IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 2, 2004 Session

JAMES ARCHIBALD v. SATURN CORPORATION

Direct Appeal from the Circuit Court for Maury County
No. 9834, Hon. Jim T. Hamilton, Judge

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No. M2003-02493-WC-R3-CV - Mailed: February 7, 2005
Filed - March 9, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated § 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 employee demonstrated a reasonable excuse for failing to give timely notice of his injury to the employer and that the employer was not prejudiced by the delay in notice. The trial court fixed the employee's vocational impairment rating at forty percent. The employer contends that the trial court erred in finding that the employee had a reasonable excuse for failing to give timely notice and that the employer was not prejudiced. The employer also contends that the trial court's award to the employee was excessive in light of the record. We find no error and affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Circuit Court Affirmed.

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

Brian A. Lapps, Jr., Waller Lansden Dortch & Davis, PLLC, Nashville, TN, for the appellant, Saturn Corporation.

J. Anthony Arena, Arena & McElhaney, PLLC, Nashville, TN, for the appellee, James Archibald.

MEMORANDUM OPINION

The employee-appellee, James Archibald, has worked for Saturn Corporation from August 16, 1989, until the present. During the week of July 4 through July 9, 2000, Mr. Archibald injured himself while replacing a paint booth at the Saturn plant, feeling what he described as a sharp, knife-like pain in the back of his neck. The pain immediately subsided, and Mr. Archibald continued to work without further problems. Mr. Archibald testified at trial that he was unaware at that point he had injured himself; hence, he did not report the neck pain to

Saturn at that time.[1]

Several days later, Mr. Archibald began to feel numbness down his right arm. Around that same time, Mr. Archibald was lifting a box of parts when metal chips became embedded in his right hand. He had the pieces removed on two occasions, July 12 and July 16, 2000, at the Saturn medical department. During one of those visits, Mr. Archibald informed personnel at the medical department that he was having numbness in his right arm, which was progressively becoming worse. He had not experienced any further neck pain after the initial incident. A nurse advised Mr. Archibald that the numbness he was feeling in his right arm might be a symptom of diabetes.

On July 24, 2000, Mr. Archibald sought the treatment of a chiropractor for numbness in his arm and numbness and tingling in his leg. He stated to the chiropractor that he felt it was probably a work-related injury, but did not complain of any associated neck pain. The chiropractor offered manipulations and Mr. Archibald continued treatment three more times within a seven-day period. On July 31, 2000, Mr. Archibald saw his personal physician, Dr. James Kelly, for a glucose test, which came back negative for diabetes. When Mr. Archibald related to Dr. Kelly the problems he was having with his right arm, including dropping items held in his right hand, Dr. Kelly referred him to Maury Regional Hospital that same day for a cervical MRI. The MRI showed a herniated disc and resulting spinal cord compression. Mr. Archibald testified that this was the first time he was aware of a serious spinal injury, and he began to link the injury to the neck pain he had experienced while drilling. Dr. Gary Porgorski, the radiologist who interpreted the MRI, felt that the spinal cord compression needed to be addressed immediately and scheduled an appointment for Mr. Archibald that day in Nashville with a neurosurgeon, Dr. Steven Abram. Mr. Archibald was admitted to the St. Thomas Hospital on August 1, 2000.

On August 1, 2000, Mr. Archibald underwent an anterior cervical discectomy and fusion at C4-C5 and C5-C6 performed by Dr. Abram and Dr. Edward Mackey. He was discharged on August 4, 2000, and fitted with a rigid cervical collar. Mr. Archibald testified that he knew he was required to report his injury to Saturn; however, he did not think about doing so because he was heavily medicated and his movement was severely restricted. On August 23, 2000, both Mr. Archibald and Dr. Abram completed an application for disability benefits that was later forwarded to Saturn, indicating that the injury was work related and specifically describing the drilling operation. On September 7, 2000, Mr. Archibald's wife drove him to Nashville for removal of his stitches, following which they drove to Saturn where he filled out a formal First Report of Injury.

The trial court found that Mr. Archibald carried his burden of proof by demonstrating that he had a reasonable excuse for failing to give Saturn timely notice of his injury. Further, the trial court found that the lack of timely notice did not prejudice Saturn. Fixing Mr. Archibald's

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[1] Q. Did you know at that point that you had injured yourself?
A. I sure didn't, I didn't.
Q. What did you think caused the pain?
A. I thought I was just tired. We was working those 10-hour days with very little breaks and we was hurrying up, working with those contractors.
(TR Vol. II, p. 33, ll. 8-14).

vocational disability rating at forty percent, the trial court awarded him $89,920 plus $17,984 in attorney's fees.

Appellate review of workers' compensation cases is *de novo* upon the record of the trial court, with a presumption of correctness for the trial court's findings of fact, unless the evidence preponderates against those findings. Tenn. Code Ann. § 50-6-225(e)(2). To determine where the preponderance of the evidence lies, the reviewing court is required to conduct an independent examination of the record. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991). The standard governing appellate review of findings of fact by a trial court requires this Panel to weigh in more depth, the factual findings and conclusions of the trial court in workers' compensation cases. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988). Where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings on review and may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). However, the reviewing court is able to make its own independent assessment of the medical proof to determine where the preponderance of the proof lies when the medical testimony in a workers' compensation case is presented by deposition. Cooper v. Ins. Co. of North America, 884 S.W.2d 446, 451 (Tenn. 1994). In that case, this Panel may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

This case presents three issues for review, all of which are factual: (1) whether the employee carried his burden in proving that he had a reasonable excuse for failing to give timely notice of his injury; (2) whether the employee's failure to give timely notice prejudiced the employer; and (3) whether the trial court's award to the employee was excessive in light of the record.

Timely Notice

We conclude that Mr. Archibald has carried his burden of proof by demonstrating a reasonable excuse for not giving Saturn timely notice of his injury. Tennessee workers' compensation law requires that an employee give written notice of a work-related injury to the employer within thirty days after the occurrence of the injury in order to receive compensation, unless the employer has actual notice of the injury. Tenn. Code Ann. § 50-6-201(a). The law, however, makes an exception where a "reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented." Id. The claimant has the burden of proving a reasonable excuse for failure to give timely notice. Aetna Casualty & Surety Co. v. Long, 569 S.W.2d 444, 449 (Tenn. 1978).

It is clear from the trial record that Mr. Archibald did not give Saturn notice within thirty days upon discovering his injury. Relying on Masters v. Indus. Garments Mfg. Co., 595 S.W.2d 811, 814-16 (Tenn. 1980), Saturn contends the fact that Mr. Archibald knew how to report an injury, but failed to do so, weighs heavily against him. In Masters, however, the plaintiff asserted that her employer had actual notice of her work-related injury and did not argue that she had a reasonable excuse for failure to give timely notice. Id. Therefore, we find Masters to be distinguishable, as there is no such factor weighing heavily against Mr. Archibald.

Contrary to Saturn's allegations, the trial court found that Mr. Archibald was not aware he had a work-related neck injury during the period the chiropractor was treating him. The record supports this finding. In fact, after being shown the chiropractor's record, the team leader for Saturn's workers' compensation department stated that Mr. Archibald complained only of numbness in his right hand and arm when he visited the chiropractor.[2]

Still, Mr. Archibald did not report his injury until September 7, 2000, approximately five weeks after he first learned of his injury on July 31, 2000. The trial court, however, found that Mr. Archibald's testimony regarding his reason for not reporting the injury to be credible.[3] Mr. Archibald testified that he "stayed half out of his mind most of the time on the medication." He further testified that he was unable to use the telephone due to medications and a neck brace, and assumed his wife had informed Saturn about his injury.

