IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 16, 2004 Session

HENRY EARL CAMPBELL v. JIM KERAS BUICK COMPANY and GREAT AMERICAN INSURANCE COMPANIES

Direct Appeal from the Circuit Court for Shelby County
No. 302047 Div. 4 George H. Brown, Jr., Judge

No. W2003-00158-WC-R3-CV- Mailed February 2, 2004; Filed March 10, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee. Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of the finding of fact and conclusions of law. The trial court found that the Employee failed to prove causation, failed to give notice as required by Tennessee Code Annotated section 50-6-201, and waived his right to worker's compensation benefits for a back injury. We affirm on the basis that Employee failed to prove causation and failed to prove notice.

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

JOE H. WALKER, III, SP.J., delivered the opinion of the court, in which JUSTICE JANICE M. HOLDER, J., and JAMES L. WEATHERFORD, SR.J., joined.

James L. Gordon, Memphis, Tennessee, for the appellant, Henry Earl Campbell

B. Duane Willis, Jackson, Tennessee, for the appellee, Jim Keras Buick Company and Great American Insurance Companies

MEMORANDUM OPINION

FACTUAL BACKGROUND

Employee was 47 years of age, and had worked for the Employer for over twenty-five years. He has an eleventh grade education and a history of cleaning and detailing cars that Employer sells. Employee alleges that on June 1, 1998, he was getting in a car when his foot slipped, causing him to fall on his rear end and injure his back.

The Employee had a prior back injury in 1976, and a settlement was court-approved in 1977, awarding Employee benefits amounting to twenty percent permanent partial disability to the body as a whole. On May 17, 1978, Employee and Employer entered into a written agreement which acknowledges the prior injury and in which Employee agrees to not lift any heavy object which "could result or cause injury to my back." The agreement stated in part "my back was previously injured and under no condition will I hold Reed Keras Buick responsible for a back injury sustained on the job."

Dr. Gary L. Kellett testified that he treated Employee in May 1997 for low back and right leg pain caused by a sneezing and coughing episode about a week before the office visit. The pain radiated down the right leg of Employee. Dr. Kellett recommended conservative treatment with exercises and medication. Dr. Kellett was aware of the prior disc operation and fusion Employee had and felt he was doing well prior to the sneeze.

Employee alleges he was injured at work June 1, 1998.

Dr. John P. Howser, neurosurgeon, testified that he examined Employee August 28, 1998, for back pain. Employee gave a history that approximately three months before the examination he sneezed and his foot slipped and he had the onset of back pain. His left leg had sharp pains which radiate to the back. Employee reported he had seen Dr. Kellett who gave him pain pills. Dr. Howser was aware of the past history of fusion surgery. Employee told Dr. Howser he had been doing well since the surgery until he sneezed. Examination revealed muscle spasm and restricted range of motion of the lumbar spine. He saw Employee during several visits and treated Employee with lumbar epidural and caudal epidural blocks, hamstring exercises, and facet blocks. Employee did not mention an injury at work during these visits. On December 21, 1998, Employee phoned and related he had an incident at work in May 1998, where he slipped on some chemicals on the floor and fell at work. Employee saw Dr. Howser again January 26, 1999, for an office visit.

Dr. John Lindermuth, neurosurgeon, testified that he first saw Employee April 22, 1999. Employee gave a history of injury at work in May 1998. Dr. Lindermuth diagnosed failed back syndrome, based on Employee's previous surgery in 1976 with a good result, and then having re-injured himself.

Employee testified at trial that he reported his fall and injury on June 1, 1988 to his supervisor, Steve Markle. Markle testified that Employee did not report a work-related injury on June 1, or any other day. He never filled out any worker's compensation forms, or referred Employee to a doctor.

Employee has not returned to work at Employer's place of business, but has worked briefly at two other jobs.

TRIAL JUDGE'S FINDINGS

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225.

The trial court found that there had been no timely reporting of an on-the-job injury; that the Employee did not meet his burden with regard to causation; and that the document signed by Employee forecloses the Employee from prosecuting a back related injury.

The trial court accredited the testimony of the Employer that the Employee did not notify Employer of a work-related incident until months after the alleged injury occurred. The trial court accredited the testimony of Dr. Howser and Dr. Kellett that Employee's "problems emanated from a sneezing episode."

The trial court found that "the plaintiff has not met his burden with regard to causation, with regard to the issue of notice." Further, the court found that the document signed by Employee May 17, 1977, was an agreement as to Employee's physical condition of back problems and "effectively waives Mr. Campbell's rights in the event that the Court had found that he suffered a work-related injury to his back, which the Court didn't find." The court specifically found that the Employee did not suffer a work-related injury to his back.

CAUSATION

The trial court found that causation was not proven.

Regarding the issue of causation, it is well-settled that 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 (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 (Tenn. 1997) .

Dr. Howser, testified that he examined Employee August 28, 1998, for back pain. Employee gave a history that approximately three months before the office visit, he sneezed and his foot slipped and that he then had the onset of back pain.

Dr. Lindermuth testified that Employee gave a history on April 22, 1999, that he had injured himself at work in May 1998 while working for Employer. Dr. Lindermuth gave no details about the injury at work other than "Well, according to my records, he told me that he did

injure himself at work…" Dr. Lindermuth testified about Employee's condition, the treatment rendered, and his prognosis; however Dr. Lindermuth was not asked any question as to causation, and never expressed an opinion that the medical condition found had a causal connection to any incident at work.

We find that the evidence does not preponderate against the trial court's finding that causation was not proven in this case. From our independent examination of the record, we are not persuaded the trial court was in error by finding that the Employee failed to prove causation.

NOTICE

Tennessee Code Annotated section 50-6-201, provides in pertinent part:

> Every injured employee or his representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practical, give or cause to be given to the employer who has not actual notice, written notice of injury, . . . and no compensation shall be payable under the provisions of this chapter unless such written notice is given to the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made. . . .

The trial court accredited the testimony of Employee's supervisor, Mr. Markle, who testified that Employee did not report an on-the-job injury. No worker's compensation forms were filled out, and Employee was not referred to a doctor by Employer. No benefits have been paid under the worker's compensation statutes.

The reviewing court must give considerable deference to the trial court's findings with regard to the weight and credibility of oral testimony, as it is the trial court which had the opportunity to observe the witness's demeanor and to hear the in-court testimony. Long v. Tri-Con Industries, Ltd., 996 S.W.2d 173, 178 (Tenn. 1999) (citing Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn.1997)). The trial court observed both the Employee and the supervisor and accredited the testimony of the supervisor.

We find that the evidence does not preponderate against the trial court's finding that notice was not proven in this case.

WAIVER

The purpose of the Workers' Compensation Law is to provide compensation for loss of earning power or capacity sustained by workers through injuries in industry, Mathis v. J. L. Forrest & Sons, 216 S.W.2d 967 (Tenn. 1949), and to compensate for disability of the Employee occurring under certain specified conditions while such Employee is working for the employer. Norton v. Standard Coosa-Thatcher Co., 315 S.W.2d 245 (Tenn. 1958).

In certain circumstances, benefits might be waived. See, e.g. Tenn. Code Ann. § 50-6-213 (providing that epileptics may elect not to be covered by certain provisions). However, a general waiver of benefits by an Employee should not be favored.

Employer cites the opinion of Nay v. Resource Consultants, Inc., 2000 Tenn. LEXIS 2 (Tenn. Workers' Comp. Panel Jan. 5, 2000), in which a panel determined that a knowing and intelligent waiver of a cause of action which has not vested may be made in workers' compensation cases, and that where it can be shown that the waiver was considered initially by the parties and the trial court, a judge can approve a settlement of rights although they have not yet vested.

In this case, there was no showing that Employee made a knowing and intelligent waiver of future rights under the workers' compensation statutes. Employee worked for twenty years after the agreement of May 17, 1978 was signed. The agreement was not court-approved.

The Panel has determined that the trial court was correct in its ruling with regard to causation and notice, but declines to approve a waiver of future compensation coverage presented in this case.

The judgment of the trial court is therefore affirmed. Costs are taxed to the appellant.

_____

JOE H. WALKER, III, SP.J.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 16, 2004

HENRY EARL CAMPBELL v. JIM KERAS BUICK COMPANY and GREAT AMERICAN INSURANCE COMPANIES

Circuit Court for Shelby County
No. 302047 Div. 4

No. W2003-00158-WC-R3-CV - Filed March 10, 2004

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 Appellant, Henry Earl Campbell, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM