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

FILED

February 25, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

JAMES MICHAEL RICHARDSON,	)	
	)	
Plaintiff/Appellee,	)	Gibson Chancery
	)	
v.	)	No. 02S01-9804-CH-00039
	)	
A. O. SMITH COMPANY,	)	Honorable George R. Ellis, Chancellor
	)	
Defendant/Appellant.	)	

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MEMORANDUM OPINION

Members of Panel:

Justice Janice M. Holder
Senior Judge John K. Byers
Senior Judge F. Lloyd Tatum

REVERSED AND DISMISSED **TATUM, Senior Judge**

OPINION

This workers' compensation appeal was referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tenn. Code Ann. §50-6-225(e)(3) (Supp. 1998) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This case was tried on February 24, 1998. The chancellor found that there was no period of temporary total disability, but awarded the plaintiff fifteen percent (15%) permanent partial disability to the whole body as a result of a work-related accident in December 1988 or January 1989. Defendant, A. O. Smith Company, has appealed the chancellor's decision as not supported by a preponderance of the evidence. After careful review, we find that the judgment of the trial court must be reversed.

At the time of trial, the Plaintiff, James Michael Richardson, testified that he was a 50-year-old man with a high school education and vocational training as an industrial electrician. His post-high school employment experience involved mostly electrical work. He was subsequently employed by the defendant as an electrical, mechanical maintenance man and was working as an appraiser for an insurance adjusting company at the time of trial.

He recounted the events surrounding his back injury as follows. In late December of 1988 or early January of 1989, the plaintiff felt "a hurting" in his lower back while helping another employee lift a 25-horsepower electric motor onto a stand. He reported the injury to his supervisor immediately. Believing that the injury was a minor strain, the plaintiff sought two or three treatments from a chiropractor, but his symptoms worsened. He was ultimately seen by Dr. Jerry Engelberg, a neurosurgeon. After an MRI was performed, Dr. Engelberg told the plaintiff that he had a tumor, an ependymoma, in his spine that had caused some spinal damage. According to the plaintiff's testimony, Dr. Engelberg told him he needed immediate surgery, because there was a risk that he might never walk again if he were to stumble or miss a step. After surgery was performed, the plaintiff received radiation and chemotherapy treatments under the supervision of an oncologist, Dr. Kirby Smith.

At the time of the trial, the plaintiff still had complaints of low back cramps, difficulty

sleeping at night, and inability to drive more than 30 minutes because of his discomfort. He testified that he is also unable to do many things that he could formerly do, such as riding motorcycles, because he cannot tolerate any bouncing. The plaintiff stated that he still follows Dr. Smith's instructions not to twist or lift weight over 25 to 30 pounds. He also testified that he can no longer do the type of maintenance or electrical work he could prior to January 1989, because he is unable to do the lifting required, and the radiation treatments have made it difficult for him to think very well if he gets hot or tired. His sense of balance has also been greatly affected, so he does not work at heights without being sure that there is something to hold on to.

Medical expert testimony was received at trial by depositions of three doctors. Dr. Jerry Engelberg, a Memphis neurosurgeon, first saw the plaintiff on February 1, 1989, with complaints of pain in his lower back, mainly at night, and problems with urination and erection. The doctor stated that the plaintiff related this to the January injury at work. An initial neurological examination was not remarkable, and x-rays of the plaintiff's spine were essentially normal. However, the plaintiff's symptoms indicated a possible tumor, and an MRI was ordered. The test revealed a mass, which was determined to be an ependymoma,[1] located in the lumbar region at L2-3 of the plaintiff's lower back. Dr. Engelberg stated that no disc herniation was found at any time. During surgery to remove the tumor on February 21, 1989, Dr. Engelberg found that it had spread throughout nerve roots (cauda equina) at the lower end of the spine and had formed a sheet of tumor cells in the tissue covering the nerve roots (subarachnoid space), which made total removal impossible. The tumors that could not be surgically removed were treated with radiation to the brain and spinal cord, along with chemotherapy. It was Dr. Engelberg's medical opinion that the lifting incident did not cause the tumor found in the plaintiff's spine, nor was it a factor in the spread of the tumor. Dr. Engelberg stated that the symptoms were most likely caused by the tumor pressing on the nerve roots.[2] He based his opinion on the fact that the plaintiff had low back pain at night and problems with urination and erection. Disc

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[1]Dr. Engelberg explained that this is a primary central nervous system tumor arising from the ependyma that lines the cavities of the brain and spinal cord and is part of a group of primary supporting cells in the brain and spinal cord.

[2]In his deposition, Dr. Engelberg previously described these nerve roots as being located in the lower spine.

pain or pain from a ruptured disc usually hurts when the individual is standing up and bearing weight, and the symptoms described by the plaintiff indicated "something other than a disc problem." When asked whether the plaintiff has any anatomical impairment related to the February 1989 lifting incident, Dr. Engelberg replied, "I would not award anatomical impairment. I think the source of this man's pain is the tumor compressing nerve roots, and I would not know on what basis to award any impairment here." He also stated that the plaintiff would have been temporarily disabled for approximately six months from the surgery and the radiation, which he explained "has to take a significant amount out of you physically. . . ." According to Dr. Engelberg, the radiation and chemotherapy treatments have certain unavoidable side effects, such as severe fatigue and nausea. He stated that the plaintiff will require medical care for his tumor condition for the rest of his life.

Dr. Kirby Smith, an oncologist, treated the plaintiff over a 51-month period from 1989 to 1993. At Dr. Engelberg's request, Dr. Smith first saw the plaintiff in the hospital on March 3, 1989, after his surgery. Dr. Smith stated that the plaintiff's tumors were concentrated in the lumbar spine at the L2-3 level, with other tumors present in the sacral and lower thoracic areas. He testified that, at the time of this first visit, the tumors had affected the plaintiff's spinal cord function, in that he was having back pain and urinary hesitancy. According to Dr. Smith's testimony, early studies and the myelogram showed an obstruction in the L2-3 region that was interfering with spinal cord function at that level. Dr. Smith stated that the plaintiff's low back pain "was probably coming from the tumor in the lumbar spine area." The plaintiff's post-operative course of treatment involved radiation to a large area of the spinal column and chemotherapy administered during June, July, and August of 1989. This reduced the size of some tumors and arrested the growth of all the tumors, according to several MRIs.

Dr. Smith stated that the most recent scan in May of 1993 still showed evidence of the tumor, but the plaintiff's initial complaints of back pain had gradually become less noticeable over the period of treatment. At the plaintiff's last visit on June 9, 1993, Dr. Smith testified that the plaintiff's chief complaints were sinus problems, some neck pain, and "a little bit of low back pain, particularly on the right side of his back." At that time, a

physical examination was performed, and no neurological abnormalities related to his back were found. Although Dr. Smith was unaware of the lifting incident during his initial consultation with the plaintiff, when presented with the facts surrounding the incident, Dr. Smith stated his opinion that the lifting incident could not have caused the tumor nor was it likely to have speeded up the tumor's growth. Based on the myelograms, x-rays, and findings in surgery, Dr. Smith stated that the tumors probably had been there for a number of months before January of 1989, when the lifting incident occurred. He testified that there was a possibility that the lifting incident made the tumor become symptomatic sooner than it would have otherwise. Dr. Smith also stated that the plaintiff's back pain would ultimately have become noticeable, and that "lifting or no lifting he would have developed the symptoms that brought him to Dr. Engelberg, and the same findings would have been there, which would have led to the surgery."

According to Dr. Smith's testimony, there is no way to predict how much longer the plaintiff's back would have been asymptomatic if the lifting incident had not occurred, but, because the plaintiff had almost a complete block in the lumbar region of his spine, he probably would have noticed symptoms in the lumbar region sooner than in the upper thoracic spine. Dr. Smith also stated that the plaintiff is not as active as he was before the surgery, and that he will ultimately have problems with the cancer again in the future.

The plaintiff offered the deposition of Dr. Joseph C. Boals, III, an orthopedic surgeon who saw the plaintiff on March 28, 1995. Dr. Boals testified that the plaintiff came to him at the request of plaintiff's attorney and wanted him to "listen to his story, to his history, evaluate the findings and let him know if there was any impairment from that injury." Dr. Boals stated that it was his opinion that the plaintiff suffered a low back strain[3] from the trauma, but that the overall symptomatology that followed the lifting incident "had to be clouded by the pre-existing tumor," so that "the pain and suffering and the things that happened to him thereafter cannot all be attributed to the lumbar strain." He testified that not all back strains cause permanent impairment. When asked for his medical opinion as to any permanent physical impairment to the plaintiff as a result of the back strain as

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[3]Throughout his deposition, Dr. Boals referred to the injury as a "sprain" and sometimes as a "strain." In this opinion, these terms will be used interchangeably as there is nothing in the record by which we can differentiate the two.

opposed to the tumor, Dr. Boals answered:

> Well, of course, this is probably the most difficult kind of assessment that any evaluator could ever be asked to make. You have a patient with a bad tumor on his spine, that has been injured on the job.
>
> I am handcuffed to know what the eventual outcome of that lumbar strain would be because of the presence of this tumor. This gentleman could have healed this sprain in four to six weeks and had no additional complaints of pain, and could have moved on through his life.
>
> However, because the tumor was there and because he is probably going to continue to have trouble with this area of his back until his demise, there is no way to know whether or not that strain would have completely healed.
>
> Giving both sides the benefit of the doubt, I cannot say that the twenty or thirty or fifty percent impairment he has got with the tumor is caused by this sprain, but I do think that probably I would assign five percent of the body as a whole to the fact that the sprain at least aggravated or brought on additional symptomatology that resulted in this diagnosis.
>
> Now, one might say that the examiner could take the stand and say this was going to happen anyway, but the fact that it happened at work and the fact that he had a lifting episode that created an injury makes me feel that at least part of this initiation of treatment and flare-up of the tumor, if you will, was caused by the injury.
>
> I have no way of knowing exactly how much it caused, so I am arbitrarily picking this number out of the sky and trying to be realistic and not giving him thirty or forty percent for the damage which he has to his spine now, but I would assign five percent to the work injury.

Dr. Boals further testified that the mere fact that a lumbar strain was diagnosed in the beginning does not necessarily mean that the plaintiff has a five percent impairment from that injury. Dr. Boals explained that the Guidelines suggest an impairment of five percent in the lumbar spine when there is a documented injury that persists for six months with symptomatology, accompanied by loss of motion or arthritis on the x-ray. He testified that he was "maybe stretching this a little bit" to say that the tumor was probably preventing the strain from healing over a six-month period, which would put the plaintiff in the five percent category under the Guidelines. He also stated that he is not a cancer specialist and would not try to discuss the etiology of the cancer or the part it has played in the plaintiff's back pain symptoms, as an oncologist would be in a better position to do that. He explained that:

> If the oncologist takes the position that that was going to happen anyway, that's one thing, but the way we have always treated work injuries was this: If the patient reported an injury and had a documented tenderness in his back, evidence of a sprain, than it was work related if there was an incident.

When asked if he would disagree with a physician who treated the plaintiff close to the date of injury and felt that all of the pain plaintiff experienced was related to the tumor, Dr. Boals stated, "If he can logically set forth a reason for that, I have no problem with it." In response to a final question about the speculative nature of his assignment of a five percent impairment rating to the plaintiff, Dr. Boals replied, "I think this case is speculative anyway."

The standard of review of factual issues in workers' compensation cases is de novo upon the record of the trial court with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2) (1991 & Supp. 1998); Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993). This Court now determines where the preponderance of the evidence lies. King v. Jones Truck Lines, 814 S.W.2d 23, 25 (Tenn. 1991). When the trial record contains oral testimony of witnesses, this Court must give considerable deference to the trial judge's findings regarding the weight and credibility of that testimony. Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992). However, when the determination of factual issues involves medical testimony derived solely from depositions, as in the present case, this Court is in the same position as the trial judge when reading the testimony and may draw its own conclusions about the weight, credibility, and significance to be given to such testimony. Seiber v. Greenbrier Indus., Inc., 906 S.W.2d 444, 446 (Tenn. 1995). See also Henson, 851 S.W.2d at 812; Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989).

The plaintiff in a workers' compensation case has the burden of proving causation and permanency of his injury by the preponderance of the evidence. See Roark v. Liberty Mutual Ins. Co., 793 S.W.2d 932, 934 (Tenn. 1990). The claimant must use expert medical testimony to establish causation and permanency, but such testimony must be considered in conjunction with the employee's testimony as to how his injury occurred and his subsequent physical condition. Thomas v. Aetna Life & Casualty, 812 S.W.2d 278, 283 (Tenn. 1991). When there is differing testimony from medical experts, this Court may

choose which view to believe and may consider the experts' qualifications, the circumstances of their examination, what information was available to them, and the importance of that information to other experts in making such a determination. See Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

To prove causation, a workers' compensation claimant must establish a causal relationship between the claimed disability and the employment activity by expert testimony. Id. Generally, an injury is considered to have arisen out of and is in the course of employment if it has a rational connection to the claimant's work and occurred while he was engaged in his duties. Id. Although absolute certainty is not required to prove causation, the medical testimony connecting the injury with the work-related activity must not be so uncertain or speculative that assigning liability to the employer would be arbitrary or only a mere possibility. Livingston v. Shelby Williams Industries, Inc., 811 S.W.2d 511, 515 (Tenn. 1991) (quoting Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987)).

To constitute sufficient medical proof that is probative on the issue of permanency, the expert witness must state his opinion in language that means that the factors in favor of a permanent disability outweigh those against permanency. Singleton v. Procon Products, 788 S.W.2d 809, 811-12 (Tenn. 1990). Words such as "it's just a possibility," "very possibly . . . but I couldn't tell you that, and nobody else can," and "I can't say whether it will or won't, it would be more subject to it, there is more of a possibility of it" amount to saying that there is only a likelihood or just a possibility of the events happening and are not sufficient to carry the burden in favor of permanency. See Singleton, 788 S.W.2d at 811 (discussing Owens Illinois, Inc. v. Lane, 576 S.W.2d 348 (Tenn. 1978) and Maryland Casualty Co. v. Young, 362 S.W.2d 241, 243 (Tenn. 1962)); Owens Illinois, Inc. v. Lane, 576 S.W.2d 348, 350 (Tenn. 1978).

A.O. Smith Company has presented only one issue on appeal, that is whether the trial court erred in finding that the plaintiff sustained a permanent partial disability as a result of the 1989 lifting incident. In his brief, the plaintiff states: "This is a chronic back strain case, not a case of aggravation of a preexisting malignant spinal tumor." He stated that all issues raised by the pleadings concerning accelerated growth or spread of the

malignancy in plaintiff's spine were abandoned.

After careful review of the record, we find that the evidence preponderates against the trial court's finding of a permanent disability from the back strain. In reviewing the depositions, we find that the only expert witness who connected any part of the plaintiff's symptoms and disability to the 1989 lifting incident was Dr. Boals, and his testimony is somewhat equivocal, arbitrary, and speculative. For example, he stated that there was no way that he could know whether the original strain would have completely healed because of the presence of the tumor. Dr. Boals's assignment of a five percent disability rating to the body as a whole under the Guidelines was based on his speculation that the tumor had prevented the back strain from healing for six months. However, he also stated that he was arbitrarily picking the five percent figure and admitted that an opinion on the tumor's effect on the plaintiff's symptoms should be deferred to an oncologist. His own assessment of the plaintiff's case was that it was speculative.

In looking at Dr. Boals's testimony as a whole, we find that the language he used in stating his opinions shows only a mere possibility, as opposed to a probability, that the Plaintiff suffered a permanent disability from the lifting incident. Such evidence is insufficient to satisfy the plaintiff's burden of proof on causation or permanency. We also observe that Dr. Boals only saw the plaintiff one time, which was over six years after the lifting incident. There is no evidence in the record to indicate that Dr. Boals performed any tests or examined the claimant, other than taking his medical history, listening to his account of the events, and evaluating the medical findings to see if a permanent impairment was present. Neither Dr. Engelberg nor Dr. Smith diagnosed the plaintiff as having a back strain or connected his symptoms to such an injury, although they saw the plaintiff immediately after the lifting incident. It was Dr. Boals who first raised this diagnosis six years after the accident.

On the other side of the coin are the testimonies of the plaintiff's treating neurosurgeon and oncologist, Dr. Engelberg and Dr. Smith, which are basically consistent. Both doctors saw the plaintiff within a month or two of the lifting incident, and each performed tests and examinations on the plaintiff's back. Both doctors stated their opinions that the plaintiff's back pain symptoms were most likely caused by the tumor in

the lumbar region of the spine, which, due to its size and spread, was present before the lifting incident. No disc herniations were found by Dr. Engelberg in any of the tests or in surgery from February 1989 onward, and Dr. Smith testified that the plaintiff's complaints of back pain had diminished over the course of treating the tumor. Dr. Engelberg stated that his opinion to a reasonable degree of medical certainty was that there was no anatomical impairment to the plaintiff from the lifting incident and essentially no basis to award one, because the source of the plaintiff's pain was the tumor compressing the nerve roots. Dr. Smith also expressed the opinion to a reasonable degree of medical certainty that the plaintiff's back pain would ultimately have surfaced with the same symptoms, the same findings, and the same surgery, regardless of the lifting incident. In addition, there was no evidence of trauma to the tumor. Dr. Engelberg assigned a six-month period of disability to the adverse side effects of the surgery and treatments related to the tumor, and both he and Dr. Smith stated that the cancer would cause the plaintiff problems for the rest of his life. Neither treating physician connected the plaintiff's back pain or resulting disability to a back strain.

In assigning weight and significance to these doctors' testimony, it is important to note some additional facts in this case. It was Dr. Engelberg who actually saw the tumor and its placement in the plaintiff's spinal column during surgery. By this time, the major portion of the tumor had almost completely blocked the lumbar region of the spine, where the plaintiff was feeling the pain, and was pressing on the nerve roots. Dr. Smith also saw the plaintiff close to the time of the lifting incident and treated his tumor for an extended period of approximately 51 months. Dr. Boals stated in his testimony that an oncologist, in this case Dr. Smith, would be in a better position to give any medical opinions concerning the effects of the tumor on the plaintiff's symptoms, and that he would not disagree with a treating physician who attributed all of plaintiff's pain to the tumor, if he had logical reasons for doing so. Dr. Engelberg, as the treating physician, did give his opinions and logical medical reasons for attributing the plaintiff's pain to the tumor and not to a back strain.

In his brief, the plaintiff argues that his testimony, coupled with that of Dr. Boals, is sufficient to support an award in this case. We disagree. The preponderance of the

evidence establishes that plaintiff's symptoms and disability were caused by the tumor. The plaintiff has failed to establish by a preponderance of the evidence that his difficulties were caused by the industrial accident.

On our de novo review, we find that the evidence preponderates against the findings of the trial court in favor of the plaintiff. The judgment of the trial court is therefore reversed, and the case is dismissed.

Plaintiff will pay the costs.

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F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

JAMES MICHAEL RICHARDSON,	)	GIBSON CHANCERY
	)	NO. H3829
Plaintiff/Appellee,	)	
	)	Hon. George R. Ellis,
vs.	)	Chancellor
	)	
A. O. SMITH COMPANY,	)	NO. 02S01-9804-CH-00039
	)	
Defendant/Appellant.	)	REVERSED & DISMISSED.

FILED

February 25, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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 Appellee, for which execution may issue if necessary.

IT IS SO ORDERED this 25th day of February, 1999.

PER CURIAM