IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS= COMPENSATION APPEALS PANEL
AT NASHVILLE
February 26, 2004 Session

SAMUEL L. ROWE V. SVERDRUP TECHNOLOGY, INC. and TRAVELERS INSURANCE COMPANY

Direct Appeal from the Chancery Court for Coffee County
No. 01-451 John E. Rollins, Judge

No. M2003-01467-WC-R3-CV - Mailed - July 22, 2004
Filed - August 25, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of the findings of fact and conclusions of law. In this appeal, the employer contends that the trial court erred by finding by a preponderance of the evidence that the employee's hip replacement surgery and subsequent disability were due to an injury that arose out of his employment. Specifically, the issue is whether the employee's injury resulted from a pre-existing cancerous condition of the right hip. We find no error and affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2003 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed

ROGER A. PAGE, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and RITA STOTTS, SP. J., joined.

Robert Durham, Cookeville, Tennessee for appellant, Sverdrup Technology, Inc. and Travelers Insurance Company.

Robert S. Peters, Winchester, Tennessee, for appellee, Samuel Rowe.

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. Tenn. Code. Ann. § 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 Serv., 822 S.W. 2d 584, 586 (Tenn. 1981). 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. Insurance Co. of North America, 884 S.W. 2d 446, 451 (Tenn. 1994).

FACTUAL BACKGROUND

Samuel Rowe was born on December 3, 1941 and was sixty-one years old at the conclusion of the trial. He graduated from high school in 1961. From 1964 to 2000, he worked in maintenance at Arnold Edwards Development Center. On May 21, 1999, he injured his right hip at work when he fell over an air compressor. At the time of the injury, Rowe had an undiagnosed cancerous tumor growing in his right hip. Dr. Herbert Schwartz removed the tumor in March, 2000 and Dr. David DeBoer performed hip replacement surgery on Rowe in July, 2001.

CAUSATION

Rowe contends that his injury of May 21, 1999 caused a pathologic fracture of the right pelvis which in turn necessitated the hip replacement. The employer contends that the surgery would have been necessary irrespective of the work-related injury because the cancer would have eventually become painful and been discovered. The parties introduced the deposition testimony of three physicians at trial. Dr. David DeBoer, the orthopedic surgeon who performed the hip replacement surgery, testified that Rowe sustained an anatomical impairment of 20% to the body as a whole as a result of the hip replacement. As to causation, Dr. DeBoer testified that Rowe's fall at work could have contributed to the necessity of his hip replacement. Dr. DeBoer further stated that if Rowe had no pathologic fracture prior to May 21, 1999, the fracture he sustained from the fall at work clearly contributed to the necessity of the hip replacement surgery.

Dr. Philip Karpos, an orthopedic surgeon, treated Rowe for a right hip injury that he claimed to have sustained at work. Dr. Karpos ordered an MRI that revealed abnormalities of

the right hip socket. Dr. Karpos also ordered a CT scan that showed a problem in the right hip socket area but did not show a definite fracture. Dr. Karpos opined that Rowe did not sustain a pathologic fracture on May 21, 1999 and therefore did not sustain any permanent injury as a result of the work-related fall.

The third physician, Dr. Herbert Schwartz, an orthopedic surgeon who specializes in musculoskeletal tumors, testified that he first treated Rowe on March 2, 2000. Rowe related to Dr. Schwartz that he experienced significant hip pain when he fell at work on May 21, 1999. Rowe reported that the pain became progressively worse. Dr. Schwartz biopsied a tumor on Rowe's hip and diagnosed him with cancer. Dr. Schwartz tried to reconstruct Rowe's pelvis and hip bone with hardware and cement. Thereafter, Rowe was treated for metastatic cancer.

Dr. Schwartz concluded that Rowe had a pathologic fracture of the right pelvis. He explained that a pathologic fracture is a break in a bone due to a disease such that the break would not have occurred if not for the pre-existing disease. Dr. Schwartz reviewed several x-rays including an x-ray taken on December 1, 1999 and identified the place where Rowe sustained the pathologic fracture. Dr. Schwartz further testified that given the records he had reviewed, the medical history, the clinical history and the x-rays, he could state to a reasonable degree of medical certainty that Rowe's fall was responsible for the pathologic hip fracture on May 21, 1999.