Saturn contends that because Mr. Archibald filled out a disability claim form on August 23, 2000, he was able to report his injury at that time as well. The disability form alone, though, is not enough to preponderate against the trial court's finding that Mr. Archibald had reasonable excuse for failing to give timely notice. Mr. Archibald's testimony concerning his condition and post-surgery limitations supports the trial court's determination that he gave notice of his injury as soon as was reasonable and practicable, especially given his sudden hospital admission and emergency surgery. We therefore conclude that Saturn has failed to overcome the presumption of correctness of the trial court's findings.

Prejudice

Lack of prejudice on the part of the employer is a factor to be considered in determining the reasonableness of an employee's excuse for not giving timely notice. Aluminum Co. of America v. Rogers, 364 S.W.2d 358, 360 (Tenn. 1962). Mr. Archibald reported his injury within thirty-seven, rather than thirty, days of his discovery of a serious neck injury. There is no evidence in the record to show that Saturn was prejudiced by the seven-day late notice. Saturn, on the other hand, contends that because of the late notice it was unable to conduct an investigation. However, Saturn did not dispute the time or the location of the injury, nor did

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[2] Q. I'll show you the record from the chiropractor. On that front page he says – he checks injured on job, but it doesn't say anything about his neck, does it?
A. Is your condition due to an accident? Yes. Date of accident, July 2nd through the 11th, I think is what it says. Work on job.
Q. But it doesn't say anything about his neck?
A. No. His complaints are numbness in right hand, arm, and I can't read what else it says.
(TR Vol. II, pp. 144-45, ll. 18-3).

[3] Q. After you got the results of your MRI and you realized you had a spinal cord injury and at that point you felt that that was caused by your drilling operation, why didn't you go to Saturn first and report it?
A. Oh, my mind wasn't going to – on Saturn. It was on this thing here that they was talking about doing, taking two bones out of my neck. And I was at the hospital, from Maury County hospital to St. Thomas all in the same afternoon, and I didn't have time to stop by Saturn. But Saturn wasn't on my mind or the drilling, it was just I could die, you know, a blood clot or something. You know, they're taking bones out of my neck, and I was worried about living.
(TR Vol. II, pp. 43-4, ll. 21-9).

Saturn state what other facts it expected to obtain from an investigation. Even so, had Saturn wished to collect specific details about the incident, the fact that Saturn did not attempt to conduct an investigation following Mr. Archibalds's First Report of Injury weighs heavily against its contention. Therefore, we conclude that the evidence does not preponderate against the trial court's finding that Saturn was not prejudiced by Mr. Archibald's short delay in reporting his injury.

Degree of Disability

The extent of an injured worker's permanent disability is an issue of fact. Jaske v. Murray Ohio Mfg. Co., Inc., 750 S.W.2d 150, 151 (Tenn. 1988). In assessing a claimant's disability to the body as a whole, a trial court should make an independent determination, taking into account the claimant's age, education, work experience, training, job skills, and available opportunities. Cox v. Martin Marietta Energy Systems, 832 S.W.2d 534, 536 (Tenn. 1992).

Although he had not examined Mr. Archibald since 1998, Dr. Joseph Frederick Wade, one of three surgeons deposed in this case, assigned him a twenty-five percent physical impairment rating based on the surgery performed. Another of the physicians, Dr. David W. Gaw, assigned Mr. Archibald an eighteen percent physical impairment rating. Dr. Gaw testified that Mr. Archibald had moderate loss in all six areas of movement, neck pain against resistance, and tenderness in the paracervical muscles. Also, he stated that Mr. Archibald had mild weakness of wrist flexion, but not wrist extension, and significantly decreased sensation in parts of his right arm. Dr. Gaw stated that pain was the limiting factor for Mr. Archibald and recommended that he avoid frequent awkward neck positions, and lift no more than 45-50 pounds occasionally or half that amount frequently. Finally, Dr. Gaw testified that Mr. Archibald would have difficulty with overhead or outstretched pushing and pulling in his upper extremity.

Dr. Edward S. Mackey assigned Mr. Archibald a ten to eleven percent physical impairment rating. Although he opined that Mr. Archibald was able to return to full duty with no restrictions, he did not conduct any formal range of motion measurements on the patient. Dr. Mackey also testified that while his impairment rating was based on his experience using the American Medical Association Guides to the Evaluation of Permanent Impairment, 178 (5th ed. 2001) (AMA Guides), it did not come directly from the AMA Guides. Dr. Mackey admitted that Mr. Archibald's impairment rating would probably be a little higher had he used the AMA Guides directly.[4]

Ms. Patsy Bramlett testified at trial as a vocational expert witness for Saturn. She stated that while she did not talk to Mr. Archibald personally, she considered the doctors' depositions, as well as Mr. Archibald's education, work background, and medical treatment. Ms. Bramlett testified that in making her determination she factored in the physical restrictions given by each

[4] Q. And the ten percent rating that you mentioned earlier, is that just – well, let me ask you this: Does that come precisely out of the AMA Guides, or is that just based upon your experience?
A. It's based on my experience using the Guides, but it does not come directly out of the Guides.
Q. If you use the Guides directly, would it probably be a little more than that?
A. Yes, sir.
(Deposition of Dr. Mackey, pp. 16-17, ll. 25-10).

doctor, but not the physical impairment rating assignments. Because Dr. Mackey did not put any physical restrictions on Mr. Archibald, Ms. Bramlett opined that he would have no vocational disability, based upon that doctor's testimony. Conversely, Dr. Gaw assigned physical restrictions, and based on his testimony Ms. Bramlett determined that Mr. Archibald would have a vocational disability rating of ten percent.

Nevertheless, the trial court assigned Mr. Archibald a forty percent vocational impairment rating to the body as a whole after weighing his testimony and credibility against that of Ms. Bramlett. Considerable deference must be accorded the trial court's factual findings on issues related to the credibility of witnesses and the weight to be given their testimony. Krick, 945 S.W.2d at 712. Further the trial court's findings of fact are presumed correct unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Saturn contends that Mr. Archibald's job opportunities are not affected by his injuries, since at the time of trial, he was employed by Saturn and anticipated completion of the journeyman apprentice program. In determining vocational disability, the question is not whether the employee is able to return to the work being performed when injured, but whether the employee's earning capacity in the open labor market has been diminished by the residual impairment caused by a work-related injury. Corcoran, 746 S.W.2d at 458. Therefore, the test is whether or not there has been a decrease in earning capacity in any available line of employment. Greeneville Cabinet Co. v. Ramsey, 260 S.W.2d 157, 160 (Tenn. 1953), citing Standard Surety & Casualty Co. v. Sloan, 173 S.W.2d 436, 438 (Tenn. 1943).

Mr. Archibald testified that he continues to suffer from pain in his neck and numbness in his right arm. Mr. Archibald further testified to limitations in lifting heavy objects and working with his arms overhead or outstretched. He described difficulty in concentrating at work due to the medication he takes for pain and inflammation. Mr. Archibald maintained that he has only been able to continue in his present position due to a unique partner system at Saturn, where journeymen are teamed and share the workload between them. Also, Mr. Archibald stated that since most employers do not use this system, he could not work in a similar position elsewhere without a partner on whom to rely for heavy lifting. Finally, Mr. Archibald testified that due to his neck injury, he has reduced his overtime significantly and will have to retire much earlier than planned. Consequently, we find that the evidence does not preponderate against the trial court's determination of a forty percent impairment rating.

Therefore, we affirm the holding of the trial court. The costs of appeal are taxed to the appellant, Saturn Corporation.

JERRY SCOTT, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AUGUST 2, 2004 Session

JAMES ARCHIBALD v. SATURN CORPORATION
Circuit Court for Maury County
No. 9834

No. M2003-02493-WC-R3-CV - March 9, 2005

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, Saturn Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM