IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(July 20, 2000 Session)

JOHN PAUL MILLER v. FLEETWOOD HOMES OF TENNESSEE AND KEMPER NATIONAL INSURANCE COMPANIES

Direct Appeal from the Chancery Court for Sumner County
No. 98C-35 Thomas E. Gray, Chancellor

No. M1999-00275-WC-R3-CV - Mailed - December 7, 2000
Filed - January 10, 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. The plaintiff, John Paul Miller, appeals the judgment of the Chancery Court of Sumner County, where the trial court found: (1) that Mr. Miller failed to prove by a preponderance of the evidence that he suffered a neck injury arising out of and in the course of his employment with Fleetwood Homes on or about August 4, 1997; (2) that had the neck injury occurred as alleged by Mr. Miller it was due to his own willful misconduct and his claim was otherwise barred under *Tennessee Code Annotated* §50-6-110 (a); (3) and that Mr. Miller was not entitled to any further benefits for his hand/wrist injury of June 13, 1997. 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 Chancery Court affirmed.

WEATHERFORD, SR. J., delivered the opinion of the court, in which BIRCH, J. AND RUSSELL, J. joined.

William H. Partin, Jr., Lexington, Kentucky, for the appellant, John Paul Miller

John R. Lewis, Nashville, Tennessee for the appellees, Fleetwood Homes of Tennessee and Kemper National Insurance Companies.

MEMORANDUM OPINION

The plaintiff, Mr. Miller, alleged that on August 4, 1997, he injured his neck while lifting a piece of equipment while working for Fleetwood Homes. At the time of trial, Mr. Miller was forty-eight (48) years old. He had been employed by Fleetwood Homes since April of 1995 installing lights in mobile homes under construction.

In June of 1997, Mr. Miller reported injuring his left hand at work. He received medical treatment for that injury and was released to light duty with restrictions limiting the use of his left hand to lifting no more than five to ten pounds. Mr. Miller returned to work wearing a hand cast, and stated that he "couldn't do a whole lot" with his left hand.

Mr. Miller's supervisor, Vincent Tuttle, and his assistant supervisor, John Pedigo, assigned Mr. Miller to the light duty work of function testing, which involved using a small hand-held plug tester, to test electrical plugs in houses under construction; and "high-pod" testing which involved using a probe in a one second test to check for electrical shorts in a house.

The probe used in high-pod testing was attached to a high-pod box weighing somewhere between twenty-five (25) and fifty (50) pounds. The high-pod box needed to be moved from house to house in order to do the testing. The high-pod box did not have a handle, and therefore was difficult to pick up with one hand. Mr. Pedigo testified that the high-pod box was a foot and a half long and about eight inches tall and very awkward for someone to carry it one-handed. Mr. Tuttle stated that normally a person would use both hands to carry this piece of equipment. Mr. Pedigo testified that he did not want anyone to carry the high-pod box with one arm because it could be dropped causing injury and it could damage the machine which cost between $1,500 and $3,000.

Mr. Pedigo testified that,"[Mr. Miller] knew his restrictions, what the doctor told him of how much he was allowed to pick up. He had an injured hand. I had seen him packing [carrying the high-pod box], instructed him that that was an expensive piece of machinery, and not to be packing it." Mr. Pedigo also stated that he had instructed two other Fleetwood employees, Anthony Green and Chris Eden, to move the high-pod box for Mr. Miller if it needed to be moved. Both Mr. Eden and Mr. Green testified that they did at times move the box for Mr. Miller, and that they would have come to his aid, even if they were not in the same area as Mr. Miller when the need arose. Mr. Pedigo testified that he told Mr. Miller he was supposed to get Mr. Eden or Mr. Green when he needed the high- pod box moved. Mr. Pedigo also stated that he told one of these employees to inform him if they saw Mr. Miller carrying the high-pod box.

Mr. Eden confirmed that there were times that he would not be working in the same house as Mr. Miller. Mr. Green also testified that there were many times that they were not working on the same house or that he was working on the other side of the building, and Mr. Miller may not have known where to find him.

Mr. Pedigo also stated that he taped the box to a two-wheel dolly so that the box could be rolled from house to house with one hand, and instructed Mr. Miller to use it in that manner. Mr. Eden and Mr.Green recalled seeing the box fastened to a dolly so that Mr. Miller could wheel it around.

Mr. Miller stated that he could not use the dolly because it would get knocked down by the air lines on the floor, and that in between the houses, there were chains pulling the houses down the production line and catwalks. Mr. Pedigo testified that because of where the electrical tests were performed on each house, there would be no occasion when the dolly would be in the way of the line. Mr. Miller testified that he used the dolly for a day or two and that it got knocked over by air hoses. After he told Mr. Pedigo about this, the dolly disappeared. Mr. Pedigo admitted that Mr. Miller told him the dolly turned over, and he then instructed Mr. Miller not to park it in the way of air hoses in the building. Mr. Pedigo stated that he did not know what happened to the dolly, but that it ended up missing and that Mr. Miller had used it while it was present.

Mr. Miller testified that no one at Fleetwood ever told him not to carry the high-pod box. He stated that Mr. Pedigo never told him to get anybody to help him move the high-pod box. According to Mr. Miller, he used his right hand to lift the high-pod box and carry it on his hip. However, two other employees, Nathaniel Stinson and Jeff Jenkins, testified that they saw Mr. Miller carrying the box with both hands.

According to Mr. Miller, on August 4, 1997, he got “these real bad pains in my arm” as he was lifting the high-pod box up into a house. He stated that he immediately told Mr. Pedigo that he had "hurt my arm". According to Mr. Miller, Mr. Pedigo told him to go back and finish up and take it easy. Mr. Pedigo testified that Mr. Miller did not report injuring himself on August 4, nor did he complain his arms were hurting. Mr. Miller finished his shift on August 4, 1997 and also worked the next day although in pain and stated that Mr. Pedigo again told him to take it easy.

On August 6, 1997, his pain became more severe and he went to the emergency room in Bowling Green, Kentucky. There, he complained of pain in his right shoulder and tenderness in his cervical spine, and reported lifting at work. Mr. Miller's son, Mike Miller, who also worked at Fleetwood reported to Fleetwood that his father may have even had a heart attack, but that he did not know the exact nature of his problem.

Mr. Tuttle, Mr. Miller’s immediate supervisor, testified that Mr. Miller was simply at work one day and then just “didn’t come back”. Mr. Miller did not call in to explain his absence, nor request a doctor, even though Mr. Tuttle attempted several times to call him. Had an accident been reported, Mr. Tuttle would have generated a report.

Mr. Miller returned to the emergency room on August 10, 1997 with continued complaints of the same symptoms. Later he saw his family doctor who scheduled an MRI and then saw Bowling Green neurosurgeon, William Schwank, M. D.

Despite Mr. Miller's knowledge of injury reporting procedures, he did not request permission or otherwise inform Fleetwood that he was going to the emergency room on August 6 or his second visit on August 10. At the emergency room, the history obtained from Mr. Miller did not mention lifting a high-pod box; the records reflect that there was "no known trauma". When Mr. Miller returned to the emergency room on August 10, there again was no complaint of any work injury noted.

Mr. Miller went to Fleetwood on August 20, 1997, where he was given a panel of physicians from whom he selected orthopedic surgeon Thomas Gautsch, M. D. Dr. Gautsch diagnosed Mr. Miller as suffering from a herniated C5-6 disc and performed an anterior cervical discetomy..

Dr. Gautsch testified that:

> Based on the information that I was presented with at that time, I had no reason to doubt it [that the C5-6 disc herniation was caused by his lifting and carrying of the electrical high-pod box at work]. Everything fit. I believe that he was genuine in his symptoms. Although he was feeling them quite severely, that's not all that uncommon. But his physical examination findings were consistent with his diagnostic tests, and he reported to me a potential cause which could be a potential cause for that problem.

Dr. Gautsch opined that Mr. Miller suffered a permanent impairment under the AMA Guidelines of fifteen percent (15%) to the body as a whole as a result of this injury.

After hearing the proof and final argument of counsel, the trial court ruled from the bench that Mr. Miller's credibility had been impeached and he had failed to prove the accident arose out of and in the course and scope of his employment.

The trial court did state that even if the Tennessee Supreme Court should find that he did carry the burden of proof that the accident arose out of and in the course and scope of his employment, that Mr. Miller could not prevail because he violated his restrictions and was assigned to light duty.

The Court found that the defendants had successfully proved that had the neck injury occurred as alleged, it was due to Mr. Miller's willful misconduct, and therefore his claim was otherwise barred under *Tennessee Code Annotated* §50-6-110(a).

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 the evidence is otherwise. Tenn. Code Ann. §50-6-225 (e)(2); *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). Where the 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 actual findings, *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).
Mr. Miller has presented three issues in this appeal:

I. Whether the evidence preponderates against the trial court's finding that Mr. Miller did not carry his burden of proof that his injury arose out of and in the course of his employment.

II. Whether the clear and convincing weight of the evidence established that Mr. Miller did not violate his light duty restrictions to his left hand when he lifted and carried with his right arm.

III. Whether the evidence preponderates against the Court's finding that Mr. Miller violated his employer's instructions, but that even if Mr. Miller violated his employer's instructions, said violation was neither a violation of his doctor's restrictions, nor as a matter of law did it constitute willful misconduct or any other violation of *Tennessee Code Annotated* §50-6-110 for which the employer has the burden of proof.

I. Whether the evidence preponderates against the trial court's finding that Mr. Miller did not carry his burden of proof that his injury arose out of and in the course of his employment?

The plaintiff in a workers' compensation case has the burden of proving every element of his case by a preponderance of the evidence. *Elmore v. Travelers Insurance Company,* 824 S.W.2d 541, 543 (Tenn. 1992). In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Annotated §50-6-102 (12).

In *Fink v. Caudle,* 856 S.W. 2d 952, 958 (Tenn. 1993) our Supreme Court stated:

> 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 while an employee is performing a duty he or she was employed to do.

Fink v. Caudle, 856 S.W.2d at 958.

In this case the trial court's ruling hinged on witness credibility. Mr. Miller testified that no

one at Fleetwood ever told him not to carry the high-pod box. He stated that Mr. Pedigo never told him to get anybody to help him move the high-pod box.

The trial court appeared to be very concerned that Mr. Pedigo's testimony directly contradicted the testimony of Mr. Miller, and questioned Mr. Pedigo at length on these contradictions. Mr. Pedigo maintained that he instructed Mr. Miller not to lift the high pod box and that he tried two different methods–having two other employees assist Mr. Miller and using a dolly-to keep him from carrying the high pod box. Mr. Pedigo also established that Mr. Miller did not report an injury to his neck or arms on August 4, 1997, and that the only information he had received regarding Mr. Miller's condition was that he may have had a heart attack or a stroke. He also stated that the only time Mr. Miller reported that his arm was hurting related to the earlier accident in June of 1997 that resulted in his restrictions, and that he never complained about an arm injury while he was using the high-pod box.

The trial court found that the only proof of a work related injury came from Mr. Miller himself. Describing Mr. Miller as the "historian" of what has occurred, the trial court found that "[h]is credibility has been impeached by Mr. Pedigo. I found Mr. Pedigo to be a credible witness."

Mr. Miller contends that he established causation when the Trial Court found that he carried the high-pod box and Dr. Gautsch testified that the history provided to him by Mr. Miller represented "a potential cause which could be a potential cause for that problem".

In addressing this issue the Court stated as follows:

> The Court is of the opinion he didn't carry that burden of proof. But if there is–if the preponderance of the evidence did show that he carried the proof, because he did in fact, carry and pack.....the high pod box–he did. The Court finds that he did, in fact, carry that high pod box when he was assigned to light duty.
>
> And he does have proof from expert medical testimony, that that could be a potential cause which could be a potential cause for the problem. So it would appear that, in fact, he's established by expert medical testimony causation. But because of the credibility problem, the Court has difficulty finding that he's proven that the accident arose out of and in the course and scope of his employment.

The trial court ruled: "As to the neck injury of August 4, 1997, the Court finds that the plaintiff's credibility was impeached, and that he has failed to prove by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment with the defendant employer on or about August 4, 1997."

Dr. Gautsch also testified that if Mr. Miller's history was incorrect, then his opinion regarding causation was likewise incorrect. While Dr. Gautsch's testimony seemed to support causation,the Trial Court did not believe the underlying facts on which Dr. Gautsch based his opinions on causation. There were no witnesses to the alleged accident of August 4, 1997, and none of the ten other witnesses testified that Mr. Miller had reported hurting himself lifting the high-pod box.

Having seen and heard the witnesses, the trial court was in the best position to judge the weight and credibility of oral testimony. It is clear that the trial court saw, heard and ultimately rejected the testimony of Mr. Miller and accepted the testimony of Mr. Pedigo and the other witnesses.

Accordingly, after reviewing the record in this case, we find that the evidence supports the findings of the Trial Court.

II. Whether the clear and convincing weight of the evidence established that Mr. Miller did not violate his light duty restrictions to his left hand when he lifted and carried with his right arm.

Mr. Miller claimed that he used only his right hand to lift the high-pod box and carry it on his hip. Two other employees, Nathaniel Stinson and Jeff Jenkins, testified that they saw Mr. Miller carrying the high-pod box with both hands.

Having seen and heard the witnesses, the trial court was in the best position to judge witness credibility, and after reviewing the evidence, we find that the evidence does not preponderate against the findings of the trial court.

III. Whether the evidence preponderates against the Court's finding that Mr. Miller violated his employer's instructions, but the even if Mr. Miller violated his employer's instructions, said violation was neither a violation of his doctor's restrictions nor as a matter of law did it constitute willful misconduct or any other violation of Tennessee Code Annotated §50-6-110 for which the employer has the burden of proof.

The trial court's finding on this issue again hinges on witness credibility, and for the reasons discussed earlier in this opinion regarding credibility of the witnesses, we find that the evidence does not preponderate against the trial court's finding that Mr. Miller violated his employer's instructions.

Because of our decision upholding the trial court's finding that Mr. Miller did not carry his burden of proof that his injury arose out of and in the course of his employment, we do not reach the issue of whether Mr. Miller's actions constituted willful misconduct pursuant to *Tennessee Code Annotated* §50-6-110(a), and it is therefore pretermitted.

CONCLUSION

The judgment of the Trial Court is affirmed. The costs are assessed to the appellants.

James L. Weatherford, Senior 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 appellants, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM