IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL AT NASHVILLE
JUNE 2000 SESSION

WALTER TAYLOR, JR., v. ATHENS PAPER COMPANY, INC., and GREAT AMERICAN INSURANCE COMPANIES

Direct Appeal from the Chancery Court for Davidson County
No. 98-3195-III, Hon. Ellen Hobbs Lyle, Judge

No. M1999-00853-WC-R3-CV - Mailed - July 17, 2000
Filed - August 17, 2000

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 of findings of fact and conclusions of law. The employer contends the trial court erred in finding the employee did not intentionally misrepresent his physical condition to the employer, and in finding a causal connection between the June 1998 accident and the October 1998 surgery and permanent impairment, and in finding employer responsible for "unauthorized" medical benefits. The panel has concluded that the judgment of the trial court should be affirmed on all issues.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Chancery Court Affirmed.

Turnbull, Sp. J., delivered the opinion of the court in which Drowota, J., and Loser, Sp. J. joined.

A. Gregory Ramos, North, Pursell & Ramos, Nashville, Tennessee, for the appellants, Athens Paper Company, Inc., and Great American Insurance Companies

Joseph K. Dughman, Bruce, Weathers, Corley, Dughman & Lyle, Nashville, Tennessee, for the appellee, Walter Taylor, Jr.

MEMORANDUM OPINION
Facts

The employee, Walter Taylor, Jr., was forty-one years old at the time of trial. He has a high school education and has been employed at a number of jobs since graduating from high school, all labor related and not requiring specialized training. The employee began working for the employer,

Athens Paper Company, Inc., in August 1997.

In 1994, the employee injured his lower back while working for a previous employer and filed a workers' compensation claim. The employee suffered a herniated disk at L5-S1 which resulted in a laminectomy surgery in July 1994. After the surgery, the surgeon, Dr. Stanley Hopp, put the employee on permanent restrictions of not lifting more than twenty-five pounds and also gave the employee a 10% impairment rating. Dr. Hopp also filled out a C-32 Department of Labor Form restricting pushing and pulling to one-hundred and fifty pounds if using rollers and on level ground. The employee testified that after the surgery he rehabilitated himself with a weight lifting program and had jobs where he worked beyond his restrictions.

On August 18, 1997, the employee filled out an application for employment as a truck driver with Athens Paper. The employee checked the "no" box in response to a question that stated, "Do you have any physical limitations that preclude you from performing any work for which you are being considered?" The employee was interviewed separately by Ron Crecelius, operations manager, and Donald Jenkins, then president and now chairman of Athens Paper Company, Inc. The employee and employer differed in their testimony over whether the employee was specifically asked by Crecelius or Jenkins during the interviews if the employee suffered from any back problems. The testimony of both parties also conflicted on whether the employee volunteered his past history of back problems to Jenkins and Crecelius and if Crecelius or Jenkins told the employee that the truck driver position required heavy lifting.

The employee suffered two injuries while working for the employer. The first was on November 5, 1997, when the delivery truck the employee was driving was struck from behind resulting in injuries to his cervical spine, neck, right arm, and lumbar spine. The employee sought medical treatment for neck pain on November 5, but did not take off work. The employee saw Dr. Hopp on February 5, 1998, complaining of leg and lower back pains that Dr. Hopp eventually determined was related to the November 1997 accident.

The second accident occurred on June 9, 1998, when the employee slipped and fell in the back of a truck while trying to unload its contents, resulting in pain in his lumbar spine. On June 23 and July 7 of 1998, the employee saw Dr. Thomas J. O'Brien, chosen by the employee from a panel of three physicians provided by the employer. Dr. O'Brien determined that the pain of which the employee complained was related to postoperative scarring from the July 1994 surgery and not the employee's June 1998 accident.

Meanwhile, the employee returned to see Dr. Hopp on July 2, 1998, without the employer's knowledge. On July 23, the employee presented the employer with a note from Dr. Hopp for light restrictions on his work. This was the first time the employer had any knowledge of Dr. Hopp's treatment of the employee. On July 27, the employer's insurance company received a letter from Dr. Hopp that he was recommending a ray cage fusion surgery at L5-S1 due to the employee's worsening condition and increasing pain. After some delays, on September 30, 1998, the insurance company scheduled an appointment for November 12, with Dr. Daniel M. Spengler, for a second opinion to

determine whether surgery was necessary.

On October 5, 1998, Dr. Hopp performed the ray cage fusion surgery on the employee. Apparently, the employee only told Dr. Hopp about the June 1998 accident before going into the operating room. The employee still saw Dr. Spengler on November 12, 1998. Dr. Spengler opined that the October 1998 surgery was the result of further degenerative disk disease from the 1994 accident and not the June 1998 accident. Dr. Hopp opined in his deposition that the June 1998 injury made the October 1998 surgery necessary.

From the above evidence, the trial judge found that the employee did not intentionally misrepresent his physical condition when hired by the employer and that there was a causal connection between the employee's June 1998 injury and the October 1998 surgery. The trial judge awarded a 36% vocational disability rating, workers' compensation benefits totaling $72,314.20, which included the cost of the surgery in October 1998.

Issues

We are faced with three issues:

1. Did the employee make an intentional misrepresentation of his physical condition?
2. Did the employee prove a causal connection between his work injury and the fusion surgery performed by Dr. Hopp on October 5, 1998?
3. Should the employer be held responsible for employee's unauthorized medical expenses?

Analysis

In a worker's compensation case, appellate review on factual issues is de novo with a presumption that the trail court's findings are correct, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225[e][2] (1991 Supp. 1998); E.g., Hill -v- Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness. See Ridings -v- Ralph M. Parsons Co., 914 S.W.2d, 79, 80 (Tenn. 1996)

Misrepresentation

The first issue we consider is whether the employee intentionally misrepresented his physical problems to the employer. Absent clear and convincing evidence to the contrary, appellate courts will not re-evaluate a trial judge's assessment of witness credibility. See Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999).

To bar recovery of workers' compensation benefits for giving false medical information, "the employer must show (1) that the employee knowingly and willfully made a false representation of his physical condition; (2) that the employer relied on the false representation and that this reliance was a substantial factor in the decision to hire; and (3) that there is a causal connection between the

false representation and the injury subsequently suffered by the employee. Bane v. Daniel Construction Co., 793 S.W.2d 256, 258 (Tenn. 1990).

We note that the question on the employment application: "Do you have any physical limitations that precludes you from performing any work for which you are being considered?" requires a subjective response by the employee. His belief in his own abilities was being called for. The employee testified that through weight lifting, he had increased his ability to lift, pull or push. Because the trial court found the employee's testimony credible in that he did not intentionally misrepresent his physical condition, and the employer fails to present any clear and convincing evidence to the contrary, we affirm as to the issue of intentional misrepresentation by the employee.

Causation

We next examine whether the trial court erred in finding a causal connection between the June 1998 accident and the October 1998 surgery. When reviewing testimony by deposition, appellate courts may make an independent assessment of the credibility of the documentary proof it reviews, without affording deference to the trial court's findings. See Wells v. Tennessee Bd. of Regents, 9 S.W.3d at 783-84.

In a workers' compensation case, an award may be based upon medical testimony that a given incident "could be" the cause of the plaintiff's injury, when there is lay testimony that reasonably points to the given incident as the cause of the injury. E.g., Hill -v- Eagle Bend Mfg. Inc., 942 S.W.2d 483, 487 (Tenn. 1997) Reasonable doubt as to causation "must be extended in favor of the employee." Long -v- Tri-Con Industries, Ltd., 996 S.W.2d 173, 177. (Tenn. 1999)

The trial judge accredited Dr. Hopp's testimony over the testimony of the physicians offered by the employer, Drs. O'Brien and Spengler, because of Dr. Hopp's lengthy history of treating the employee. In contrast, Drs. O'Brien and Spengler only saw the employee three times collectively. The trial judge further found with regard to O'Brien and Spengler's testimony, "if you read their testimony, they're in many instances commenting on whether Dr. Hopp intended or meant certain things. And so really the best proof of what Dr. Hopp found, intended and meant is Dr. Hopp's deposition." After reviewing the depositions of Drs. Hopp, O'Brien, and Spengler and taking into consideration the amount of time each physician spent treating the employee, we also place greater weight on Dr. Hopp's testimony. We find it reasonable that the June 1998 accident was the cause of the October 1998 surgery. Construing reasonable doubt in favor of the employee, we affirm the trial court's finding of a causal connection between the June 1998 accident and the October 1998 surgery.

Unauthorized Medical Expense

Finally, we consider whether the employer is responsible for the cost of the October 1998 surgery even though the employer did not authorize the surgery. Section 50-6-204(a)(4) of the Tennessee Code requires an employer to provide medical services to an injured employee and let the employee choose from at least three physicians. Section 50-6-204(a)(6) of the Tennessee Code requires the

employee to accept the medical services provided by the employer. See Dorris v. IVA Insurance Company, 764 S.W.2d 538, 540-41 (Tenn. 1989). "Whether an employee is justified in seeking additional medical services to be paid for by the employer without consulting the employer depends on the circumstances of each case." Id. at 541.

The testimony of the employee and Dr. Hopp indicate that after seeing Dr. O'Brien on July 7, 1998, the employee was in pain and his condition continued to deteriorate. The employer did provide a second panel of physicians from which the employee could choose. However, the appointment with Dr. Spengler was not scheduled until September 30, and the date of the appointment was not until November 12, 1998. The employer received the letter from Dr. Hopp recommending the ray cage fusion surgery on July 27, 1998, a difference of more than three months. The employer cites various reasons for the delay, but under the circumstances of this case, this delay was unreasonable because the employee was in pain, unable to work, and a doctor was recommending surgery. The employer had an obligation to stand on its denial or promptly schedule an appointment if the employer might have been persuaded to authorize the surgery. Consequently, the trial court's award of medical costs relating to the October 1998 surgery are affirmed.

The judgment of the trial court is affirmed in all respects. Costs on appeal are taxed to the appellants, Athens Paper Company, Inc., and Great American Insurance Companies.

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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 appellants, Athens Paper Company, Inc., and Great American Insurance Companies, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM