IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
JUNE 2003 Session

EDWARD CARL CAKSAKKAR. v. GOODYEAR TIRE & RUBBER CO., and JAMES FARMER, DIRECTOR, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, WORKERS' COMPENSATION DIVISION, SECOND INJURY FUND

Direct Appeal from the Chancery Court for Obion County
No. 21,127 William B. Acree, Circuit Judge (By Interchange)

No. W2002-02368-SC-WCM-CV - Mailed September 25, 2003; Filed December 16, 2003

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the 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 trial court found that the plaintiff was permanently and totally disabled. The parties do not contest this finding. The appellant, Second Injury Fund, argues, however, that the trial court erred in its apportionment of liability between the Fund and the employer when it held that only 25% permanent vocational impairment should be apportioned to the employer and 75% apportioned to the Fund as a result of the plaintiff's last back injury. For the reasons discussed below, the Panel has concluded that the judgment of the trial court should be modified so that 75% permanent vocational impairment is apportioned to the employer and 25% apportioned to the Fund.

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

ARNOLD B. GOLDIN, Sp.J. delivered the opinion of the court, in which HOLDER, J. AND LOSER, SP.J., joined.

Paul G. Summers, Attorney General and Reporter and E. Blaine Sprouse, Asst. Attorney General, Nashville, Tennessee for the appellant, Second Injury Fund.

Jeffrey A. Garrety, Jackson, Tennessee, for the plaintiff/appellee, Edward Carl Caksackkar.

Randy N. Chism, Elam, Union City, Tennessee, the defendant/appellee, Goodyear Tire & Rubber Co.

MEMORANDUM OPINION

STANDARD OF REVIEW

The review of the findings of 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. T.C.A. § 50-6-225(e)(2). Stone v. City of McMinnville, 896 S.W. 2d 548,550 (Tenn. 1995). This court is not bound by the trial court's findings, but instead conducts its own independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1981). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth the trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W. 3d 430, 432 (Tenn. 2001). When all of the expert medical testimony offered in a workers' compensation case is by deposition, the reviewing court may exercise it's own judgment as to the weight and credibility to be given the testimony in making an independent assessment as to where the preponderance of the evidence lies. Overman v. Williams Sonoma, Inc., 803 S.W. 2d 672, 676 (Tenn. 1991).

FACTUAL BACKGROUND

The employee, Edward Earl Caksakkar, filed a complaint for workers' compensation benefits alleging that he sustained a twisting injury to his lower back on December 29, 1997. This injury was followed by an additional low back injury on January 2, 1998, when he was thrown from a buggy at work into some skids stacked nearby, thereby exacerbating his earlier low back injury. His complaint alleged that his injury was permanent and that he was entitled to benefits for both temporary total and permanent or permanent partial disability, in addition to current and future medical care. Additionally, the employee brought his complaint against the "Second Injury Fund" pursuant to T.C.A. §50-6-208(b) because of a prior back injury which he sustained on November 5, 1981, while working for the same employer. As a result of his 1981 work injury, the employee entered into a workers compensation settlement based on 25% permanent partial disability to his body as a whole.

Following a trial on August 7, 2002, the court found that the employee sustained compensable injuries to his low back on December 29, 1997, and January 2, 1998, and that as a result of these injuries he was permanently and totally disabled. The trial court further found that the liability for the permanent and total disability benefits should be apportioned among the defendants pursuant to T.C.A. §50-6-208(a) and that pursuant to said statute the employee's current injury accounted for 25% of this total disability. The court then found that the employer, Goodyear, was, therefore, liable for 25% of the permanent and total benefits due to the employee, and the Second Injury Fund was liable for the remaining 75% of the benefits due. Neither the employer nor the Second Injury Fund contest the trial court's finding of permanent and total disability. The Second Injury Fund has, however, appealed from the trial court's apportionment of liability between the Fund and the employer.

The employee went to work for the appellant in 1977. He previously had injured his low back in 1981 while working for the appellant. He underwent surgery for this injury and received a settlement in 1983 based on a vocational disability of 25% to the body as a whole. Following his recovery from the surgery he returned to full-duty employment for the appellant with no restrictions. He worked continuously performing heavy labor for the appellant without incident until his injuries forming the basis of his complaint. According to the evidence at trial, the employee had not even been back to see his doctor about his 1981 back injury.

The employee was initially treated conservatively following his 1997-98 injuries. His initial treating doctor, Dr. Anthony Segal, did not believe he was a good candidate for surgery and returned him to work at light duty with no impairment.

He was later seen by Dr. David McCord. Dr. McCord performed diagnostic studies which he opined demonstrated diminished disc space at L4-L5 and degenerative changes in the employee's spine. As a result, Dr. McCord performed back fusion surgery on the employee at his L4-L5 and L5-S1 vertebrae. The first fusion surgery of October 15, 1999, failed. A second fusion surgery was performed by Dr. McCord on September 1, 2000, and it too failed. A third fusion surgery was performed at the same site on March 12, 2001, during which some vertebrae were removed.

In his deposition, Dr.McCord testified that this was a very severe injury to employee, that he should avoid prolonged sitting, heavy lifting, or overhead labor and he assigned him a permanent physical impairment rating of 26% to the body as a whole. On the employer's "Impairment Evaluation" form, that was introduced as an exhibit at trial, Dr. McCord stated that the employee "Remains 100 % occupationally disabled." He further marked that place on the form that stated: "Not Able to perform any sustained activity."[1]

In addition to Dr. McCord, the employee was referred by his counsel to Dr. Joseph C. Boals, III for an independent medical evaluation on October 23, 2001. Dr. Boals testified by deposition that the employee's injuries and subsequent surgeries caused him to have significantly limited range of body motion. Additionally, he concurred that his finding of an absence of an ankle jerk bilaterally was evidence of significant injury and of neurological loss over and above anything that might be related to the aggravation of any pre-existing condition. Based on his examination, he opined that the employee had a 39% permanent physical impairment to the body as a whole.

In his cross examination of Dr. Boals, counsel for the employer raised the issue of the significance of the employee having been diagnosed in 1978 with Reiter's Syndrome, a syndrome of conjunctivitis, arthritis and urethritis. Dr. Boals described it as a very rare syndrome and he testified that the arthritic component can cause some very advanced changes over time in the joints of the body, much like rheumatoid arthritis.

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[1]This form, entitled "THE GOODYEAR TIRE & RUBBER COMPANY IMPAIRMENT EVALUATION FOR DISABILITY PENSION", was introduced as an exhibit at trial.

As a followup, the employer's counsel asked Dr. Boals, based on his knowledge of employee's 1981 back surgery and the existence of the Reiter's Syndrome in addition to his current injuries, which problems were more than likely the cause of the employee's severe condition. He testified that there was no doubt there was previous impairment from the earlier disc surgery and that the Reiter's Syndrome would contribute to some impairment though "we really don't know whether or not that syndrome had been flared up by this recent surgery".

On further cross examination by counsel for the Second Injury Fund, the following questions and answers were elicited:

> Q. Doctor ... Your thirty-nine percent impairment that you gave this gentleman, that is based on the current work related injuries that he suffered at Goodyear starting in December of 1997?
>
> A. That's correct.
>
> Q. And in your opinion the reason this gentleman can't work now is as a result of these injuries?
>
> A. Yes.
>
> Q. When I say these injuries, I mean these most recent injuries starting in December, 1997?
>
> A. Yes. I would have to sort of qualify that by saying we have to consider his total inability to work with the Reiter's syndrome and the previous back surgery as being some component of it, *the major component being this recent surgery.*[2] (Emphasis added.)

Dr. Boals did testify, however, that he would not have expected injuries such as that suffered by the employee to require such "exotic" surgery in the absence of some underlying chronic disease "like" Reiter's Syndrome.

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[2] Of significance is the employee's own testimony at trial. He testified that he had worked continuously for the employer performing heavy manual labor without restrictions since returning from his 1981 back surgery. He further testified that he didn't know there was anything wrong with him until he got hurt in 1997-98. As he stated: "It wasn't nothing wrong with me before I got hurt. I done anything I wanted to."

LEGAL ANALYSIS

The parties do not dispute that the employee in this case is totally and permanently disabled. The only issue on appeal is the apportionment of the award by the trial court between the employer and the Second Injury Fund.

The learned trial judge determined that the award should be apportioned pursuant to T.C.A. § 50-6-208(a) and that the employee's current injury accounted for 25% of his total disability. The court then found the employer liable for 25% of the total award and the Second Injury Fund liable for the remaining 75%.

With the medical proof being that the employee had permanent physical impairment ratings of 26% to the body as a whole from his treating doctor and 39% from his evaluating doctor, the trial court was apparently persuaded by the employer of the significance of the employee's pre-injury (1978) diagnosis of Reiter's Syndrome and its impact on this injury in making an apportionment of liability for the injuries forming the basis of this claim for benefits.

In Sweat v. Superior Indus., Inc., 966 S.W.2d 31, 34 (Tenn. 1998), the employee had a pre-existing debilitating condition known as psoriatic arthritis. He alleged that he was asymptomatic prior to his employment but that his job "triggered his symptoms and worsened the underlying disease." The defendant denied that the employment caused a progression or worsening of the underlying disease. The court in Sweat found that "it is well-settled that an employer takes an employee as he finds him, that is with his pre-existing defects and diseases." Rogers v. Shaw, 813 S.W. 2d 397 (Tenn. 1991). It then went on to find that the employee was asymptomatic prior to working for the employer, notwithstanding being very active, and that his employment triggered his symptoms. The court stated that "there being no way by which the Court can quantify how much worse his condition was made by his work, it results that the employer must bear the burden of uncertainty."

In this case, as in Sweat, the employee had apparently been diagnosed years earlier with a potentially debilitating arthritic condition which was asymptomatic. The employee performed heavy manual labor for the employer for almost 20 years after being diagnosed with Reiter's Syndrome in addition to having had prior disc surgery in 1981. As the employee testified, there wasn't anything wrong with him that he was aware of before he was injured in January, 1998.[3]

In the present case, the Panel agrees with the trial judge that the liability for the permanent and total disability award to the employee should be apportioned among the defendants pursuant to

[3]The employee testified that since his January, 1998, injury he had constant pain in his back and legs, muscle spasms, sleepless nights, and he has been "just miserable". Before his injury of January, 1998, he was an avid deer hunter, fisherman, duck hunter and camper, but he can no longer perform any of these activities.

T.C.A.§50-6-208(a).[4] However, we find that the disability resulting from the employee's last compensable injury accounted for 75% of his total disability rather than the 25% as found by the trial court.

As a result, the employer is liable for 75% of the permanent and total disability benefits due to the employee and the Second Injury Fund is liable for the remaining 25% of the benefits due to the employee.

CONCLUSION

______For the reasons stated above, the judgment of the trial court is modified in accordance with this opinion. The cost of this appeal is taxed to the appellee, Goodyear Tire & Rubber Co.

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ARNOLD B. GOLDIN, SPECIAL JUDGE

[4]Both subsection (a) and subsection (b) of T.C.A. §50-6-208 are applicable in this case. As the court stated in Perry v. Sentry Ins. Co., 938 S.W. 2d 404, 407 (Tenn. 1996), "section (a) and section (b) are not mutually exclusive and an employee may meet the criteria for recovery under both sections." Moreover, according to Bomley v. Mid-America Corp., 970 S.W. 2d 929 (Tenn. 1998), in such a case courts must apply the subsection that produces a result more favorable to the employer. Here, the same result is reached under both subsections.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

**EDWARD CARL CAKSACKKAR v.
GOODYEAR TIRE & RUBBER CO., ET AL.**

No. W2002-02368-SC-WCM-CV - Filed December 16, 2003

JUDGMENT

This case is before the Court upon a motion for review filed by Goodyear Tire & Rubber Co., 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 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 Goodyear Tire & Rubber Co., for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating.