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

FILED

June 24, 1998

Cecil W. Crowson
Appellate Court Clerk

CHARLOTTE HULL, Plaintiff/Appellee v. EMRO MARKETING COMPANY, Defendant/Appellant KWIK SAK, INC., Defendant/Appellee RELIANCE INSURANCE COMPANY, Defendant/Appellee	)	RUTHERFORD CHANCERY NO. 01S01-9709-CH-00201 HON. DON R. ASH, JUDGE

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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 William S. Russell

REVERSED and REMANDED

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.

The trial court found that the plaintiff suffered an injury by accident on February 23, 1995 and was entitled to an award of 22 percent permanent partial impairment to the body as a whole ($14,080.00 for permanent partial disability and $960.00 for temporary total disability payable in a lump sum), medical expenses incurred after March 9, 1995, and future medical treatment caused by the injury. The trial court ruled that Emro Marketing Company ("Emro") was liable for the award because it was the employer at the time of the most recent injury that bore a causal relation to the plaintiff's incapacity.

_____Emro raises the following issues:

1. Whether the Chancellor erred in finding the subsequent employer liable under the last injurious injury rule when the subsequent injury was not suffered in the scope of the employee's employment with the subsequent employer.

2. Whether the Chancellor erred in applying the last injurious injury rule when the employee's initial injury was the strongest causal link to the disability of the employee, who had not fully recovered from her initial injury?

The plaintiff contends the trial court properly found Emro liable, but says if it is not then Kwik Sak, Inc. ("Kwik Sak") and Reliance Insurance Company ("Reliance") are liable. Kwik Sak and Reliance say that Emro is liable as found, but if it is not then the plaintiff has not appealed from the action of the trial judge dismissing them as defendants.

We find the trial judge erred in applying the repetitive injury rule and/or the last injurious injury rule in this case and find Kwik Sak and Reliance were the insurers at the time of the plaintiff's injury.

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).

FACTS

The plaintiff worked for Kwik Sak, a convenient store, as an assistant manager. In this capacity, the plaintiff was required to lift, bend, and stoop to load coolers and stock shelves. On November 9, 1994, the plaintiff was working alone on a busy day when she injured her back while stocking merchandise. The next day the plaintiff went to work and told her supervisor that her back was hurting.

On November 11, 1994, the plaintiff went to see a chiropractor named Dr. Bridget Most for back pain and told her that she never had back problems before the injury. The plaintiff checked on a form that her present problem was not due to any injury, but she also told the chiropractor that the back injury occurred at work and that she did not want to file a workers' compensation claim. The plaintiff testified that she never fully recovered from this initial injury.

On November 10, 1994, Emro bought and took control of the store from Kwik Sak pursuant to a Purchase and Sale Agreement. On this date, Emro also became responsible for workers' compensation matters. Thereafter, the plaintiff was employed by Emro. By December 19, 1994, the plaintiff's condition had improved to the point that she was able to resume full time work and even increase her duties at work (50 to 60 and occasionally 70 hours per week). She testified that her back pain worsened during her employment with Emro.

On the evening of February 22, 1995, the plaintiff heard her low back pop and felt intense pain when she turned over in bed at home. On February 27, 1995, the plaintiff returned to the chiropractor because her condition began to deteriorate. The plaintiff continued to work with a back condition so bad that she was reportedly carried into the store and placed on a stool. However, in February 1995, the plaintiff

testified that her back pain became so severe that she could not do her job any longer and she then saw Dr. Warren F. McPherson, a neurosurgeon.

Dr. McPherson found the plaintiff had a ruptured disc at L4-L5 and L5-S1. A back surgery was done on March 16, 1995. The plaintiff returned to work for Emro on May 2, 1995. The plaintiff has since left employment with Emro for a similar job that pays more money.

MEDICAL TESTIMONY

_____Dr. Bridget Most, a chiropractor, testified by deposition that the plaintiff's original symptoms were consistent with nerve root compression and disc bulge. Dr. Most treated the plaintiff conservatively from November to December 1994, noting that she should not do any work from November 11 to November 28, 1994. Dr. Most opined that the plaintiff's work injury in November 1994 and her heavy work schedule throughout January and February 1995 caused her back to pop in February 1995. Dr. Most referred the plaintiff to Dr. McPherson.

Dr. Warren F. McPherson, a neurosurgeon, testified by deposition. On March 9, 1995, Dr. McPherson saw the plaintiff and did an MRI the next day which indicated spinal stenosis and bulging discs. His diagnosis was that the discs were either bulging or ruptured and that the plaintiff had a nerve root entrapped. Dr. McPherson opined that the plaintiff's back pop in February 1995 was a natural progression of her work injury from November 1994 and that her continued work schedule would be consistent with worsening her condition to the point of requiring surgery. On March 16, 1995, Dr. McPherson performed lumbar laminectomy surgery on the plaintiff and restricted her from working for six weeks. He stated that the plaintiff reached maximum medical improvement on May 2, 1995 and released her to return to work with no restrictions. Dr. McPherson opined that the plaintiff has an 11 percent permanent partial impairment to the body as a whole.

Dr. David Gaw, an orthopedic surgeon, also testified by deposition. On September 21, 1995, Dr. Gaw saw the plaintiff for an independent medical evaluation. Dr. Gaw testified that the plaintiff's back problems began around November 9, 1994 and that this day was the most probable date of injury because

that is when she first experienced back pain. Dr. Gaw opined that the plaintiff's work injury in November 1994 naturally progressed and worsened to a disc rupture that required surgery as a result of her long working hours in February 1995. Dr. Gaw opined that the plaintiff's actual disc rupture occurred a few days prior to her surgery in March 1995.

ANALYSIS

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).

The evidence in this case does not show the plaintiff experienced a definitive injury in the course of her work with Emro. The evidence shows that the occurrence which led to the necessity of surgery occurred at night as the plaintiff turned over in bed.

The only suggestion that the plaintiff suffered an injury while working for Emro was that she continued to do the same type of work as she did on November 9, 1994 while working for Kwik Sak at the time of the injury.[1]

Dr. McPherson, a neurosurgeon, and Dr. Gaw, an orthopedic surgeon, testified the disc rupture suffered by the plaintiff was a natural progression of the November 9, 1994 injury. Dr. Most, a chiropractor, related the disc rupture to the work done at Emro.

The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Johnson v. Midwesco, Inc.,* 801 S.W.2d 804, 806 (Tenn. 1990). 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,*

[1] Kwik Sak claims the injury was November 10, 1994. However, the evidence supports the finding of the trial judge that the injury was on November 9, 1994.

884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.,* 775 S.W.2d 355, 356 (Tenn. 1989).

Our reading of the medical depositions and our assessment of the varied experience of the medical witnesses leads us to conclude the testimony of Dr. McPherson and Dr. Gaw is most believable on the time of injury.

The issue comes down to a question of whether the gradual injury rule should apply in this case. We believe the answer to this question lies in the case of *Mynatt v. Liberty Mut. Ins. Companies,* 699 S.W.2d 799 (Tenn. 1985).

The facts in *Mynatt* are remarkably similar to the facts in this case. On July 27, 1982, Mynatt suffered a back injury while employed by Normak. At the time of the injury, Normak was insured by Liberty Mutual. On November 1, 1982, Mynatt returned to work for Normak where he continued lifting bundles as he had before. The work caused his back to become worse and required him to stop working on February 23, 1983. Liberty Mutual had ceased being Normak's workers' compensation insurer one month prior to this. The trial judge held the plaintiff's injury occurred on July 27, 1982 and that the subsequent occurrences were only manifestations of the injury of July 27.

Liberty Mutual asserted at trial and on appeal that Normak should be liable on the basis of the gradual injury rule and that the last day the plaintiff was able to work should be February 27, 1983 when the plaintiff left work. The Supreme Court held that the gradual injury rule did not apply in the case because there was a definite incident of lifting which caused the plaintiff to be injured and that Liberty Mutual was liable because it was the insurer on the date of injury.

The *Mynatt* Court noted that some cases had applied the gradual injury rule in back injury cases but that the Supreme Court had never held that back injuries were always gradual injury cases and that the application of the rule depended on the facts of each case.

We find therefore the gradual injury rule does not apply in this case and that Emro is not liable for the plaintiff's injury because the injury predated the plaintiff's employment with Emro.

The remaining question is whether Kwik Sak and Reliance are liable in this case. These defendants claim the plaintiff did not properly appeal this case as to them under the Rules of Appellate Procedure. However, the plaintiff filed a brief with issues in response to the briefs of each of the defendants. Further, Kwik Sak has asked us to decide their liability or lack thereof to the plaintiff in the event we find that Emro is not liable. We conclude that Kwik Sak and Reliance are before us and that we have jurisdiction to decide the issues raised by them and the plaintiff.

Based upon our findings, we enter judgment for the plaintiff against the defendants Kwik Sak and Reliance. We find the plaintiff should be awarded a judgment as entered by the trial court as to the amount of recovery for permanent partial disability and temporary total disability. We find that notice is not raised as a defense to the liability of Kwik Sak (except previously as argument that no injury occurred on November 9, 1994) and that Kwik Sak is liable for all medical expenses relating to the plaintiff's injury of November 9, 1994.

This case is remanded to the trial court for a determination of the medical costs incurred by the plaintiff. The trial court shall enter a judgment consistent with our findings and the judgment shall provide for the medical expenses which the trial court finds appropriate.

The cost of this appeal is taxed to Kwik Sak and Reliance.

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John K. Byers, Senior Judge

CONCUR:

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Frank F. Drowota, III, Justice

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William S. Russell, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CHARLOTTE HULL, PLAINTIFF/APPELLEE, v. EMRO MARKETING COMPANY, DEFENDANT/APPELLANT, KWIK SAK, INC. AND RELIANCE INSURANCE COMPANY, DEFENDANT/APPELLEES.	)	RUTHERFORD CHANCERY NO. 95WC-831 HON. DON R. ASH, JUDGE S. CT. NO. 01S01-9709-CH-00201 REVERSED AND REMANDED

JUDGMENT

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 will be paid by Defendant/Appellees, Kwik Sak, Inc. and Reliance Insurance Company, for which execution may issue if necessary.

It is so ordered this 24th day of June, 1998.

PER CURIAM

DROWOTA, J. NOT PARTICIPATING