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

October 13, 2000 Session

WALLACE DOWNEY JAMES, JR. v. TENNSCO CORPORATION, ET AL

Direct Appeal from the Chancery Court for Dickson County
No. 5092-97 Trial Court Number Leonard W. Martin, Chancellor

No. M1999-01088-WC-R3-CV - Mailed - January 4, 2001
Filed - January 5, 2001

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.

Appellant presents one issue to be determined and that is whether the trial court erred in finding that the appellant did not carry the requisite burden of proof in establishing that he sustained a compensable workers' compensation injury.

In addition to the issue raised by Appellant, Appellee presents to the Court the issue of whether the employee's appeal should be dismissed for failure to comply with the Rules of Appellate Procedure. While the deficiencies are serious violations of the Rules of Appellate Procedure, the issue raised by the Appellant has been thoroughly reviewed by the panel, and the judgment of the trial court is affirmed.

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

TOM E. GRAY, SP. J, delivered the opinion of the court, in which FRANK F. DROWOTA, III, J. AND JOHN K. BYERS, SR.J. joined.

D. Stuart Caulkins, Nashville, Tennessee for the Appellant, Wallace Downey James, Jr.

Randolph A. Veazey and Connie Jones, Nashville, Tennessee for Appellees, Tennsco Corporation and Royal Insurance Company of America.

MEMORANDUM OPINION

A 43 year old man, the employee, Wallace Downey James, Jr., has a work history in

construction as a laborer and a roofer, a factory worker through temporary employment agencies, changing oil in motor vehicles and working on small machines. His formal education is limited in that he completed the eighth grade, does simple math and has difficulty reading and writing.

Mr. James was employed with Tennsco Corporation in Dickson, Tennessee on October 15, 1996 after working 90 days as a temporary employee. A material handler, Mr. James folded cardboard boxes and pallets, moved and stacked boxed bookcases as the boxes came off a production line and loaded and unloaded boxed bookcases and cabinets into and from trucks. The boxed material weighed from 45 pounds to 190 pounds and hand carts and forklifts were available and used in moving and lifting. Repetitive overhead lifting was not required.

In January, 1997, Mr. James went to see Dr. Leon Cochran with complaints of chest pain and weakness in his arm. These complaints were not attributed by him to his work. Dr. Cochran examined and tested for possible heart problems and rheumatoid arthritis. While at work in May, 1997 Mr. James started having chest pains, became weak and started shaking and walked up to the front office and fainted. Terry Williams, an employee at Tennsco, took him to the hospital, and according to Mr. James they didn't find anything wrong with his heart.

In July, 1997 Mr. James reported to his employer that he was having problems with his hand and that he needed to see a doctor. Woody Adams, Safety Director for Tennsco, talked to Mr. James and asked if he wanted to go to the clinic. Mr. James said that he would go after work and that day he was seen by Dr. Clyde E. Collins, M. D. who could not localize the site of Mr. James' symptoms. Dr. Collins recommended an orthopedic evaluation. From a panel of three physicians, Mr. James selected Dr. Ronald Derr of the Bone and Joint Clinic and he was seen and treated by Dr. Derr on July 29, 1997. Dr. Derr suggested that Mr. James might be suffering from bilateral overuse syndrome or possibly carpel tunnel syndrome. He provided Mr. James with samples of anti-inflammatory medication and returned him to work to perform tasks as tolerated. He gave cock-up splints to be worn at night for two (2) weeks until the next appointment.

Tennsco in its union contract has in effect an attendance point system whereby an employee is assigned two points for unexcused absences or tardiness or leaving early without permission and upon accumulation of twenty-four (24) points within one year the employee is terminated. Mr. James had become upset with the workplace in the Spring of 1997, and he began to leave work early without explanation and he missed days to take his girlfriend's father to the doctor, and he missed days with no doctor's excuse for illness.

On July 30, 1997, the day after seeing Dr. Derr for the first time, Mr. James did not report to work. He had not been excused from work by Dr. Derr or any other physicians. He was assigned two (2) points for the absence which gave him a total of twenty-four (24) points, and on July 31, 1997, Mr. James was terminated by Tennsco. Although he had a right to appeal the assignment of the points, Mr. James never sought to talk with anyone or to challenge the twenty-four (24) points. He did apply for unemployment compensation and drew this compensation for seventeen (17) weeks which ended when he went to work for Precision Roofing.

Keeping his appointments to see Dr. Derr on August 14, 1997, Mr. James told Dr. Derr that he had been fired from Tennsco. Upon examination the doctor found no changes, and it was the doctor's impression to rule out carpal tunnel syndrome bilaterally.

A follow-up appointment was made for August 26, 1997, and Mr. James told the doctor that the numbness and tingling in the fingers had resolved but that he had tenderness in all the fingers and the joints in his fingers were stiff.

Dr. Derr last saw Mr. James on November 25, 1997, and Mr. James reported that he continued to have tenderness in the left forearm and the left elbow area.

At the request of appellant's attorney Dr. Derr on March 3, 1998 rated Mr. James for impairment. According to the doctor's notes he opined that Mr. James would retain a permanent partial impairment of one percent (1%) left upper extremity based upon range of motion of the left wrist and due to a loss of range of motion of the left shoulder, a three (3%) percent impairment to the upper extremity or a two (2%) percent whole body impairment.

There is no evidence in the record that Dr. Derr connected the assigned impairment ratings to the work of Mr. James at Tennsco.

Dr. David W. Gaw, M. D. performed an independent medical evaluation on Wallace D. James, Jr. on the 15th day of June, 1998. The diagnosis by Dr. Gaw was probable thoracic outlet type syndrome of both upper extremities. It was his opinion that the employee had a permanent physical impairment of ten (10%) percent to each upper extremity or a twelve (12%) percent permanent impairment to the body as a whole and that the injury more probably than not arose out of the claimant's employment.

On the 19th day of January, 1999, Wallace D. James, Jr. was seen by Dr. Leon H. Ensalada, M. D. for an independent medical evaluation. Following examination Dr. Ensalada's impression was:

1. Symptoms and complaints of bilateral upper extremity pain and loss of sensation (as described in history) in conjunction with no objective findings;
2. No thoracic outlet syndrome, right or left;
3. No carpal tunnel syndrome, right or left;
4. No ulnar neuropathy, right or left;
5. No medical or lateral epicondylitis, right or left;
6. No indication of impairment related to injury or illness, right or left upper extremity. This physician gave no permanent partial impairment to the employee.

The trial judge found that Mr. James failed to carry the burden of proof necessary to sustain a finding of a compensable permanent injury arising out of and in the course and scope of his employment at Tennsco.

Appellate review of the trial court judgment in this workers' compensation case is de novo upon the record, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated §50-6-225(e)(2); Jones v. Sterling Last Corp., 962 S.W. 2d 469 (Tenn. 1998). The Appellate Court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Gallaway v. Memphis Drum Service 822 S. W. 2d 584, 586 (Tenn. 1991).

The opinion of the trial judge who saw the witnesses, heard them testify and observed their attitude and demeanor on the witness stand should carry great weight with the reviewing court and should not be overturned unless a clear preponderance of the evidence so requires. Smith v. Smith 47 Tenn 548, 339 S. W. 2d 326, 328 (Tenn. App 1960). When medical testimony is presented by deposition, this court may draw its own conclusion about the weight, credibility and significance of such testimony. Seiber v. Greenbrier Industries, Inc., 906 S. W. 2d 444, 446 (Tenn. 1995). Thomas v. Aetna Life & Cas. Co. 812 S.W. 2d 278, 283 (Tenn. 1991).

The trial judge concluded that the testimony of Mr. James was not as credible as some of the other evidence.

In this case the trial court considered the testimony of all of the witnesses, examined all of the exhibits, particularly Exhibit 13, and made the finding concerning credibility. The evidence does not preponderate against this finding of the trial court.

Examining the medical information available, including the depositions of Dr. Gaw and Dr. Ensalada, and considering the lay testimony the trial court gave more weight to the testimony of Dr. Ensalada. It cannot be found that the evidence preponderates against this finding.

Dr. Gaw's findings and opinions are shown in two depositions taken on August 17, 1998 and April 8, 1999. Although on physical examination of the claimant, no objective abnormality was found to exist, Dr. Gaw opined that Mr. James had probable thoracic outlet type syndrome of both upper extremities. This diagnosis was based on history and subjective accounts of symptoms and a positive Adson's test. Dr. Gaw recommended EMG/NCV testing to confirm this diagnosis.

Dr. Gaw testified that the American Medical Association Guidelines to the Evaluation of Permanent Impairment, Fourth Edition, does not mention thoracic outlet syndrome but that the condition was equivalent to carpal tunnel syndrome, and he assigned a permanent partial impairment of ten (10%) percent to each upper extremity. The doctor testified that thoracic outlet syndrome gets better if the person is no longer doing the repetitive activity and that Mr. James stated the tingling and numbness became worse while he was off work for several months.

In the second deposition given on April 8, 1998, Dr. Gaw acknowledged that thoracic outlet syndrome can be caused by work, but is believed to be more frequently caused by a congenital problem and is more appropriately diagnosed by a neurologist, neurosurgeon or vascular surgeon. It was also acknowledged by Dr. Gaw that thoracic outlet syndrome is difficult to diagnose, is a fairly uncommon disorder, is controversial and is often a "wastebasket" diagnosis.

Dr. Leon Ensalada, who like Dr. Gaw saw Mr. James one time for an independent medical evaluation, disagreed with Dr. Gaw's assessment that the employee suffered from thoracic outlet syndrome disorder, that the employee had any permanent partial impairment and that there was a causal connection to the work of Mr. James at Tennsco. Dr. Ensalada testified, "Mr. James does not have thoracic outlet syndrome on either the right or left." He then goes to great length justifying his conclusion. He does acknowledge that there is an entity of thoracic outlet syndrome and states that the diagnosis should be reserved for two specific presentations which are (1) vasculopathic thoracic outlet syndrome and (2) axonopathic thoracic outlet syndrome.

According to Dr. Ensalada, thoracic outlet syndrome characterized as vasculopathic is seen with extreme usage of the arm. The symptom and signs include coldness of the arm, swelling of the arm, discoloration of the arm and breakdown of the skin and supporting structure due to lack of oxygen. Dr. Ensalada testified that Mr. James had none of the symptoms or signs when examined on the 19th day of January, 1999.

Making testimony as to axonopathic thoracic outlet syndrome Dr. Ensalada said that it is a painful condition due to an impingement or interference with the nerves. He stated:

> ...when this syndrome occurs, there is a loss of sensation in the distribution of the ulnar never, which would be along the outside of the hand and in the small finger, but there wouldn't be loss of sensation in the median nerve distribution, which would be the thumb, index, and long finger. Reflexes are normal in axonopathic thoracic outlet syndrome.

In his history to Dr. Ensalada, Mr. James reported that "my hands and fingers go to sleep... they get numb; the joints in my fingers hurt all of the time ..." and he referred all fingers and both thumbs on each hand.

We cannot say the preponderance of the evidence weighs against the finding of the trial court.

The burden of proof rests upon the party claiming the benefits of the Workers' Compensation Act to establish the claim of permanent or permanent partial disability by a preponderance of all the evidence. Parker v. Ryder Truck Lines, Inc. 591 S. W. 2d 755 (Tenn. 1979). Oster, A Div. Of Sunbeam Corp. v. Yates 845 S. W. 2d 215, 217 (Tenn. 1992). This burden of proof was not sustained by the plaintiff.

The judgment of the trial court is affirmed, and the cost of this appeal is taxed to the Appellant.

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TOM E. GRAY, 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 will be paid by the appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM