IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(May 23, 1997 Session)

FILED

February 20, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

DENNIS O'NEIL MILLIGAN,

Plaintiff,

vs. NO. 02S01-9612-CV-00110

TEN-STATE, INC., HARDIN CIRCUIT COURT

Defendant. C. Creed McGinley, Judge

FOR APPELLANT:

William F. Kendall, III
Waldrop & Hall, P.A.
Jackson, Tennessee

FOR APPELLEE:

Keith S. Carlton
Wood & Carlton
Corinth, Mississippi

MEMORANDUM OPINION
Mailed ________________, 1997

Members of Panel:

Janice M. Holder, Associate Justice, Supreme Court
Robert A. Lanier, Special Judge
Don R. Ash, Special Judge

AFFIRMED Lanier, Judge

MEMORANDUM OPINION

______This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law.

On or about July 9, 1993, while employed by the defendant, the claimant was attempting to move a mobile home with the assistance of fellow employees when his foot slipped and he was caused to twist and fall to his knee. He felt a burning sensation in his lower back shortly thereafter and reported this to his supervisor. The company referred him to a Dr. Howard Thomas, who in turn referred him to Dr. R. J. Hornsby. In the course of his examinations and treatments by these physicians, he underwent not only an MRI, an EMG and nerve conduction study, but also an epidural block and myelogram, which gave him a severe spinal headache. Because he continued to complain of pain in the low back upon examination, he was also evaluated by a physical therapist, who reported, ". . . he was totally inconsistent in every test and no impairment was noted that was consistent." (Notes of Dr. Hornsby).

No permanent disability rating was given by either Dr. Hornsby or Dr. Thomas. However, claimant was referred by his attorney on October 4, 1994 to Dr. Robert Barnett, for an evaluation. Dr. Barnett saw him one time. Dr. Barnett said that he "thought that he had some lumbar radiculopathy, probably aggravation of preexisting degenerative changes." Dr. Barnett was also of the opinion that the claimant has a permanent impairment of ten percent (10%) of the whole body. When asked what the opinion was based upon, the doctor replied,

> Medically documented injury with the pain and stiffness, with some radiculopathy, and some limited motion, [giving a reference to the AMA guides].

(Deposition of Dr. Barnett, page 9).

The doctor was then asked whether or not the history of claimant injuring himself in July of 1993 on the job "was consistent" with his diagnosis of lumbar radiculopathy and a ten percent (10%) permanent impairment to the body as a whole. The doctor

replied, “it is consistent.”

(Deposition of Dr. Barnett, pages 10 and 11).

The latter statement may be interpreted as the equivalent of the doctor stating that, in his opinion, it was possible for the claimant to both have had the accident in question and to have the permanent impairment to which the doctor testified. Dr. Barnett also gave his opinion that “heavy and repetitive lifting, overhead work and long standing should be limited.”

(Deposition of Dr. Barnett page 11).

However, on cross-examination, Dr. Barnett clarified his opinion somewhat. His review of the other examinations and his own examination did not find any type of nerve root impingement. The nerve conduction test was normal. He interpreted the MRI as showing some “desiccation,” meaning degeneration. He explained that the desiccation preexisted the accident, that claimant may do better or worse, depending upon his situation, and that he was employable. The arthritic changes shown on the x-rays, he felt, were due to age and he was unable to state that they were caused by the accident in question.

(Deposition of Dr. Barnett, pages 10 - 14).

Dr. Barnett said that the accident is “consistent with” having caused an aggravation to the L4 disc and the arthritic changes in the claimant’s back.

(Deposition of Dr. Barnett, Page 16).

On February 15, 1994, claimant told Dr. Hornsby that he had started to return to work but his car broke down. He told the doctor that he was keeping house, walking, doing some deer hunting and that sort of thing. (Notes of Dr. Hornsby).

The evidence strongly suggests that plaintiff sustained a genuine and painful injury on the job. If he did not, his submission to the various invasive procedures described above could only be explained either by a psychopathic or extremely devious personality, neither of which is demonstrated by the record in this case. The trial court awarded the claimant permanent partial disability in the amount of thirty-five percent (35%) to the body as a whole. It is appellant’s position that there is no evidence upon which to base such an award. In considering this matter, it is important to bear in mind

that, while aggravation of a preexisting physical condition is compensable, in order to recover benefits for permanent disability based upon such aggravation, the aggravation must be permanent, and not the mere normal or expected progress of the preexisting condition. The burden is upon the claimant to establish this permanent aggravation by competent expert evidence. Tibbals Flooring Company vs. Stanfill, 219 Tenn. 498, 410 SW 2d 892 (1967). In our opinion, the record as a whole in this case supports a finding of the claimant having sustained a permanent injury on the job. It can be argued that the testimony of Dr. Barnett, discussed above, supports the conclusion that claimant's accident on the job temporarily aggravated the preexisting condition from which he suffered and which preexisting condition leaves him with some permanent impairment. The closest either party got to completely clarifying the question was when the employer's attorney asked the following question and received the following answer:

> Q. So, you can't state with any reasonable degree of medical certainty that this desiccation was caused or aggravated by this incident in July of 1993, can you?
>
> A. It preexisted that.

(Deposition of Dr. Barnett, page 14)

The burden is upon the claimant to demonstrate through competent evidence that his condition was permanently aggravated by the accident. However, the court must consider the deposition of Dr. Barnett as a whole, and resolve doubts in favor of the worker. Imperial Shirt Co. v. Jenkins, 217 Tenn. 602, 299 S.W.2d 757 (1966). Applying that standard, there is sufficient evidence to support an award for permanency.

The judgment of the trial court is affirmed. The costs on appeal are taxed to the defendant Ten-State, Inc.

____

Robert A. Lanier, Special Judge

CONCUR:

____
Janice M. Holder, Associate Justice

____
Don R. Ash, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

DENNIS O'NEAL MILLIGAN,	)	HARDIN CIRCUIT
	)	No. 2244 Below
Appellee,	)	
	)	Hon. C. Creed McGinley,
v.	)	Judge.
	)	
	)	No. 02S01-9612-CV-00110
TEN-STATE, INC.	)	
	)	
Appellant.	)	AFFIRMED.

FILED

February 20, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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 assessed to the appellants.

IT IS SO ORDERED this ____ day of February, 1998.

PER CURIAM

Holder, J. - Not participating.