IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 15, 2006 Session

DOUGLAS ELLIOTT v. RANDSTAD EMPLOYMENT SERVICES, INC., AND WARD NORTH AMERICA INSURANCE COMPANY

Direct Appeal from the Circuit Court for Washington County
No. 35101 – Honorable G. Richard Johnson, Judge
Filed January 31, 2007

E2005-02450-WC-R3-WC - Mailed December 21, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance to Tenn. Code Ann. § 50-6-225 (e)(3) (2005) for hearing and reporting of findings of fact and conclusions of law. The Employee appeals, claiming he is entitled to permanent, or at least temporary, benefits. We affirm the trial court's finding that the Plaintiff failed to prove a permanent injury, but we remand the case for a determination of whether any temporary total disability benefits are payable.

Tenn. Code Ann. § 50-6-225(e)(3) (2005) Appeal as of Right; Judgment of the Washington County Circuit Court Affirmed in part, and Modified in part.

T. E. FORGETY, JR., Special Judge, delivered the Opinion of the Court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and THOMAS R. FRIERSON, II, Special Judge, joined.

Howard R. Dunbar, Johnson City, Tennessee, for the Appellant, Douglas Elliott.

Douglas R. Bergeron, Knoxville, Tennessee, for the Appellee, Randstad Employment Services, Inc.

MEMORANDUM OPINION

Facts

The Employee, Douglas Elliott, filed his Complaint seeking worker's compensation benefits on May 6, 2003. On June 15, 2005, Mr. Elliott filed a Motion seeking to have the court order the institution of temporary total benefits, medical treatment, and reimbursement for automobile mileage. The court record does not contain an Order disposing of the Motion, or a transcript of the proceedings. However, the Defendant pled in its answer that the Motion had been heard and denied by the trial court. And, the Plaintiff admitted this at trial. At any rate, the matter was tried upon the merits on August 31, 2005.

At the trial, it appeared that Mr. Elliott was employed by Randstad, a supplier of temporary employees. He was assigned to The Bosch Brake Company in Johnson City from June 9, 2002 until July 31, 2002. His job involved the inspection of automobile brake rotor assemblies. At some point, he began to experience problems with his hands, and reported these on July 31, to his supervisor at Randstad. He was sent that day to Dr. Marilyn Bishop of Med Works Occupational Health in Johnson City. Dr. Bishop diagnosed Mr. Elliott as having bilateral de Quervain's disease (tendonitis on the thumb side of the hand at the point where the thumb attaches to the wrist). Dr. Bishop did not testify, and her records were not formally introduced into evidence. However, the other testifying physicians did refer to her findings in their depositions. Mr. Elliott testified that Dr. Bishop restricted him from lifting any more than ten pounds and ordered that he wear splints on his wrists. However, he was not told that he could not work at all. When Mr. Elliott reported his restrictions to Randstad, he was advised he could not go back to Bosch, because his work there involved lifting more than ten pounds. According to him, he did not get the wrist splints because his worker's compensation claim was denied, and he could not afford to buy them himself. Ms. Julie Penley, an employee of Randstad at the time, testified and introduced office notes recounting certain of her encounters with Mr. Elliott. These notes show that Mr. Elliott asked about a light duty job on August 23, and also asked what would happen if his doctor told him he could not work at all. On August 27, Randstad offered Mr. Elliott a light duty office job putting together employment packets. According to Ms. Penley, this job was within the restrictions placed upon Mr. Elliott. Randstad's records show that on September 3, the Plaintiff called "and knows that light duty is here for him and he does not show…". On September 5, Mr. Elliott met with Ms. Penley and Lance Dykes of Randstad. During that meeting, the Employer made the following notes, among others:

> Doug talked about his "RA" (rheumatoid arthritis – Mr. Elliott had been previously diagnosed as possibly having this condition) condition and how if he does light duty then we would be aggravating his "RA"…… if he does ANYTHING it will aggravate his condition of RA

> Doug stated the worse I get, the more I will get when I take you (Randstad) to court … I can go away and there is a way to do it. Just get with Kelli . . . and your risk people adn (sic) give me a check . . . . . he did not want to hire a lawyer because they are all greasy slim (sic) balls that just want to pad their pockets . . . I can go away and there is a way to do it . . .

In any event, Mr. Elliott did not try to perform the light duty job, but simply told Randstad he was not able to do it. There is no indication that he asked for wrist splints, nor that he was refusing the light duty job because he did not have them.

Mr. Elliott was treated by Dr. William McIlwain, an orthopedic surgeon, beginning on November 11, 2002. Dr. McIlwain noted that Mr. Elliott related that he had previously been diagnosed as possibly having rheumatoid arthritis, but that he had subsequently been told he had fibromyalgia instead. Dr. McIlwain noted a number of complaints that he simply could not explain medically. He did diagnose de Quervain's, but did not relate any of Plaintiff's "multiple" other problems to his job. Mr. Elliott was referred to Ms. Tena Wallace, an occupational therapist specializing in hand therapy. Ms. Wallace noted multiple inconsistencies in the patient's evaluation. She also found no objective evidence of limitations to Mr. Elliott's hands or wrists. Based upon Ms. Wallace's examination and report of January 7, 2004, Dr. McIlwain felt the de Quervain's had resolved itself by February 23, 2004. He testified that he had never diagnosed Mr. Elliott as having carpal tunnel, and if he was later diagnosed as having it, it would have come from some source other than his job at Bosch.

Dr. William Kennedy performed an independent medical examination of the Plaintiff on January 18, 2005. He opined that Mr. Elliott suffered from carpal tunnel, and bilateral de Quervain's. He assessed permanent partial impairments of 14% to the right upper extremity and 8% to the left upper extremity. The trial court found:

> "The credibility was a large issue in this case. The court finds and concludes that the Plaintiff has not proven, by a preponderance of the evidence, that he sustained any permanent injury at his work for Randstad at Bosch Brakes. Accordingly, this cause is dismissed with the costs taxed to the Plaintiff."

Standard of Review

On appeal, we review the trial court's findings of fact *de novo* upon the record with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005); *Peace v. Easy Trucking Co.*, 38 S.W.3d 526, 528 (Tenn. 2001); *McCormick v. Aabakus, Inc.*, 101 S.W.3d 60, 62 (Tenn. 2000). The burden is upon the Employee to establish every element of his claim by a preponderance of the evidence. *Roark v. Liberty Mut. Ins. Co.*, 793 S.W.2d 932, 934 (1990); *Ferrell v.*

Cigna Prop. & Cas. Ins. Co., 33 S.W.3d 731, 735 (2000). However, where the medical evidence was presented by deposition, we may draw our own conclusions about the credibility and the weight to be assigned to the testimony. *Carter v. First Source Furniture Group*, 92 S.W.3d 367, 370 (Tenn. 2002); *Mannery v. Wal-Mart Dist. Center*, 69 S.W.3d 193, 196 (Tenn. 2002). Finally, where there is a conflict in the expert medical testimony, the trial court has the discretion to accept the opinion on one expert over another. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990); *Bond v. American Air Filter*, 692 S.W.2d 638, 640 (Tenn. 1985).

Issues

The Employee/Appellant states the issues as follows:

I. That the trial court erred in failing to find that Plaintiff sustained a compensable injury . . .

II. That the trial court erred in failing to make findings of fact with respect to the relevant factors involved in this case.

Discussion

In his first issue, Plaintiff complains that the trial court erred by failing to find that he had suffered a compensable injury. Certainly the court did dismiss Mr. Elliott's complaint. However, the Court's specific ruling was that

> . . . the Plaintiff has not proven by a preponderance of the evidence that he sustained any permanent injury . . .

Despite the precise wording of his first issue, Mr. Elliott complains that the lower court did not award him temporary total disability or medical benefits. The Plaintiff argues correctly that certain workers compensation benefits are not dependent upon a permanent injury. For example, necessary medical treatment must be provided to an injured worker whether or not he is permanently, or even temporarily, disabled. Tenn. Code Ann. § 50-6-204 (2005); *Ingram v. Aetna Cas. & Sur. Co.*, 876 S.W.2d 91, 93 (Tenn. 1994). And of course, temporary total disability benefits are available to the employee without regard to whether he suffers a compensable permanent injury. *Tenn. Code Ann .§ 50-6-207 (3) (A)(i) (2005)*; *Clayton v. Pizza Hut*, 673 S.W.2d 144, 145 (Tenn. 1984). Since permanent disability benefits – partial or total – are separate and distinct from temporary total or medical benefits, we will discuss these separately.

In the first instance, we observe that the Plaintiff testified extensively as to his abilities and disabilities. However, the trial court saw and heard Mr. Elliott, and noted in finding no permanent injury that "credibility was a large issue in this cause." We must and do, accord this finding considerable deference. *Conner Bros. Excav. Co., Inc., v.*

Long, 98 S.W.3d 656, 660 (Tenn. 2003); *Carter v. First Source Furniture Group*, 92 S.W.3d 367, 370 (Tenn. 2002). Given the inconsistencies in Plaintiff's complaints to Dr. McIlwain and the therapist Ms. Wallace, as well as his statements and actions in the presence of Ms. Julie Penley of Randstad, we certainly cannot conclude that the trial court erred as to his credibility.

The record also indicates a sharp conflict in the testimony and conclusions of the medical experts. As we set out above, Dr. Kennedy, the Plaintiff's independent medical examiner, opined that Mr. Elliott had carpal tunnel syndrome and de Quervain's disease. He testified that Plaintiff needed additional medical treatment, and he assessed a 14% permanent partial impairment to the right upper extremity, and an 8% impairment to the left upper extremity. However, the treating physician, Dr. McIlwain, testified that Mr. Elliott had not had carpal tunnel syndrome during his treatment of him. Moreover, if the Plaintiff had carpal tunnel by the time Dr. Kennedy saw him (two and one half years after the alleged injury), then his work at Bosch/Randstad had not caused it. Dr. McIlwain also noted that the hand therapist, Ms. Wallace, found no objective evidence in January 2004 to support Mr. Elliott's ongoing complaints. Finally, he testified that the Plaintiff's de Quervain's disease had resolved itself by February 23, 2004. The testimony of the hand therapist, Ms. Wallace, generally supported the conclusions of Dr. McIlwain. In light of the dispute in the medical testimony, the trial court had the discretion to choose which expert to believe. *Bond* 692 S.W.2d at 640. *Johnson* 801 S.W.2d at 806. We conclude that the evidence in the record does not preponderate against the conclusions of the lower court. Accordingly, we affirm the trial court's finding that Plaintiff suffered no permanent injury.

Since we find no error in the trial court's acceptance of Dr. McIlwain's testimony, it also follows that the Plaintiff was not entitled to any further medical treatment after February 23, 2004, when his de Quervain's had resolved itself.

As indicated above, Plaintiff argues that he was entitled to temporary total disability benefits, if nothing else. We note again that the trial court's judgment – overtly at least – only dealt with the Plaintiff's claim for permanent injuries/disability. However, Dr. McIlwain did diagnose Mr. Elliott with bi-lateral de Quervain's disease, as apparently did the initial treating physician, Dr. Bishop. Moreover, Dr. Bishop did order that Mr. Elliott wear wrist splints as he continued to work. According to Plaintiff, he was not provided with the splints, and could not afford to buy them himself. Of course, an employer is required to furnish an injured employee with all necessary medical apparatus. Tenn. Code Ann. 50-6-204(a)(1) (2005). The record does reflect that in August or September of 2002, Randstad offered Mr. Elliott a light duty job assembling packets of employment papers. While he refused this job, claiming he was unable to perform it, the record is unclear as to whether the wrist splints were required for him to be able to perform it. Of course, the entitlement to temporary total disability benefits continues only until the employee reaches maximum medical improvement, or until he is able to return to work. *Wilkes v. Resource Authority of Sumner Co.*, 932 S.W.2d 458, 462 (Tenn. 1996); *Fagg v. Hutch Mfg. Co.*, 755 S.W.2d 446, 452 (Tenn. 1988). We are unable to determine from the record whether Mr. Elliott was able to return to work

without the wrist splints in August-September 2002; until he achieved maximum recovery in February 2004; or at some time between these dates. Accordingly, we deem it appropriate to remand this case for a determination of any right Mr. Elliott may have to receive temporary disability benefits.

Conclusion

We AFFIRM the trial court in its finding that Mr. Elliott suffered no permanent injury. We REMAND the case for a determination as to what temporary total disability benefits, if any, Plaintiff may be entitled to receive. Costs on appeal are adjudged one-half to Douglas Elliott and one-half to Randstad Employment.

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TELFORD E. FORGETY., JR., SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

DOUGLAS ELLIOTT V. RANDSTAD EMPLOYMENT SERVICES, INC., AND WARD NORTH AMERICA INSURANCE COMPANY
Washington County Circuit Court
No. 35101

January 31, 2007

No. E2005-02450-WC-R3-WC

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 both the appellant, Douglas Elliott, and the appellee, Randstad Employment Services, Inc., for which execution may issue if necessary.