IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 17, 2006 Session

GARY NELSON v. NORANDAL USA, INC., ET AL.

Direct Appeal from the Circuit Court for Carroll County
No. 04CV4 C. Creed McGinley, Judge

No. W2005-02312-SC-WCM-CV - Mailed July 3, 2006; Filed September 26, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the 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. In this appeal, the employee insists the evidence preponderates against the trial court's finding that he knew or should have known he had a compensable injury more than a year before the action was commenced. As discussed below, the Panel concludes that the evidence preponderates against the finding of the trial court. Accordingly, we reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Circuit Court Reversed, Case Remanded

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and J. S. DANIEL, SR. J., joined.

Jeffrey P. Boyd, Hill & Boren, Jackson, Tennessee, for the appellant, Gary Nelson

Gregory D. Jordan and James V. Thompson, Rainey, Kizer, Reviere & Bell, Jackson, Tennessee, for the appellee, Norandal, USA, Inc.

Paul G. Summers, Attorney General & Reporter, and Juan G. Villasenor, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

MEMORANDUM OPINION

The employee or claimant, Gary Nelson, initiated this civil action to recover workers' compensation benefits for an injury arising out of and in the course of employment with the

employer, Norandal, USA, Inc. The employer and Second Injury Fund denied liability and averred the action was not timely commenced. After considering the evidence, the trial judge found the employee knew or should have known he had a work related permanent injury more than one year before commencement of the civil action, thus dismissing the claim as being time barred. The employee has appealed.

Appellate 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). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Gov't of Sumner County, 908 S.W.2d 921, 922 (Tenn. Workers' Comp. Panel 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Hill v. Wilson Sporting Goods Co., 104 S.W.3d 844, 846 (Tenn. Workers' Comp Panel 2002). Issues of statutory construction are solely questions of law. Id. Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. Workers' Comp. Panel 1995), because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence 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 (Tenn. 2001). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Id at 61. Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn Workers' Comp. Panel 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Bridges v. Liberty Ins. Co. of Hartford, 101 S.W.3d 64, 67 (Tenn. Workers' Comp Panel 2000). Our independent examination of the record, giving due deference to the findings of the trial court, reveals the following facts.

The employee or claimant is fifty-five years old with a high school education and some vocational training. He began working for the employer in 1978. In May of the same year, he suffered a crushing injury to both ankles when a steel beam hit him while he was operating an overhead crane. Benefits were voluntarily paid and, after receiving medical care, the claimant returned and continued to work until retiring, when he had become disabled, in 2005. His last job was to sit and monitor a machine during most of his shift. The treating physician in 1978 was Dr. James Warmbrod, Jr. Dr. Warmbrod examined him again in May 1991, but found no limitation of motion and no evidence of further injury. The claimant has continued to work with gradually increasing pain and swelling since returning to work. He returned to Dr. Warmbrod on September 6 and September 13, 2002 with complaints of increasing pain in both legs. He also complained that walking and standing made his ankles sore and swollen, all of which he suspected were related to the 1978 accident at work. Dr. Warmbrod diagnosed progressive traumatic arthritis, prescribed braces for both ankles and discussed surgical options to fuse the ankle joints to relieve pain. The

doctor also explained to the claimant that such surgery would effectively disable him from walking and standing. Dr. Warmbrod testified that the 1978 accident at work was the origin of the claimant's disability to work, but that the arthritis was an aggravating factor.

For evaluation, Mr. Nelson saw Dr. Claiborne Christian in December 4, 2003. The claimant related his injury to the 1978 accident at work rather than the continual standing and walking on concrete. Dr. Christian opined the condition was idiopathic, prescribed work restrictions and advised him to arrange with his employer for a parking space closer to his work station. His request for such accommodation was denied. The claimant insists he could not have known he had a work related permanent injury before his visit to Dr. Christian. Suit was filed on January 15, 2004, more than eighteen months after his last visit to Dr. Warmbrod. The claimant visited Dr. Jacob Aelion on January 14, 2004. Dr. Aelion diagnosed osteoarthritis which could be aggravated by repetitive standing and walking on concrete.

All of those doctors testified the claimant's condition was related to, or caused by, the 1978 accident when both ankles were injured at work. On April 20, 2004, he visited Dr. Joseph C. Boals, III, for an evaluation. Dr. Boals obtained a thorough history, read the claimant's medical records and test results and examined the claimant. Following the visit, Dr. Boals dictated a report which stated, among other things, "[I]t is my opinion that Mr. Nelson has a cumulative trauma disorder affecting both his ankles and feet bilaterally. This apparently began many years ago with a crush injury to the ankles and over time has been *aggravated by his job* with increasing symptoms." (Emphasis supplied). It is well settled that the aggravation of a pre-existing condition is compensable as an injury by accident. That date, April 20, 2004 was the earliest time the claimant could have known he had a separate gradually occurring second work related injury. In his deposition, Dr. Boals reinforced his report with the following testimony on cross examination:

> Q. Doctor, would you agree that in the description of the injury that he had, crushing injury to the right ankle and fracture of the left ankle, that residuals from arthritic changes were inevitable from an injury of that nature?
>
> A. Maybe and maybe not. Since I was not back there, I don't know how severe this was. Crush injuries can, of course, only be soft tissue. It may not involve joints. I think it is more likely that this man began having trouble with his feet back then, but his prolonged standing on concrete would be more likely the cause of his arthritis than those injuries since they did not require surgery.

The claimant continued working until 2005, when he took early retirement. In his retirement letter, dated April 11, 2005, after suit had been filed, he said, "Because of the many years of standing on concrete, I now have arthritis in both ankles and feet" and that he was retiring because of inability to perform his duties.

The trial court found that the claimant was credible but knew or should have known he had a permanent injury on September 13, 2002 when Dr. Warmbrod advised him that his only hope for

relief would be surgical fusion of both ankles, which would inhibit his ability to stand and walk. The trial court further found the injury was work related but did not make a conditional award of benefits or determine the last day the employee worked before becoming disabled because of his increasing pain. The trial court also found that the claimant failed to give timely notice of his injury. Although notice is not an issue on appeal, it is this Panel's conclusion that service of the complaint constituted timely notice.

From our independent examination of the record, we conclude that the evidence preponderates against the trial court's finding that the claimant knew or should have known of his second compensable injury on September 13, 2002 and in favor of a finding that his second compensable injury was first discoverable and apparent on April 20, 2004, when the claimant visited Dr. Boals.

An action by an employee to recover benefits for an accidental injury, other than an occupational disease, must be commenced within one year after the occurrence of the injury. Tenn. Code Ann. § 50-6-224(1). However, the running of the statute of limitations is suspended until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained. It is the date on which the employee's disability manifests itself to a person of reasonable diligence - not the date of accident - which triggers the running of the statute of limitations for an accidental injury. Hibner v. St. Paul Mercury Ins. Co., 619 S.W.2d 109 (Tenn. 1981).

For gradually occurring accidental injuries, however, the date of injury is generally the date on which the claimant was forced to quit work because of severe pain. Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997). In this case, however, the trial court made no finding with respect to that date. All the medical proof is that the claimant's disability to work occurred gradually over a period of time.

On those authorities and because the evidence preponderates against the trial court's finding, the Panel concludes the claim is not time-barred. The judgment of the trial court is therefore reversed and the case remanded to the Circuit Court for Carroll County for further consideration consistent herewith..

Costs of appeal are taxed to the appellees and their sureties in which execution may render is necessary.

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JOE C. LOSER, JR., SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Norandal USA, Inc., et al, 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 the appellee, Norandal USA, Inc., et al, and sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating