IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 22, 2005 Session

DANNY RUSSELL v. THYSSENKRUPP ELEVATOR MANUFACTURING, INC.

Direct Appeal from the Chancery Court for Hardeman County
No. 14160 Martha B. Brasfield, Chancellor

No. W2004-01472-SC-WCM-CV - Mailed August 16, 2005; Filed November 29, 2005

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 findings of fact and conclusions of law. In this case, the employer contends that the trial court erred in finding: 1) that the employee's pre-existing leg condition was aggravated by his work for the employer; 2) that the employee gave proper notice of his injuries; and 3) that the employee had sustained a 90% permanent partial disability to the body as a whole. For the reasons set out below, we affirm the judgment of the trial court.

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

JAMES L. WEATHERFORD, SR.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SR.J., joined.

Gregory D. Jordan and James V. Thompson, Jackson, Tennessee, for the appellant, ThyssenKrupp Elevator Manufacturing, Inc.

Steve Taylor, Memphis, Tennessee, for the appellee, Danny Russell.

MEMORANDUM OPINION

Mr. Danny Russell was forty-four years old at the time of trial. He has a bachelor's degree in agriculture and has completed half of the course requirements for a master's degree in business administration from the University of Memphis. His prior experience includes work at a farmers' co-op and as a sales representative for an office supply company.

Mr. Russell has worked for the employer, ThyssenKrupp Elevator Manufacturing, Inc., since

1985 as a packer/assembler. He left this employment for approximately eighteen months to serve in the United States Navy in the mid-1980's and attended aviation officers candidate school. While serving in the military, Mr. Russell sustained stress fractures to both lower legs. When the fractures did not heal properly and the pain did not resolve, he was medically discharged from the military and received a 10% disability to each leg for these injuries.

Mr. Russell returned to work for ThyssenKrupp in the packing department and the crating department. Dr. Lowell Stonecipher examined him and found that he was fit to return to work at full duty.[1] He continued to have mild pain in his legs but did not have trouble doing his job. However, at times he was not able to do as much at home after work His wife testified that he would have to elevate his feet after work and had to rest more than most people. He had occasional flare-ups of leg pain that would come and go and sometimes walked with a slight limp.

In the summer of 2000, Mr. Russell started working on the PF line where he would place elevator parts on a wooden shipping skid and push the skid down the conveyor-type line. The PF line was at the end of the line and at this point the skids would weigh anywhere from 500 to 4500 pounds. There were approximately thirty to forty skids a day pushed down the line on his shift. Some skids were light enough that he could push them down the line without any assistance. With the heavier ones, he would push the skid as far as he could and then call for assistance. Mr. Russell also indicated that the metal track that he pushed the skids down was bent because it had been damaged by forklifts. This made it even harder to push the skids down the line.

Very soon after transferring to the PF line he started having severe pain in his lower legs. He did not report this to his employer because he thought it was related to his prior injury while in the military. He continued on the PF line for approximately three months. From 1988 until the summer of 2000, when he started working on the PF line, he never missed work because of problems with his legs. In December 2000, he requested and received a transfer to another position in the plant. Mr. Tony Faehr, subplant manager, testified that Mr. Russell never complained of increased pain in his legs or a work-related injury. Other workers did not notify him of complaints by Mr. Russell.

After he left the PF line, Mr. Russell's leg pain continued to increase. In January of 2001, he realized he would have to seek medical treatment for his legs. Beginning in March 2001 he saw Dr. Kelly Pucek and other physicians for treatment. On July 10, 2001 he saw Dr. G. Bradford Wright, orthopedic surgeon, who thought he had activity-induced compartment syndrome of the extremities. According to Dr. Wright's records, Mr. Russell had reported that he had had intermittent pain in his legs for about 15 years, that his pain had increased substantially since January 2001, and that any weight-bearing positions increased his pain. On August 13, 2001, Dr. Wright performed compartment release surgery on both lower legs. Mr. Russell continued to have pain in his legs after the surgery. Dr. Wright last saw him on December 11, 2001, and recommended a

[1]When his condition improved after his military discharge, he rode his bicycle to work, worked out and swam several days a week.

consult with a rheumatologist. Mr. Russell did not return to Dr. Wright for treatment.

Dr. Wright was unable to testify within a reasonable degree of medical certainty that Mr. Russell had compartment syndrome because the follow-up period after surgery was too short. At the last visit, he became suspicious that Mr. Russell might have another condition. Dr. Wright did acknowledge that Mr. Russell's condition could have some relation to the previous stress fractures in that a trauma of that type would tend to raise pressures in and around the compartments in his extremities. Dr. Wright stated that Mr. Russell had no impairment from the surgery itself:

> As to a question of whether – what the underlying condition – what the impairment should be due to the underlying condition, that I don't really have a good opinion on. Because I think, as I said, when I last saw him there was still a question as to what, indeed we were still dealing with.

According to Mr. Russell, "After my legs had had time to heal and I realized the surgery had not helped, I realized that this was a work-related problem because of a increasing problem from working and pushing skids." He then called Jerry Watkins, vice president of ThyssenKrupp, and reported his injury. At this point, no physician had told him his injury was work-related. A few days later another employee called him to fill out an accident report for a workers' compensation claim. Ms. Ozzie Gunn, human resources manager, stated that she received notice of Mr. Russell's claim on or about December 1, 2001. He later received notice that his claim was denied because he had a previous injury. Mr. Russell stopped working for ThyssenKrupp on June 18, 2002.

Mr. Russell saw Dr. Lee S. Stein, neurologist, for treatment beginning March 4, 2002. Dr. Stein referred him to two nerve specialists for evaluation. Dr. Stein diagnosed peripheral neuropathy which was not resulting in his pain and suspected plantar fasciitis as the etiology of his pain. Because Mr. Russell's pain was "orthopedic in nature," he recommended re-evaluation by an orthopedist. Dr. Stein did not typically evaluate plantar fasciitis and did not know enough about the etiology of this condition to render an opinion. Dr. Stein stated that Mr. Russell did not have an impairment from a neurologic standpoint and that "any disability that would be given should be from an orthopedic standpoint."

Mr. Russell stated that he didn't tell Dr. Stein, Dr. Pucek or Dr. Wright that his leg pain was work-related because: "I was looking for an answer to my problem and I gave them the type of work that I was doing and I was looking to see if it was work-related or not."

On July 30, 2002, Mr. Russell saw Dr. Joseph Boals for an independent medical evaluation. Dr. Boals diagnosed Mr. Russell with bilateral lower extremity pain and weakness with etiology undetermined. He also found that this condition had been aggravated by a work injury. He characterized Mr. Russell's increased workload beginning in the summer of 2000 as "the precipitating straw that broke the camel's back . . . [that] really set the stage of visits to doctors and treatment and medication and now chronic pain syndrome." Dr. Boals noted that Mr. Russell takes multiple medications for pain including Oxycontin, Hydrocodone, Zanaflex, Klonopin, Neurotin,

Provigil, Actig, and Celexa.

Dr. Boals assigned a 19% impairment to the body as a whole. This was based on a 5% impairment for each lower-extremity-based anatomical change due to the compartment release surgery and a 15% permanent impairment to the body as a whole for chronic pain syndrome. These impairment ratings were over and above Mr. Russell's previous service-related disability. Dr. Boals recommended that Mr. Russell work at a sedentary job with only occasional walking and standing, that he wear cushioned shoes with arch supports, and that he avoid prolonged standing, walking, stooping, climbing, or repetitive use of foot pedals.

Mr. Russell uses crutches and/or a walking stick depending on the amount of time he will be on his feet. He has problems sitting or standing for long periods of time and cannot lift anything heavy. He has severe pain every day ranging from two to nine on a scale of one to ten. He has muscle spasms in his legs that are very painful. Some of the pain medication he takes causes blurred vision and double vision.

Dr. David Strauser, vocational rehabilitation specialist, testified at trial. He has a Ph.D. in rehabilitation counseling and is currently the Director for the Center for Rehabilitation and Employment Research at the University of Memphis. Dr. Strauser found that Mr. Russell had lost access to 92% of the jobs available to him prior to his injury. He based this impairment rating on the sedentary restriction given by Dr. Boals. Dr. Strauser stated that the Department of Labor provides that the sedentary labor market constitutes of only 8% of the labor market in the national and local economy. He agreed that because of his postgraduate education Mr. Russell was unusual in the manual labor market and had additional transferable skills not dependent on his physical capabilities. He concluded that this education, training, and military experience was what "kept [Mr. Russell] from being a hundred percent vocationally impaired." Dr. Strauser did express concern about how Mr. Russell's pain medication would impact the higher cognitive functioning required for most sedentary work.

The trial court found that Mr. Russell sustained a compensable injury on July 18, 2002, resulting in a 90% permanent impairment to the body as a whole. The trial court found that Mr. Russell proved by a preponderance of the evidence "that his transfer to the PF line and his additional duties at work did cause an increase in his pain and did aggravate the underlying condition of his legs."

ANALYSIS

Review of findings of fact by the trial court shall be *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). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988). Where the trial judge has seen and

heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

ThyssenKrupp first raises the issue of whether the trial court erred in finding that Mr. Russell sustained a compensable aggravation of a pre-existing condition that was related to his work activities.

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(13). 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, 692 (Tenn. 1997). 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. *Id.* (Citations omitted).

An employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if she had not had the pre-existing conditions. *Kellerman v. Food Lion*, 929 S.W.2d 333, 335 (Tenn.1996).

In *Sweat v. Superior Industries, Inc.*, 966 S.W.2d 31, 32-33 (Tenn. 1998), our Supreme Court stated:

> The general rule is that aggravation of a pre-existing condition may be compensable under the workers' compensation laws of Tennessee, but it is not compensable if it results only in increased pain or other symptoms caused by the underlying condition. It has been otherwise stated that, to be compensable, the pre-existing condition must be "advanced", or there must be an "anatomical change" in the pre-existing condition, or the employment must cause "an actual progression . . . of the underlying disease."

966 S.W.2d at 32-33(citations omitted).

The trial court found Mr. Russell to be a credible witness. The trial court noted that none of the many physicians who have treated Mr. Russell expressed any doubt that he was suffering from severe pain in his legs. After reviewing the extensive medical history in its findings of fact in this case, the trial court concluded: "A definitive diagnosis for the Plaintiff's pain has eluded the doctors. It appears that they all have approximately the same opinion as Dr. Boals, that is, that the Plaintiff suffers from chronic pain of unknown etiology."

The trial court found that Mr. Russell proved by a preponderance of the evidence "that his

transfer to the PF line and his additional duties at work did cause an increase in his pain and did aggravate the underlying condition of his legs." The trial court based its ruling Mr. Russell's testimony that his leg pain increased after transferring to the PF line which required more strenuous duties and heavier lifting, that he initially thought his increase in pain was related to his military injury, that activity-induced compartment syndrome was diagnosed after his increase in work duties, and that he expected the doctors to tell him the cause of his pain. The trial court also credited the testimony of Dr. Boals who testified live at trial. Dr. Boals found that his condition had been aggravated by the increased work load which eventually resulted in Mr. Russell developing chronic pain syndrome. When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 666-67 (Tenn. 1983).

From a careful review of the record and consideration of the circumstances of this case, we find no error by the trial judge in accepting the opinion of Dr. Boals. The evidence does not preponderate against the trial court's finding that Mr. Russell's work duties on the PF line caused an increase in pain and aggravated his pre-existing leg condition.

ThyssenKrupp also raises the issue of whether Mr. Russell failed to give proper and timely notice of his injuries.

Tennessee Code Annotated section 50-6-201 provides:

> (a) Every injured employee or such injured employee's representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, . . . and no compensation shall be payable under the provisions of this chapter unless such written notice is given the employer within thirty (30) days after the occurrence of the accident, unless 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.
>
> (b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or such injured employee's representative shall provide notice to the employer of the injury within thirty (30) days after the employee:
>
> (1) Knows or reasonably should know that such employee has suffered a work-related injury that has resulted in permanent physical impairment; or
>
> (2) Is rendered unable to continue to perform such employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

Tenn. Code Ann. § 50-6-201.

The trial court found that Mr. Russell gave proper and timely notice to ThyssenKrupp of his work-related injury.

When the compartment release surgery was not successful, Mr. Russell concluded that his injuries were related to his increased work on the PF line. He reported his injury to the vice-president of the company sometime around December 1, 2001. At that time no physician had informed him that his injuries were work-related. He had described the type of work he was doing to the physicians and was looking to them for "an answer to my problem." It was not until eight months after he gave this notice that he saw Dr. Boals who found that his injuries were work-related. The trial court found Mr. Russell to be a credible witness.

The evidence does not preponderate against the finding of the trial court that Mr. Russell gave proper and timely notice of his injuries. This issue is without merit.

ThyssenKrupp contends that the trial court's award of 90% permanent partial disability was excessive.

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. Tenn. Code Ann. § 50-6-241(c); *Worthington v. Modine Manufacturing Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). The assessment of this disability is based on all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at the types of employment available in his disabled condition. *Orman v. William Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991). The test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 459 (Tenn. 1988).

The trial court found that Mr. Russell sustained a 90% permanent disability to the body as a whole which was six times the 15% impairment rating for chronic pain assigned by Dr. Boals. After citing Tennessee Code Annotated section 50-6-241(c)[2], the trial court found:

> Dr. Strauser testified that the Plaintiff could only perform 8% of the jobs set out in the dictionary of Occupational Titles. The Plaintiff lives in Hardeman County, Tennessee, where, Dr. Strauser notes, some of the jobs comprising that 8% are not available to the Plaintiff. The Plaintiff came to court on crutches and had difficulty ambulating. He is not able to perform any type of factory work or military duty that

[2] "If the court awards a multiplier of five (5) or greater, then the court shall make specific findings of fact detailing the reasons for awarding the maximum impairment. In making such determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. 50-6-241(c).

> he has performed in the past. The Plaintiff suffers from severe leg pain and has been prescribed and takes various pain medications, which Dr. Strauser noted could affect his cognitive thinking and cause difficulty in focusing and paying attention to detail. The Plaintiff is young and has many years ahead of him before he reaches retirement age.

ThyssenKrupp did not present any proof on vocational disability. The trial court considered the appropriate factors and found Mr. Russell to be credible in his testimony. The trial court accepted the testimony of Dr. Strauser, who testified at trial. The trial court was in the best position to judge the credibility of the witnesses.

After reviewing the record in this case, we find the evidence does not preponderate against a finding that Mr. Russell sustained a 90% vocational disability as a result of his injuries.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to the appellant and its sureties, for which execution may issue if necessary.

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JAMES L. WEATHERFORD, SR.J.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

DANNY RUSSELL v. THYSSENKRUPP ELEVATOR MANUFACTURING, INC.

Chancery Court for Hardeman County
No. 14160

No. W2004-01472-SC-WCM-CV - Filed November 29, 2005

JUDGMENT

This case is before the Court upon Thyssenkrupp Elevator Manufacturing, Inc.'s, motion for review 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 are incorporated herein by reference.

Whereupon, it appears to the Court that the motion for review is not well-taken and should be DENIED; 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 assessed to Thyssenkrupp Elevator Manufacturing, Inc., for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating.