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

WILLIAM T. CARLSON v. SATURN CORPORATION

Direct Appeal from the Circuit Court of Maury County
No. 9831, Hon. Stella L. Hargrove, Judge

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No. M2003-02521-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 Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court awarded benefits of thirty-six percent permanent partial disability, finding that the employee had given timely notice of a gradual, work-related injury. The employer contends that the trial court erred in the following: (1) finding both a gradual injury and that the notice requirement under Tenn. Code Ann. § 50-6-201 was satisfied; and (2) finding that the injury was work-related in light of the medical evidence. The employee counters by claiming that the appeal is frivolous. We hold that the judgment of the trial court should be affirmed on both issues, and that the appeal is not frivolous.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal 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.

Thomas H. Peebles, IV, and Terrence O. Reed, Nashville, Tennessee, for the appellant, Saturn Corporation.

Larry R. McElhaney, Arena & McElhaney PLLC, Nashville, Tennessee, for the appellee, William T. Carlson.

MEMORANDUM OPINION

On February 22, 2002, the employee-appellee, William T. Carlson, initiated this civil action to recover workers' compensation benefits alleging he sustained a neck injury arising out of and within the course and scope of his employment with Saturn Corporation ("Saturn"). The trial court found that Mr. Carlson was a credible witness and that he had given timely notice of a gradual, on-the-job injury. Mr. Carlson was awarded $80,928.00 for his thirty-six percent permanent partial disability. Two issues are presented for review: (1) whether the trial court erred in finding that Mr. Carlson's

injury was work-related; and (2) that he provided timely notice of the injury to Saturn pursuant to Tenn. Code Ann. § 50-6-201. Mr. Carlson has countered by raising the issue that Saturn's appeal is frivolous.

Mr. Carlson was forty-nine years old at the time of trial. He has a twelfth-grade education with no vocational training other than on-the-job skills. He is an avid weight-lifter and has trained in that activity since the age of twelve. Before transferring to the Saturn plant in 1993, Mr. Carlson had been employed by General Motors Corporation in California for approximately twenty years as an assembly line worker. On August 22, 2000, prior to this injury, Mr. Carlson underwent knee surgery and returned to work at Saturn in September 2000. He was initially given light duty with restrictions and then placed on more active duty on November 14, 2000.

On or about November 14, 2000, Mr. Carlson began experiencing discomfort in his neck and shoulder while at work on Saturn's automobile assembly line. The discomfort occurred while he was using a torque gun to secure seat belt brackets and seal deck lids. This work required Mr. Carlson to resist the torque gun with his left arm while using his outstretched arm to push the deck. Mr. Carlson testified that he did not realize that he had injured himself, and he dismissed the discomfort as his being out of shape and having just recently returned to active duty. As Mr. Carlson continued to perform those jobs, the pain in his neck and shoulder gradually increased. However, while Saturn was shut down briefly for the holiday season, he experienced no pain. In January 2001, Mr. Carlson began to experience weakness in his left arm. At that time, in an attempt to recondition and strengthen his arm, Mr. Carlson began lifting light weights, which he had not done since his August 2000 knee surgery.

On January 30, 2001, Mr. Carlson first visited Saturn's medical facility for the purpose of undergoing a "power equipment physical." On that day, he discussed the problems with his left shoulder with the nurse. The medical record indicates that Mr. Carlson told the nurse that he was injured while either using the torque gun on the bracket job or lifting weights. However, at trial, Mr. Carlson stated that he had only told the nurse that he was injured at work and denied that he had suggested to her that lifting weights could have caused his injury. During the January visit, the nurse did not advise Mr. Carlson to fill out Saturn's "101 Form" in order to claim a work-related injury.

Mr. Carlson continued to work until March, with no improvement in his condition. On March 13, 2001, he visited the medical facility again, reporting pain in his shoulder. On that visit, Mr. Carlson filled out the 101 Form for workers' compensation benefits. On the form he stated that his symptoms first began on November 14, 2000. He also described the onset of his symptoms as being gradual rather than sudden. (Trial Ex. 3).

On September 17, 2001, Mr. Carlson underwent surgery performed by Dr. Vaughn Allen, a neurosurgeon. Dr. Allen testified that a herniated disc in the neck had caused Mr. Carlson's problem. Dr. Allen also testified that he believed that the injury was work-related if the history provided to him by Mr. Carlson was accurate.

Appellate review 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). 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 the factual findings and conclusions of the trial court in workers' compensation cases in more depth. 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, when the medical testimony in a workers' compensation case is presented by deposition, the reviewing court is able to make its own independent assessment of the medical proof to determine where the preponderance of the proof lies. Cooper v. Insurance Co. of North America, 884 S.W.2d 446, 451 (Tenn. 1994). In such cases, this Court may draw its own conclusions about the weight and credibility of deposition 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).

The trial court found Mr. Carlson's notice to be timely, due to the fact that his injury was gradual; hence, the notice obligation had not arisen until he was unable to work. In its appeal, Saturn argues that Mr. Carlson's injury was sudden, since he was able to identify the exact date of the injury, as well as the activities that caused his pain. 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 in cases where the injury occurs as the result of gradual or cumulative events. In those cases, notice of injury is to be provided to the employer within thirty days after the employee either: (1) knows or reasonably should know that he has suffered a work-related injury resulting in permanent physical impairment; or (2) is rendered unable to continue to perform his normal work activities as a result of a work-related injury and knows or reasonably should know that the injury was caused by work-related activities. Tenn. Code Ann. § 50-6-201(b). However, Section 50-6-201(a) provides there can be a reasonable excuse for failure to give timely notice, and the claimant has the burden of proving a reasonable excuse for failure to give such notice. Aetna Casualty & Surety Co. v. Long, 569 S.W.2d 444, 449 (Tenn. 1978).

In order to resolve the issue of notice, we must first determine whether this was an accidental injury, the symptoms occurring thereafter being simply manifestations of the original injury, or whether this was a gradual injury which continued to develop. In cases involving gradual injury, there is no particular incident or event identifiable as a causal accident. Lawson v. Lear Seating Corp., 944 S.W.2d 340, 342 (Tenn. 1997). Rather, the injury results from the ordinary or usual strain or exertion of the employee's job, and because there is no one particular, identifiable incident, a new trauma is suffered

each working day. Id. In cases involving gradual onset injuries, the duty of the employee to give notice to the employer does not arise until the employee becomes unable to work because of the condition. Baker v. Home-Crest Corp., 805 S.W.2d 373, 376 (Tenn. 1991).

We find that the evidence does not preponderate against the trial court's finding that due to the gradual nature of the injury, the notice requirement was satisfied. In this case, the gradual nature of Mr. Carlson's injury is evidenced by the fact that it did not result from a single event and its subsequent progression as he continued working, but rather was an ongoing injury. Although Mr. Carlson identified November 14, 2000, as the date of injury onset, his testimony was that he recorded this date because that was the day when he returned to active duty and consequently began experiencing gradual pain in his neck and shoulder. Likewise, although Mr. Carlson experienced discomfort when performing certain activities, he performed the jobs for several hours a day, and there was no one point in time where he could identify an initial trauma. Over time, the discomfort in his neck and shoulder developed into actual pain, and then into weakness in his left arm. The development of symptoms was not just a manifestation of an original injury, but resulted from the culmination of ongoing injuries. Moreover, Mr. Carlson continued working for several months following November 14, 2000, and each additional day he worked constituted a successive injury. Therefore, we find that the trial court was correct in concluding that Mr. Carlson's injury was gradual.

Saturn next contends that Dr. Allen's testimony does not support causation for a gradual injury. In both his C-32 report [1]and deposition, Dr. Allen testified that Mr. Carlson's injury was work-related "if the onset was that date while doing that activity." [2] At trial, Saturn presented the nurse's notes taken during Mr. Carlson's visit to its medical facility on January 30, 2001. These notes indicated that Mr. Carlson had told the nurse that he was injured while either using the torque gun or lifting weights. Dr. Allen stated that based upon these notes, he could not testify with medical certainty that the neck injury was related to work activities at Saturn if the notes were, indeed, accurate. Dr. Allen also testified that Mr. Carlson had pinched nerves in his shoulder prior to November 14, 2000. Therefore, Saturn argues that the medical evidence did not eliminate the possibility that Mr. Carlson's injury was not work-related, but rather, a preexisting neck problem.

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[1] 3. Considering the nature of Claimant's occupation and medical history along with diagnosis and treatment, does this injury more probably than not arise out of the Claimant's employment?

[X] YES [?]NO

(Trial exhibit 1).

[2] Q. And if that history is accurate, Dr. Allen, what is your opinion as to the causation of the neck injury which you treated and performed surgery on?

A. If that history is accurate, if the onset was that date while doing that activity, my opinion would be that this was a work-related injury.

Q. Would that opinion be to a reasonable degree of medical certainty?

A. Yes.

(Deposition of Dr. Allen, pp. 24-5, ll. 23-3).

An injury arises out of and in the course of employment if it has a rational causal connection to the work and occurs while the employee is engaged in the duties of his employment. Hall v. Auburntown Indus., Inc., 684 S.W.2d 614, 617 (Tenn. 1985). Any reasonable doubt as to whether an injury arose out of the employment is to be resolved in favor of the employee. Id. Absolute medical certainty is not required. The trial judge may properly predicate an award on medical testimony to the effect that a given accident "could be" the cause of the plaintiff's injury when he also has before him lay testimony from which it may be reasonably inferred that the accident in fact was the cause of the injury. Chapman v. Employers Ins. Co., 627 S.W.2d 122, 123 (Tenn. 1978).

Saturn points to testimony by Dr. Allen that there was no causal connection between Mr. Carlson's injury and his employment. However, that testimony was given in response to a patient history recorded by Saturn's company nurse. Dr. Allen's response was conditioned on the accuracy of those notes, and it was only when presented with that particular history that he could not opine the injury was work-related.[3] We observe that the nurse's notes recorded on January 30, 2001, were inconsistent with Mr. Carlson's own testimony regarding causation. We find that the evidence in this case supports the trial court's finding of a causal connection between Mr. Carlson's injury and his employment. The trial judge had discretion in weighing conflicting evidence. The Court heard the testimony, observed the witnesses, and accredited the testimony of Mr. Carlson. We find no compelling reason to disagree with the trial judge's finding. Additionally, even if Mr. Carlson exhibited a preexisting neck problem, the trial court could still find the injury at issue was work-related under Hall, resolving any reasonable doubt in favor of the employee. Further, Dr. Allen testified that despite the preexisting pinched nerves, it was the herniated disc that had progressed the problem from asymptomatic to symptomatic, actually causing Mr. Carlson's problem. Therefore, we affirm the trial court's finding regarding causation.

Mr. Carlson counterclaims that Saturn's appeal is frivolous. We disagree. Damages for a frivolous appeal may be awarded if an appeal has no reasonable chance of success and if the issues raised are issues of fact with material evidence supporting the trial court's finding on those issues. Liberty Mutual Ins. Co. v. Taylor, 590 S.W.2d 920, 922 (Tenn. 1979). In the present case, the appeal had a reasonable chance of success, as the sufficiency of the evidence to support the trial court's findings is at issue. As such, the appeal was not frivolous.

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[3] Q. Based upon – I want you to assume just for a second that that's an accurate history as to the onset of the symptoms in his shoulder. Can you state with a reasonable degree of medical certainty whether – based upon that history that there is any connection between work at Saturn and the ruptured disk that the plaintiff was later found to have?
A. Not based on that history, I could not.
Q. Why not, Doctor?
A. Well, in order for one to state that it's work-related, or at least from my personal perspective to state that it's work-related, I have to have something that states that the symptoms were concomitant with a specific injury that occurred at work. And if that history is accurate, of course – that you just read me, that does not state that something acutely started at work.
(Deposition of Dr. Allen, pp. 10-ll, ll. 14-5).

After careful review of the record, we affirm the findings of the trial court. Costs of the appeal are taxed to the appellant, Saturn Corporation.

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JERRY SCOTT, SENIOR JUDGE

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

WILLIAM T. CARLSON v. SATURN CORPORATION

Circuit Court for Maury County
No. 9831

No. M2003-02521-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