

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

(January 27, 2000 Session)

JAMES ARTHUR SMITH v. SENTRY INSURANCE COMPANY

**Direct Appeal from the Chancery Court for McNairy County
No. 7105 Dewey C. Whitenton, Chancellor**

No. W1999-02148-WC-R3-CV - Mailed May 8, 2000; Filed June 28, 2000

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 defendant, Sentry Insurance Company (Sentry), insurer for the employer, Kolpack (Kolpack), appeals the judgment of the McNairy Chancery Court awarding the plaintiff, James Arthur Smith (Smith), forty percent (40%) permanent partial disability to the right arm and twenty percent (20%) permanent partial disability to the left arm. For the reasons stated in this opinion, we affirm the judgment of the trial court as modified to a single award of thirty percent (30%) permanent partial disability to both arms.

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

MALOAN, SP. J., delivered the opinion of the court, in which HOLDER, J., and WEATHERFORD, SR. J., joined.

David J. Deming, Nashville, Tennessee, for the appellant, Sentry Insurance Company.

Lloyd R. Tatum, Henderson, Tennessee, for the appellee, James Arthur Smith.

MEMORANDUM OPINION

At the time of this trial, Smith was sixty (60) years old. He left school after the fifth (5th) grade to work on the family farm, but he can read and write. Before he retired in January 1997, he worked for Kolpack foreleven (11) years. Smith built refrigerator motors; welded refrigerator bases; and assembled refrigerator bases with an air-driven screwdriver or "airdriver." Smith would hold the airdriver in his right hand and put pressure on it with his left hand. In August or September 1996, Smith began to have problems with the screws twisting off causing his right arm to strike the base of the refrigerator. On one occasion in October 1996, he hit his right arm so hard he thought it was broken. Smith began to have pain, numbness, and loss of grip strength in his right hand.

After the October 1996 injury, Smith was pulled off the assembly job in which he used the airdriver. He was then assigned a job where he pulled tape off metal parts with his left hand because he was unable to use his right hand. After a few days, he could not do this job due to numbness, pain, night cramps, and loss of grip strength in his left hand. Smith was transferred to an inspection job and then to a painting job which he did with his left hand. He was only able to work twenty (20) hours a week until he retired in January 1997. Smith testified he did not have any problems with either hand before October 1996.

Smith suffers from a pre-existing condition known as peripheral neuropathy, a disease of the peripheral nerves. Beginning in 1991, his feet were cold and numb, and he had problems walking. He smokes cigarettes and drinks six (6) or more beers every day.

Smith was treated by Dr. Karl Edward Misulis, a neurologist, who first saw him on November 19, 1996, for back and leg pain. He gave a twenty (20) year history of back and leg pain. An earlier EMG by Dr. Jim King disclosed mild carpal tunnel syndrome of the right arm. Dr. Misulis felt Smith had possible spinal stenosis and moderate neuropathy possibly related to his alcohol use. Dr. Misulis explained neuropathy as a degenerative nerve disease with many causes such as diabetes, thyroid problems, vitamin B-12 deficiencies, foliate deficiencies, syphilis, and cancer; but it is "usually not an occupational induced condition." Work activities would increase pain, but would be temporary. When asked if the carpal tunnel syndrome in Smith's right arm was work related, Dr. Misulis replied, "It certainly could be." Dr. Misulis felt the carpal tunnel syndrome was superimposed on the neuropathy which can also cause pain and numbness in his arms.

Dr. John Neblett, a neurosurgeon, saw Smith on December 16, 1996, on referral from Dr. Jim King, for right hand pain. Smith gave a history of suffering contusions to the soft tissue of the right hand due to the forceful use of the airdriver. Dr. Neblett felt Smith's right hand problems were not permanent and clinically he did not appear to have carpal tunnel syndrome. He further expressed the opinion that Smith's work had no effect on his peripheral neuropathy.

Dr. John Brophy, a neurosurgeon, saw Smith on February 18, 1997, for an evaluation of his peripheral neuropathy. Smith gave a history of right hand pain since October 1996 from using the airdriver and left hand pain since January 1997 from painting. Dr. Brophy's examination was consistent for peripheral neuropathy which, in his opinion, was neither caused by nor advanced by Smith's work.

Dr. Robert Barnett, an orthopaedic surgeon, examined Smith for the purpose of an independent medical evaluation on August 11, 1997. Dr. Barnett took a history of pain and weakness in both hands. Dr. Barnett agreed the peripheral neuropathy was not work related, but felt Smith's work at Kolpack aggravated the neuropathy in both arms. Grip strength testing disclosed forty (40) pounds on grip on the left hand and ten (10) pounds on the right hand instead of the expected normal of one hundred (100) pounds from a man Smith's age. Dr. Barnett felt Smith's drinking, smoking, and other health problems could contribute to his neuropathy and assigned a ten percent (10%) permanent impairment to the right arm and a five percent (5%) permanent partial

impairment to the left arm for the “work-related part” of his impairment. Dr. Barnett felt Smith could not do repetitive motion type jobs or lift very much and “is totally disabled for any kind of jobs that required anything other than just sitting or walking around.”

The trial court found Smith’s repetitive use of the air gun and the injury to his right arm of October 1996 or a combination of the two caused the carpal tunnel in Smith’s right arm and/or aggravated the peripheral neuropathy in both arms. The trial court awarded forty percent (40%) permanent partial disability to the right arm and twenty percent (20%) permanent partial disability to the left arm.

Sentry has presented two (2) issues on appeal:

I. Plaintiff’s employment did not cause, aggravate or cause a progression of Smith’s preexisting neuropathic condition.

II. Smith did not suffer a work related injury to his left arm.

ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. *Tennessee Code Annotated* §50-6-225(e)(2). *Lollar v Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court’s factual findings. *Humphrey v David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Overman v Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

I.

The general rule is that an employee’s work that aggravates a pre-existing injury or condition by merely increasing the amount of pain, but does not otherwise “injure or advance the severity” of the employee’s injury or condition, is not compensable. *Sweat v Superior Industries, Inc.*, 966 S.W.2d 32 (Tenn. 1998); *Cunningham v Goodyear Tire & Rubber Company Co.*, 811 S.W.2d 891 (Tenn. 1991). However, increased pain may be disabling and compensable when expert medical and the injured employee’s testimony establish an advancement of the severity of the pre-existing condition which increases the percentage of permanent impairment. *Hill v Eagle Bend Manufacturing, Inc. et al*, 924 S.W.2d 483, 488 (Tenn. 1997); *Fink v Caudle*, 856 S.W.2d 952, 959 (Tenn. 1993).

Sentry relies on the medical testimony of Drs. Misulis, Neblett and Brophy to establish Smith's injury or condition is not compensable. Dr. Misulis stated Smith's work would increase his pain, but it would be temporary. Dr. Neblett only saw Smith for right hand pain, but thought Smith only suffered temporary symptoms from the October 1996 contusion. Dr. Brophy felt Smith's peripheral neuropathy was not caused or advanced by his work at Kolpack.

Smith relies on the expert medical testimony of Dr. Robert Barnett who agrees Smith's peripheral neuropathy was not caused by his work at Kolpack, but was aggravated by the repetitive use of the airguns. Dr. Barnett testified that airguns are noted for causing types of neuropathy due to the repetitive vibrations. "It is one of the worst things that you can use is the airguns." Dr. Barnett assigned a ten percent (10%) permanent impairment to Smith's right arm and a five percent (5%) permanent impairment to the left arm as the "work-related" portion of his impairment. Dr. Barnett felt Smith could not use his arms or hands for repetitive motion type jobs and is "totally disabled for any kind of jobs that required anything other than just sitting or walking around."

Differences of opinion as to causation and permanency of impairment by medical experts are common in workers' compensation cases. The trial court has the discretion to accept the testimony of one medical expert over the testimony of another medical expert(s). *Kellerman v Food Lion Inc.*, 929 S.W.2d 804, 806 (Tenn. 1990); *Johnson v Midwesco, Inc.*, 801 S.W.2d 804, 813 (Tenn. 1990); *Hinson v Wal-Mart Stores, Inc.*, 654 S.W.2d 675 (Tenn. 1983).

Smith testified that although he had experienced problems with his lower extremities as early as 1991, he did not have any problems with either arm until fall of 1996, when in a matter of months both hands began to have pain, numbness and loss of grip strength from his work at Kolpack.

After considering all the evidence in this case, this panel concludes the evidence does not preponderate against the trial court finding of a compensable injury.

II.

Sentry next submits there is no proof in the record Smith suffered any injury to his left arm at Kolpack. We disagree. Dr. Barnett assigned permanent impairment to both arms due to work at Kolpack. Although Dr. Barnett's testimony as Smith's use of an airgun with his left hand was "I don't know," he did state the repetitive use of airguns caused neuropathy. Smith testified he used the airgun with both hands, he held with the right and applied pressure with the left hand.

Absolute medical certainty is not required for recovery in a case for worker's compensation benefits. *Chapman v Employers Insurance Co.*, 627 S.W.2d 122 (Tenn. 1981). The connection between the accident and the injury may be shown by expert medical testimony in conjunction with lay testimony, *Smith v Empire Pencil Co.*, 781 S.W.2d 833 (Tenn. 1989); and any reasonable doubt in this area is to be resolved in favor of the employee. *Hall v. Auburntown Industires, Inc.*, 684 S.W.2d 614 (Tenn. 1985).

We find the evidence does not preponderate against the trial court's finding of a compensable injury to the left arm.

III.

The panel notes the trial court made separate awards to each arm. *Tennessee Code Annotated* §50-6-207(3)(A)(ii)(w) provides scheduled benefits for the loss of two (2) arms, therefore, we modify the award to thirty percent (30%) permanent partial disability to both arms which will neither increase nor decrease the award, but will conform the trial court's judgment to the statute.¹ *McIlvain v Russell Stover Candies, Inc.*, 996 S.W.2d 179, 181 (Tenn. 1999).

CONCLUSION

The judgment of the trial court is affirmed as modified. The defendant, Sentry Insurance Company, is taxed with the costs of this appeal.

IN THE SUPREME COURT OF TENNESSEE

¹The trial court awarded forty percent (40%) permanent partial disability to the right arm or 80 weeks of benefits and twenty percent (20%) permanent partial disability to the left arm or 40 weeks of benefits based on a two hundred (200) week maximum loss of an arm for a total award of one hundred twenty (120) weeks of benefits. Loss of two arms, *Tennessee Code Annotated* §50-6-207(3)(A)(ii)(w), is a scheduled injury with a maximum of four hundred (400) weeks of benefits. Thirty percent (30%) permanent partial disability to both arms is also one hundred twenty (120) weeks of benefits.

SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

JAMES ARTHUR SMITH v. SENTRY INSURANCE COMPANY

Chancery Court for McNairy County
No. 7105

No. W1999-02148-WC-R3-CV - Filed June 28, 2000

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 fact 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 Appellant, Sentry Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM