IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
MAY 22, 2003

GENE PATTON V. SEVIER COUNTY, TENNESSEE

Direct Appeal from the Sevier County Circuit Court
No. 97-517- Rex H. Ogle, Judge

Filed October 21, 2003

No. E2002-02004-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The employer appeals an award of disability benefits for aggravation of a pre-existing condition where there is no detectible anatomical change. The employee challenges the sufficiency of the award and the failure to award the statutory bad faith penalty. We affirm.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and ROGER E. THAYER, Sp. J., joined.

Jerry H. McCarter, Gatlinburg, Tennessee, for the Appellant, Sevier County, Tennessee.

Jerry K. Galyon, Sevierville, Tennessee, for the Appellee, Gene Patton.

MEMORANDUM OPINION

Facts

Gene Patton sustained an injury to his back in a non-work related automobile accident in June 1995. He returned to work at the Highway Department of Sevier County, Tennessee with limitations on lifting. He testified that he had no problems working but was cautious when lifting. He suffered a second injury to his back on April 26, 1996 while helping two other employees lift a vat of oil. Mr. Patton claimed that the pain resulting from this work injury made it impossible for him to work. Mr. Patton was initially treated for the work injury by Dr. Sam McGaha, who referred him to Dr. Alan Whiton, an orthopedic surgeon. The employer declined to authorize treatment by Dr. Whiton.

Dr. Joel Bryan Ragland saw Mr. Patton, for treatment arranged by the employer, on August 8, August 15, and September 5, 1996. Dr. Ragland diagnosed a musculoskeletal strain in the lumbar spine, and prescribed pain medication; he released Mr. Patton to return to work on September 5, 1996. Dr. Ragland assigned a medical impairment rating of five percent for the back problem as a whole; he did not "think an added impairment over and above what he sustained from his MVA would be indicated." Mr. Patton, then, returned to Dr. Whiton, who performed a discotomy on January 19, 1997, a spinal fusion on March 23, 1997, and another spinal fusion on June 23, 1997. Following the surgeries, Mr. Patton returned to work for the Highway Department as a truck driver. Dr. Whiton assigned a permanent impairment rating of 20 percent to the whole body.

The trial court awarded permanent partial disability benefits for thirty-five percent to the body as a whole.

Standard of Review

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 findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Tucker v. Foamex, L.P.*, 31 S.W.3d 241, 242 (Tenn. 2000). 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 to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (2002). "When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings." *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). However, this Court is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Id.*

Issues

1. Did the trial court err in awarding worker's compensation benefits for the aggravation of a pre-existing condition when there is no detectible anatomical change?

2. Did the trial court err in failing to award fifty percent permanent partial disability?

3. Did the trial court err in denying penalty and interest pursuant to Tenn. Code Ann. § 50-6-225?

Discussion

I.

Mr. Patton injured his back in a motor vehicle accident in June 1995. In April 1996, he injured his back lifting an oil vat at work. Sevier County argues that there was no discernable anatomical change in Mr. Patton's back following the injury at work and, therefore, no basis for a permanent disability award. Aggravation of a pre-existing condition is not compensable if it results only in increased pain or other symptoms caused by the underlying condition. *Sweat v. Superior Industries, Inc.*, 966 S.W.2d 31, 32 (Tenn. 1998); *Cunningham v. Goodyear*, 811 S.W.2d 888, 890 (Tenn. 1991). Dr. Ragland testified that a MRI of Mr. Patton's back made in September 1995, after the motor vehicle accident, and a MRI made on August 12, 1996 showed no anatomical change after the work injury. Dr. Whiton agreed that a comparison of the MRI scans did not show an anatomical change, but testified:

> I think for his pain, it was my understanding. It changed from a moderate amount to a severe amount. I would state that something anatomical had to happen. The MRI scan did not pick it up. It's my opinion that what happened is the disk broke down a bit more.

When Dr. Ragland released Mr. Patton to return to work on September 5, 1996, his progress note for that date stated:

> At the end of our evaluation, he broke down and started crying, saying that he just wanted to get better and is tired of hurting. Unfortunately, I think there is very little that can be done for him. I think that everything of a conventional nature has already been tried. I think with time, he will probably get somewhat better. . . .

Dr. Whiton explained why his diagnosis, opinion and treatment differed from that of Dr. Ragland, as follows:

> (L)umbar strains tend to resolve spontaneously with time is one of his statements here. I will agree with that. In this gentleman's case, his pain did

not resolve at all, and he was still incapacitated by it. (emphasis supplied) I think with Dr. Ragland, if I can try and read into what he's stating, is that this guy had a little strain. He's going to get over that, and he's going to go back to the way he was feeling before this injury at work. As far as I can tell, that did not happen. He did not get resolution of that pain.

Q. If you were to learn that he did, in fact file a lawsuit and allege therein disability resulting from his lawsuit and in the sworn statement, I think that was filed in April 1996, just shortly before this alleged incident at his employment, if he would say that I am in constant pain, in his deposition, his answers to interrogatories, "I am in constant pain. I have trouble bending, stooping, standing up, and I cannot sit for a long period of time." Now if he would say that in an answer to interrogatories in April 16, 1996, would that have any effect on what you are telling us here today? If you were to learn that a few days before this he was complaining of constant pain, having trouble sitting standing, and all this sort of thing, would that have any effect on your more recent observations of him when he alleged that two days afterward, that some time after this that he had a job-related injury?

A. I'll try to break down that question. I think you're asking me to compare the pain that he's testifying there to the pain that he had when I saw him. You describe a constant pain. He had trouble sitting and bending. Nowhere in there really quantify or measure the pain. [sic] So, I look at what a guy can do. Was he able to work with restrictions? Admittedly, at least he could get there 40 hours a week, drive there, do the work, drive home and not have to take a lot of pain medicine, not even think that he'd need an operation to fix it. That's the picture I get prior to this lifting injury at work. The picture I get after is that he was in so much pain that he really couldn't even present himself to work in a sedentary job 40 hours a week. I've seen the man cry; I've seen him on a walker; I've seen him barely able to stand; and I've seen him with, what I feel, is a tremendous amount of pain and impairment. I don't think he was in that shape when he answered those questions. That's my personal opinion. The man was at work, and he's been unable to work since I met him. Hopefully, he will be able to go back soon.

Dr. Whiton was asked whether he simply disagreed with the opinion of Dr. Ragland, and he responded as follows:

Well, let's put it all back into context. This paragraph basically begins by saying he has a lumbar strain and this will get completely better. This pain that you got from this injury is going to go away with time just like all lumbar strains do, and you'll be back to where you were before, meaning the back pain you had from the motor vehicle accident. Then he's saying I'm not going to add any more impairment for something that's going to get all better

> by itself with time. I think it's silly to add an impairment for something that's going to get better. I agree with all that, but Mr. Patton, in fact, did not get better. So, the assumption that he made did not apply to Mr. Patton. That's his very last sentence. "This is all the characteristics of a strain which should resolve spontaneously with time." My understanding that the patient's history was that he didn't get spontaneous resolution of his pain. I don't think I'm really trying to be different or disagree with Dr. Ragland. I just observed something that he maybe in one office visit didn't have a chance to observe. This man really was hurting, and he wasn't getting any better.

Subsequent to this testimony, Dr. Whiton performed the surgeries on Mr. Patton. Then, he gave another deposition in which he stated:

> His finding I characterized as sequentially unstable or instability of the spine requiring a fusion, and that's a fairly straightforward 20 percent impairment of the whole person.

If employment causes an actual progression or aggravation of a pre-existing condition that produces increased pain that is disabling, it is compensable. *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 488 (Tenn. 1997). In this case, the trial court obviously believed the testimony of Mr. Patton that the pain following the work injury was much more severe than the pain following the automobile accident, and, thus accredited the testimony of Dr. Whiton. It is well-settled that the trial court has the discretion to accept the opinion of one medical expert over that of another. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804 (Tenn. 1990). After our own reading of the medical depositions in this case, we find no abuse of discretion.

II.

Counsel for Mr. Patton asserts that the trial court erred in not awarding two and one-half times the medical impairment rating. Tenn. Code Ann. §50-6 207 merely places a cap or limit on the amount an employee who is returned to work at the same or greater wage can recover. It does not mandate that the employee receive benefits for any specific amount of disability. The extent of disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. Tenn. Code Ann. § 50-6-241(c); *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 773 (Tenn. 2000). The evidence does not preponderate against the trial judge's determination of disability.

III.

Finally, counsel for Mr. Patton asserts that the trial court erred in failing to award penalty and interest, pursuant to Tenn. Code Ann. § 50-6-225 on temporary total disability benefits and medical expenses which the employer refused to pay. The statute imposes a penalty for bad

faith, and limits the penalty to "additional expense, loss or injury" caused by the refusal to pay. The record contains no evidence to support an award for bad faith.

Conclusion

The judgment of the trial court is affirmed and this case is remanded for any necessary further proceedings. Costs of this appeal are taxed against Sevier County, Tennessee and its surety.

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Howell N. Peoples, Special Judge

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ORDER

This case is before the Court upon 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 on appeal are taxed to the appellant.

IT IS SO ORDERED this 21st day of October, 2003.

PER CURIAM

Barker, J. - Not participating.