IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 18, 2005 Session

JOHN W. FOSTER v. GALLAGHER-BASSET INSURANCE, et al.

Direct Appeal from the Chancery Court for Wilson County
No. 01159 C. K. Smith, Chancellor

No. M2004-02348-WC-R3-CV - Mailed - October 12, 2005
Filed - January 27, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer asserts that the evidence preponderates against the trial court's award to the employee of 50% permanent partial disability to body as a whole. The employer also argues that the trial court erred in requiring it to pay the employee $1,302.00 for unauthorized chiropractic treatment. We conclude that the medical evidence preponderates against the trial court's rulings, and in accordance with Tenn. Code Ann. § 50-6-225(e)(2), reverse the judgment of the trial court as to both issues.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J., and WILLIAM H. INMAN, SR.J., joined.

Michael Lee Parsons, Nashville, Tennessee, for the appellant, Mercedes Benz of Nashville, Inc.

B. Keith Williams and Jason G. Denton, Lebanon, TN, for the appellee, John W. Foster.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

At the time of trial, John Foster was sixty-four years of age with a high school degree and some training from the Auto Diesel College. He had worked in the auto body and frame repair business for approximately 40 years. In 1988, Mr. Foster was involved in an automobile accident

and required lower back surgery. After recovering from surgery, he continued to seek the services of a chiropractor on a periodic basis for treatment of low back pain. On May 22, 2000, Mr. Foster re-injured his lower back pushing a 3,000 to 4,000 pound device while working as a body repair mechanic at Mercedes Benz of Nashville.

On the day of the injury, Mr. Foster saw Dr. Chris Corley, a local chiropractor. Approximately one month later, on June 22, 2000, Mr. Foster saw Dr. Roy Terry, a company-authorized orthopedic surgeon. After evaluating Mr. Foster's history and current condition, Dr. Terry prescribed medication and physical therapy. Dr. Terry then released Mr. Foster from his care. Mr. Foster felt he had not been helped by Dr. Terry. He was referred to Dr. Thomas O'Brien for a second opinion. Dr. O'Brien examined Mr. Foster on a single occasion, August 24, 2000, and placed no specific restrictions on Mr. Foster's activities. About that time, Mr. Foster returned to work in the same position at Mercedes. On October 19, 2000, Mr. Foster obtained an independent medical evaluation of Dr. David Gaw at the request of a previous attorney. Dr. Gaw reviewed the records of Drs. Terry and O'Brien and placed no additional physical restrictions on Mr. Foster.

Three years later, on July 8, 2003, Mr. Foster sought chiropractic evaluation and treatment from Dr. Frank Etlinger at the request of his current attorney. Dr. Etlinger treated Mr. Foster 13 times over a six 6 week period. He assigned Mr. Foster a 13% percent permanent impairment and found that Mr. Foster reached maximum medical improvement on August 21, 2003. Dr.Etlinger restricted Mr. Foster to lifting 15 to 20 pounds and no repetitive bending.

After returning to work in July or August of 2000, Mr. Foster continued to work as a body repair mechanic until his employment was terminated in August of 2003. He testified he is now unable to perform the work he has done throughout his career.

II. MEDICAL AND EXPERT TESTIMONY

Dr. Roy Terry testified by way of deposition. He is board certified by the American Board of Orthopedic Surgery and has privileges at four area hospitals. Dr. Terry first saw Mr. Foster on June 22, 2000. Mr. Foster reported an injury that had occurred on June 15, 2000, while pushing some benches at the place of his employment with Mercedes of Nashville. Dr. Terry testified that Mr. Foster had prior back surgery and, following the surgery, chronic back problems that were treated by Dr. Chris Corley, a chiropractor. Dr. Terry believed the June 2000 incident had exacerbated Mr. Foster's previous condition to some degree but did not believe that it had caused any new anatomical change or additional impairment. Dr. Terry testified that while the incident caused Mr. Foster to complain of more pain when he engaged in work-related activities, there were no additional physical limitations over and above those resulting from his prior surgery. Dr. Terry prescribed a muscle relaxer and medication for pain and referred Mr. Foster for physical therapy. He released Mr. Foster on August 31, 2000, to return to his previous activities.

Dr. Thomas J. O'Brien, a board certified orthopedic surgeon, also testified by way of deposition. Dr. O'Brien is licensed to practice if five states, has made numerous national and

regional presentations and has frequently had articles relating to his area of expertise published in medical journals and books. Dr. O'Brien saw Mr. Foster on August 24, 2000, on a referral from Dr. Roy Terry. Dr. O'Brien diagnosed Mr. Foster as having sever degenerated disc disease that manifested itself in the symptoms described by him. Dr. O'Brien believe Mr. Foster's symptoms were the result of any work-related incident that occurred in June 2000. In Dr. O'Brien's opinion, Mr. Foster did not have any impairment or additional limitation of activity as a result of his work at Mercedes of Nashville.

Dr. David Gaw, a member of the American Board of Orthopedic Surgery and American Board of Independent Medical Evaluators testified by deposition concerning his evaluation of Mr. Foster. Dr. Gaw reviewed the records of Drs. Terry and O'Brien and the MRI scan that was done in June 2000. Dr. Gaw saw Mr. Foster on October 19, 2000, and conducted his own physical examination. Mr. Foster reported to Dr. Gaw the injury that occurred on May 22, 2000, and a second injury in mid-June 2000 that occurred when he was pushing a rack. In Dr. Gaw's opinion, Mr. Foster was suffering from degenerative lumbar disc disease in his back. Dr. Gaw testified that the incident at Mercedes may have aggravated Mr. Foster's pre-existing injury resulting in the history of increased pain reported by Mr. Foster. While Dr. Gaw believed that Mr. Foster would have had permanent impairment due to his 1988 back surgery, he would have no further permanent anatomical impairment due to the May 2000 incident according to the A.M.A. Guidelines in effect at the time. Dr. Gaw further testified that in his opinion the May 2000 injury would not have resulted any permanent anatomical change and would not have increased any physical limitations placed on Mr. Foster.

Dr. Frank Charles Etlinger, certified by the National Board of Chiropractic Examiners, was the final medical expert to testify by way of deposition. Dr. Etlinger first saw Mr. Foster on July 8, 2003. At that time, Mr. Foster complained of pain in his neck, in his right thumb, index and second fingers, and in his lumbar spine radiating to his left thigh and calf. He also complained of headaches. Mr. Foster related his symtoms to a work-related incident that occurred on May 22, 2000. In his deposition, Dr. Etlinger testified that Mr. Foster was asymptomatic before the incident at Mercedes and that the incident had aggravated his pre-existing condition and caused an increase in his pain. Dr. Etlinger assigned Mr. Foster a 13% permanent impairment to the body as a whole, basing his decision on DRE Category III of the *Fifth Edition of the American Medical Association Guidelines to Evaluation of Permanent Impairment*. Dr. Etlinger's exact testimony was, "Mr. Foster is postlaminectomy with radicular symptoms. And, that puts him into the Category III and entitles him to a 13 percent impairment to the whole person."

III. RULING OF THE TRIAL COURT

The trial court awarded Mr. Foster benefits based on a fifty (50%) percent permanent partial disability to the body as a whole. The trial court also ordered Mercedes to pay Mr. Foster $1,302.00 for the chiropractic treatment performed by Dr. Etlinger. The awards were based on the trial court's finding that Mr. Foster suffered a compensable injury which resulted in the aggravation of a pre-existing condition and an increase in disabling pain.

IV. STANDARD OF REVIEW

The standard 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 evidence is otherwise. Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989); Tenn. Code Ann. § 50-6-225(e)(2). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded those circumstances on review since the trial court had the opportunity to observe the witness' demeanor and to hear the in-court testimony. Long v. Tri-Con Industries, Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the content of the depositions and the reviewing court may draw its own conclusions with regard to those issues. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

V. ANALYSIS

When weighing conflicting medical testimony, "it is within the discretion of the trial judge to determine which testimony to accept." Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004) (citing Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers Comp. Panel 1996)). Here, the trial judge relied on the depositions of each of the four medical experts and determined that Dr. Etlinger's testimony outweighed those of Drs. Terry, O'Brien, and Gaw. While the trial judge's findings of fact are presumed to be correct, where the issues involve expert medical testimony and all the medical proof is contained in the record by deposition the reviewing court is in the same position as the trial judge and may draw its own conclusions about the weight and credibility of that testimony. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

In Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991), the Supreme Court set out a list of factors for courts to consider when evaluating conflicting medical testimony. The first factor enumerated in Orman is the relative qualifications of the experts. Id. After reviewing each testifying medical expert's background, we find that the three orthopedic surgeons, Drs. Terry, O'Brien, and Gaw, each have more extensive education, training, and experience than Dr. Etlinger. Therefore, unlike the trial court, we are more persuaded by the testimony of the three doctors because of their superior qualifications.

The second factor set out in Orman is the relative circumstances of the medical witnesses' examinations. Id. Here, the three orthopaedic surgeons examined Mr. Foster within months of the incident at Mercedes. Dr. Etlinger, on the other hand, did not see Mr. Foster until over three years after the May 22, 2000, incident. We conclude that Drs. Terry, O'Brien, and Gaw were in a better position to evaluate Mr. Foster's May 2000 injury because they examined him closer to the time the incident occurred.

The third factor to consider when weighing conflicting medical testimony is the information available to each expert and the evaluation of the importance of that information by other experts.

Id. In the case before us, each of the medical experts knew of Mr. Foster's previous low back surgery and his pre-existing degenerative condition. During their evaluations, the three orthopaedic surgeons took into account the fact that Mr. Foster had prior back surgery and degenerative disc disease that pre-existed the May 2000 incident and opined that his physical impairment and the restrictions to activity were no greater after the incident than before it. Dr. Etlinger based his impairment rating on Mr. Foster being "postlaminectomy." That fact existed prior to the May 2000 incident. Dr. Etlinger's theory was that the May 2000 incident caused the pre-existing conditions to become symptomatic and, therefore, Mr. Foster's entire condition could be attributed to it. Dr. Etlinger does not indicate whether he was aware that Mr. Foster had been treated for back pain on a somewhat regular basis between the time of Mr. Foster's back surgery in 1989 and May 2000. In any event, because Dr. Etlinger based his impairment rating on a condition that pre-existed Mr. Foster's work injury, his testimony in this regard is of little value. The general rule is that aggravation of a pre-existing condition may be compensable but not if it results only in increased pain or other symptoms caused by the underlying condition as the employment must cause an advancement or anatomical change. Cunningham v. Goodyear Tire and Rubber Co., 811 S.W.2d 888 (Tenn. 1991). Thus, if a work injury aggravates a pre-existing condition merely by increasing pain, but does not otherwise "injure or advance the severity" of the employee's condition, the claimant did not sustain an injury by accident within the meaning of the Workers' Compensation Act and is not entitled to compensation. Id. at 891.

After applying the Orman factors, we conclude that the medical evidence preponderates against the trial court's finding that Mr. Foster had sustained a permanent partial disability as a result of the May 22, 2000, incident at Mercedes.

The appellant also challenges the trial court's ruling that it pay Mr. Foster $1,302.00 for unauthorized treatment received from Dr. Etlinger. Mercedes argues that Mr. Foster's failure to select an authorized physician, pursuant to Tenn. Code Ann. § 50-6-204(a)(4)(A), relieves it of its responsibility to pay for Mr. Foster's expenses. This section provides that "the employer shall designate a group of three (3) or more reputable physicians or surgeons . . . from which the injured employee shall have the privilege of selecting the operating surgeon or attending physician." Id. Since Mercedes failed to provide him with a panel of three physicians, Mr. Foster argues that he was entitled to seek medical care of his own choosing.

An employer is not obligated to pay for medical care provided to the employee by a non-designated physician even though the employer has not complied with the requirements of Tennessee Code Annotated section 50-6-204(a)(4)(A). Dorris v. INA Ins. Co., 764 S.W.2d 538, 541 (Tenn. 1989); Buchanan v. Mission Ins. Co., 713 S.W.2d 654, 656-57 (Tenn. 1986). Tennessee Code Annotated section 50-6- 204(d)(7) provides:

> If the injured employee refuses to comply with any reasonable request for examination or to accept the medical or specialized medical services which the employer is required to furnish under the provisions of this law, such injured employee's right to compensation shall be suspended and no compensation shall be due and payable while such employee continues

such refusal.

This provision has been construed to require an employee to consult with the employer before engaging an unauthorized physician. Procter & Gamble Defense Corp. v. West, 203 Tenn. 138, 310 S.W.2d 175 (1975). Where an employee incurs medical expenses on his own, the employer is not liable for payment of the expenses absent a showing by the employee that he had a reasonable excuse for not consulting with his employer before incurring such expense. Harris v. Kroger Co., Inc., 567 S.W.2d 161, 163-4 (Tenn. 1978).

Mr. Foster has not offered an excuse for failing to consult with his employer before incurring medical expenses from an unauthorized provider. Therefore, we agree with the appellant that the trial court erred in requiring it to pay for Mr. Foster's unauthorized chiropractic treatment.

VI. CONCLUSION

The judgment of the trial court is reversed and the costs on appeal shall be taxed to the appellee, John Foster.

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DONALD P. HARRIS, SR. J.

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Wilson Chancery
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No. M2004-02348-SC-WCM-CV - Filed - January 27, 2006

ORDER

This case is before the Court upon the motion for review filed by John Foster pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to John Foster, for which execution may issue if necessary.

PER CURIAM