower extremity pain and right lower extremity numbness secondary to lumbar neuritis with bulging disc at L4-L5 and bulging disc at L5-S1."

Dr. Joseph Boals examined Gaston on June 14, 2001, for an independent medical evaluation. Dr. Boals found a full range of motion in Gaston's back without spasm and a normal neurological examination. Dr. Boals diagnosed an acute lumbar strain and possible rupture at L5-S1 caused by Gaston's fall at work. Dr. Boals assigned a five percent (5%) permanent physical impairment to the body as a whole based on the AMA Guidelines and advised against prolonged walking, standing, stooping, squatting, climbing and repetitive flexion or extensive rotation of his back.

Gaston testified he began having back pain in October 2000 and he currently has almost constant pain in his back and numbness in his right leg. He lost his job with Love's County Stores due to reasons unrelated to his injury and he currently works for DET Distributing setting up advertising and delivering approximately two hundred (200) cases of beer a day. He is required to lift, bend, stoop, twist, squat and climb.

After the October 2, 2001 trial, the Chancellor awarded twelve percent (12%) permanent partial disability to the body as a whole. The employer has appealed and raised two issues: the lack of notice of a back injury and the amount of the award.

ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However,

where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Overman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

NOTICE

Tennessee Code Annotated § 50-6-201 requires an injured employee to give notice of an injury to his or her employer. The notice “shall state . . . the name and address of the employee, the time, place and nature and cause of the accident resulting in injury or death . . .” Tenn. Code Ann. § 50-6-202 (a)(1).

At trial, the parties stipulated Gaston gave adequate notice of his May 27, 2000 fall at work. The employer contends this notice was for an injury to both knees and burns to the face, not for a back injury.

The facts of the present case are similar to *Quaker Oats v. Smith*, 574 S.W.2d 45, 48 (Tenn. 1978) where the employee fell at work and reported an injury to her legs and later developed problems in her back. The employer denied responsibility for the back injury due to lack of proper notice. The Supreme Court stated, “. . . we know of no requirement that an employee give notice of each of several injuries he received in an on-the-job accident. He is in compliance with the statutory requirement of notice if he notifies his employer of the accident and the fact he has suffered an injury.”

At oral argument, the employer conceded the real issue is causation, not notice. The employer relies on the fact Gaston did not make any back complaints until October of 2000 and in Dr. Garey’s notes of December 8, 2000, Gaston denied any back pain.

Except in the most obvious case, the employee must establish, by expert medical evidence the causal relationship between the disability complained of and the employment activity or condition. *Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587, 591 (Tenn. 1989). The medical evidence in this case consists of the deposition of Dr. Boals and the medical records of Drs. Garey and Hockaday. Dr. Boals clearly states in his opinion Gaston’s impairment to his back was caused by his fall at work. No other physician was deposed and, therefore, the trial court and this panel are without the benefit of any other medical opinion as to causation. We find this issue is without merit.

VOCATIONAL DISABILITY

The employer next contends the evidence preponderates against the trial court’s award of twelve percent (12%) permanent partial disability to the body as a whole. In support of its argument,

the employer submits Gaston is young, well-educated, has managerial experience, and is presently engaged in a physically demanding job without any formal medical restrictions. Further, the employer introduced at trial a six (6) hour video tape which shows Gaston performing his job at DET Distributing in excess of Dr. Boals' recommendations. Gaston testified he had almost constant pain in his back, numbness in his right thigh and sensitivity in his right leg.

The extent of vocational disability is a question of fact to be determined from all the evidence, including both expert and lay testimony. *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998). In assessing vocational disability, the trial court is required to consider many pertinent factors such as the age, education, skills, training, local job opportunities and capacity to work at types of employment available in the worker's disabled condition. Tenn. Code Ann. § 50-6-241 (a)(1); *Worthington v. Modine*, 798 S.W.2d 232, 234 (Tenn. 1990); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

After a review of all the evidence in the case, we find the evidence does not preponderate against the trial court's award of twelve percent (12%) permanent partial disability to the body as a whole.

CONCLUSION

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the defendants, RSKCo and Love's Country Stores, Inc.

W. Michael Maloan, Special Judge

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JUDGMENT ORDER

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 on appeal are taxed to the Appellants, RSKCo and Love's Country Stores, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

