IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 27, 2002 Session

RANDY SELBY v. HIGHWAYS, INC.

Direct Appeal from the Circuit Court for Putnam County
No. 98N0444 John A. Turnbull, Judge

No. M2002-00340-WC-R3-CV - Mailed - March 17, 2003
Filed - May 15, 2003

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 appeals the trial court's decision on the grounds that it argues that the medical testimony preponderates against the trial court's finding that the August 22, 1998, incident was the cause of the plaintiff's psychological injury, that the trial court erroneously allowed Dr. John Averitt, a clinical psychologist, to testify on the issue of permanency and causation, that the trial court erroneously relied upon the testimony of Dr. Averitt in weighing the medical expert evidence, and that the trial court erroneously allowed Dr. Averitt to testify on the issue of maximum medical improvement. We affirm the decision of the trial court but modify the judgment as to the date of the plaintiff's maximum medical improvement.

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

BYERS, SR.J., delivered the opinion of the court, in which DROWOTA, C.J., and LOSER, SP.J., joined.

John W. Barringer, Jr., of Nashville, Tennessee, for the Appellant, Highways, Inc.

James P. Smith, of Crossville, Tennessee, for the Appellee, Randy Selby.

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 (employee) was thirty-eight years of age at the time of trial. He testified that he left high school in the ninth grade and began working on a tobacco farm where he worked for approximately two years. He then worked on another farm, in a garment factory, and in a foam rubber factory. He then got married, obtained his graduate equivalency degree, and attended a communications vocational school in the state of Washington. He did not obtain a degree from this school, despite his having thought he did. His final job before working for the defendant was at a paving company where he ran machinery.

The plaintiff testified that he began working for the defendant company in approximately 1993. He alleges that he received psychological injuries from an incident that occurred on August 22, 1998, in the course and scope of his employment with Townsend Tree Service. Specifically, the plaintiff alleges that while he was working on a sand crusher at a sand plant, he was "hit on the side of the head with a coke can which caused him to become psychologically unstable." The plaintiff testified that over the course of the years he worked for the defendant there were several "incidents that made him feel bad," and he felt he was abused, harassed, teased, and outright tortured by his co-workers. The testimony at trial showed that this harassment included the plaintiff being shot with a BB gun, being pushed into a lake, getting caught in flume box and drenched with thousands of gallons of water, having lit cigarettes placed in his pockets, having starter fluid sprayed down his pants, and having a rope tied around his neck and pulled by a loader.

The plaintiff testified that following the can-throwing incident of August 22, 1998, he went to the emergency room after his eye began to swell and his mother could tell that something was wrong with him. In the emergency room, medical personnel determined that the plaintiff indeed had an injury to the right side of his face. Following his visit to the emergency room, the plaintiff was treated for symptoms of anxiety and panic. He testified that these symptoms manifested themselves in anxiety, hypersensitivity, difficulty focusing, difficulty sleeping, and delusions, including the delusion that his co-workers are trying to kill him. He was treated by Dr. Kirby Pate and examined by several doctors and psychiatrists who testified at trial. Pursuant to the testimony of these doctors, the trial court held that the plaintiff was permanently and totally disabled as a result of the injury of August 22, 1998, to his mental faculties.

Medical Evidence

The medical evidence for the purposes of the issues raised in this trial was presented by the depositions of Dr. Kirby Pate, Dr. James W. Varner, Dr. Ben Bursten, and Dr. Susan K. Vaught, and by the live testimony of Dr. John Averitt.

Dr. Pate, a licensed psychiatrist in Nashville, Tennessee, testified by deposition that he first

saw the plaintiff on March 30, 1999. On that date, Dr. Pate took a history of the plaintiff which Dr. Pate said primarily came from the plaintiff's mother who was present at the meeting. Dr. Pate testified that this history included a pattern of harassment on the job over several years leading up to the incident of August 22, 1998. The plaintiff reported to Dr. Pate that he was having symptoms of difficulty sleeping, variation of mood, problems writing checks and keeping a checkbook, difficulty going into public places, and intense anxiety. Dr. Pate testified that it was his opinion, based upon a reasonable degree of medical certainty, that the plaintiff suffered from clinical depression. Dr. Pate testified that the incident of August 22, 1998 did not necessarily cause the plaintiff's condition, but that the plaintiff's symptoms "blossomed" as a result of it.

Dr. Varner, a board-certified psychiatrist in Hendersonville, Tennessee, testified by deposition that he first saw the plaintiff on September 3, 1999, at the request of the defendant. He testified hat he attempted to obtain a history from the plaintiff on that date but that doing so was difficult. Because of the difficulty the plaintiff appeared to have answering simple questions, Dr. Varner began to suspect malingering. Dr. Varner testified that he decided to conduct a neuropsychological examination of the plaintiff, which he asked Dr. Averitt to set up. Dr. Averitt suggested Dr. Vaught conduct the testing and she did so at Dr. Varner's request. Based upon the results of this testing, Dr. Vaught was of the opinion that the plaintiff was malingering.

Dr. Bursten, a psychiatrist and licensed psychology examiner with extensive training and experience in forensic psychiatry, testified by deposition that he first saw the plaintiff on March 28, 2001. Dr. Bursten testified that he reviewed a great deal of information on the plaintiff, including the depositions of the plaintiff and Drs. Pate, Vaught, and Averitt. Dr. Bursten then performed a forensic evaluation of the plaintiff and found that while he felt that the plaintiff was magnifying his symptoms, this behavior was due to anxiety rather than malingering. Dr. Bursten testified that it was his opinion that there was a causal relationship between the injury of August 22, 1998, and the plaintiff's current problems and he assessed the plaintiff a thirty percent impairment to the body as a whole. This rating was not, however, based upon the latest edition of the *AMA Guides*.

Dr. Vaught, a clinical psychologist who specializes in neuropsychology in Hendersonville, Tennessee, testified by deposition that she first saw the plaintiff on February 11, 2000, at the request of Dr. Varner. She took a history of the plaintiff on that date and administered several tests to him. Dr. Vaught testified that the plaintiff performed very poorly on these tests, indicating severe psychological problems, but she also testified that he showed signs of malingering. Despite these signs of malingering, Dr. Vaught testified that the plaintiff did show signs of anxiety and depression and that he very well could be suffering from depression or anxiety related to the work incident of August 22, 1998.

Dr. Averitt, a licensed psychologist in Cookeville, testified live at trial in this case. He testified that he first saw the plaintiff on September 4, 1998, on referral from the plaintiff's primary care physician. Dr. Averitt took a history from the plaintiff on that date and the plaintiff told him about the coke can incident of August 22, 1998. The plaintiff and his mother also reported to Dr. Averitt that the plaintiff had ben subjected to a pattern of harassment at work. When Dr. Averitt was

asked about permanency and causation of the plaintiff's injuries, defense counsel objected on the basis that a clinical psychologist is not competent to testify on the issues of permanency and causation, citing Cigna Property and Casualty Insurance Company v. Sneed, 772 S.W.2d 422 (Tenn. 1989). The defendant preserved a standing objection to all testimony by Dr. Averitt and was allowed to cross examine on those issues without waiving its objection. Dr. Averitt then testified that it was his opinion that the plaintiff's harassment at work was the cause of his psychological problems. He opined that the plaintiff reached maximum medical improvement in April of 2001 and would probably not be able to return to any gainful employment due to his stress level and concentration problems together with his level of fear in public places. Dr. Averitt testified that he was of the opinion that the plaintiff was not malingering.

Discussion

Although we are required to weigh the evidence in a case in depth to determine where the preponderance of the evidence lies, see e.g., GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001), we are required to make such evaluation within the confines of established rules in evaluating the propriety of the trial court's factual findings.

The defendant appeals the trial court's decision on the grounds that it argues that the medical testimony preponderates against the trial court's finding that the August 22, 1998, incident was the cause of the plaintiff's psychological injury, that the trial court erroneously allowed Dr. John Averitt, a clinical psychologist, to testify on the issue of permanency and causation, that the trial court erroneously relied upon the testimony of Dr. Averitt in weighing the medical expert evidence, and that the trial court erroneously allowed Dr. Averitt to testify on the issue of maximum medical improvement.

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(a)(5). 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 Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted); Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993).

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 lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted). In all but the most obvious cases, such as the loss of a member, expert testimony is required to establish causation. Thomas v. Aetna Life & Casualty Co., 812 S.W.2d 278 (Tenn. 1991). Similarly, only medical experts may testify as to whether a given disability is permanent. Bolton v. CNA Ins. Co., 821 S.W.2d 932 (Tenn. 1991). GAF Bld. Material v. George, 42 S.W.3d

430 (Tenn. 2001).

In this case, the trial court heard testimony from a variety of doctors via deposition and one doctor by live testimony. When the medical testimony is presented by deposition, as it was for all but one of the doctors 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 also heard the live testimony of Dr. Averitt and the plaintiff himself.

The trial court, in reviewing all of the testimony outlined above, determined that the plaintiff had indeed suffered a work-related injury on August 22, 1998. In reviewing the same evidence, we are not inclined to disturb that determination. Dr. Bursten, Dr. Vaught, and Dr. Averitt all testified that at the very least, the incident of August 22, 19998, *could have been* the cause of the plaintiff's injuries. Viewed in the light most favorable to the employee, we cannot say that the evidence in this case preponderates against the ruling of the trial court as to causation and affirm the decision of the trial court on that issue.

Regarding the testimony of Dr. Averitt, the defendant is correct that the trial court cannot base a finding of causation solely upon the opinion of a psychologist. Cigna Property and Casualty Insurance Company v. Sneed, 772 S.W.2d 422 (Tenn. 1989). This does not, however, completely exclude the testimony of such a witness. In rendering its judgment, the trial court in this case explained that it based its decision on causation upon not only the testimony of Dr. Averitt, but also upon the plaintiff's testimony and that of Dr. Bursten. In this case, as in all workers' compensation cases, the plaintiff's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972). The plaintiff's live testimony, which the trial court had the benefit of viewing and we do not, coupled with the medical testimony of Dr. Bursten, formed a competent basis upon which to find causation and we affirm on that issue.

Similarly, we do not find reversible error with the trial court for what the defendant contends was reliance upon Dr. Averitt's testimony in weighing the medical expert evidence. We have 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 lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. Reeser, 938 S.W.2d 690, 692. While it would certainly be error for the trial court to rely solely upon Dr. Averitt in its weighing the medical evidence presented, that does not appear to be the case here. The trial court asked Dr. Averitt at a single point in his testimony if, from his extensive treatment of the plaintiff, he was inclined to agree with the testimony of one doctor or another on a single issue. There is no evidence in the record that indicates the trial court based its decision solely upon Dr. Averitt's answer to this question. We thus affirm on this issue.

Finally, regarding the date of maximum medical improvement, the defendant's argument here is well-taken. Except where permanent disability is obvious to a layman, a finding of permanency

must be based upon competent medical evidence that there is medical probability of permanency or that permanency is reasonably certain. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996). Out of all of the medical doctors who testified in this case, the only one who submitted a date for maximum medical improvement was Dr. Varner, who placed the plaintiff at maximum medical improvement on May 9, 2000. The only basis for the date used by the court was the testimony of Dr. Averitt, whose testimony by itself is not competent for the purpose of causation or permanency. We are of the opinion that the most accurate date of maximum medical improvement based upon the expert medical testimony in this case is May 9, 2000. The defendant thus overpaid fifteen weeks of temporary total disability benefits. We rule that the defendant should be credited these payments of fifteen weeks at a stipulated rate of $374.59, for a total of $5,618.85.

For the foregoing reasons, the judgment of the trial court is affirmed with the adjustment of the date of maximum medical improvement to May 9, 2000. The cost of this appeal is taxed to the defendant.

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JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

RANDY SELBY v. HIGHWAYS, INC.

No. M2002-00340-SC-WCM-CV - Filed - May 15, 2003

JUDGMENT

This case is before the Court upon Highways, Inc.'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 Highways, Inc., for which execution may issue if necessary.

PER CURIAM

Drowota, C.J., not participating.