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

DANNY J. ADAMS,	)	
	)	
Plaintiff/Appellee,	)	**HENRY COUNTY**
	)	
VS.	)	**HON. C. CREED McGINLEY**
	)	**JUDGE**
LIBERTY MUTUAL INSURANCE	)	
COMPANY and PLUMLEY	)	
COMPANIES, INC.,	)	**No. 02S01-9512-CV-00132**
	)	
Defendants and	)	
Cross-Plaintiffs/Appellants,	)	
	)	
and	)	
	)	
U. S. TOOL & GAUGE, INC.,	)	
	)	
Defendant and	)	
Cross-Defendant/Appellee.	)	

FILED

September 27, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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MEMORANDUM OPINION

MEMBERS OF PANEL:

LYLE REID, JUSTICE
HEWITT TOMLIN, JR., SENIOR JUDGE
CORNELIA A. CLARK, SPECIAL JUDGE

AFFIRMED AS MODIFIED AND REMANDED

CLARK, SPECIAL JUDGE

This worker's compensation appeal has been referred to the special worker's compensation appeals panel of the Supreme Court in accordance with Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Liberty Mutual Insurance Company ("Liberty Mutual") and Plumley Companies, Inc. ("Plumley") have appealed the trial court's decision requiring them to pay plaintiff workers' compensation benefits based on fifty percent permanent impairment to the body as a whole. Liberty Mutual and Plumley raise four issues:

1. Should Plumley be responsible for a shoulder injury that did not occur during plaintiff's employment there?

2. Is plaintiff's shoulder injury claim against Plumley barred by his misrepresentation of his physical condition?

3. Is plaintiff's claim of a shoulder injury barred by his failure to give timely notice to Plumley?

4. Should plaintiff's subsequent employer, defendant U.S. Tool & Gauge ("U. S. Tool") be responsible for any aggravation to his shoulder where plaintiff did not seek medical treatment until he had worked for U. S. Tool for about five months?

For the reasons set forth below, we affirm the trial court's finding of liability but modify its finding of impairment.

Danny Adams ("plaintiff"), born September 16, 1943, finished eleven years of school and worked primarily at manual labor during his adult life. On August 18, 1993, while working for Plumley and lifting a thirty-pound heater, he bruised his right elbow when he hit it against a handrail. The result was swelling to the elbow to the extent that it looked like a small football was growing out of his arm. Plaintiff gave timely notice of this injury, was treated by Dr. James Robertson for a mild contusion, and was released to return to work on September 13, 1993. Dr. Robertson

assigned no permanent impairment to the elbow as a result of this event.

In October 1993 plaintiff developed pain in his shoulder as a result of this injury. However, he continued to work at Plumley until November of 1993. He then voluntarily left his employment because his pain prevented him from doing his work. However, he did not advise Plumley that his resignation had anything to do with the prior injury. He immediately went to work for U. S. Tool. His job duties there consisted of overhead work, spray painting, welding, and assembling machinery. He remained at U. S. Tool until February 21, 1994, when he resigned because of continued shoulder pain.

In February 1994 plaintiff contacted the safety manager at Plumley and requested to see a doctor for his elbow. He did not advise the safety manager or anyone else at Plumley that he also claimed a shoulder injury. On February 7, 1994, plaintiff saw Dr. Terry Harrison,[1] complaining of pain and discomfort in his elbow. Dr. Harrison's examination included a manipulation of plaintiff's shoulder, but resulted in no documented pain response. His x-rays were negative and he had good range of motion. Dr. Harrison understood that plaintiff was still working for Plumley. He did not know plaintiff had changed jobs.

On February 21, 1994, plaintiff returned to Dr. Harrison and complained for the first time of pain in the right shoulder, along with tenderness, decreased range of motion, and poor grip. Dr. Harrison diagnosed bursitis. Plaintiff saw Dr. Harrison again on March 7, 1994, complaining of increased pain and discomfort in the right shoulder. Believing that plaintiff had bursitis with possible tendinitis in the shoulder,

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[1]Dr. Harrison had previously treated plaintiff for shoulder pain in October 1992. At that time Dr. Harrison noted a history of trauma to the shoulder and back. 1991 x-rays showed arthritis and degenerative joint disease. Dr. Harrison noted mildly decreased range of motion but no significant loss, normal grip, and no sensory loss. He advised plaintiff against any heavy lifting or straining. He felt plaintiff's activity would be greatly limited. He is certain there was some permanent impairment at that time. However, that pain never caused plaintiff to miss time from work.

relating to his degenerative arthritis, Dr. Harrison referred him to Dr. Lowell Stonecipher, an orthopedic surgeon. Dr. Harrison later received a note from Dr. Stonecipher reflecting that he had seen plaintiff on March 28. As of that date, his elbow was much better, but he was still experiencing shoulder problems. Dr. Harrison did not assign any permanent impairment based on the injury.

Dr. Stonecipher initially believed plaintiff had tendinitis in his shoulder and tennis elbow. Dr. Stonecipher ordered an MRI, which indicated findings consistent with either chronic inflammatory changes of the rotator cuff or a partial tear of the rotator cuff.

Dr. Stonecipher referred plaintiff to Dr. David L. Johnson, an orthopedic surgeon. Plaintiff was seen once by Dr. Johnson on April 15, 1994. He agreed with Dr. Stonecipher's diagnosis of chronic inflammatory changes in the rotator cuff, with a possible rotator cuff tear, as well as some degenerative joint disease. He recommended surgical treatment. Dr. Johnson testified by deposition that repetitive activity at or above the shoulder level was an aggravating factor in plaintiff's shoulder condition. He also stated that the injury at Plumley may have had some effect on his shoulder.

At the request of his attorney, plaintiff was examined by Dr. Robert J. Barnett on August 29, 1994. Dr. Barnett testified by deposition that the elbow and shoulder problems he saw were caused by the August 1993 injury. He believed the injury aggravated the preexisting arthritic and degenerative conditions in the shoulder. He assigned a permanent impairment rating of twenty (20%) percent to the arm or twelve (12%) percent to the body as a whole. Dr. Barnett also was unaware that plaintiff had left Plumley and begun working for U. S. Tool. He did not see the 1991 x-rays showing degenerative joint disease. On cross-examination Dr. Barnett agreed that the work at U. S. Tool could have contributed to plaintiff's shoulder problems. He was unable to assign a percentage of impairment that existed before

the 1993 injury.

At trial, plaintiff testified that he was unable to work and was waiting for adequate resources to have the surgery recommended by Dr. Johnson.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2). This tribunal is required to make an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991); Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988).

The trial court found that plaintiff was permanently impaired as a result of the injury he sustained while employed by Plumley in August 1993. In doing so the court made a specific positive finding about plaintiff's credibility. Where the trial judge has seen and heard the witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded those findings on review. Landers v. Fireman's Fund Insurance Company, 775 S.W.2d 355 (Tenn. 1989). When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675 (Tenn. 1983).

The court further found that although plaintiff had a pre-existing condition, it was the work-related accident that created a permanent disability. An employer takes an employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the pre-existing condition. Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991).

The court also found that plaintiff did not suffer a compensable injury while employed by U. S. Tool, but only an increase in pain. Where work aggravates a pre-existing condition or injury merely by increasing pain, there is no injury by accident. Townsend v. State, 826 S.W.2d 434 (Tenn. 1992).

The evidence in this case does not preponderate against any of these findings made by the trial judge.

The trial court did not address specifically the allegation of misrepresentation by plaintiff sufficient to bar his recovery. The judge did, however, find specifically that the plaintiff was very credible. We find that Plumley/Liberty Mutual has not carried its burden of proving (1) knowing and willful false representation as to physical condition; (2) reliance upon the false representation constituting a substantial factor in hiring; and (3) causal connection between the false representation and the on-the-job injury. Raines v. Shelby Williams Industries, Inc., 814 S.W.2d 346 (Tenn. 1991).

The trial court also did not specifically address the issue of notice to Plumley. There is no dispute that plaintiff gave timely notice of the August 8, 1993, accident. Plumley/Liberty Mutual assert that he is barred from recovery because he did not notify them at that time about a shoulder injury. However, plaintiff's shoulder injury did not manifest itself until later. An employee is not required to supplement an initial notice with notice of a later worsening condition. Quaker Oats Company v. Smith, 574 S.W.2d 45 (Tenn. 1978). This argument is without merit.

Once causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomical impairment, for the purpose of evaluating the extent of a claimant's permanent disability. McCaleb v. Saturn Corporation, 910

S.W.2d 412 (Tenn. 1995). From our independent examination of the record and consideration of the pertinent factors, the panel finds that the evidence preponderates against a finding of fifty percent permanent partial impairment to the body as a whole as a result of this injury, and in favor of an award based on thirty percent impairment to the body as a whole. The judgment of the trial court is modified accordingly.

The judgment of the trial court is affirmed as modified. The case is remanded to the trial court for such further proceedings, if any, as may be appropriate. Costs on appeal are taxed jointly and severally to Plumley Companies, Inc. and Liberty Mutual Insurance Company.

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CORNELIA A. CLARK, SPECIAL JUDGE

CONCUR:

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LYLE REID, JUSTICE

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HEWITT TOMLIN, JR., SENIOR JUDGE