IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 1, 2006 Session

GERALD JUMP v. C & M DISPOSAL

Direct Appeal from the Chancery Court for Bradley County
No. 03-120 Jerri S. Bryant, Chancellor

Filed July 28, 2006

No. E2005-02629-WC-R3-CV - Mailed June 27, 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 § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court dismissed the complaint finding Plaintiff had failed to establish he suffered an aggravation of a pre-existing fracture to his left wrist. On appeal, Plaintiff argues the medical evidence preponderates against the court's dismissal of the action. Defendant seeks recovery of discretionary costs and also seeks to have the costs of preparing the transcript of the evidence taxed as appellate costs. We affirm the dismissal of the action and remand the issue of discretionary costs to the trial court.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and SHARON G. LEE, SP. J., joined.

Bert Bates, Cleveland, Tennessee, for Appellant, Gerald Jump.

Robert J. Uhorchuk, Chattanooga, Tennessee, for Appellee, C & M Disposal.

MEMORANDUM OPINION

Plaintiff, Gerald Jump, has appealed from the entry of a judgment dismissing his case after an evidentiary hearing. The Chancellor ruled the evidence was not sufficient to establish Plaintiff's pre-existing injury was aggravated by the incident at work or that he sustained a new compensable injury.

Facts

Plaintiff completed the tenth grade and, according to one of the medical reports in evidence, he was twenty-seven years of age when he was seen by one of the doctors during November 2002. He began working for Defendant, C & M Disposal Services, Inc., during May 2001 and his complaint alleges he sustained a work-related injury to his left wrist during December 2002.

The evidence indicates that on December 30, 2002, he was working at the rear of a garbage truck on a regular pick-up route and while the truck was at a landfill to empty its contents, there was a loud noise and something hit Plaintiff in the back of the head causing him to fall to the ground. He stated that when he fell his left hand went into a hole and his hand was "bent back." He was taken to Erlanger Hospital where x-rays were taken and he was released upon being advised he needed to see an orthopaedic doctor. His father, Gerald Lee Jump, testified he was driving the garbage truck and saw the incident in his rearview side mirror. He said another truck was backing in to empty its contents and a tire blew out causing something black to fly out and strike his son.

Plaintiff testified he originally injured his left wrist in about 1996 when he was involved in a motorcycle accident and he cracked two small bones which required a cast on his wrist for about six weeks. He continued to have pain and in December 2001 or January 2002, he went to the hospital emergency room where he was given a splint to wear and his wrist seemed to get better. In October 2002, about two months before the date of the incident in question, he said he fell while picking up a garbage can and returned to the hospital. He was advised to see an orthopaedic surgeon and finally did go to see a doctor who recommended a surgical repair to his left wrist. This procedure was scheduled during December 2002 but he failed to appear and the surgery was not performed. Plaintiff testified that after the December 30, 2002 incident, he was off a few days and then returned to doing his regular work of picking up garbage. Sometime later he was discharged for insubordination.

During the course of Plaintiff's examination, he was questioned about the incidents in 1996, October 2002 and December 30, 2002 and was often confused as to what happened on the various dates and also he could not remember some facts until mentioned by counsel. He did admit that the 1996 fracture of his wrist never healed properly and that he had been bothered by it throughout the years that followed. On cross-examination, he stated that he returned to work after one of the incidents within a week or two and at another time he said he returned to work after two or three months.

Prior to the trial, Plaintiff answered a series of written interrogatories. During cross-examination, he was questioned about his answers to two of them. Interrogatory number four asked if he had been convicted of a felony or a crime involving dishonesty or false statements within the past ten years. His answer was "No, I have not." He admitted this answer was false and that he had three separate convictions for theft in Tennessee and one in the state of Georgia. He testified that his wife prepared the answers and he signed the document which was notarized.

Interrogatory number sixteen asked him to list all hospitals and doctors where he had been treated, etc. during the past ten years. His answer did not list his emergency room visits to Erlanger Hospital in December 2001 or January 2002, the October 2002 visit or the December 30, 2002 visit.

All of the medical evidence was presented by deposition.

Dr. Duc T. Ngugen, a board-certified orthopaedic surgeon, first saw Plaintiff on November 13, 2002, which was about six weeks prior to the incident in question. He stated Plaintiff was complaining about left wrist pain and told him of his accident years earlier. His examination and x-rays indicated Plaintiff had a scaphoid fracture nonunion of the left wrist and he said Plaintiff had been living with the pain since the injury had occurred. He told Plaintiff that surgery could be performed in an effort to repair the fracture with a bone graft to entice it to heal. He stated Plaintiff agreed to try surgery and it was scheduled on December 17, 2002. He stated Plaintiff did not appear for the procedure and he had not seen him since his last visit.

Dr. Martin Finnegan, a diagnostic radiologist, examined x-rays taken on December 30, 2002, the date of the alleged accident, and rendered a report to Erlanger Hospital. He said the x-rays showed the presence of an old fracture of the left wrist and there was no evidence of an acute injury.

Dr. Robert D. Mastey, an orthopaedic surgeon, saw Plaintiff on September 12, 2003, about nine months after the incident in question. He said Plaintiff was complaining of left wrist pain as well as numbness and tingling. He was told of the old original injury to the wrist and he was of the opinion Plaintiff's scaphoid fracture nonunion was painful since it had not healed properly. He stated the x-ray taken during October 2002 indicated an old fracture with minimal arthritic changes. He recommended surgery, which was performed on October 28, 2003, but it did not seem to provide much pain relief. The only other option was fusion surgery which the doctor recommended and Plaintiff agreed to have on July 28, 2004, but he did not appear at the time and place for the procedure. He said that Plaintiff had such a high requirement for narcotic pain medication that it would not be proper to treat him only with medication and that was why he recommended fusion surgery.

Dr. Mastey also testified that Plaintiff had reported he had been involved in two other accidents in 2004. One incident was when a car door was closed on his left hand and the other incident involved an auto accident when the car flipped causing a contusion to his wrist and hand. The trial of this case was conducted during August 2005.

Dr. Mastey stated he had not seen any medical records of other doctors who may have seen and/or treated Plaintiff before his first visit during September 2003. On the question of causation of an injury as a result of the event of December 30, 2002, the doctor said the scaphoid fracture was possibly consistent with an injury occurring on that date. At several other times during his examination, he also stated the fracture could also be consistent with an injury occurring either in 1996 or 2002. At another point, he stated that what happened on the date in question could have aggravated Plaintiff's old injury and resulted in increasing his pain.

In rendering a decision on the various issues raised by the evidence, the trial court was troubled with the credibility of the Plaintiff and also by the fact the Dr. Mastey did not have an accurate history from the Plaintiff or the benefit of any prior medical records. The court observed that the doctor had not seen Plaintiff prior to the time in question and was not in a good position to judge whether his condition had changed because of the events of December 30, 2002. Also, the court stated a claim was not compensable based upon a mere increase of pain. For these reasons the court held Plaintiff had not carried the burden of proof and dismissed the case.

Standard of Review

The standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Analysis of Issues

The Plaintiff argues the trial court did not properly weigh the medical evidence as Dr. Mastey's testimony indicated the work-related incident on December 30, 2002 could have aggravated the pre-existing wrist injury and that it was not proper to dismiss the claim.

The burden of proof in a workers' compensation case rests with the plaintiff to establish every element of the case by a preponderance of the evidence, including the existence of a work-related injury by accident. *Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587, 591 (Tenn. 1989); *Hill v. Eagle Bend Mfg. Inc.*, 942 S.W.2d 483 (Tenn. 1997). An employer takes an employee as the employer finds him or her and is liable for disabilities which are the result of the activation or aggravation of a pre-existing weakness, condition or disease brought by the occupation. *Arnold v. Firestone Tire & Rubber Co.*, 686 S.W.2d 65, 67 (Tenn. 1984).

Although causation of an injury cannot be based upon speculative or conjectural proof, absolute medical certainty is not required. *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992). It is entirely appropriate for a trial judge to predicate an award on medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when the trial judge also has heard lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury. *Hill, supra*; *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

In the present case, we concur with the trial court that Plaintiff's credibility was certainly affected by his inconsistent statements as well as his false answers to some of the interrogatories. The undisputed evidence indicates Plaintiff had received a rather serious fracture years prior to the incident in question and that it never healed properly and he had sought medical treatment on several occasions including scheduling surgery which was to be performed two weeks prior to the alleged injury date.

Dr. Finnegan, a radiologist who reviewed the x-rays of December 30, 2002, testified the fracture was old and there was no evidence of an acute injury. Also, Dr. Mastey would go no further in his testimony than to say the incident in question "could have" aggravated Plaintiff's pre-existing fracture and caused pain.

The "could have" rule of causation states that a court may predicate an award on medical evidence that a certain event could have caused an injury provided the court has heard other evidence from which it may reasonably be inferred the incident was in fact the cause of the injury. In the present case, we find that the trial court had heard other evidence from which it could reasonably be inferred that the incident in question was in fact not the cause of the alleged injury. Therefore, from our review of the record, we cannot say the evidence preponderates against the conclusion and finding of the trial court.

Defendant Employer argues the Plaintiff should be liable for the payment of discretionary costs and also for the payment of appellate costs in preparing and filing the transcript of evidence.

After trial Defendant filed a motion under Rule 54, Tennessee Rules Civil Procedure, to recover discretionary costs for court reporter expenses and expert witness fees in the total sum of $2,398.20. The rule provides that a trial court retains jurisdiction of a motion of this nature even though a party has filed a notice of appeal. Rule 54.04, Tenn. R. Civ. P. The trial court is primarily responsible for ruling on an application for discretionary costs and the issue on appeal is confined to the question of whether the trial court abused its discretion in allowing or denying an item of expense under the rule. *Miles v. Marshall C. Voss Health Care Center*, 896 S.W.2d 773, 776 (Tenn. 1995). Since the Chancellor did not rule upon this motion, we cannot apply the applicable standard of review and this issue is remanded to the trial court.

After Plaintiff filed his notice of appeal, he also filed a separate notice stating he did not intend to file a transcript or statement of the evidence. Defendant responded by motion requesting the trial court require Plaintiff to prepare and file a transcript at Plaintiff's expense. Upon hearing the motions, the Chancellor ruled that Defendant could prepare and file the transcript and the parties could raise the issue before the appellate panel.

The cost of preparing a transcript of the evidence can be recovered on appeal. Rule 40(c), Tenn. R. App. P. In order to recover such item of costs on appeal, the party must file with the clerk of the appellate court an itemized and verified statement of costs within seventy-five (75) days after entry of a judgment. Rule 40(d), Tenn. R. App. P. Other provisions allow objections to be filed. Accordingly, the Defendant may, after entry of judgment in this cause, pursue its costs on appeal pursuant to and in compliance with Rule 40(d).

Conclusion

The judgment of the trial court is affirmed and the case is remanded for determination of the

motion to recover discretionary costs. Costs of appeal are taxed to Plaintiff, Gerald Jump, and his surety.

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ROGER E. THAYER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

GERALD JUMP V. C & M DISPOSAL
Bradley County Chancery Court
No. 03-120

July 28, 2006

No. E2005- 02629-WC-R3-CV

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 appears 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Gerald Jump, for which execution may issue if necessary.