IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 17, 1996

JIMMY JOHNSON,	)	OBION CHANCERY
	)	NO. 18,315
Plaintiff,	)	
	)	Hon. William Michael Maloan
v.	)	Chancellor
	)	
WAUSAU INSURANCE CO.,	)	NO. 02S01-9601-CH-00008
	)	
Defendant.	)	

FILED

September 9, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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MEMORANDUM OPINION

Mailed (then insert date it was mailed)

Members of Panel:

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

AFFIRMED

TOMLIN, SENIOR JUDGE

This workers' compensation appeal has been referred to the Special Workers' 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.

Jimmy Johnson ("plaintiff") has appealed the trial court's dismissal of his suit for workers' compensation benefits on the grounds that plaintiff failed to prove that he sustained an injury arising out of and in the course and scope of his employment by preponderance of the evidence. Plaintiff was employed by Gurien Finishing Corporation ("Gurien"), who was insured by defendant, Wausau Insurance Company. For the foregoing reasons, we find no error and affirm.

Plaintiff was employed at Gurien as a washer operator as part of Gurien's manufacturing process of stonewashed jeans. Plaintiff alleges that on August 10, 1993, he injured his lower back while pulling open a washer door that had been jammed with a rock. He stated that he did not report the injury at the time of the accident because it felt more like a cramp. When he woke up in pain the following morning, plaintiff testified that he reported the accident to his shift manager, Cindy Long. He stated that he advised Long that he hurt himself jerking on a washer door.

Plaintiff was treated by his personal physician, Dr. Philip Sherman, on August 16, 1993. He gave Dr. Sherman a history of hurting his back while pulling machines at work. Plaintiff complained to Dr. Sherman of low back pain with some pain radiating into his legs, with the pain being worse in his left leg than his right. Dr. Sherman diagnosed plaintiff as suffering from lumbosacral strain and prescribed pain medication.

In November 1993 plaintiff returned to Dr. Sherman with complaints of

lower back pain that had existed from September to November 1993. Dr. Sherman referred plaintiff to Dr. Joseph Rowland, a neurosurgeon. On his initial visit to Dr. Rowland, plaintiff complained principally of low back pain, with pain in both legs. A test by Dr. Rowland indicated that plaintiff had negative straight leg raising, minimal limitation of bending, and no muscle spasm. Dr. Rowland made an initial diagnosis of lumbosacral strain, although a CAT scan revealed a general bulging disc at L5 with a little spur formation. Dr. Rowland prescribed conservative treatment and pain medication.

Plaintiff was absent from work for only four days from August 1993 to March 1994. In December 1994 plaintiff returned to see Dr. Sherman with complaints of low back pain and again on January 4, 1995 for pain in his upper back.

On March 8, 1994, plaintiff's shift manager, Long, testified that plaintiff telephoned her to advise her that he would not be reporting to work that day because he had suffered an "accident off duty." The following day, plaintiff advised her that he had hurt his back while coughing. Gurien's personnel manager, June Robinson, testified that on the same day, March 8, plaintiff called to tell her that he would not be reporting to work because he had reinjured his back from the August 1993 accident while sneezing. She also identified at trial a report of a guard responsible for taking down information regarding absence or lateness reports of employees. This report shows that on March 8, plaintiff called in to say that he had an "accident off duty" and that he would not be in.

Plaintiff again went to see Dr. Sherman on March 8 with complaints of low back pain. Dr. Sherman diagnosed plaintiff's condition at that time as acute exacerbated lumbar strain with sciatica. A week later, plaintiff was seen by Dr. Grover Schleifer, who stated that plaintiff gave a history of injuring

his back a week earlier while coughing. Plaintiff also gave Dr. Schleifer a history of injuring his back in August 1993. Dr. Schleifer prescribed a pain medication, physical therapy, and instructed plaintiff to stay off work for two weeks.

In May 1994 Dr. Schleifer recommended that plaintiff return to work without any restrictions. After plaintiff's pain persisted the following month, Dr. Schleifer referred plaintiff to Dr. Glenn Barnett, a neurosurgeon in Jackson.

Testifiying from his records, Dr. Barnett stated that plaintiff complained of low back pain as well as right leg pain and right testicular pain. He did not complain of pain in his left leg. While plaintiff gave Dr. Barnett a history of hurting his back at work on August 10. 1993, he stated that it resulted from pulling jeans out of a washer, not jerking open a washer door. An MRI performed at that time, showed a very large paracentral L5 disc herniation to the right of midline. Shortly thereafter, Dr. Barnett performed surgery to remove plaintiff's herniated disc.

Postoperatively there was no indication of any residual or recurrent disc herniation, yet plaintiff continued to suffer pain. In October 1994 Dr. Barnett was of the opinion that plaintiff had received the maximum medical benefit from surgery and give him a ten (10%) percent permanent impairment to the body as a whole.

Dr. Barnett testified to the effect that, assuming no other history, the work injury was causally related to plaintiff's ultimate need for surgery a year later. Dr. Barnett was of the opinion that the acutely herniated L5 disc was a relatively recent occurrence. He admitted on cross examination that a coughing episode could have caused the herniated disc.

At the insistence of plaintiff's counsel, plaintiff saw Dr. Robert J. Barnett, an orthopedic surgeon in Jackson, for the purpose of performing a one-time medical evaluation of plaintiff's back. Plaintiff gave Dr. Barnett a history of injuring his back on August 12, 1993 while trying to jerk open a washer door. Dr. Robert Barnett stated that plaintiff's condition was the result of the August 1993 accident and that he relied on the history provided him by plaintiff in giving this opinion.

Dr. Riley Jones, an orthopedic surgeon, reviewed plaintiff's medical records and x-rays at the request of defendant's counsel and gave his testimony by deposition. Dr. Jones stated that the large herniated disc fragment found at L5 in plaintiff's June 1994 MRI would have shown up on plaintiff's December 1993 CT scan had it been present at that time. Dr. Jones was of the opinion that the August 1993 accident did not cause the herniation.

On appeal, this Court is required to view the findings of the trial court de novo upon the record of that court, accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of the evidence is found to be otherwise. T.C.A. § 50-6-225(e)(2).

It is well settled that a plaintiff in a workers' compensation case has the burden of proving every element of his or her case by a preponderance of the evidence. Elmore v. Traveler's Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992). The law in this state pertaining to the issue of causation is clearly set out in Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987), wherein this Court stated:

> This Court has consistently held that causation and permanency of a work-related injury must be shown in most cases by expert medical evidence. Furthermore, by "causal connection" is

> meant not proximate cause as used in the law of negligence, but cause in the sense that the accident had its origin in the haxards to which the employment exposed the employee while doing his work. Although absolute certainty is not required for proof of causation, medical proof that the injury was caused in the course of the employee's work must nt be speculative or so uncertain regarding the cause of the injury that attributing it to the plaintiff's employemtn would be an arbitrary determination or a mere possibility. If, upon undisputed proof, it is conjectural whether disability resulted from a cause operating within employment, there can be no award. If, however, equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn by the trial court under the case law.

Id. (citations omitted).

In regard to our review of findings based upon expert testimony, this Court in Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987) stated as follows concerning the preponderance standard of review adopted effective July 1, 1985:

> This standard of review differs from that previously provided and requires this Court to weigh in more depth factual findings and conclusions of trial judges in workers' compensation cases. Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. In the present case, however, some of the issues involve expert medical testimony. All of the medical proof was taken by deposition or was documentary, so that all impressions of weight and credibility must be drawn from the contents thereof, and not from the appearance of witnesses on oral testimony at trial.

Id. at 315-16. See also Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 589 (Tenn. 1989).

From our thorough review of the evidence in this case, we conclude that it does not preponderate against the chancellor's finding that "the employee failed to prove by a preponderance of the evidence, that he

sustained an injury arising out of and in the course and scope of his employment at Gurien Finishing Company on August 10, 1993 or at any other time during his employment." While it is plaintiff's contention that he injured himself on August 10, 1993 "jerking on a washer door," there is evidence in the record contradictory to his testimony. Cindy Long, plaintiff's shift manager, testified that she completed an accident report the day after plaintiff contends he reported the injury. She stated that plaintiff was "not sure" how he hurt his back, but that he "could have been pulling washers" when the accident occurred.

John Shumate, a co-worker of plaintiff who was present when he reported the injury to Long, testified that plaintiff told Long that he did not know whether he had hurt his back at work or at home. Shumate further testified that he saw plaintiff in the bathroom stretching his back from side to side the day before he reported the accident. When Shumate inquired as to what was wrong, plaintiff, according to Shumate, told him that he had hurt his back while having sex.

Plaintiff also testified that Shumate and he went rabbit hunting in January or February 1994, and at that time plaintiff fell head first into a forty foot ditch. Both plaintiff and Shumate testified that the fall did not hurt plaintiff's back. Plaintiff also testified that he played tackle football once and went fishing after the August 1993 incident. Brian Moran, a co-worker, testified that he often car pooled to work with plaintiff and socialized at his house during the period from August 1993 to March 1994, and that plaintiff never complained of back pain during that time. Jacqueline Gilliam, a physical therapist, attended plaintiff on March 17, 1994. She testified when she saw plaintiff on that date, he could not recall a specific injury as to how he had injured his back, but that he begin experiencing pain on August 11, 1993.

Although the chancellor did not make any specific finding that plaintiff's testimony was not credible, his determination that he failed to establish by preponderance of the evidence that he had sustained an injury in the course of performing his employment of necessity implied that his testimony was not credible. In light of this contradictory testimony, coupled with the conflicting medical evidence, we are of the opinion that the evidence does not preponderate against the chancellor's findings below. Consequently, the chancellor did not commit an error.

The decree of the trial court is affirmed. Costs in this cause on appeal are taxed to plaintiff, for which execution may issue if necessary.

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HEWITT P. TOMLIN, JR. SENIOR JUDGE

CONCUR:

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LYLE REID, JUSTICE

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CORNELIA A. CLARK, SPECIAL JUDGE