IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, MAY 1999 SESSION

EDWARD RAY HOWELL, JR.	)	KNOX CHANCERY
	)	
Plaintiff/Appellant	)	
	)	
VS.	)	Hon. Frederick D. McDonald,
	)	Chancellor
PHP COMPANIES, INC. and	)	
TENNESSEE DEPARTMENT OF	)	
LABOR, SECOND INJURY FUND	)	
	)	
Defendants/Appellees	)	No. 03S01-9809-CH-00108

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

Members of Panel:

Frank F. Drowota III, 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, Edward Ray Howell, Jr., has appealed from the action of the trial court in dismissing his claim for benefits. The Chancellor found that the injury in question did not aggravate his previous physical condition to the extent of constituting an anatomical change as a result of the accident.

Plaintiff was 39 years of age and was employed as a mail sorter for defendant, PHP Companies, Inc. In this appeal he contends he was injured on September 3, 1996, while lifting a large bag of mail out of the trunk of his supervisor's automobile. He sought a determination that he was totally disabled claiming both physical and mental injuries.

Prior to the incident in 1996, he had sustained numerous injuries to his body and some were work-related. During this prior period of time, he was also seen and treated for psychiatric problems which resulted in hospitalization during 1992.

The following would generally summarize his prior physical problems: In 1985 or 1986, he suffered neck and back injuries as a result of an auto accident; in 1988 he sustained a work-related injury to his right shoulder resulting in 30% disability award; in 1989 he sustained injuries to his left femur, right knee and facial injuries from an auto accident; in 1990 he slipped and fell while at work for another employer and was awarded 100% disability; in 1991 he began having problems with his left shoulder which resulted in surgery being performed in 1992; in 1993 he sustained injuries to his neck and back in an auto accident; and in 1996, prior to the incident in question, he injured his right arm and shoulder by falling at a Burger King restaurant, which resulted in surgery shortly after the incident in question.

Plaintiff testified that he had total of 26 surgical procedures for various problems prior to the September 3, 1996 accident and three surgical procedures (knee injuries, right shoulder and left shoulder) after the event.

The evidence is quite clear that after receiving the 100% award of disability for the 1990 injury, he entered a rehabilitation program and over a period of time

strengthened his body to the extent of being first able to do part-time work and then regular employment when hired by defendant employer during July 1996.

The injury involved in this appeal is plaintiff's left shoulder which began causing problems in 1991 and resulted in surgery in 1992. The trial court heard evidence from two doctors concerning the physical injury. Dr. T. Craig Beeler, an orthopedic surgeon and treating physician, testified by deposition. Dr. William E. Kennedy, an orthopedic surgeon and evaluating physician, did not testify but his affidavit and medical records were admitted into evidence. The trial court accepted the opinion of Dr. Beeler over the opinion of Dr. Kennedy. Thus, the primary issue in the appeal concerns the construction and interpretation of Dr. Beeler's testimony.

On direct examination, Dr. Beeler testified that plaintiff first gave him a history of injuring himself on February 5, 1997, which was five months after the incident on the previous September 3rd; he opined the history given of September 3rd probably aggravated his previous condition in his left shoulder; and that he had an additional 5% permanent impairment to the upper extremity or a 3% impairment to the body as a whole. When he was questioned about any permanent restriction resulting from September 3rd incident, he replied that the patient was already under permanent restrictions with his previous problem. When questioned about future care, he stated: "I don't know. I think he'll have some continued symptoms in his shoulder. Hopefully, we won't have to do anything further for him, but it is a possibility that he will continue having problems with his shoulder later on down the road."

On cross-examination, the doctor testified that he performed the prior surgery on his left shoulder; that the shoulder problem developed in late 1991 and he did an arthroscopic procedure called an acromioplasty which involved "burring some of the bone back on top of the shoulder so that there's more room for the tendons to travel." He said it was an operation specifically for an impingement or tendonitis in the shoulder. As to the September 3rd injury, he testified plaintiff was having discomfort as before "with the addition of the discomfort he was having at the small joint called the acromioclavicular joint in the shoulder." He stated he was having more pain and at a different location and the only anatomical change was due to arthritis at the right acromioclavicular joint. The questioning continued as follows:

> Q. Other than the arthritis you've talked about there was no other anatomical change to the shoulder; is that correct?

A. No other anatomical change, no, sir.

Q. The arthritis was not something that was caused by this incident that he related to you of September '96, was it?

A. Well, I can't say that it was and I can't say that it wasn't. I can say that he became symptomatic. It could have been the straw that broke the camel's back. A lot of folks have arthritis in their acromioclavicular joint and are asymptomatic from it. We operated on him for his surgery to excise some symptomatic scar tissue as well as to excise the distal clavicle. And he improved after that, so I think that that was what was causing his problem at that point in time.

Q. Specifically with regard to the existence of the arthritis, however, you can't say one way or the other before this incident occurred whether or not he had arthritis in that shoulder; is that correct?

A. That's correct.

Q. Ordinarily a person who has undergone a surgical procedure several years previously, one of the potential consequences of that is that they develop arthritis in that joint; isn't that true?

A. They can get arthritis in that joint and they also can get arthritis in that joint from trauma of life.

Further examination of Dr. Beeler indicated that he performed surgery again (April 1997) on plaintiff's left shoulder and this procedure revealed that the burred off portion of the bone had re-calcified and was impinging on the tendons again.

Dr. Kennedy's medical records indicated he was of the opinion the September 3, 1996 incident caused an anatomical change in the form of a disruption of plaintiff's "left A/C joint" and that he would have an additional 10% impairment as a result of same. Dr. Kennedy only saw plaintiff for an evaluation exam during December 1997.

The case is to be reviewed de novo accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The rule is that if there is conflicting medical testimony, 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).

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); *Fink v. Caudle,* 856 S.W.2d 952, 958 (Tenn. 1993).

If the employment does not cause an actual progression or aggravation of the pre-existing condition but merely produces additional symptoms of pain, an employer is not responsible for benefits. *Townsend v. State,* 826 S.W.2d 434, 436 (Tenn. 1992); *Cunningham v. Goodyear Tire & Rubber Co.,* 811 S.W.2d 888, 891 (Tenn. 1991); *Smith v. Smith's Transfer Corp.,* 735 S.W.2d 221 (Tenn. 1987).

The employee bears the burden of proving every element of the case, including the existence of a work-related injury by a preponderance of the evidence. *Talley v. Virginia Ins. Reciprocal,* 775 S.W.2d 587, 591 (Tenn. 1989).

In reviewing the case under these rules, we do not find the evidence preponderates against the conclusion of the trial court. Dr. Beeler performed surgery on plaintiff's left shoulder in 1992 and again after the incident in question in 1997. The first surgery resulted in removing some of the bone in order for the tendons to have more room to move. The second procedure revealed the bone had re-calcified and was impinging on the tendons again. There is no evidence either condition resulted from a work-related injury. Dr. Beeler was of the opinion that plaintiff had some new pain and discomfort but it was due to some arthritis which was located in the acromioclavicular joint of the shoulder and he could not say it probably resulted from the September 3, 1996 incident. His testimony supports the conclusion there was no anatomical change of plaintiff's condition other than the existence of arthritis. For these reasons we find plaintiff has not established he is entitled to recover for a physical injury.

As to the claim for psychological injury or mental disorder, different rules apply. Recovery of benefits is appropriate for a mental injury if the mental disorder is caused by an identifiable, stressful, work-related event producing a sudden mental stimulus such as fright, shock or excessive unexpected anxiety. Also, compensation for psychological disorders has been allowed when an employee sustains a compensable work-related injury by accident and thereafter experiences a mental disorder which is caused by the original compensable work-related injury. *Hill v. Eagle Bend Mfg., Inc., supra.*

The second rule would not have any application to the present case since we have held the evidence does not preponderate against the trial court's conclusion on the physical injury issue. Therefore, any recovery in this case must meet the test of the first mentioned rule, which requires the employee to establish the mental illness or condition has resulted from a specific incident producing fright, shock or unexpected anxiety.

Plaintiff was hospitalized during 1992 for major depression and post-traumatic stress disorder which followed several of his pre-existing injuries; he testified that after rehabilitating himself, he stopped seeing the psychiatrist for several years until during 1997. After the September 3rd incident, he underwent surgery upon his knees during October 1996 and had surgery upon his right shoulder during November 1996. Since he was off from work for such a long period of time, he was terminated during January 1997. Dr. Kelley Walker and Dr. Jerry B. Lemler, both who are psychiatrists, testified his present impairment was due to his loss of employment. The termination of his job was by letter notification and there is no evidence of any type of confrontation with any personnel at his place of employment.

We are of the opinion the facts do not support a recovery for mental illness or disorder under the first rule.

Finding the evidence does not preponderate against the trial court's ruling, we affirm the judgment in all respects. Costs of the appeal are taxed to defendant employer.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
Frank F. Drowota III, Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED

January 6, 2000

Cecil Crowson, Jr.
Appellate Court
Clerk

EDWARD RAY HOWELL, JR.,	)	KNOX CHANCERY
	)	NO. 132986-1
PLAINTIFF/APPELLANT,	)	
	)	HON. FREDERICK D. McDONALD,
v.	)	CHANCELLOR
	)	
PHP COMPANIES, INC., ET AL.,	)	S. CT. NO. 03S01-9809-CH-00108
	)	
DEFENDANTS/APPELLEES.	)	AFFIRMED

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-Employer, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

DROWOTA, J. NOT PARTICIPATING