Dr. Schwartz explained that the mechanism of a pathologic fracture differs from a typical fracture of a bone. The pathologic fracture may be a simple crack or an interruption in the cortex of the bone. In a case where a bone is filled with a tumor, the bone acts like an eggshell and the crack may appear as multiple smaller cracks. Dr. Schwartz opined that Mr. Rowe sustained a serious pathologic fracture on May 21, 1999 when he fell at work and was never able to return to work on a regular or full-time basis.

The employer asserts that no medical proof was submitted to establish that the employee's alleged fall on May 21, 1999 aggravated, exacerbated, or objectively advanced the cancerous tumor in Rowe's right hip in any way. We disagree. The pathologic fracture sustained on May 21, 1999 resulted in Rowe seeking medical care for significant hip pain. As a consequence, he underwent surgery both for cancer and for a hip replacement. Prior to his fall, Rowe had no surgery scheduled, no diagnosis of metastatic cancer and no knowledge that his bone structure had been weakened. His bone, unable to withstand normal stresses, fractured after he fell. The fall adversely affected his weakened bone structure and brought attention to the previously undiagnosed cancer or tumor. In explaining the pathology of cancer, Dr. DeBoer testified that a decision for surgery to remove a tumor involves several factors, one of which is a violation of the integrity of the bone such that a person cannot walk on it again. In his opinion, the need for surgery in Rowe's case was partly to fix the fracture. Dr. DeBoer testified that the purpose of establishing the diagnosis, resecting the tumor and fixing the pelvis was to repair the fracture so that Rowe could walk again.

The facts in the case of Boyd v. Young, 246 S.W. 2d 10 (Tenn. 1951) are instructive. When the employee, Woodrow Young, reached down to lift a box of cheese, he strained or twisted his back and injured the tissues or muscles in his back between his shoulders. Young experienced great pain. After this accident, he was diagnosed with a cancerous condition in the upper back. The trial court found it significant that the cancer or tumor was found in the exact place where Young had been injured at work. Thus, the cancer seemed to have been caused or aggravated by the work injury. The appellate court affirmed the award to the employee in Boyd and made careful note of the obvious diseased condition of Young's upper spine at the time of the accident.

Similarly, in Rowe's case, his pathologic fracture occurred at the spot where he was later diagnosed with metastatic cancer. It is axiomatic that the employer takes the employee as he is, that is, with his defects and pre-existing afflictions. Rogers v. Shaw, 813 S.W. 2d 397, 399 (Tenn. 1991) (citations omitted). It is also well-settled that if a compensable injury hastens or accelerates the death or disability of an employee who has a pre-existing illness, the death or disability is compensable under the Tennessee Workers' Compensation Statutes. Id. (citations omitted). Rowe's fractured hip was causally related to his employment, even though he suffered from bone cancer. If the pathologic fracture hastened his disabled condition, then the fracture is compensable.

After a review of the medical testimony, the trial court stated that Rowe had established causation. 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. Richards v. Liberty Mut. Ins. Co., 70 S.W. 3d 729, 732 (Tenn. 2002). After a thorough review and careful consideration of all the medical proof, we find no error by the trial court in holding that Rowe had established causation. Any reasonable doubt as to causation must be resolved in favor of the employee. Reeser v. Yellow Freight Sys., Inc., 938 S.W. 2d 690, 692 (Tenn. 1997).

In the instant case, the chancellor was compelled to consider differing medical testimony as to causation. The trial court had to decide which of the competing medical opinions to accept. It is certainly within the discretion of the trial court to conclude that the opinion of one expert should be accepted over that of another. Hughes v. MTD Products, Inc., No. 02501-9602-CH-00019, 1996 WL 554473 at *2 (Tenn. Sept. 27, 1996) (citing Hinson v. Wal-Mart Stores, Inc., 654 S.W. 2d 675, 676 (Tenn. 1983)); Kellerman v. Food Lion, Inc., 929 S.W. 2d 333 (Tenn. 1996); Thomas v. Aetna Life & Casualty Co., 812 S.W. 2d 278, 283 (Tenn. 1991); Johnson v. Midwesco, Inc., 801 S.W. 2d 804, 806 (Tenn. 1990). The medical proof is sufficient to establish that the surgeries and permanent impairment were caused by the work-related injury of May 21, 1999.

CONCLUSION

The judgment is affirmed in all respects. Costs are taxed to the appellant.

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ROGER A. PAGE, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
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FEBRUARY 26, 2004 Session

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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 appeals 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 will be paid by the appellant, Sverdrup Technology, Inc. and Travelers Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM