IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
September 29, 1997

FILED
January 15, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

MICHAEL A. SMITH,	) MADISON CHANCERY
	) NO. 49514
Plaintiff,	)
	) Hon. Joe C. Morris, Chancellor
v.	)
	)
CONTINENTAL CASUALTY COMPANY,	) NO. 02S01-9704-CH-00033
	)
	)
Defendant.	)

For Plaintiff:

Mr. Thomas K. McAlexander
Hill Boren
1269 N. Highland Ave.
Jackson, TN 38303

For Defendant:

Mr. Kenneth R. Rudstrom and
Mr. Thomas F. Preston
Spicer, Flynn and Rudstrom
80 Monroe Avenue
Memphis, TN 38103

MEMORANDUM OPINION

Members of Panel:

JANICE M. HOLDER, JUSTICE
HEWITT P. 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 T.C.A. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. Following a bench trial, the chancellor below found that there was no proof that plaintiff injured his back during the course and scope of his employment, and further found that plaintiff gave his employer no notice of injury. On appeal plaintiff has raised one issue for our consideration: whether the trial court erred in preventing plaintiff from offering proof as to a specific injury and notice of injury by sustaining an objection to certain testimony of plaintiff. In addition, defendant presents one issue: whether the evidence preponderates against the chancellor's finding that plaintiff did not sustain a work-related injury. We find no error and affirm.

Michael A. Smith ("plaintiff") was employed by Kroger Grocery Company from 1978 through March 1994. Specifically, on March 16, 1994, plaintiff worked a nine hour shift and went home. The next morning he awoke with extreme pain in his back. He later went to the emergency room of the hospital in Jackson where he was subsequently diagnosed as having osteoporosis and three or four possible compression fractures of the vertebrae in the thoracic spine. When plaintiff's pain did not clear up, his treating physician referred him to Dr. Genaro Palmieri, who practices a specialty of endocrinology and metabolic bone diseases in Memphis. The subsequent examination of plaintiff by Dr. Palmieri confirmed that he indeed had the disease osteoporosis, in which the bones become extremely porous and more easily subject to fracture. X-rays taken by Dr. Palmieri's radiologists confirmed the fractures at T-4 and T-7, which according to the radiologists were old and were present before 1987.

During the course of the trial, plaintiff was asked upon direct examination when a doctor first informed him of a connection between his work at Kroger and his back condition. Defendant's objection on the ground of hearsay was sustained by the chancellor. Subsequently, the chancellor ruled that there was nothing to indicate that plaintiff injured his back during the course and scope of his employment, therefore the injury was not compensable. The chancellor also

found that plaintiff had given no notice to defendant of his injury within the thirty day period as required by the workers' compensation statutes. In essence, there was a judgment for defendant.

Our scope of review is de novo upon the record in the trial court, whose findings of fact are accompanied by a presumption of correctness, unless we find that the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2) (Supp. 1997). This tribunal is also required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995).

I. The Causation Issue.

In Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991) our supreme court considered an issue such as this in this fashion:

> It is well established that an injury must both 'arise out of' as well as be 'in the course of' employment in order to be compensable under workers' compensation. The phrase 'in the course of' refers to time, place, and circumstances, and 'arising out of' refers to cause or origin. . . . Generally, an injury arises out of and is in the course and scope of employment if it has a rational connection to the work and occurs while the employee is engaged in the duties of his employment.
>
> Except in the most obvious, simple and routine cases, the claimant in a workers' compensation action must establish by expert medical evidence the causal relationship alluded to above between the claimed injury (and disability) and the employment activity. It is entirely appropriate for a trial judge to predicate an award on medical testimony to the effect that a given incident 'could be' the cause of the plaintiff's injury, when he also has before him lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury. (citations omitted).

It is undisputed that plaintiff could not identify any specific incident or trauma which preceded his pain. In addition to being treated by Dr. Kelly Ballard, who did not testify, and Dr. Palmieri, plaintiff was examined by Dr. Richard E. Fishbein, an orthopedic surgeon of Nashville, and by Dr. Robert J. Barnett, a well known orthopedic surgeon in Jackson. Both examinations were at the request of plaintiff's attorney and both were for the purpose of evaluation. Dr. Fishbein testified unequivocally that the compression-type fractures in plaintiff's spine

were triggered by plaintiff's lifting while working at Kroger on the day before he awoke with pain in his back. Dr. Barnett was never asked to give, nor did he state any opinion as to the cause and source of plaintiff's injury.

When asked whether or not the work activities of plaintiff prior to the day in question triggered plaintiff's fractures or refractures, Dr. Palmieri, plaintiff's treating physician, stated: "It's possible, it's very likely." However, on cross-examination Dr. Palmieri said: "The only thing we know is that this man developed these fractures and that's it."

Furthermore, on cross-examination of Dr. Palmieri as to whether there was any documentation that he had been lifting anything too heavy, Dr. Palmieri answered: "[W]e were much more concerned for the fact that it was a young man with a fracture and a history of Wilson's Disease. That was big flashing medically. It was nothing to do with the work or no work or nothing. That was the major factor." Dr. Palmieri also testified that while his radiologists were of the opinion that the fractures were old and predated 1987, he was of the opinion that the fractures were likely new.

In addition to the medical proof on causation, we must also consider the testimony and actions of plaintiff. Plaintiff admitted that when he went to the emergency room on March 17, 1994, as well when he was later examined by Dr. Ballard and Dr. Smith, he did not tell either doctor that he had suffered a work-related injury. The record also reflects that he did not at any time seek to have Kroger treat this incident as a work-related injury. On all of the Requests for Leave of Absence forms that plaintiff filled out he checked the specific box that stated he was suffering from an illness, rather than from an injury.

When faced with conflicting medical evidence, the trial court has the discretion to accept the opinion of one medical expert over that of another. Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). It seems clear to this Panel that the chancellor relied more upon the uncertainty of causation as stated by Dr. Palmieri and the lack of an opinion as to causation in Dr. Barnett's deposition, than upon the testimony of Dr. Fishbein. Inasmuch as all of the medical evidence was by deposition, "this Court is as able to weigh the testimony

in the same manner as the trial judge and may determine the weight to be given thereto." Coffey v. City of Knoxville, 866 S.W.2d 516, 519 (Tenn. 1993). In the opinion of this Panel, the evidence does not preponderate against the finding of the chancellor. We resolve this issue in favor of defendant.

II. The Hearsay Objection.

Plaintiff contends that the chancellor erred in sustaining defendant's hearsay objection on a question posed to plaintiff concerning how and when he was allegedly told of a connection between his employment at Kroger and his back complaints. The following is an excerpt of the transcript relative to this issue:

Q.	When did--when did the doctor first tell you there was a--could be a connection between your work at Kroger--
Mr. Rudstrom:	Objection to the leading or I mean to the hearsay.
The Court:	Okay. Sustained.
Mr. McAlexander:	Your Honor, just by way of responding to the objection. I think there is some case law that it's--it's not necessarily hearsay if it's being offered for the--not necessarily for the truth of the matter, but his [sic] under--but rather the effect on this listener. I think one of the hearing cases that came out of Conalco here in Jackson addressed that point.
Mr. Rudstrom:	I--I don't know anything about the cases at all, but all the doctors are testifying; so I just don't feel that that's a proper question to ask him for hearsay information.
The Court:	Okay. We will move on.

Following the ruling of the court on this evidentiary matter, plaintiff's counsel did nothing to preserve this testimony for its consideration by this Panel on appeal. Therefore, what plaintiff would have testified to in response to his counsel's question is not in the record. Under these circumstances, this issue becomes moot because there is no evidentiary question for this Panel to pass on, and we must resolve this issue in favor of defendant.

Accordingly, the judgment of the chancellor is affirmed in all respects. 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:

_____
JANICE M. HOLDER, JUSTICE

_____
CORNELIA A. CLARK, SPECIAL JUDGE

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Plaintiff/Appellant,	)	
	)	Hon. Joe C. Morris,
vs.	)	Chancellor
	)	
CONTINENTAL CASUALTY COMPANY,	)	NO. 02S01-9704-CH-00033
	)	
Defendant/Appellee.	)	AFFIRMED.

JUDGMENT 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 will be paid by Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 15th day of January, 1998.

PER CURIAM

(Holder, J., not participating)