IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 29, 2005 Session

ROBERT MERRIMON v. BRIDGESTONE/FIRESTONE, INC.

Direct Appeal from the Chancery Court for Rutherford County
No. 01-2912WC Robert E. Corlew III, Chancellor

No. M2003-01978-WC-R3-CV - Mailed - March 27, 2006
Filed - May 24, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court 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. The employee complained of back pain for many years, culminating in a workers' compensation complaint alleging disability owing to his back problems, with little specificity. The trial court concluded that the Plaintiff's condition was not caused by his employment. The judgment of the trial court is affirmed.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Martin D. Holmes, Nashville, Tennessee, for appellant, Robert Merrimon.

Kenneth M. Switzer and Kitty Boyte, Nashville, Tennessee, for appellee, Bridgestone/Firestone, Inc.

MEMORANDUM OPINION

The Plaintiff alleged:

> At various points in time during the Plaintiff's employment with the Defendant, he has injured or strained his back. On those occasions, he was able to return back to full duty. In December 2000, the Plaintiff injured or aggravated his back while performing his job duties for the Defendant. In addition to or in the alternative, the Plaintiff has sustained progressive injuries to his back The Plaintiff's

> back condition has progressively worsened over a period of time until it became physically disabling. The Plaintiff's current back condition was either caused or aggravated by his job duties at Bridgestone.

We note, as did the trial judge, that the Plaintiff alleges (1) that he injured his back in December 2000, or (2) aggravated [a pre-existing back condition], or (3) sustained progressive injuries to his back, or (4) his back condition progressively worsened. The trial judge found that the Plaintiff, during his twenty-eight-year employment, reported to the Employee's clinic eighteen (18) times complaining of back pain with no specific lifting incident producing the pain.

From these myriad alternatives the trial judge determined that the Plaintiff's back problems were not related to his employment and dismissed his complaint. The Plaintiff appeals and presents for review the issue of whether the trial judge erred in failing to find whether the Plaintiff sustained a compensable injury. The trial judge also determined that the complaint would be barred by the statute of limitations, the propriety of which is presented for review.

Our review is de novo on the record with a presumption of the correctness of the judgment unless the evidence preponderates against it. Tenn. R. App. P. 13(d). Issues of law are reviewed with no presumption of correctness. Tenn. Code Ann. § 50-6-225(e)(2).

The Plaintiff is fifty-six years old, graduated high school and, in 1974, received an associates degree in business management from Draughons Junior College. In September 1973, at age twenty-six, he began working at Bridgestone. In 1979, he began working in production where frequently he was required to lift 100 to 110 pound rolls of steel wire throughout the day. Plaintiff continued working at Bridgestone until March 2001.

When he was hired by Bridgestone, he had no back problems and passed an employment physical. Since that time he has periodically sprained his back, but was always able to return to work. From September 1973 to December 2000, a period of seventeen years, he missed approximately six days. Sometime in December 2000, he was lifting heavy rolls of steel when his back "snapped" causing pain in his back and legs which he reported to his supervisor.

He was first seen by Dr. William Bacon, an orthopedic surgeon, on December 22, 2000. Dr. Bacon diagnosed the Plaintiff with lumbar disk syndrome at L5-S1, and testified that the bulging disk at L5-6 revealed on the MRI was consistent with a lifting type injury. Dr. Bacon continued to treat the Plaintiff periodically and recommended light duty restrictions. Bridgestone was unable to accommodate these restrictions and, as a consequence, on March 13, 2001, he was sent home.

Dr. Bacon was of the opinion that the Plaintiff had reached maximum medical improvement on April 30, 2002, and would retain a 13 percent impairment to the body as a whole. He placed permanent restrictions on the Plaintiff to avoid repetitive bending, prolonged sitting or standing over one hour at a time, no lifting over thirty pounds and no operation of a tow motor. He believed that

the Plaintiff would eventually require surgery and that his employment at Bridgestone contributed to his back condition. He testified that heavy lifting aggravated the Plaintiff's back and that the degenerative changes were caused, in part at least, by heavy lifting:

> Q: Do you have an opinion, based upon a reasonable degree, as to what effect, if any, his work at Bridgestone had on these degenerative changes?
>
> A: I still think the same thing. That they were caused, in part at least, by heavy lifting.
>
> Q: Doctor, have all of your opinions thus far been based upon a reasonable degree of medical certainty unless otherwise stated?
>
> A: Yes.

The Plaintiff was also evaluated by Dr. Gordon Doss, a certified rehabilitation counselor and licensed professional counselor. He testified that the Plaintiff retained a vocational disability between 80 to 85 percent in the open labor market.

In connection with his claim for pension disability[1] at Bridgestone, the Plaintiff was seen by Dr. Thomas O'Brien, an orthopedic surgeon. According to Dr. O'Brien, Plaintiff had some discomfort with range of motion testing but had a functional range of motion for a man of his age. In addition to a normal range of motion, he exhibited no symptoms of positive tests for a herniated or ruptured disk. He had no muscle spasm and his neurological exam was normal. A review of his MRI film showed advanced degenerative disk disease of the lumbar spine at the bottom level. Dr. O'Brien had no history of the Plaintiff sustaining a specific injury apparently because the Plaintiff told Dr. Bacon that his problem had developed over a period of time with intermittent back difficulty since 1975.

According to Dr. O'Brien, the Plaintiff's description of his symptoms, the findings on physical examination, and the findings on the MRI are all degenerative in nature and are not related to any specific trauma. When specifically asked if he had an opinion as to whether or not Plaintiff suffered any type of injury that caused him to have the few symptoms he described as a result of his work at Bridgestone/Firestone, Dr. O'Brien stated, "No." He testified that Plaintiff's condition is one of progression, is common in patients as they enter middle age and is, therefore, age-related and not related to his job. He opined that the Plaintiff retained no impairment using the *AMA Guides*. He commented on Dr. Bacon's recommendation of a DRE Category III based on radiculopathy, and testified that the Plaintiff has none of the objective findings necessary to qualify him for radiculopathy, such as muscular wasting, atrophy or guarding.

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[1] This claim was not connected to his claim for workers' compensation benefits.

Carolyn Lawson, who was employed at the Bridgestone/Firestone health unit, identified medical records that she had in her possession. She testified about a visit by Plaintiff to her office on November 30, 2000, when the Plaintiff mentioned an injury he sustained in April, 1996, with little or no specificity, other than it was an old injury. Ms. Lawson testified about the numerous visits that Plaintiff made to the health unit with regard to problems with his back since the beginning of his employment with Bridgestone/Firestone. Those visits are listed as March 15, 1978 (removing a tire from the tire assembly machine), February 26, 1982 (back hurting from removing beads from bead rack), April 30, 1982 (removing beads again), May 6, 1982 (getting on a tow motor and hurt his back), September 19, 1987 (hurt back driving a tow motor backwards), November 17, 1990 (routine work in his department), October 2, 1993 (working on No. 9 cutter and experienced lower back pain), July 18, 1994 (hurt lower back from an old injury), August 29, 1995 (picking up a liner and low back pain), January 19, 1996 (pushing a cart, lumbar strain), November 13, 1996 (same injury), March 27, 1998 (nothing described for cause of injury-low back pain), February 17, 2000 (lifting), and finally November 30, 2000 (no event described). In all of the above references, his complaints were about problems with his back, with no specifically identified injury.

On May 16, 1991, Plaintiff saw Dr. Stanley Hopp, who recorded the following history:

> The patient states that 15 years ago [1976] he had an episode of back pain running a forklift, lifting and walking, which apparently has caused episodic back pain. . . .
>
> * * * * *
>
> More recently, 11-17-90, he had a flare-up when he was working on a body ply machine. Dr. Daniel related another injury 3-26-91 resulting in lumbar muscle strain. Most recently, 5-1-91, a similar flare-up. Initially treatment with Orudis seemed to help, but more recently has not. He has a 20-pound lifting restriction. He complains of pain with walking and sometimes getting out of bed, sudden turning or pulling. No previous back surgeries. Denies radiation of pain down the leg. Paresthesias or incontinence of - of focal weakness.
>
> * * * * *
>
> Lumbar syndrome without objective radiculopathy superimposed on degenerative disk disease, L5 and S1.

On September 26, 1994, Plaintiff saw Dr. Terry who reported that "[o]kay, Mr. Merrimon is a very educated individual about his back problems. He is seen here in referral for a second opinion by Dr. Butcher for his back problems. He had seen Dr. Laughlin, who I believe is in Nashville, for three times following a December 18, 1993 injury when he said that a disk was messed

up. He states that he had an L5-S1 degenerative disk."

The Plaintiff's testimony centered on his allegation that he injured his back in December of 2000, resulting in total and permanent disability. This allegation is contrary to much of the proof, and inconsistent with his statements to various physicians. The trial judge concluded that the Plaintiff did not prove his allegation of a December 2000 injury, and proceeded to consider the underlying argument of a gradually occurring injury. He found no causal connection between the Plaintiff's employment and his condition, and commented, essentially as an educational afterthought, that in any event his claim would be barred by the statute of limitations, if pleaded as an affirmative defense.[2] The Appellee argued that the thrust of the Plaintiff's claim, at trial, was based on the December 2000 event which allegedly aggravated a pre-existing condition. When this theory weakened, the Plaintiff shifted to the gradually-occurring theory which the trial judge found unproved.

We have made a careful review of the evidence and the exhaustive analysis of the proof by the trial judge. We conclude that we can neither substitute our judgment for that of the trial judge, nor find that the evidence preponderates against his findings. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). The judgment is affirmed at the cost of the Appellant.

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WILLIAM H. INMAN, SENIOR JUDGE

[2] The statute of limitations was not pleaded as an affirmative defense, and consequently is waived. *Humphreys v. Allstate Ins. Co.* , 627 S.W.2d 933, 935 (Tenn. 1982).

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No. M2003-01978-SC-WCM-CV - Filed May 24, 2006

ORDER

This case is before the Court upon the motion for review filed by Robert Merrimon 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 are assessed to Robert Merrimon, for which execution may issue if necessary.

PER CURIAM

MAY 24, 2006

TO: SANDRA VANCE, DEPUTY CLERK, NASHVILLE

FROM: WILLIAM M. BARKER, JUSTICE

RE: ROBERT MERRIMON V. BRIDGESTONE/FIRESTONE, INC.
RUTHERFORD CHANCERY - NO. M2003-01978-SC-WCM-CV

COPY: SANDRA VANCE, VIA E-MAIL

MOTION FOR REVIEW: DENIED