IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, DECEMBER 1997 SESSION

BENJAMIN K. REED	)	HAMILTON CHANCERY
	)	
Plaintiff/Appellant	)	
	)	
V.	)	Hon. R. Vann Owens,
	)	Chancellor
MUELLER COMPANY	)	
	)	
Defendant/Appellee	)	NO. 03S01-9708-CH-00093

For the Appellant:

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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

E. Riley Anderson, Chief Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED. THAYER, Special 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.

The employee, Benjamin K. Reed, has appealed from a ruling of the trial court dismissing his claim for benefits as a result of an accident while working for defendant, Mueller Company. The trial court found the employee had failed to establish that his back injury was caused by the accident at work on July 26, 1994. Since the case was dismissed, there was no ruling on the employer's defenses of lack of proper notice and the expiration of the one year statute of limitations.

Employee Reed was 44 years of age at the time of the trial and had completed the 12th grade. He had some trade school education and was employed by defendant as an industrial maintenance technician. On the day in question, he was carrying a "hulk gun" when he stepped on a metal grate and received an electrical shock. He stated it threw him into a beam causing an injury to his back. A co-worker, Dennis Disney, was nearby and saw the accident.

Plaintiff testified he notified his supervisor about the accident and also discussed it with the company nurse. He continued to work and later saw Dr. Celeste Long; he did not improve and went to see his family doctor, David C. Conner; Dr. Conner eventually referred him to Dr. Paul A. Blackstone; he remained off work from sometime in January 1995 to March 1995; Dr. Blackstone diagnosed his problem as a ruptured disc; he did not improve and ceased working during September 1995.

Plaintiff has seen numerous doctors during 1994-1996. Surgery was performed on October 14, 1995 by Dr. Scott D. Hodges to remove the ruptured portion of the disc. He did not get much relief from this surgical procedure and was operated on again by Dr. Blackstone on May 30, 1996 to remove the whole disc. At the trial below, he stated he was still having a lot of pain. During his examination, he admitted he was drawing company related disability benefits while he was off from work. He admitted that he had never requested his employer to furnish him a doctor and that the first time his employer was aware he was insisting his claim was work-related was when the suit was instituted on January 24, 1996. He also stated he had

been involved in several prior workers' compensation claims where he had received benefits.

In dismissing the case, the trial judge specifically found plaintiff's credibility was doubtful and his testimony was entitled to little weight because of various conflicting medical histories and because of other evidence in the case.

All of the expert medical testimony was introduced by deposition.

Dr. Celeste Long, an internal medical physician, first saw plaintiff on August 31, 1994, which was about five weeks after the July 26th incident at work. She testified he told her about receiving an electrical shock at work; that his complaint was abdominal pain; she thought it could be coming from his back and obtained an x-ray of the lumbar spine; the x-ray indicated there was no disc injury; that she saw him a second and last time on September 28, 1994 and he was still complaining of pain; he said he felt full and did not have an appetite; that her records indicated the incident was not work-related and his group medical insurance carrier was billed for the visits; her conclusion was: "abdominal pain; etiology uncertain."

Dr. David C. Conner, an osteopathic physician, testified he had seen plaintiff prior to the day in question but not for any back complaints. He first saw him after the July 26th incident on October 31, 1994, when he appeared to have an upper respiratory infection. He saw him again on November 2, 1994, for a follow-up visit and prescribed an antibiotic. On December 30th visit, he was complaining of a sinus problem and ear aches. On January 3, 1995, plaintiff called his office complaining of low back pain. He came to the office the next day, January 4th, saying he had low back pain and that the pain was going down both legs. He related it had been like that for about five days.

Dr. Conner obtained an x-ray of the low back which only indicated an congenital problem. The x-ray did not indicate an injury had occurred. The doctor stated he saw him on other visits during January and also several visits from July 1995 to September 1995. The doctor stated that nothing was ever mentioned to him about his receiving an electrical shock or sustaining a back injury on any of the many visits to his office. He was of the opinion that if he had injured his back on July 26th, he would have expected complaints about the injury sooner than January 1995.

Dr. Howell B. Dalton, an internal medicine physician, testified he saw plaintiff on November 15, 1994 when he complained of a cough; again on April 17, 1995 for sinus infection; on September 15, 1995 visit, he complained of low back pain but gave no history of trauma; on September 19, 1995, his back was worse and he referred him to a Dr. Moses, an orthopedic surgeon; he later received a report from Dr. Moses indicating he had given a history of being involved in an accident on January 1, 1995. The doctor stated he also received a report from a Dr. Gibson which indicated the results of a nerve conduction study and it contained a history of having received an electrical shock. Dr. Dalton stated that during the numerous visits to his office, plaintiff never mentioned anything about an injury at work.

Dr. Paul A. Broadstone, an orthopedic surgeon, first saw plaintiff on January 25, 1995. He testified plaintiff told him of receiving an electrical shock which caused him to be thrown against a piece of equipment; he said plaintiff indicated his back and leg pain started about two months later. An M.R.I. report indicated a bulging disc. He saw him again after he had ceased working and another M.R.I. report showed it had progressed to a ruptured disc; the doctor's records also indicated plaintiff revealed during a visit in July 1996, he had been involved in a motor vehicle accident on July 15th when his vehicle was struck and turned about several times. The doctor billed his group medical insurance for the various services rendered; Dr. Broadstone performed the second surgical procedure on May 30, 1996.

Dr. Scott D. Hodges, an orthopedic surgeon, testified he first saw plaintiff during October 1995. He said plaintiff initially did not indicate his complaints were work-related; that he performed surgery on October 10, 1995, and that he did not seem to get the relief he had expected; that on a later visit during March 1996, he told the doctor he believed his problem with his back was work-related and he gave a history of having received the electrical shock.

Dr. Roger W. Catlin, an anesthesiologist who specialized in pain management, saw plaintiff on April 23, 1996, and stated plaintiff gave him a history of having been involved in an accident at work where he received the injury.

In addition to this medical testimony, the trial court heard the oral testimony of Rachel Tolliver, an LPN nurse for defendant employer. She said her records indicated plaintiff had called on January 12, 1995, at 9:20 p.m. and said he could not

work as he slipped and fell at home and had hurt his back. She testified he did report having received an electrical shock but never reported an on-the-job back injury. On one occasion he said his back was hurting but he was going to try to work.

Our review of the case is de novo accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

An employee has the burden of proving every element of the case, including causation by a preponderance of the evidence. *Tindall v. Waring Park Ass'n,* 725 S.W.2d 935, 937 (Tenn. 1987).

If there is conflicting medical testimony on causation of any injury, the trial judge has discretion to conclude that the opinion of a particular expert should be accepted over that of another expert and that one expert's testimony contains a more probable explanation than another expert's testimony. *Thomas v. Aetna Life & Cas. Co.,* 812 S.W.2d 278 (Tenn. 1991).

The primary issue on appeal is whether the evidence preponderates against the conclusion of the trial court that plaintiff did not injure his back as a result of the electrical shock he received on July 26, 1994.

Plaintiff contends the history given to Dr. Broadstone and Dr. Catlin supports his contention he was injured on July 26th when he received the electrical shock.

Defendant argues the testimony of Dr. Long, Dr. Conner, Dr. Dalton and Dr. Hodges supports its theory that plaintiff was injured sometime early in January 1995, while off from work.

From our independent review of the case, we find there is considerable evidence supporting the trial court's conclusion, and we do not find the evidence preponderates against the trial court's findings.

The judgment is affirmed. Costs of the appeal are taxed to plaintiff.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

BENJAMIN K. REED,	)	HAMILTON CHANCERY
	)	No. 97-0079 Below
Appellant,	)	
	)	Hon. R. Vann Owens,
v.	)	Chancellor.
	)	
	)	No. 03S01-9708-CH-00093
MUELLER COMPANY,	)	
	)	
Appellee.	)	AFFIRMED.

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 appellant.

IT IS SO ORDERED this .... day April, 1998.

PER CURIAM

Anderson, J. - Not participating.