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

FILED

August 4, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

SCOTT S. McKEEHAN, Plaintiff/Appellant v. WHITE CONSOLIDATED INDUSTRIES, INC., d/b/a ATHENS PRODUCTS, and DINA TOBIN, DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, Defendants/Appellees	)	McMINN CHANCERY NO. 03S01-9806-CH-00056 HON. EARL H. HENLEY, CHANCELLOR

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

Members of Panel:

Justice Frank F. Drowota, III
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED

BYERS, Senior Judge

OPINION

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.

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988).

The trial judge found the plaintiff sustained an accident in July 1988 and was 100 percent permanently vocationally impaired. As a result, the defendant was ordered to pay 96 percent of the award and the Second Injury Fund was ordered to pay 4 percent of the award.

The plaintiff appeals and asserts the date of the industrial accident should be fixed as August 25, 1995.

The defendant and the Second Injury Fund appeal also and say the trial court erred in finding the plaintiff 100 percent totally and permanently disabled.

We affirm the judgment of the trial court.

The plaintiff, Scott McKeehan, was 37 years old at the time of the trial. Mr. McKeehan has a high school education and received a special vocational course through his employer, Athens Products. He has an employment history of heavy manual labor.

In 1987, Mr. McKeehan injured his back in an automobile accident, and surgery for a herniated disc was done. No workers' compensation award was sought because this was a non-work related injury.

Mr. McKeehan testified that he reinjured his back on July 20, 1988 while tightening a bolt in the course and scope of his employment. An MRI performed at that

time indicated that this was a new event with a new disc fragment at the same L5-S1 area. He again received surgery to remove the herniated disc. The defendants do not contend the plaintiff suffered a compensable injury.

Following this surgery, Mr. McKeehan returned to work in January 1989. He admitted that his back injury had not totally resolved itself when he returned to work. Dr. Paul Schwiger, the treating physician, also testified that Mr. McKeehan continued to suffer problems with his back after his return to work. Dr. Schwiger noted that he wanted Mr. McKeehan to change his work in March 1989 due to his continued symptoms but Mr. McKeehan reported that he did not want restrictions and was able to regulate his activities.

Mr. McKeehan continued to suffer back pain and periodically sought medical treatment for this injury. He received numerous steroid injections for the continued pain.

Dr. Schwiger testified that he performed studies on Mr. McKeehan's back in April 1989, July 1990, January 1991, July 1992, and August 1995. None of these studies indicated a new injury. Rather, these studies showed a continuation of the same problem of degeneration at the L5-S1 disc.

On August 25, 1995, Mr. McKeehan reached the point where the continued pain was too much and he quit working. He sought additional treatment from Dr. Steven Natelson, a neurosurgeon. Dr. Natelson noted that an MRI performed in October 1995 showed only the abnormality at level L5-S1. Dr. Natelson performed fusion surgery in January 1996, implanted a dorsal column stimulator in November 1996, and implanted a morphine pump in June 1997. While Mr. McKeehan has received temporary relief from these efforts, he has continued to complain of pain. Dr. Natelson testified that Mr. McKeehan had an additional 10 percent impairment due to the fusion surgery, an additional 5 percent impairment due to chronic pain, and an overall medical disability of 30 percent related to his back. Mr. McKeehan had just reached maximum medical improvement at the time of Dr. Natelson's deposition on September 17, 1997.

Mr. McKeehan testified that he does not believe he is totally disabled, but rather believes that he is capable of doing some kind of work. Dr. Natelson opined that Mr. McKeehan should be able to work even though he is precluded from his previous type

of employment. Dr. Julian Nadolsky, a vocational expert, stated that Mr. McKeehan is capable of performing unskilled light or sedentary work and is 90 percent vocationally disabled. Dr. Nadolsky noted, however, that due to pain, Mr. McKeehan is realistically 100 percent vocationally disabled.

The plaintiff had a previous injury that was found to be a 4 percent impairment to the body as a whole.

In addition to the medical evidence, the plaintiff testified he was unable to find any work that he could perform as a result of his injury. Further, his mother and daughter testified the plaintiff was unable to engage in physical activities as he previously did.

The defendants insist the evidence shows the plaintiff is not 100 percent disabled because Dr. Natelson testified the plaintiff, though precluded from work that requires heavy lifting, stopping, bending, etc., "can answer the telephone" and do other such things. Further, Dr. Nadolsky, a vocational expert, was of the opinion the plaintiff was precluded at least from 95 percent of jobs suitable to his skill levels. However, he further opined that because of the use of a morphine pump for the rest of his life and because of severe pain in his lower back he should be considered 100 percent disabled.

The defendants also place considerable emphasis on the plaintiff's statement that "I don't feel like I am [totally disabled], no sir. I'm going to do what I can do. Whatever it takes to live I have to do it."

From all of this testimony, we conclude the evidence preponderates in favor of the finding by the trial judge that the plaintiff is 100 percent disabled. Dr. Natelson's testimony concerning the plaintiff's ability is conclusory and lacking in any specificity as to what the plaintiff can do. The vocational expert basically rates the plaintiff as 100 percent disabled. The testimony of the plaintiff about his thoughts on his disability seems to be more a desire than a factual rendition of his ability. We therefore affirm the finding that the plaintiff is 100 percent disabled.

The plaintiff asks us to find that his injury was on August 25, 1995 rather than on July 20, 1988, when the plaintiff injured his back while tightening a bolt.

The plaintiff claims that the condition of his back became worse from his return to work from December 5, 1988 until August 25, 1995. He argues that his injury is a repetitive or gradually occurring injury and that the date of injury should be the date he was last able to work.

The plaintiff relies upon the case of *Brown Shoe Co. v. Reed,* 350 S.W.2d 65 (Tenn. 1961) in support of his claim. In *Brown,* the injury was to the worker's ulna nerve. The injury did not occur in a single episode, rather it developed as a result of the continual use of the worker's arm over a period of time. The Supreme Court pointed out that the case involved a repeated trauma caused by the continual use of the worker's arm performing his assigned task.

In this case, the evidence shows the injury to the plaintiff's back occurred in a single episode. The disabilities he suffers flow therefrom. We do not find that the medical evidence, which says the continual work caused or aggravated the plaintiff's symptoms, changes this injury from a single episode to a gradually occurring injury. We

therefore affirm the finding of the trial judge that this is an injury occurring in 1988.[1]

[1] The statute of limitations is not an issue in this case because the defendant continued to furnish medical care for the plaintiff.

The costs of this appeal are taxed equally to the plaintiff and the defendant.

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John K. Byers, Senior Judge

CONCUR:

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Frank F. Drowota, III, Justice

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Roger E. Thayer, Special Judge

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SCOTT S. McKEEHAN	)	McMINN CHANCERY
	)	No. 119,092
Plaintiff-Appellant,	)	
	)	No. 03S01-9806-CH-00056
v.	)	
	)	
WHITE CONSOLIDATED	)	
INDUSTRIES, INC., dba ATHENS	)	
PRODUCTS,	)	Hon. Earl H. Henley
and	)	Chancellor
DINA TOBIN, DIRECTOR OF THE	)	
DIVISION OF WORKERS	)	
COMPENSATION, TENN. DEPT.	)	
OF LABOR, SECOND INJURY	)	
FUND	)	
Defendants-appellees.	)	

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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 facts 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 taxed equally to the plaintiff, Scott S. McKeehan and Michael D. Newton, Surety and to defendant, Athens Products, for which eexecution may issue if necessary.

08/04/99