IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 28, 2000 Session

KENNETH CROTTS v. BENCHMARK MECHANICAL CONTRACTORS, INC.

Direct Appeal from the Circuit Court for Hardin County
No. 2811 C. Creed McGinley, Judge

No. W1999-00711-WC-R3-CV - Mailed - December 11, 2000; Filed February 5, 2001

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 plaintiff, Kenneth Crotts, appeals the judgment of the Circuit Court of Hardin County which found the plaintiff failed to carry his burden of proving an injury by accident and dismissed his claim. For the reasons stated in this opinion, we affirm the judgment of the trial court.

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

W. MICHAEL MALOAN, SP. J,, delivered the opinion of the court, in which JANICE M. HOLDER, J., and HENRY D. BELL, SP. J, joined.

Paul Todd Nicks, Jackson, Tennessee, for the Appellant, Kenneth Crotts

W. Timothy Hayes, Jr., Memphis, Tennessee, for the Appellee, Benchmark Mechanical Contractors, Inc.

MEMORANDUM OPINION

The plaintiff, Kenneth Crotts, was thirty eight (38) years old at the time of trial. He completed the ninth (9th) grade and has not obtained a GED. His wife testified he could barely read or write. His prior work history is mostly manual labor jobs in welding and pipe fitting. Plaintiff went to work for the defendant, Benchmark Mechanical Contractors, Inc., in September 1996 as a welder and pipe fitter.

Plaintiff testified he strained his back muscles in the early 1980's, but he fully recovered and had no problems with his back or missed any work before April 16, 1997. He had seen his family doctor, Dr. Virender Anand, in February and March 1997 for sinus and hand problems.

On April 16, 1977, while installing a breaker valve, he felt a pain in his back that "felt like somebody stabbed me in the back" and the pain went all the way down his right leg to his knee cap. He told his direct foreman, Gerald Coston, and the general foreman, Billy Cagle, about the injury. James Earl Young, another pipe fitting crew foreman overheard this conversation with Coston. Both Coston and Young testified they were aware of the injury.

On the evening of April 16, 1997, plaintiff went to the Magnolia Hospital emergency room in Corinth, Mississippi. Plaintiff testified he told the emergency room attendants that he hurt his back that day, that he had back pain some 15 years ago, and that he had pain all over his body due to the heavy work at Benchmark. The emergency room records do not reflect a recent injury, but "...low back pain x 15 years. worse past several months. States R leg is tingling (not a new symptom)...." He was released and told to see his family doctor the next day. Plaintiff saw Dr. Anand on April 17, 1997. He complained of "back discomfort" and reported he went to the emergency room the night before. Dr. Anand referred him to Dr. Glenn Barnett, a neurosurgeon in Jackson, Tennessee.

Plaintiff testified he told Dr. Barnett about the lifting incident, but Dr. Barnett testified by deposition he saw plaintiff on April 23, 1997, and plaintiff gave a history of "over the last couple of years he's had progressive difficulty with his right leg, described a burning, numbness that starts in his hip and goes down the leg...." Dr. Barnett's office notes of April 23, 1997, state his diagnosis as right hip and leg pain, etiology undetermined. Dr. Barnett testified plaintiff did not give a history of any work injury, and such a history would be something he would record on this notes.

Plaintiff was not satisfied with Dr. Barnett's treatment and returned to see Dr. Anand who referred him to Dr. Melvin Law, an orthopedic surgeon in Nashville. Dr. Law first saw plaintiff on May 29, 1997. Plaintiff gave a history of "back pain and leg pain...present for about two years..." but "noticed his pain occurred while he was lifting some heavy equipment while at work." Dr. Law performed a two level fusion on the plaintiff's low back on July 17, 1997. Dr. Law assessed a ten percent (10%) permanent partial impairment rating and placed restrictions of no repetitive bending, lifting, twisting, no lifting over 20 pounds and no repetitive pushing, pulling, kneeling or squatting activities.

Plaintiff was seen by Dr. Joseph Boals for an independent medical evaluation. Dr. Boals' testimony was introduced by a Standard Form Medical Report for Industrial Injuries. Dr. Boals felt plaintiff's injury was work related and assigned a thirty-six percent (36%) permanent partial impairment to the body as a whole.

On May 2, 1997, plaintiff and his wife filled out a Notice of Disability Claim form to a credit life insurer. On this form to describe his illness or injury, the plaintiff or his wife put "degenared (sic) disc disease" and the date of the first symptoms as "2-28-97." The form asked "If caused by accident, describe briefly"; "Date occurred"; and "Place. (Home, work, other)", and each was left blank. The attending physician portion was completed by Dr. Anand. He listed "herniated disc" for

his diagnosis and for the nature and cause of injury of condition, Dr. Anand wrote "unknown origin." The form asks "When did patient first consult you for this condition?" and Dr. Anand wrote "February 1997." The defendant Benchmark completed part IV of the disability claim. On the question "Was claim covered by worker's compensation?," the defendant checked "NO."

Plaintiff testified he has not worked since April 1997 and his back and leg still hurt. He testified the first time he contacted the defendant and requested worker's compensation benefits was July 8, 1997, when he talked to the safety director, Jeff Turnmire. Turnmire told him there was no report of his injury. Turnmire testified no one told him of plaintiff's claim until the telephone call of July 8, 1997.

The trial court found the plaintiff failed to carry his burden of proving an injury which arose out of and in the course of his employment. The trial court did make a finding that if he were in error on the compensability issue, he would award fifty-five percent (55%) permanent partial disability to the body as a whole.

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. Tenn. Code Ann. § 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).

The plaintiff in a worker's compensation case has the burden of proving every element of his case by a preponderance of the evidence. *Elmore v. Traveler's Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992). An accidental injury arises out of one's employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and occurs in the course of one's employment if it occurs when an employee is performing a duty he was employed to do. *Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993). As to causation, our Supreme Court stated in *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987) as follows:

> This Court has consistently held that causation and permanency of a work-related injury must be shown in most cases by expert medical evidence. Furthermore, by "causal connection" is meant not proximate cause as used in the law of negligence, but cause in the sense that the accident had its origin in the hazards to which the

> employment exposed the employee while doing his work. Although absolute certainty is not required for proof of causation, medical proof that the injury was caused in the course of the employee's work must not be speculative or so uncertain regarding the cause of the injury that attributing it to the plaintiff's employment would be an arbitrary determination or a mere possibility. If, upon undisputed proof, it is conjectural whether disability resulted from a cause operating within employment, there can be no award. If, however, equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn by the trial court under the case law.

The trial court must evaluate the expert medical evidence as to causation and permanency in conjunction with the employee's testimony as to how his injury occurred and his subsequent physical condition. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991).

The trial court commented on the numerous contradictions between plaintiff's proof, the medical records, the disability insurance claim form, and defendant's proof. The trial judge concluded "...he has very significant problems, but they are not the result of a work-related accident or alternatively they are not a specific problem at work that made symptomatic a very serious condition that was asymptomatic. I quite simply–the proof was against that."

The trial court had the opportunity to observe and weigh the credibility of the witnesses who orally testified in this case. This panel must defer to the trial court on issues of credibility and other oral testimony unless the proof preponderates against the trial court's finding. Tenn. Code Ann. §50-6-225(e)(2). *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). After a careful review of the entire record in this case, we find the evidence does not preponderate against the trial court's finding that the plaintiff failed to carry his burden of proof that he was injured by accident growing out of and in the course of his employment for the defendant, Benchmark Mechanical Contractors.

CONCLUSION

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the plaintiff, Kenneth Crotts.

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W. MICHAEL MALOAN, SPECIAL 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 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 Plaintiff/Appellant, Kenneth Crotts, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM