IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 9, 2002 Session

DOUGLAS EDWARD SMITLEY v. SUBURBAN MANUFACTURING CO. and JAMES FARMER, DIRECTOR OF TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, WORKERS' COMPENSATION DIVISION, SECOND INJURY FUND

Direct Appeal from the Chancery Court for Rhea County
Nos. 9187 and 9461 Jeffrey Stewart, Chancellor

Filed January 13, 2003

No. E2002-00255-WC-R3-CV

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. The defendant Second Injury Fund appeals the trial court's decision that the Fund is liable for seventy percent of the awarded permanent total disability to the body as a whole. We affirm the decision of the trial court.

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

BYERS, SR.J., delivered the opinion of the court, in which BARKER, J., and PEOPLES, SP.J., joined.

E. Blaine Sprouse, of Nashville, Tennessee, for Appellant, Second Injury Fund.

Michael Augustine Wagner, of Chattanooga, Tennessee, for Appellee, Douglas Edward Smitley.

Robert J. Uhorchuk, of Chattanooga, Tennessee, for Appellee, Suburban Manufacturing Company.

MEMORANDUM OPINION

Review of the findings of fact made by the trial court is *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. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

The plaintiff was forty-six years of age at the time of trial. He dropped out of high school in the eighth or ninth grade and does not have a graduate equivalency degree. He has worked most of his life in manual labor jobs. In 1997, before the plaintiff began working for the defendant company, he underwent lumbar diskectomy surgery to relieve pressure on a nerve root. He testified that he began having problems with his neck in 1997, caused by a "pinched nerve." Dr. Paul Broadstone, the doctor who performed the surgery, followed up with the plaintiff and reported that he was doing well.

After his back surgery, the plaintiff began working for the defendant company, Suburban Manufacturing. He worked as a press operator and metal finisher. He became a permanent employee in October of 1998 after a physical examination which determined that no special accommodations needed to be made for his employment. On January 20, 1999, the plaintiff tripped over an air hose at work, falling to the floor and landing on his hip and shoulder. Suburban acknowledged this accidental injury to the plaintiff's lower back as compensable under workers' compensation law, and provided medical care and treatment for the injury.

After the plaintiff's fall, he saw Dr. Broadstone and was later admitted to Erlanger Medical Center. He was ultimately treated by Dr. Scott Hodges for his low back injury of January 20, 1999. Dr. Hodges performed a diskectomy and fusion at the L5-S1 level on June 23, 1999. Dr. Hodges testified that he would assign the plaintiff a permanent physical impairment rating of five percent to the body as a whole and that his date of maximum medical improvement was January 18, 2000. Dr. Hodges also testified that he placed permanent work restrictions on the plaintiff of lifting no more than thirty pounds occasionally, twenty pounds frequently, and changing positions every hour. The plaintiff returned to work on September 20, 1999, but reported continued cervical problems that were later found to have been caused by non-union in the 1997 fusion surgery.

The plaintiff testified that on October 11 or 12, 1999, while performing a task that required him to bend his neck and look down in a squatted position repetitively, he felt a sudden "pop" in his neck and then the slow onset of a blinding headache. The plaintiff saw both Dr. Hodges and Dr. Broadstone again and he determined that he would not be able to return to work because of the intense neck pain he was having. Because of the continued cervical problems and non-union of the original fusion surgery the plaintiff underwent a second fusion surgery in March of 2000. Dr. Broadstone assessed an additional two percent permanent anatomical impairment as a result of the second surgery.

Medical Evidence

The medical evidence for the purpose of the issues raised in this appeal was provided by the deposition testimony of Dr. Paul Broadstone and Dr. Scott Hodges.

Dr. Broadstone, a board-certified orthopedic surgeon in Chattanooga, testified that he first saw the plaintiff on February 19, 1997. Dr. Broadstone testified that at that time the plaintiff was diagnosed with stenosis, osteophytes, and a ruptured disk in his lumbar spine at L5-S1. Dr. Broadstone performed a lumbar diskectomy at level L5-S1 in February of 1997 and assessed the plaintiff a permanent medical impairment of eight to ten percent to the body as a whole at that time. This condition and the surgery were not work-related. Dr. Broadstone testified that he saw the plaintiff again on March 23, 1998 for treatment of symptoms of headaches, neck pain, and shoulder pain. At that visit, Dr. Broadstone diagnosed the plaintiff with foramina narrowing and a disk herniation in the cervical spine at level C6-7. With regard to this condition, Dr. Broadstone performed a diskectomy and cervical fusion surgery with bone graft on May 18, 1998. Based upon the plaintiff's cervical condition and surgeries, Dr. Broadstone testified that he was of the opinion that the plaintiff's permanent medical impairment was up to eighteen percent disability to the body as a whole. Dr. Broadstone also testified that the plaintiff had sustained a non-work related hernia and underwent a hernia repair surgery in April of 1997. As a result of this surgery and condition, Dr. Broadstone assessed the plaintiff a permanent disability rating of nine percent to the body as a whole.

Dr. Broadstone testified that he saw the plaintiff again on January 27, 1999, when the plaintiff reported that he had suffered a trip and fall accident at work on January 20, 1999, and had injured his back. He saw the plaintiff two more times before the plaintiff was admitted to Erlanger medical Center on March 21, 1999, due to increasing lower back pain. Dr. Broadstone testified that he later saw the plaintiff again after the "pop" of October 12, 1999, and diagnosed him with a pseudoarthrosis or non-union at the C6-7 level as opposed to a new trauma or injury caused on October 12.

Dr. Hodges, an orthopedic surgeon and spine specialist in Chattanooga, testified that he first saw the plaintiff on April 15, 1999. Dr. Hodges testified that he performed a physical examination and treated the plaintiff for his low back injury of January 20, 1999. As a result of the injury, Dr. Hodges performed a diskectomy and fusion at the L5-S1 level on June 23, 1999. He testified that he would assign a permanent physical impairment rating of five percent to the body as a whole and that his date of maximum medical improvement was January 18, 2000. Dr. Hodges also testified that he gave the plaintiff work restrictions of lifting no more than thirty pounds occasionally, twenty pounds frequently, and changing positions every hour. Dr. Hodges saw the plaintiff again on November 5, 1999, when the plaintiff reported severe neck pain that had begun with a "pop" in his neck while he was working on October 12, 1999. Like Dr. Broadstone, Dr. Hodges testified that the plaintiff is now totally and permanently disabled as a result of a pseudoarthrosis or non-union in his cervical spine as opposed to a new trauma or alleged work injury in October of 1999 to the neck.

Discussion

The defendant Second Injury Fund argues that because the plaintiff did not become "totally and permanently disabled through a subsequent injury," but from a neck injury on or about October 12, 1999, after he had returned to work from the back injury underlying this case, the Second Injury Fund should have no liability in this case. The Fund argues that the plaintiff had no prior workers' compensation awards but did have pre-existing disabilities, therefore Tenn. Code Ann. § 50-6-208(a) is applicable. The Fund contends that the "subsequent injury" in this case was the January 20, 1999, injury, that the problems and that the evidence preponderates against a finding that the plaintiff's January 20, 1999, low back injury caused him to be totally and permanently disabled.

Although we are required to weigh the evidence in a case in depth to determine where the preponderance of the evidence lies, we are required to make such evaluation within the confines of established rules in evaluating the propriety of the trial court.

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). However, when the medical testimony is presented by deposition, 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. INA*, 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

The trial court in this case considered all of the lay and medical testimony, both live and by deposition, and concluded that the plaintiff had indeed become totally and permanently disabled through a subsequent injury. The trial court specifically ruled that the plaintiff's low back injury of January 20, 1999, caused him to be totally and permanently disabled as there was no meaningful return to work after that injury. In making this determination, the trial court was entirely within its discretion and the evidence presented on appeal does not indicate any abuse of that discretion.

The defendant Suburban Manufacturing Company contends that the Second Injury Fund's appeal is frivolous as it has no chance of success and is without basis in the medical or factual record before this Court. While the preponderance of the evidence is certainly strongly in opposition to the Fund's position, we cannot say that the Fund's argument is entirely without basis in the record and we do not find the appeal frivolous.

For the foregoing reasons, the judgment of the trial court is affirmed. The cost of this appeal is taxed to the defendant Second Injury Fund.

_____

JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

DOUGLAS EDWARD SMITLEY V. SUBURBAN MANUFACTURING CO. and JAMES FARMER, DIRECTOR OF TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, WORKERS' COMPENSATION DIVISION, SECOND INJURY FUND
Rhea County Chancery Court
Nos. 9187 and 9461

January 13, 2003

No. E2002- 00255-WC-R3-CV

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.

The costs on appeal are taxed to the appellant, Second Injury Fund, and its surety, for which execution may issue if necessary.