

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
December 17, 2003 Session

TONY BILBREY v. KENNETH O. LESTER CO., INC.

A Direct Appeal from the Criminal Court of Wilson County
No. 98-0901 The Honorable J. O. Bond, Judge

No. M2003-00649-WC-R3-CV - Mailed - February 24, 2004
Filed - March 29, 2004

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) to hear and report to the Supreme Court Findings of Fact and Conclusions of Law. The trial court found that the employer had made voluntary medical payments within one year of the filing of suit; that the statute of limitations had not expired; and that the plaintiff suffered a work related back injury. The trial court fixed plaintiff's disability at 22-1/2 percent to the body as a whole. 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 is affirmed

JOHN A. TURNBULL, Sp. J., delivered the opinion of the court in which FRANK DROWOTA C.J., and HOWELL N. PEOPLES, SP. J., joined.

John R. Lewis, Nashville, Tennessee, for Appellant, Kenneth O. Lester Co., Inc.

Anthony E. Hagan, Lebanon, Tennessee, for Appellee, Tony Bilbrey.

OPINION

Tony Bilbrey filed this workers' compensation action on May 21, 1998. In his complaint, he alleged that he suffered a back injury on November 12, 1996 as he was unloading a truck in Marietta, Georgia, while making a delivery for his employer, Kenneth O. Lester Co., Inc. Bilbrey testified that he reported his injury to one of his dispatcher / supervisors (either Midgett or McKee) immediately upon returning to Tennessee. Bilbrey further testified that his supervisor advised him that Mr. Roberts, the employer's workers' compensation supervisor, would set up an appointment for him with Dr. Roy Johnson. Although Bilbrey testified that he did not speak directly to Roberts, someone with the employer made an appointment for him with Dr. Johnson for December 24, 1996. Bilbrey was advised of and kept this appointment.

Bilbrey saw Dr. Johnson "six or eight times." On November 10, 1997, Dr. Johnson referred Bilbrey to Dr. Robert Stein, an orthopedic surgeon. Dr. Johnson's medical records indicated that the employer had authorized treatment and that Bilbrey's medical bills were paid, some by the employer and some by Kemper, the employer's workers' compensation insurer.

Dr. Stein saw Mr. Bilbrey for an orthopedic consultation on November 17, 1997. Dr. Stein found no compression fracture but believed that Bilbrey was symptomatic from an acute nerve impingement. From the history conveyed by the patient, Dr. Stein related Bilbrey's condition to the November, 1996 injury. Dr. Stein fixed Bilbrey's impairment at three percent to the body as a whole.

Mr. Bilbrey was later treated by Dr. Roy Terry, an orthopedic surgeon in Lebanon, who found a compression fracture of L5-S1, which he also related by history, to the November, 1996 injury. Dr. Terry assigned Bilbrey a permanent impairment rating of fifteen percent to the body.

Bilbrey's testimony that he was injured on November 12, 1996 sharply conflicted with the testimony of his co-driver, Randy Short. The trip logs indicate that Short accompanied Bilbrey on his deliveries to Marietta, Georgia on November 12, 1996. Short remembered no fall or apparent injury suffered by Bilbrey during this trip, but testified that Bilbrey had complained that "his back was bothering him from cutting some cedar trees or something on his place." Bilbrey's testimony that he reported the injury to Midgett or McKee also conflicted with the testimony of each of those supervisors. Each testified that Bilbrey did not report an injury and that they made no arrangement for a doctor's appointment for Bilbrey. Roberts, the employer's workers' compensation supervisor, also denied making a medical appointment for Bilbrey or authorizing his treatment. He conceded, however, that someone from Lester may have authorized treatment.

Bilbrey was terminated by Lester on January 28, 1997, allegedly for stealing company property. The company or the insurance carrier continued paying Bilbrey's medical bills through his last visit with Dr. Johnson on November 10, 1997.

After suit was filed, and after it was revealed that the trip logs showed Randy Short was with Bilbrey on his November 12, 1996 delivery, Bilbrey amended his complaint to allege the injury occurred on November 5, 1996. The trip log for November 5, 1996, indicated Bilbrey was not accompanied by Short, but that deliveries were made to the same customer in Marietta, Georgia. Bilbrey's testimony that he was hurt making a delivery in Georgia was supported by the testimony of Linda Bilbrey, his wife, who reported a contemporaneous phone call in which Mr. Bilbrey described how the injury occurred. She also confirmed Mr. Bilbrey's testimony regarding his report of the injury. Mrs. Bilbrey's testimony was not admitted as substantive evidence, but only on the issue of Bilbrey's credibility.

The trial court, faced with this highly conflicted testimony, concluded that Bilbrey was hurt on the job, and reported the injury. The trial judge found the doctor's records most persuasive and concluded that someone from Lester had authorized Bilbrey's treatment, and that Lester and its workers' compensation insurance company paid for his medical treatment within one year of the filing of this suit. The trial judge found Dr. Terry's testimony regarding impairment to be more in line with the AMA Guidelines, and fixed Bilbrey's vocational disability at 22-1/2 percent.

Analysis

We are to review the record anew, with the presumption that the factual findings of the trial court are correct unless the preponderance of the evidence is otherwise. See Tenn. Code Ann. 50-6-225 (e) (2); *Mannery v. Wal-Mart Distribution Ctr.*, 69 S.W.3d 193, 196 (Tenn. 2002). A trial court's decision regarding the credibility of witnesses who testify live is entitled to considerable deference on appeal, *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996) and should not be reversed absent an abuse of discretion. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992).

The trial court's holding was credibility driven. Since the trial judge saw, heard, and observed the witnesses who testified live, great deference must be given to those findings, which had their genesis in determinations of credibility. Although the trial judge observed that Bilbrey's memory as to dates was deficient, and that Bilbrey's credibility was damaged by his admission of theft from his employer, the trial judge found credibility in Bilbrey's testimony that he was hurt on the job, and that he reported the injury to his employer. The independent documented evidence in Dr. Johnson's records that Lester authorized treatment and paid for that treatment as a workers' compensation claim tipped the close balance on credibility in favor of Bilbrey on the highly contested

issues of causation and notice of injury. We cannot say that the presumption of correctness of these findings by the trial court has been overcome, or that the preponderance of the evidence weighs against the findings of the trial court. Even though a cold review of the written record might lead us to a different conclusion, we do not have the benefit of hearing and observing the live witnesses as did the trial judge. We cannot simply substitute our judgment on credibility for that of the trial judge. See Story v. Legion Ins. Co., 3 S.W. 3d 450, 451 (Tenn. 1999).

The employer also challenges the award of 22-1/2 percent whole person disability. The employer argues that the opinion Dr. Stein, who found no vertebral compression fracture of L5-S1, and fixed a three percent impairment, is entitled to greater weight than the opinion of Dr. Terry, who found a compression fracture at that site, and fixed an impairment rating of fifteen percent. The trial judge noted that each doctor was an orthopedic surgeon who testified honestly as to his findings and opinions. The trial judge further found that the testimony of the doctors and a review of their records indicated a consistent report of symptoms from the employee and provided no evidence of a subsequent injury. Reasoning that since neither the medical evidence nor the lay testimony indicated any subsequent event that likely produced a compressed fracture, the trial judge chose to accept the fifteen percent impairment rating of Dr. Terry. The trial judge noted that Dr. Terry's rating was supported by the appropriate section of the AMA Guidelines. "Where medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept." Kellerman v. Food Lion, Inc., 920 S.W. 2d 333, 335 (Tenn. 1999). We find no abuse of discretion by the trial judge in accepting Dr. Terry's opinion as more persuasive. Thus, the award of 22-1/2 percent permanent partial disability to the whole person must be affirmed. Costs of the appeal are assessed against the appellant.

John A. Turnbull, Sp. 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, Kenneth O. Lester Co., Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM