

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

November 27, 2002 Session

WHIRLPOOL CORPORATION v. JAMES NEVILLE

**Direct Appeal from the Chancery Court for Davidson County
No. 99-268-III Ellen Hobbs Lyle, Chancellor**

**No. M2002-00187-WC-R3-CV - Mailed - February 28, 2003
Filed - April 1, 2003**

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 (employer) appeals the trial court's decision that the disc herniation in the defendant's (employee's) neck, resulting in cervical radiculopathy, was a gradually occurring injury that arose out of and in the course of his employment with the plaintiff. The plaintiff also appeals on the grounds that it contends that proper notice was not given and that the claim should have been barred by the statute of limitations. We affirm the decision of the trial court.

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

BYERS, SR.J., delivered the opinion of the court, in which DROWOTA, J., and LOSER, SP.J., joined.

David T. Hooper, of Brentwood, Tennessee, for the Appellant, Whirlpool Corporation.

Jerry D. Mayo, of Nashville, Tennessee, for the Appellee, James Neville.

MEMORANDUM OPINION

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Stone v. City of McMinnville, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

The defendant (employee) was fifty-three years of age at the time of trial. He did not finish high school, but instead earned his graduate equivalency degree. He has also taken classes in mechanical engineering, electrical engineering, hydraulics, and pneumatics. He served as a policeman in Marinette, Wisconsin, for ten years before coming to Tennessee in 1981. His first job in Tennessee was as a maintenance technician and it was in this position that he came to work for the plaintiff company. The defendant's duties included repair work on a monorail and plumbing maintenance. He testified that most of his duties with the plaintiff company involved plumbing and the use of small tools.

The defendant testified that he developed carpal tunnel syndrome out of his work with the plaintiff company and had carpal tunnel release surgery performed by Dr. Vaughan Allen on both hands in 1994. In 1995, he was released with a permanent restriction to avoid continuous flexion and extension of the wrists as well as repetitive work or lifting any objects over thirty-five pounds. He filed a claim for workers' compensation and that claim was settled in 1995 for 27.75 percent permanent disability to both arms and open future medical benefits. The defendant testified that he continued to have hand and arm pain over the following years and was treated for this pain with cortisone shots.

The defendant also testified that in the early 1990's he had had minor pain in his neck that came and went. He testified that on August 8, 1995, while trying to pull cables on a flat conveyor, he injured his neck but did not report this injury to his supervisor. On March 17, 1999, he reported to Employee Health regarding neck pain and he was treated there with heat on his neck. He testified that on April 24, 1999, while assembling and replacing heavy duty racks, he heard a loud pop and snap in his neck followed by excruciating pain. He testified that the next day his neck hurt very bad. This occurred over a weekend when Employee Health was closed, so he did not report the injury until the following Monday, during which time he continued to work.

The defendant testified that he saw Dr. Allen on June 22, 1999, and told him of the neck pain he was having. Dr. Allen performed an MRI (magnetic resonance image) and then recommended surgery to the defendant's neck. Dr. Allen performed surgery on July 15, 1999. The defendant reported that the surgery relieved all his neck and shoulder pain. He returned to work on October 4, 1999, with no restrictions for his neck but still with the prior restrictions for his wrists and hands. After returning to work, he continued to have problems with his arms, wrists, and hands, and these problems got progressively worse. Dr. Allen suggested that the pain was probably caused by tendinitis, but the defendant elected to again have surgery on both wrists and these surgeries were performed in January and February of 2000.

Medical Evidence

The medical evidence for the purposes of the issues raised in this trial was presented by the deposition of Dr. Vaughan Allen. Dr. Allen, a board-certified neurological surgeon, testified that

he first saw the defendant employee on October 4, 1994. At that time, Dr. Allen testified, the defendant complained of numbness, tingling, and a loss of strength in his hands. Dr. Allen diagnosed the defendant as having bilateral carpal tunnel syndrome. Dr. Allen performed surgery and ascribed a ten percent impairment to each arm as a result.

Dr. Allen testified that he saw the defendant again on April 5, 1996. At that time, the defendant complained of pain in his wrist, arm, and shoulder. Dr. Allen diagnosed “wear and tear” arthritis/tendinitis.

Dr. Allen testified that he saw the defendant again on February 25, 1997. The defendant told Dr. Allen that he had seen an orthopaedic surgeon in the meantime and had received steroids in both shoulders which he said had effectively reduced inflammation. Dr. Allen prescribed more anti-inflammatory drugs to treat the pain. Dr. Allen saw the defendant again on June 24, 1997, when the defendant complained of intense neck and right arm pain which he said had been shooting into his hands for three to four weeks. An MRI taken at that time indicated that the defendant had right paracentral disc herniation. The MRI further indicated a straightening of the cervical lordosis, which Dr. Allen attributed to muscle spasms in the neck area.

Dr. Allen next saw the defendant on September 26, 1997, when the defendant complained of neck pain and bilateral arm pain. Dr. Allen made findings on that visit of a slight diminution of the left triceps, a mild hypalgesia of the index finger, and a loss of range of motion. Dr. Allen acknowledged that these findings indicated nerve root impingement.

Dr. Allen next saw the defendant on June 22, 1999, when the defendant complained of neck and bilateral arm pain. A myelogram was performed at that time and it was positive, reflecting an operable herniated disc at the C6-7 level. Dr. Allen performed surgery on the defendant’s neck on July 15, 1999. As a result of the surgery, the defendant developed a wound infection and was treated with antibiotics for six weeks. Dr. Allen opined that the defendant was temporarily and totally disabled until he returned to work on October 4, 1999.

The defendant visited Dr. Allen again sometime between October of 1999 and January of 2000, and complained again of numbness and tingling in his hands. Dr. Allen diagnosed a recurrence of bilateral carpal tunnel syndrome and performed surgery to the right arm on January 20, 2000, and on the left arm on February 14, 2000. The defendant was off work until May 2, 2000. After returning to work, the defendant complained of mechanical neck pain and shoulder and wrist pain, and was prescribed an anti-inflammatory drug.

As a result of the defendant’s neck problems, Dr. Allen assigned him a fifteen percent impairment to the body as a whole, with permanent restrictions of not lifting over thirty-five pounds repetitively, not over fifty pounds occasionally, and to avoid work over the shoulders for extended periods of time. Dr. Allen also opined that the defendant will be subject to an increased risk of recurrent herniation in the future because of this injury.

Discussion

Although we are required to weigh the evidence in a case in depth to determine where the preponderance of the evidence lies, see e.g., GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001), we are required to make such evaluation within the confines of established rules in evaluating the propriety of the trial court's factual findings.

The plaintiff appeals the trial court's decision that the disc herniation in the defendant's neck, resulting in cervical radiculopathy, was a gradually occurring injury that arose out of and in the course of his employment with the plaintiff. The plaintiff also appeals on the grounds that it contends that proper notice was not given and that the claim should have been barred by the statute of limitations.

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 Ann. § 50-6-102(a)(5). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted); Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted).

In this case it is clear from the testimony of Dr. Allen that the defendant's work activities could have caused the neck problems at issue. This testimony is corroborated by the defendant's own testimony, as well as the employee health records introduced as evidence at trial. As such, we find no error on the part of the trial court on the issue of causation and thus affirm on this issue.

Regarding the issues of notice and the statute of limitations, the plaintiff argues that the defendant's injury occurred so long ago that timely notice was not given and the claim should have been barred by the statute of limitations. However, in cases involving gradual onset injuries, such as this one, the duty of the employee to give notice to the employer does not arise until the employee becomes unable to work because of the condition. Barker v. Home-Crest Corp., 805 S.W.2d 273 (Tenn. 1991); Lawson v. Lear Seating Corporation, 944 S.W.2d 340 (Tenn. 1997). Similarly, in a case of a repetitive stress injury, the date of the accidental injury for the purpose of the statute of limitations running is the date that the claimant is no longer able to work because of the injury. Lawson. Thus the date of the accidental injury in this case was July 15, 1999, when the defendant had surgery and was unable to work. The plaintiff's arguments are without merit and we affirm on these issues as well.

Finally, the defendant argues on appeal that the trial court should have awarded more than twenty-five percent vocational disability for the cervical injury. The ultimate question in a workers' compensation case is vocational disability. In making a determination as to vocational disability, the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work in at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241©); Robertson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986).

In making its decision as to the plaintiff's vocational disability rating, the trial court did take the aforementioned factors into account, as reflected in the record. We thus affirm on this issue as well.

We cannot say that the evidence preponderates against the findings of the trial court on any of the issues brought by the appellant or the appellee and we affirm the judgment. The cost of this appeal is taxed to the appellant.

JOHN K. BYERS, 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 Appellant, Whirlpool Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM