IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 24, 2005 Session

DARRELL DENNEY v. NORWALK FURNITURE CORPORATION.

Appeal from the Circuit Court for Putnam County, Tennessee
No. 01-484; Hon. Vernon Neal, Chancellor

No. M2004-01661-WC-R3-CV - Mailed - June 28, 2005
Filed - September 28, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with the provisions of Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Worker, Darrell Denney, has appealed the action of the trial court, which dismissed his cause of action, finding that his injury was entirely degenerative in nature, and was not caused by his employment, nor was it aggravated or exacerbated by his employment sufficient to cause the claim to be compensable under the terms of the Worker's Compensation law. Upon our consideration of all of the evidence, we find that the evidence preponderates in favor of a finding of an exacerbation of the Worker's underlying condition, to cause the injury to be compensable. Thus, we find that the decision of the trial court should be reversed, that the Worker is entitled to an order holding him harmless from medical expenses incurred, that he is entitled to an award of temporary total disability from the date he left his employer until the date when he returned to work, and that the Worker should be compensated in a sum of 70% vocational disability apportioned to the right arm. We remand the case to the trial court for determination of remaining issues, including commutation of the award, to the extent it has not fully accrued, any offsets which may be applicable, collection of costs, and such further matters which arise in accordance with the terms of this opinion.

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

ROBERT E. CORLEW, SPECIAL JUDGE, delivered the opinion of the court, in which ADOLPHO A. BIRCH, JUSTICE, AND DONALD P. HARRIS, SENIOR JUDGE, joined.

Ronald Thurman, Cookeville, Tennessee, for the Appellant, Darrell Denney.

Daniel H. Rader, III, Moore, Rader, Clift, and Fitzpatrick, P.C., Cookeville, Tennessee, for the Appellees, Norwalk Furniture Corporation.

MEMORANDUM OPINION

FACTUAL BACKGROUND

The facts before the Court were largely undisputed. The Worker, who had been an employee of the Defendant, Norwalk Furniture Corporation, since August 1986, alleged that he suffered injuries to his right wrist on two separate occasions. The first injury occurred on March 28, 2002, and was diagnosed only as a sprain. Although the Worker returned to work for the pre-injury employer without restrictions, he alleged that he continued to suffer pain and discomfort. The second, and more significant injury occurred on July 11, 2002, when the Worker and a fellow employee were attempting to remove a heavy gearbox. The co-worker who was assisting the Worker to remove the gearbox testified that he did not recall any complaint being made by the Worker at the time. However, the Worker asserts that he suffered immediate pain because his wrist was "hyper-extended backwards." The Worker was sent to a walk-in clinic, where a sprain was again diagnosed. When pain continued, the Worker was sent to an orthopedic surgeon, John M. Turnbull. Dr. Turnbull ordered x-rays and referred the Worker to David Schmidt, another orthopedic surgeon. Both Dr. Turnbull and Dr. Schmidt diagnosed the Worker with an advanced scapholunate collapse of the right wrist, which occurred at or near the area where hand and the wrist join. Dr. Turnbull discussed the fact that this type of injury does not occur generally due to chronic overuse, but rather

> [M]ost commonly this occurs as a result of an acute forceful injury in which either the scaphoid bone breaks and the wrist becomes unstable, or the ligament between the scaphoid and the lunate --- which are the two bones in the wrist --- becomes torn. and over a period of time of using the wrist, which is unstable now because of that injury, it become arthritic.

Deposition of Dr. Turnbull, at 11. Dr. Schmidt performed surgery on the Worker's

wrist, which the Worker testified cause him to experience some, but not complete, relief. The Worker was released to return to work for his pre-injury employer on August 18, 2003, without restrictions, and subsequently reached maximum medical improvement on November 24, 2003. Previously, in 1995, the Worker had suffered a seemingly unrelated injury to his hand where a "4 x 4 board" hit his hand. The Worker had suffered a fracture of the first metacarpel, which is the bone leading to the thumb, an area which is one inch away from the area of the Worker's wrist where the advanced scapholunate collapse was diagnosed. The trial court denied the claim, but opined that should the claim have been found to have been compensable, the Worker's vocational disability totaled 70% apportioned to the right arm.

The evidence is undisputed that, at the time of the 2002 incidents, the Worker suffered from a pre-existing condition. In addition, the evidence preponderates in favor of a finding that the pre-existing condition was totally asymptomatic prior to the first of the 2002 incidents, but so symptomatic after the second such incident that a surgical procedure was required.

The Worker was fifty years of age at the time of trial and has a twelfth-grade education, but no other formal training. He was in the Marine Corps, served a tour of duty in Vietnam. He performed factory work for the Defendant for more than fifteen years prior to the occurrence of issues herein. He is right-hand dominant. Following this injury, a complete fusion of his wrist was performed surgically, which greatly limits the Worker's motion. Nonetheless, he has returned to work for his pre-injury employer. The injury is a scheduled member injury to the right arm.

STANDARD OF REVIEW

Our 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(e)(2). Conclusions of law established by the trial court come to us without any presumption of correctness. Watt v. Lumbermens Mutual Casualty Insurance Co., 62 S.W.3d 123, 127 (Tenn. 2001).

ISSUES

The evidence preponderates in favor of a finding that, at the time of his incidents in 2002, the Worker had a pre-existing condition caused by degenerative arthritis. Further, the proof preponderates in favor of a finding that the Worker sustained two incidents at work in 2002, where he injured his wrist, and an incident in 1995, which involved his hand. Finally, the proof preponderates in favor of a finding that, as a result of one, both, or all three of the incidents at work, the Worker's pre-existing condition became symptomatic. Two issues then face this Court. First, whether there is sufficient proof to determine that there was a causal connection between the Worker's 1995 injury and his current condition. To do so, we must determine that the Worker became symptomatic in 2002 partially as a result of the 1995 work related injury, and thus that the 1995 injury set in motion the developing arthritic condition which ultimately required a surgical procedure. Second, independent of the first issue, is the question, separate and apart from the 1995 injury, whether the Worker's pre-existing condition, regardless as to how it developed, caused an aggravation or exacerbation of that preexisting condition sufficiently related to the Worker's employment to cause the Employer to be liable under the terms of the Workers' Compensation law.

Both issues contain factual and legal components. With regard to the first issue, whether the 1995 injury ultimately became disabling, the question is primarily the factual issue. The proof is undisputed that scapholunate collapse resulted from an injury five to fifteen years prior. The proof is further undisputed that the Worker suffered an injury to his hand in 1995 which then became symptomatic in 2002. The question, then, is whether there is a causal connection between that 1995 injury and the 2002 problems.

Concerning the second issue, there are two sub-issues. First, is a factual medical issue as to whether the Worker's underlying medical condition was advanced anatomically by his employment. Second, if there was no advancement medically, there is then a legal issue as to whether an injury which causes a previously asymptomatic underlying condition to become symptomatic is, within itself, compensable, where there is no anatomical advancement of the underlying condition. The medical testimonies of the three physicians who testified as to all of these issues is extremely significant.

EXPERT TESTIMONY

Three orthopedic surgeons testified: Dr. John M. Turnbull, who first saw the Worker some five weeks after the second injury, and after the Worker had initially received immediate care; Dr. David M. Schmidt, to whom the Worker was then referred, and who performed the majority of the treatment for the Worker, including a surgical procedure; and Dr. David W. Gaw, who saw the Worker for purposes of an independent medical evaluation.

Dr Turnbull opined that the Worker's injury was not work-related. It was his opinion that the type of injury from which the Worker suffered was chronic, generally, resulted from "a remote injury," or past trauma, some five to fifteen years previously. Repetitive work generally does not cause this type of condition. Dr. Turnbull opined that employees "can have radiographic problems without symptoms, and then develop symptoms after another minor injury to that area," but the injuries of which the Worker complained did not advance his condition, but only "made it symptomatic." Dr. Turnbull acknowledged that the two recent injuries that the Worker suffered at work caused him to experience such pain that it was disabling. He testified that the anatomical changes "were already so severe in the wrist that any test that would have been done would have just confirmed the chronic nature of his injury." Dr. Turnbull felt that the Worker would have required surgery at some point regardless of his employment. He explained that sometimes "a minor injury can just set off the time-bomb that was ticking already." Regarding a causal connection between the 1995 injury and the 2002 problems, Dr. Turnbull simply opined that it was "possible" that the chronic condition would have developed after the 1995 injury, but whether or not such causal connection was more likely than not, he responded that such an answer would be "purely speculative."

Dr. Schmidt opined that although the Worker's wrist condition was "severe," requiring a complete fusion, there was "not a structural or significant pathologic change" which resulted from the Worker's most recent injuries. He felt that the injuries were caused by a pre-existing condition, and he expressed his opinion that the 2002 incidents were in the nature of "a symptom aggravator as opposed to pathology aggravator." Like Dr. Turnbull, Dr. Schmidt opined that the Worker's injury could not have been caused by repetitive use. When asked whether work which involved lifting heavy lumber, would "accelerate" the arthritic process, Dr. Schmidt responded:

> [Q]uite frankly, it's kind of a semantic issue. Accelerate. It's a wear process that's going to progress with time because of mechanical change.

> It's a mechanical alteration in the way the two bonds fit together so they wear out.
>
> And, again, if you don't do anything with your wrist, it might not wear out as much. If you're using your wrist for things --- and I can't say within a reasonable degree of medical certainty that picking up lumber would accelerate this more so than anything else. Now, if you were just doing a great deal of very heavy gripping, yes, it might progress a bit more rapidly than otherwise, but the end stage result of this problem, regardless of that being a factor or not, is going to be that the wrist is going to wear out over time.

Deposition of Dr. Schmidt, at 32. Dr. Schmidt further acknowledged that increases in symptoms are sometimes caused by extremely minute anatomical changes which medical science is not sufficiently advanced to note or detect. In addition, he testified that it is "conceivable" that the Worker may have suffered some minute anatomical change as a result of either or both of the 2002 incidents which he was unable to detect, though he opinion was that no such change occurred. He opined that the Worker would sustain 30% anatomical impairment apportioned to the right arm just for the surgical procedure performed. Dr. Schmidt testified without equivocation that the 1995 injury had no relation to the 2002 problems.

Dr. Gaw diagnosed the Worker with post-operative arthrodesis, or fusion of the right wrist. He opined that although the Worker's degenerative condition was pre-existing, the 2002 incidents both aggravated and accelerated the Worker's underlying condition. Dr. Gaw testified that "any excess stress . . . just further aggravates it or accelerates it because it doesn't have the normal cartilage, it's not -- in this condition mechanically the bones were not lined up right. So any increased stress will cause the condition to get worse or proceed." Further, he testified that, although the 2002 injuries caused the Worker's underlying condition to become painful, the pain was caused by an aggravation of the underlying condition: "I think it made the pain worse by aggravating his condition. I don't know any other way to explain the increase in pain." Based on the loss of range of motion of the right wrist, Dr. Gaw opined that the Worker sustained an anatomical impairment of 28% apportioned to the right arm. Concerning the 1995 injury, Dr. Gaw opined that there was no causal connection between that injury and the 2002 incidents. It was his opinion that although the injured areas were only an inch apart, they involve different anatomical parts of the wrist. While acknowledging the pre-existing nature of the Worker's arthritic

problems in his wrist, Dr. Gaw emphasized the aspect of pain as a result of the 2002 incidents: "Those changes take a good while to develop. . . .[T]he only reason for surgery is pain. . . . I don't care what the x-ray looks like, you would not operate on it unless it was painful." Dr. Gaw further testified affirmatively that the pain was caused by an anatomical change:

> I can say with reasonable medical certainty if he was not having any pain prior to [the 2002 incidents] and having severe pain afterwards that there had to be some kind of change, be it microscopic, hormonal, chemical, that would produce the increased symptomatology.

Deposition of Dr. Gaw, at 27. He testified further:

> If a person goes from having very little pain to a lot of pain that results in a major treatment such as surgery, then there has to be some ---that's the reason for surgery is increased pain. [Dr. Schmidt] didn't treat the x-ray.
>
> I don't care if he wasn't having pain, he would not have had any treatment. I don't think we're smart enough yet to measure all of these things, but certainly he had a pre-existing condition.

Deposition of Dr. Gaw, supra, at 28.

LAW

Considering the evidence, then, as we are required to do, to determine where the preponderance of the evidence lies, we first consider the issue of a causal connection between the 1995 injury and the injury which manifested itself in 1995. The trial court found no causal connection. Dr. Schmidt and Dr. Gaw each found no connection, and Dr. Turnbull expressed his opinion likewise that there was no causal connection. However, Dr. Turnbull testified that it was "possible" that there was a causal connection between the two incidents, inasmuch as he stated that the injury from which the Worker suffered in 2002 was caused by a remote injury five to fifteen years prior which often becomes symptomatic later upon a smaller subsequent injury.

The Workers' Compensation laws should be "liberally construed to promote and adhere to the [purposes of the Workers' Compensation] Act of securing benefits

to those workers who fall within its coverage." Martin v. Lear Corp., 90 S.W.3d 626, 629 (Tenn. 2002). Nonetheless, the burden of proving each element of a worker's cause of action rests upon the worker in every Worker's Compensation case. Cutler-Hammer v. Crabtree, 54 S.W.3d 748, 755 (Tenn. 2001). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the Worker. Phillips v. A & H Construction Co., 134 S.W.3d 145, 150 (Tenn. 2004); Reeser v. Yellow Freight Systems, Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Medical proof may not be speculative, however. Clark v. Nashville Machine Elevator Co., Inc., 129 S.W.3d 42, 47 (Tenn. 2004); Simpson v. H. D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990). Of course, absolute medical certainty is not required. Hill v. Eagle Bend Manufacturing, Inc., supra, at 487; Tindall v. Waring Park Association, 275 S.W.2d 935, 937 (Tenn. 1987). Our courts have "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 Systems, Inc., supra, at 692; accord, Long v. Tri-Con Industries, Ltd., 996 S.W.2d 173, 177 (Tenn. 1999) P & L Construction Co. v. Lankford, 559 S.W.2d 793, 794 (Tenn. 1978); GAF Building Materials v. George, 47 S.W.3d 430, 433 (Tenn. Workers' Comp. Panel 2001). The element of causation is satisfied where the "injury has a rational, causal connection to the work," Braden v. Sears, Roebuck & Co., 833 S.W.2d 496, 498 (Tenn. 1992).

We agree with the trial court that although there is some evidence from which the court could conclude that there is a causal relationship between the Worker's 1995 injury and the problems which he experienced in 2002, the evidence preponderates against such a finding. We agree with the Worker that the evidence preponderates in favor of a finding that the current problems result from a chronic ailment which was caused during the time the Worker was employed by the Defendant. However, the evidence preponderates against a finding that the 1995 injury was related to the current problems. There is no evidence of any of trauma to the Worker's wrist, and in the absence of such proof, the Worker cannot prevail as to this issue. Though Dr. Turnbull testified that a causal connection was possible, he also opined that there was no causal relationship. Dr. Schmidt and Dr. Gaw both refused to acknowledge that it was even possible that there was a relationship between the 1995 incident and the current problems. When weighing all of this evidence, we conclude that the evidence preponderates against a finding of a causal connection.

Next we consider whether the 2002 incident is compensable. Upon our consideration of the evidence, we find that the proof preponderates in favor of compensability. In determining this issue, we have recognized the two sub-issues stated above. We have first considered the factual medical issue as to whether there was an anatomical change in the Worker. Dr. Gaw clearly expressed his opinion that there was an anatomical change, no matter how minor or insignificant. Dr. Schmidt testified it was his opinion that there was no anatomical change, but he acknowledged that the question was one of semantics. He acknowledged that it certainly was conceivable that minute changes may have occurred, and he further acknowledged the short-comings of the practical detection of such minute changes. Dr. Turnbull testified that the advanced state of the Worker's pre-existing problems was so great that it was not possible to detect any further changes through x-ray. Thus, despite the opinions of both Dr. Schmidt and Dr. Turnbull that there were no anatomical changes, and upon the further extremely firm opinion of Dr. Gaw that there had to be minute anatomical changes in order for the extreme pain suddenly to commence, we find that the evidence preponderates in favor of a finding that minute anatomical changes occurred which caused an advanced chronic problem which had never been symptomatic, suddenly to become symptomatic after the incident of February 2002, and the more significant incident of July 2002 which caused the pain to be disabling. We have noted Dr. Gaw's testimony that, in fact, it was the pain that caused the surgery to become necessary and that surgery is never indicated for this type of condition, regardless how advanced it may be, until it becomes symptomatic. The condition became symptomatic only as a result of the incidents at work.

The law provides that an employer takes the employee as he is, with his defects and pre-existing afflictions. E.g., Rogers v. Shaw, 813 S.W.2d 397, 399 (Tenn. 1991); Express Personnel Services, Inc. v. Belcher, 86 S.W.3d 498, 500 (Tenn. Worker's Comp. Panel 2002); Flowers v. South Central Bell Telephone Co., 672 S.W.2d 769, 770 (Tenn. 1984). One who employees a worker essentially "assumes the risk [that an employee may have] a weakened condition aggravated by an injury which might not affect a normal person" without the pre-existing condition. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). Further, the law has established that it is unnecessary that a court find that a work-related accident caused permanent impairment in order for an injury to be compensable. Williams v. Delvan Delta, Inc., 753 S.W.2d 344, 346 (Tenn. 1988); Elmore's Variety Store v. White, 553 S.W.2d 350, 352 (Tenn. 1977). Where one or more events occur which cause the aggravation of a pre-existing weakness, condition or disease, the Worker is entitled to

compensation. Parks v. Tennessee Municipal League Risk Management Pool, 974 S.W.2d 677, 679 (Tenn. 1998); Arnold v. Firestone Tire and Rubber Co., 686 S.W.2d 65, 67 (Tenn. 1984).

We find that the medical factual evidence sufficiently establishes that there was an anatomical change in the Worker. Thus, we need not address whether an injury which is asymptomatic and then becomes so painful that surgery, which had never been considered, was unavoidable, within itself causes an injury to be compensable, even when there is no anatomical advancement. The law has been determined that an aggravation or exacerbation of a pre-existing injury does not occur where there is no anatomical change in the person, but only an increase in pain or symptoms caused by the underlying condition. Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d 888, 891 (Tenn. 1991); Talley v. Virginia Insurance Reciprocal, 775 S.W.2d 587 (Tenn. 1989); Smith v. Smith's Transfer, 735 S.W.2d 225-226 (Tenn. 1987). An exception to this rule has been established, however, where the Worker's aggravation causes only pain, but where the pain has become totally disabling. Hill v. Eagle Bend Manufacturing, Inc., 942 S.W.2d 483, 488 (Tenn. 1997); White v. Werthan Industries, 824 S.W.2d 158, 160 (Tenn. 1992) ("There is no doubt that pain in considered a disabling injury, compensable when occurring as a result of a work-related injury." quoting Talley, supra, at 592). We do not consider it necessary further to address this question, however.

SUMMARY

Thus we find that the injury is compensable. We acknowledge the wisdom of the trial judge in proceeding, after he had heard all of the evidence, to determine the proper percentage of vocational disability, though he, in fact, found the injury was not compensable. Such determination is extremely valuable in cases such as this one where the proof is relatively evenly balanced. Where this Court subsequently determines that an injury is compensable, it is not necessary to remand the case for purposes of determining the proper percentage of vocational disability, which we would otherwise be required to do. Because the trial court made the finding in the alternative, we now can proceed simply to determine whether the alternative finding as to the percentage of vocational disability determined by the trial court is in accordance with the preponderance of the evidence. Upon our consideration of the Worker's age, educational, job skills, capacity to work, anatomical impairment, and the lay testimony of the Worker and his wife, we agree with the trial court and also

find that the evidence preponderates in favor of a determination that the Worker has suffered 70% vocational disability apportioned to his right arm.

Based on the foregoing, we reverse the determination by the trial court that the Worker's injury is not compensable, but we affirm the trial court's determination that a 70% award apportioned to the arm is appropriate. This cause will be remanded to the trial court for determination of issues surrounding medical bills, temporary disability, and such further proceedings as may be necessary under the terms of this opinion.

The costs on appeal will be taxed against the Employer. As a part of the costs on appeal, the mediator's costs will also be paid by the Employer.

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ROBERT E. CORLEW, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
SPECIAL WORKER'S COMPENSATION APPEAL PANEL
MARCH 24, 2005 Session

DARRELL DENNEY v. NORWALK FURNITURE CORPORATION

Circuit Court for Putnam County
No. 01-484

No. M2004-01661-WC-R3-CV - Filed - September 28, 2005

JUDGMENT

This case is before the Court upon the motion for review filed by Norwalk Furniture Corporation 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs, including the mediator's costs, are assessed to Norwalk Furniture Corporation, for which execution may issue if necessary.

BIRCH, J., NOT PARTICIPATING