IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

THOMAS GREGORY v. AMERICAN MANUFACTURERS MUTUAL INS.

Chancery Court for Sumner County
No. 97C-71

No. M1999-00403-SC-WCM-CV
Filed - June 1, 2000

ORDER

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 on appeal are taxed to the appellant.

IT IS SO ORDERED this 1st day of June, 2000.

PER CURIAM

IN THE SUPREME COURT OF THE STATE OF TENNESSEE
AT NASHVILLE
(DECEMBER 16, 1999)

THOMAS GREGORY,	)	SUMNER CHANCERY
	)	
Plaintiff/Appellee,	)	Hon. Thomas E. Gray,
	)	Chancellor.
	)	
V.	)	No. M1999-00403-WC-R3-CV
	)	
AMERICAN MANUFACTURERS MUTUAL INSURANCE,	)	
	)	
Defendant/Appellant.	)	

For Appellant	For Appellee
John R. Lewis	William Underhill
Nashville, Tennessee	Madison, Tennessee

MEMORANDUM OPINION

Mailed - March 21, 2000
Filed - June 1, 2000

Members of the Panel:

Justice Adolpho A. Birch, Jr.
James L. Weatherford, Senior Judge
Hamilton V. Gayden, Jr., Special Judge

AFFIRMED

Hamilton V. Gayden
Special Judge

MEMORANDUM 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. Sec. 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The Plaintiff/Appellee filed suit in the Chancery Court for Sumner County for workers'

compensation benefits; on the same date, the Defendant/Appellant filed a complaint to determine the Plaintiff's entitlement to benefits in the Circuit Court for Sumner County. The two cases were consolidated in the Chancery Court. After a bench trial the Chancellor awarded the Plaintiff temporary disability benefits, permanent partial benefits and discretionary costs.

The dispositive issue presented to this Panel is whether the Chancellor erred in finding that the Plaintiff proved by a preponderance of the evidence that he had suffered an injury to his back in the course and scope of his employment on January 2, 1997. It is the position of the employer that the Plaintiff's case fails due to lack of credibility given the conflicts in the testimony and the Chancellor's specific finding that the Plaintiff was not credible.

This suit arises out of an alleged back injury the Plaintiff states occurred on his job with Fleetwood Enterprises, Inc. on January 2, 1997. The only evidence and testimony that tends to corroborate the Plaintiff's version of the January 2, 1997 is his own testimony, the testimony of his wife and the testimony by way of deposition of two medical providers for Plaintiff Gregory, the latter physicians causally relating the disputed back injury to the job based only on the history given to them by the Plaintiff. On the other hand, the employer presented several witnesses who contradicted or disputed Plaintiff's version of reporting the particular injury in question to his superiors or the health providers of the employer.

The Chancellor made a finding of fact that the Plaintiff had been impeached. The Chancellor found that the Plaintiff's wife had been untruthful. The Chancellor also held that the witnesses for the employer were credible. Notwithstanding the critical analysis of Plaintiff's proof by the Chancellor, he held there was sufficient evidence to prove that the Plaintiff was injured on the job and that he reported his injury to the employer or that the employer knew of the injury.

The Plaintiff worked as an exterior assembler for Fleetwood Enterprises. Plaintiff testified that on January 2, 1997, he injured his left shoulder and back in the course of his employment while lifting a door. However, he only reported the shoulder injury to his supervisor, Keith Hammock, and was subsequently referred to Linda Mowell, who supervised Fleetwood's workers' compensation. The Plaintiff employee was referred to the Macon County Walk-in Clinic the same day. The Plaintiff testified that while waiting for attention at the walk-in clinic his back and legs began to hurt. The Plaintiff failed to mention any back pain to Ms. Mowell who attended him and waited with him at the walk-in clinic. Plaintiff also testified he did mentioned his back injury to David Yancey, a nurse

practitioner with the walk-in clinic. Mr. Yancy specifically testified that Plaintiff did not mention any problems with his back on this January 3, 1997 visit.

The following day, January 4, 1997, Plaintiff consulted a Chiroprator, Dr. Frank Etlinger, with complaints of back and leg pain. However, Plaintiff failed to inform Dr. Etlinger that he had a work injury and stated that he had experienced pain in his back "off and on a lot." Prior to seeing Dr. Etlinger, Plaintiff was required to complete a confidential personal history form. The Plaintiff testified his wife read the questions on the form to him, he in turn told her what to put down, and then he signed the form. However, at the trial the Plaintiff's wife testified that she filled out the form based on her own knowledge without any input from the Plaintiff. Plaintiff's wife testified that the Plaintiff told her that he had injured his back on January 2, 1997; however, according to the the history given to Dr. Etlinger, Plaintiff's back problems were told by him to have begun two to three weeks prior to January 4, 1997, that he had experienced symtoms "on and off a lot", and that his back problem was not due to any accident. Plaintiff's wife testified she put down this false information in order to help obtain insurance coverage. In addition, a section on the confidential personal history form dealing with work-related accidents was left blank. During the January 4, 1997 visit to the Chiroprator and 27 follow-up visits, the Plaintiff never related that his back was work-related.

The Plaintiff returned to work on January 6, 1997 with restrictions from Dr. Etlinger. Ms. Mowell, the head of the Workers' Compensation for the employer testifed she specicially asked about the connection of Plaintiff's now-known back problem to the alleged injury on January 2, 1997. Ms. Mowell testified that Plaintiff said there was no connection and "that this was a previous problem that I had." Another employee of the Defendant, Plaintiff's foreman, related the Plaintiff told him the same thing separately when he inquired of the Plaintiff as to the connection of the shoulder and back problems.

As of January 30, 1997, the Defendant concedes that the Plaintiff was complaining of a work-related back injury. Plaintiff was sent back to the walk-in clinic. He was told to return to the clinic should he fail to improve. He did not return to the clinic nor did he return to work.

Eventually Plaintiff came under the treatment of a neurosurgeon, Dr. Arthur Cushman, who first saw him on April 30, 1997. The history given to Dr. Cushman by the Plaintiff was that he suffered a work-related injury to his back. A second physician, Dr. David Gaw also supports

Plaintiff's contention that his injury was work-related based on the history given to Dr. Gaw by the Plaintiff. Subsequently, the Plaintiff underwent two successive back surgeries.

The Chancellor found Plaintiffs injuries to be compensable and awarded temporary total benefits, discretionary costs and lifetime medical benefits. The case is before the panel de novo. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn.Code Ann. Section 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies.

Both counsel for the Plaintiff and the Defendant agree that this case hinges on the question of credibility. The Chancellor found the Plaintiff to have been impeached but specifically stated in his findings of fact and conclusions of law, ". . .If in fact the court believed none of Mr. Gregory's testimony and decided that his credibility was so far impeached, the case would be dismissed with judgment for the Defendant. . ." Obviously, the Chancellor chose to believe the Plaintiff in some particulars. The implication is that the Chancellor believed the Plaintiff when he testified he hurt his back on January 2, 1997 while in the course and scope of his employment. It is up to the trier of fact to decide whether to believe any or none of the witnesses' testimony proven to be false in certain particulars. *Accord* Tegethoff v. Metropolitan Life Ins.Co., 424 S.W.2d 565 (Tenn. Ct. App. 1966). The Chancellor went on to say, ". . .when the credibility of a witness is impeached the Court can take a look and believe some or believe none of the witness' testimony. . ."

It is also the theory of the Defendant that the court erred in giving any credibility and thus weight to the testimony of either the Plaintiff or the Plaintiff's wife, because the two contradicted each other and thus canceled out the testimony of one another. Defendant argues that the testimony of the two cannot be reconciled, particularly in connection with the contradictory testimony surrounding the filing out of the confidential form provided by the Chiropractor, Dr. Etlinger.

Defendant cites Tibbals Flooring Co. v.. Stanfill, 410 S.W. 2d 892 (Tenn. 1967) for the proposition that the inconsistent testimony of the Plaintiff and his wife cannot be reconciled and cancel each other out. In Tibbals the concept that contradictory statements of a witness in connection with the same fact have a result of cancelling each other out applied to a physician who gave inoppposite testimony as to the affect of a plaintiff returning to work; in the case at hand, the

contradiction between two witnesses in reference to the same set of facts does not necessarily mean the testimony of one witness in contradiction to the other cancels each other out. In this case, the Chancellor believed the Plaintiff's wife in her crucial testimony that the Plaintiff did not have a back injury prior to January 2, 1997. And in somewhat of an anomaly, the Chancellor apparently believed the Plaintiff's wife who admitted to writing down false information on Dr. Etlinger's confidential patient history form. In the Chancellor's finding of facts and conclusions of law he states, ". . .We have the testimony of Mrs. Gregory, the wife of Mr. Gregory, who says no, he didn't have anything wrong with him up until the 2nd. . ."

Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995).

This Panel is of the opinion there is ample evidence upon which the court based its descretion to believe some of the Plaintiff's testimony and the testimony of Plaintiff's wife. Thusly, after a review of the record and consideration of argument of counsel, the Panel is of the opinion that the Chancellor's findings of fact and conclusions of law should be affirmed.

The Defendant/Appellant shall be assessed the cost of this appeal.

_____
Hamilton V. Gayden, Jr., Special Judge

CONCUR:

_____
Justice Adolpho A. Birch, Jr.

_____
James L. Weatherford, Senior Judge