

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
AUGUST 30, 2000 Session

SHIRLEY LOOPE v. INSTITUTIONAL JOBBERS CO., INC. ET AL.

**Direct Appeal from the Chancery Court for Knox County
No. 130947-2 Daryl L. Fansler, Judge**

**No. E1999-02503-WC-R3-CV
FILED: JANUARY 9, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found a work-related injury and awarded a ten percent whole body impairment. The defendant argues the evidence preponderates against the finding of compensability. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Knox County Chancery Court is Affirmed.

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J. and ROGER E. THAYER, SP. J., joined.

Barry K. Maxwell, Esq. and Wesley L. Hatmaker, Esq., for the appellant, Institutional Jobbers, Co., Inc.

David A. Burkhalter, II, Esq. and Kirk J. Angel, Esq., Knoxville, Tennessee, for the appellee, Shirley Loope

MEMORANDUM OPINION

Facts

The plaintiff, age sixty-one at the time of trial, has a high school diploma but no subsequent training. Her work history is that of a clerk in retail and banking. She began working for the defendant in 1977 as a file clerk and in other positions.

On August 24, 1995, the plaintiff injured her left arm, shoulder and neck when she picked

up a bag of mail that weighed between twenty and thirty-five pounds. She immediately reported the injury. She did not seek medical treatment at that time, but the next day, she did tell the safety director she needed to see a physician. The parties stipulated the work-related injury did occur. The plaintiff had been treated previously—in late 1980—for neck pain by both her physician and a chiropractor.

In January of 1996, the plaintiff was informed her job was being eliminated; the plaintiff was informed of other suitable positions with accompanying training that were open within the defendant's organization; however, she requested a severance package and, after meeting with an attorney, decided not to sign it. Her employment with the defendant ended in March of 1996.

Medical Evidence

The plaintiff chose to see Dr. Russell Gibson. She gave a history of experiencing pain after picking up a mail bag. She did not disclose that she had previously undergone chiropractic and medical treatment for neck pain to Dr. Reid or to Dr. Gibson who treated upon referral from Dr. Reid. Dr. Reid found the plaintiff suffered "pertinent tenderness in the trapezius muscles on the left with decreased range of motion secondary to pain." From the plaintiff's description of the pain shooting from her arm to her neck and head, Dr. Gibson concluded she had not suffered any nerve root damage and diagnosed neck strain. He released the plaintiff to work the next day with no restrictions. On the second visit, Dr. Gibson performed no objective tests but ordered x-rays that revealed "mild arthritic changes," which Dr. Gibson described as "degenerative changes that were probably more chronic" than due to injury. On the third and final visit, Dr. Gibson concluded the neck strain had resolved itself; he felt the plaintiff reached maximum medical improvement on September 21, 1995 and that she could return to work without restriction.

The plaintiff saw Dr. Gibson again sometime in January of 1996, shortly after being informed that her job was being eliminated. At this visit, the plaintiff complained of headaches, shooting pains, and left arm numbness. Dr. Gibson found tenderness but felt it unrelated to the job injury. He referred the plaintiff to Dr. William Reid, a neurosurgeon.

Dr. Reid found a diminished reflex in the plaintiff's left arm and diagnosed a pinched nerve. He ordered physical therapy, which the plaintiff underwent and a myelogram, which revealed "bone spurs at C5-6, more pronounced on the left than the right, with a slight continuation of the left to the C-6 nerve root." Dr. Reid then ordered an MRI—the test revealed "degenerative disc disease at C5-6 with left foraminal stenosis, which is basically the same finding as the compression of the nerve root at C-6 on the left by the myelogram." He found the results consistent with the plaintiff's complaints of shoulder and arm pain and consistent with the history of her on-the-job injury.

Dr. Reid opined the plaintiff had sustained a permanent disability as a result of the mail bag injury and assessed a six percent permanent impairment based on the AMA Guidelines with lifting restrictions of no more than fifty pounds or twenty-five pounds on a repetitive basis, and no standing or sitting for more than eight hours.

Discussion

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 finding, 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 courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Since the parties stipulated a work-related injury did occur in August of 1995, the core issue is the causation of the condition treated by Dr. Reid in January of 1996.

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." TENN. CODE ANN. § 50-6-102(a)(5). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted); *Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993).

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted). Only a medical expert may testify as to whether a given disability is permanent. *Bolton v. CNA Ins. Co.*, 821 S.W.2d 932 (Tenn. 1991). The medical testimony in this case showed the on-the-job injury "could have" been the cause of the plaintiff's condition; that is sufficient to satisfy the causation prong of the plaintiff's case.

In this case, as in all workers' compensation cases, the claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972). Although the trial court found the plaintiff's testimony was couched in terms most favorable to her cause, it did not find her testimony to be lacking in credibility.

The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990). The trial court permissibly accepted the testimony of Dr. Reid over that of Dr. Gibson. We find no reversible error in this regard.

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). Our review of the depositions in this case show the evidence does not preponderate against the findings of the trial court.

Basically, the defendant in this case is arguing the plaintiff had a pre-existing condition that was not connected in any fashion to the work-related injury. We do not agree.

An employer is responsible for workers' compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, if employment causes an actual progression or aggravation of the prior disabling condition or disease which produces increased pain that is disabling. *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483 (Tenn. 1997), citing *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993); *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992); *Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587, 591 (Tenn. 1989) ("There is no doubt that pain is considered a disabling injury, compensable when occurring as the result of a work-related injury."). It is true that an employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the pre-existing conditions; but if work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident. *Sweat v. Superior Indus., Inc.*, 966 S.W.2d 31, 32 (Tenn. 1998). To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. *Id.* at 33.

The plaintiff clearly had degenerative disc disease; however, the medical testimony of Dr. Reid shows the work-related incident could have "tripped the balance" causing the nerve impingement. Dr. Reid stated the plaintiff's unreported previous treatment for neck pain did not affect his diagnosis or treatment—he based his opinion on the presence of arm pain, stating the degenerative process is part of the underlying process. The medical testimony is sufficient for purposes of making an award under our workers' compensation laws.

We affirm the judgment of the trial court. The costs of this appeal are taxed to the defendant.

JOHN K. BYERS, SENIOR JUDGE

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JUDGMENT

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 to the defendant, Institutional Jobbers Company, Inc., and Barry K. Maxwell, surety, for which execution may issue if necessary.

01/09/01