

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 22, 2010 Session

OTIS PATRICK v. SAFELITE GLASS CORPORATION, ET AL.

**Appeal from the Chancery Court for Shelby County
No. CH-03-1521-3 Kenny W. Armstrong, Chancellor**

No. W2009-00896-WC-R3-WC - Mailed July 15, 2010; Filed August 17, 2010

The employee alleged that he had sustained a compensable injury to his back. His employer denied the claim due to discrepancies between his account of the event that caused the injury and certain medical records. The trial court found that the employee had failed to sustain his burden of proof, and dismissed the complaint. The employee appealed,¹ contending that the evidence preponderates against that finding. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the Court, in which JANICE M. HOLDER, C. J., and ALLEN W. WALLACE, SR. J., joined.

Stephen F. Libby, Memphis, Tennessee, for the appellant, Otis Patrick.

Lori D. Parrish and Jason R. Hollingsworth, Memphis, Tennessee, for the appellees, Safelite Glass Corporation and Zurich North America.

¹ Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

Otis Patrick (“Employee”) was a mobile auto glass installer for Safelite Glass Corporation (“Employer”). He alleged that he injured his back on Tuesday, January 7, 2003, while installing a windshield on a Ford Expedition at Raleigh-Egypt High School in Memphis, Tennessee. He testified that, because of the size of the vehicle, it was necessary for him to stand on the front seat in order to cut away the sealant that held the windshield in place. He said that while he was in the process of cutting, his knife broke, causing him to fall to the ground from a height of approximately four feet. He testified that he was able to continue working, finishing the job he was working on and several others before the end of his work day. When he awoke the next morning, he was in significant pain. He stated that his wife drove him to Employer’s place of business, where he turned in the paperwork for the jobs he had completed the previous day. Employee testified that he informed the unidentified woman to whom he gave the paperwork that he had injured himself on the job. He further testified that he informed his immediate supervisor, Tim Mitchell, that he had injured his back and was going to an emergency room for treatment. Mr. Mitchell testified at trial, and gave a conflicting account. It is undisputed that Employee did not return to work for Employer, or elsewhere, after January 8, 2003.

Employee was seen in the emergency room of St. Francis Hospital on January 8. The record of that encounter was critical to the trial court’s ruling. It contains the following history under a section labeled “triage”: “Lower L side back pain, numbness that goes and comes in R shoulder and leg; fell from 4 feet on back Dec. 24.” Another page from the same record contains this description: “c/o [complains of] L LBP [lower back pain] x 2 wks, on & off. Fell 3 wks ago at work.” A third entry states: “c/o low back pain off & on x 2 wks [secondary to] ‘fall’ 3 wks ago.” Employee had x-rays taken, received a prescription for pain medication, and was referred to his primary care physician, Dr. Wahid.² Dr. Wahid saw Employee on January 17 and 19, 2003. It appears from his records that he changed Employee’s medication and prescribed physical therapy. Employee then returned to the St. Francis emergency room on January 23. The record of that encounter recites three different onset dates for Employee’s back pain: January 22, one week prior to January 23, and three weeks prior to January 23.

Dr. Wahid continued to treat Employee intermittently over the next year, for lower back pain and a number of other conditions (heart disease, obesity, hypertension, arthritic

² Dr. Wahid died prior to the Employee’s trial. Some of his records were placed into the record as exhibits to the deposition of Dr. Dalal.

knees). In November 2004, Employee was seen by Dr. Allen Boyd, a neurosurgeon. Dr. Boyd ordered an MRI, which revealed degenerative changes in the lumbar spine and a possible herniated disk at the L4-5 level. Employee considered surgery but ultimately decided against it because of risks associated with the medications that he took for his heart disease.

Dr. Apurva Dalal, an orthopaedic surgeon, conducted two independent medical evaluations (IME) of Employee at the request of his attorney. He testified by deposition. The first examination occurred on November 27, 2006. On that occasion, his diagnosis was “herniated disc superimposed upon preexisting degenerative arthritis.” He assigned a 10% permanent impairment, according to the diagnosis related estimate (“DRE”) portion of the American Medical Association (“AMA”) Guides. He recommended that Employee “avoid prolonged walking, standing, stooping, squatting, bending, climbing and excessive motion in the back.” The second examination occurred on October 30, 2007. Based upon Dr. Dalal’s testimony on cross examination, this re-evaluation was prompted by a letter from Employee’s attorney, which suggested that an incorrect method had been used to arrive at the 10% impairment. Dr. Dalal changed Employee’s impairment rating to 25% to the body as a whole, based upon the range of motion method.

Dr. John Brophy, a neurosurgeon, conducted an IME on March 31, 2008, at the request of Employer’s attorney. His diagnosis was similar to that of Dr. Dalal: a herniated disc at L4-5 with degenerative changes at adjacent levels of the spine. He assigned an impairment of 5% using the DRE method from the AMA Guides.

Tim Mitchell, who was Employee’s immediate supervisor in January 2003, testified that he recalled seeing Employee at Employer’s shop on January 7. He testified that he recalled the date because he had just returned from vacation.³ He denied that Employee informed him of any work injury at that time. He said that he heard Employee making a grunting noise as he was working and that Employee did not look well. Mr. Mitchell was aware that Employee had a heart attack the previous year and said that he was concerned for that reason. He testified that he approached Employee, who stated that he did not feel well. Mitchell stated that he then suggested that Employee go home at that time, but Employee called his wife to take him to the hospital instead. Mitchell reported seeing Employee and his wife on one occasion a couple of weeks later. On that occasion, Employee was bringing

³ Mr. Mitchell was adamant that this incident occurred on Tuesday, January 7. However, he also testified that Employee was taken directly to the hospital on the date the conversation occurred. It is undisputed that the hospital visit occurred on Wednesday, January 8, 2003. Further, Employee’s pay stub for that week showed that he worked sixteen hours, presumably Monday and Tuesday, and received twenty-four hours of leave pay for the remainder of the week.

a note from Dr. Wahid excusing him from work for two more weeks. Mitchell denied that Employee mentioned a work injury to him on either of these dates or at any time until several months later.

Employee was sixty-one years old. He was a high school graduate and had subsequently taken several vocational courses, including auto body repair, welding, “electrical,” and auto glass replacement. He had worked at Cleo Wrap, a gift wrap manufacturer, for approximately ten years before beginning at Employer in 1996 or 1997. He testified that he had no back injuries or problems prior to January 2003. He did have a history of heart attacks and heart disease, which resulted in the placement of stents in his coronary arteries in 2001. He had returned to work without restriction after that procedure. He testified that, since his January 2003 injury, he had back pain and numbness in his legs. His symptoms were worsened by prolonged standing, walking, or bending. He sometimes used a cane to walk. He was unable to assist in most household chores. He expressed the opinion that he was not capable of performing any of his previous jobs.

The trial court took the case under advisement, stating that it would issue its ruling in the form of a letter to counsel. That letter is not contained in the record. However, counsel for the parties agreed at oral argument that the judgment subsequently entered incorporated the trial court’s findings in their entirety. The trial court found that Employee had not sustained his burden of proof concerning causation. It specifically referred to the discrepancies between Employee’s account of his injury and the medical records. It also referred to the conflicting testimony of Employee and Mr. Mitchell. It found Mr. Mitchell to be credible and made no such finding concerning Employee.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). On matters involving credibility and weight afforded to witness testimony, we give considerable deference to the trial court when the trial judge had the opportunity to observe the witness’ demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). On matters involving expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and we may draw our own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). We review a trial court’s conclusions of law de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. Causation

The trial court's findings, as set out in the judgment, state:

In reaching its decision, this Court was influenced by the following:

1. The Plaintiff's failure to report his alleged injury that same day even though he called into the office at Safelite Glass Corporation after completing each installation job assigned that day.

2. The testimony of the Plaintiff's supervisor, Tim Mitchell, who I find to be credible. Mr. Mitchell testified that Mr. Patrick never mentioned a fall at work when he spoke to him in the office on January 8, 2003, the same day he went to the emergency room at St. Francis Hospital.

3. The January 8th emergency room records from St. Francis Hospital, which reflect that Mr. Patrick gave a history of a back injury on December 24, 2002, some two weeks earlier than the date he alleged he suffered the fall at work.

4. Dr. Wahid's medical notes of January 17, 2003, which references the Plaintiff's emergency room visit of January 8, 2003, but fails to mention the Plaintiff giving any history of a work injury on January 7, 2003.

To be clear, this Court does not find that the Plaintiff does not have a back condition. The Court's finding here is simply that the Plaintiff, based on the matters mentioned, has failed to prove by a preponderance of the evidence that the back condition complained of occurred within the course and scope of his employment as alleged.

Employee contends that the evidence preponderates against the trial court's finding that he did not sustain his burden of proof. He points out that he worked full time without any complaints or problems until January 7, 2003, and was never able to work thereafter. He

notes that the January 8, 2003 emergency room record from St. Francis hospital, while giving a December 24, 2002 date of injury, also states that the injury occurred as a result of a four-foot fall at work. In addition, the January 23, 2003 record from St. Francis includes a statement that his symptoms had been present for three weeks, which is roughly consistent with a January 7 injury date. Employee also points to other documents, including forms generated in connection with the physical therapy ordered by Dr. Wahid, which are also consistent with his description of a work-related injury.

Employer notes, as the trial court did, the conflicts between Employee's testimony and various medical records generated at or near the time of the alleged injury. It also points out that the trial court specifically found Mr. Mitchell to be credible, but made no such finding concerning Employee. Employee's testimony directly conflicted with Mitchell's concerning the discussions between them on the day after the alleged injury. The trial court's finding implicitly rejects Employee's testimony.

Consistent with our obligations under the workers' compensation law, we have independently reviewed the record in its entirety. In evaluating the evidence, we acknowledge that the trial court had the opportunity to see and hear the witnesses, especially Employee and Mr. Mitchell. We did not have that opportunity. Their accounts of the events of January 8, 2003, cannot be reconciled. The trial court chose Mr. Mitchell's account and explicitly accredited his testimony. In so doing, it necessarily rejected Employee's testimony. Those findings are entitled to great deference in this forum. Madden, 277 S.W.3d at 900. Taking these factors into account, we are unable to conclude that the evidence preponderates against the decision of the trial court on the issue of compensability. In light of that conclusion, it is not necessary for us to address the additional issues raised by the Employee.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Otis Patrick, and his surety, for which execution may issue, if necessary.

JOHN EVERETT WILLIAMS, JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

OTIS PATRICK v. SAFELITE GLASS CORPORATION, ET AL.

**Chancery Court for Shelby County
No. CH-03-1521-3**

No. W2009-00896-WC-R3-WC - Filed August 17, 2010

ORDER

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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Otis Patrick, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM