IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 30, 2005 Session

JAMES R. WHITED v. NISSAN MOTOR CORPORATION

Direct Appeal from the Circuit Court for Robertson County
No. 10321 Ross H. Hicks, Judge

No. M2005-00041-WC-R3-CV - Mailed - May 12, 2006
Filed - August 15, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In 1999 the Employee injured his cervical spine and was awarded benefits, including lifetime medical benefits. During the succeeding years he experienced various problems with his neck. In May 2003, the Employee struck a bay pole while operating a tow motor and claims an injury to his neck as a result of this incident. The treating neurosurgeon, Dr. Zellem, testified that the Employee suffered no new injury. An independent medical examiner, Dr. George Gaw, testified that the tow motor incident was a new injury. The trial judge accepted the opinion of Dr. Zellem and dismissed the Employee's complaint. We affirm the judgment of the trial judge.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., joined and ROBERT E. CORLEW, SP. J., dissented and filed a separate opinion.

Richard A. House and Larry Williams, Nashville, Tennessee, for Appellant, James A. Whited.

Kitty Boyte and Kenneth M. Switzer, Nashville, Tennessee, for the Appellee, Nissan Motor Corporation.

MEMORANDUM OPINION

Background

James Whited, the Employee, is a forty-two year old husband and father of two. He is a high school graduate and former marine. His work history includes farming and driving delivery trucks. The Employee began working for the Employer, Nissan, in 1990. He spent his first years at Nissan in various technician positions, but has worked as a tow motor operator since 2002.

The Employee has sustained several injuries while working for the Employer, including a neck injury in 1999. Dr. Ronald Zellem performed surgery on the Employee for this injury, at the C5-6 level, on June 8, 1999, and continued to treat the Employee for this injury throughout 2002. The Employee entered into a settlement agreement with the Employer for this cervical injury, as well as two other settlements for unrelated injuries.

On May 27, 2003, the Employee collided with a bay pole while operating a tow motor in the course and scope of his employment. He reported the incident to the Employer, and consulted Dr. Robert Clendenin, III, a panel physician who then referred him back to Dr. Zellem. On July 14, 2003, the Employee saw Dr. Zellem who informed him that he suffered a compromise of the disk at C6-7 which would likely require surgical intervention.

The Employee continues to work for the Employer full time, including working overtime and using his seniority to switch positions within the plant. The Employer asserts that the Employee has failed to prove his case by a preponderance of the evidence.

The trial court found that the Employee did not suffer a compensable new injury and dismissed the complaint. The Employee appeals, asserting that the tow motor incident of May 27, 2003 caused the herniated disk or otherwise aggravated a pre-existing condition.

Standard of Review

In workers' compensation cases, our review is de novo on the record accompanied by a presumption that the trial court's factual findings are correct, unless the evidence preponderates otherwise. Tenn. Code Ann. 50-6-225(e)(2); *Mannery v. Wal-Mart Distrib. Cntr.*, 69 S.W.3d 193, 196 (Tenn. 2002).

The Medical Proof

Dr. Zellem, a board-certified neurosurgeon, testified by deposition. He first saw the Employee in May 1999 and treated him for a "compression of nerves and changes in his neck from cervical spine disease". Dr. Zellem testified that the Employee recovered nicely from the 1999 surgery, which involved mostly right-sided symptoms, but continued to see the Employee throughout 2002. On January 7, 2002, the Employee began complaining of problems with his neck, including

radiating pain down his left arm. The Employee returned to therapy, underwent time activity restriction from work, and was placed on medication. Dr. Zellem performed a myelogram, and other tests, in March of 2002. These tests revealed a "new herniated disk at C6-7, or one level below the original fusion". Dr. Zellem testified that this herniation was not necessarily the result of some trauma, since an individual with disk problems and a history of fusion surgery is predisposed to experiencing further disk problems in the future. At this point, in March of 2002, Dr. Zellem was "suspicious" that the Employee would require further surgery on this disk.

On July 14, 2003, the Employee again consulted Dr. Zellem but made no mention of the alleged tow motor incident, notwithstanding that Dr. Zellem specifically asked if he had experienced a new accident or injury. The Employee also completed a routine medical history form on which he noted that he had suffered a neck injury in 1999, but made no mention of the now-asserted May 27, 2003 injury. Dr. Zellem testified that he reviewed Dr. Clendenin's notes in treating the patient, which revealed that the injury may have been work related. He also agreed that it would be typical for a lay person to relate current neck problems to a previous neck injury.

Dr. Zellem noted that the Employee's symptoms in July of 2003 were similar to the symptoms discussed throughout the course of his treatment. Dr. Zellem prescribed a course of physical therapy and medications, but ultimately performed surgery on the Employee's C6-7 disc on September 2, 2003. The Employee recovered well from this surgery, and was released at maximum medical improvement on October 3, 2003. Dr. Zellem assigned him a 7 percent permanent partial impairment rating for this injury, but assigned no permanent restrictions. Dr. Zellem opined that the 2003 C6-7 disk herniation was related only to the Employee's original injury in 1999.

Dr. David Gaw, an independent medical examiner, saw the Employee on January 21, 2004. His diagnosis was degenerative cervical disk disease. He testified that imaging studies in 2003 contrasted to studies in 1999 and 2002, revealed that there was a progression or increase in his symptoms and anatomical impairment. Dr. Gaw also testified that an individual having had one surgery on the neck or back is far more likely to have problems in the future. He noted that in this case, the Employee was at a particularly high risk for future disk problems, since he had the C5-6 level fused, causing stress on the disk below, C6-7. Further, in reading the various myelograms taken over the years, Dr. Gaw testified that the Employee had begun to show a small bulge or protrusion at the C6-7 level as early as 1999. Dr. Gaw admitted that 7 percent of his suggested 10 percent impairment rating is due to loss of spine motion, which was not measured after the 1999 surgery, and is therefore difficult to attribute to either specific surgery within a reasonable degree of medical certainty.

The history that the Employee related to Dr. Gaw differed significantly from the history related to Dr. Zellem. This inconsistency was acknowledged by Dr. Gaw, who had reviewed the medical records of Dr. Zellem. As already noted, the Employee completed a form document in which he attributed his condition to the 1999 accident. Dr. Gaw testified that his opinion on the cause of the 2003 injury is based solely on the history given him by the Employee.

Analysis

On appeal, the Employee asserts that his collision with a bay pole on May 27, 2003 is the cause of the disc herniation he suffered at the C6-7 level, and the surgery resulting therefrom. Alternatively, he argues that his employment advanced or exacerbated a pre-existing condition in his cervical spine, resulting in a compensable anatomical change. The Employee further avers that his 2003 injury is compensable because the medical services provided by his Employer for the original 1999 injury were negligent, and caused further injury. We cannot agree.

The plaintiff in a workers' compensation case bears the burden of proving, by a preponderance of the evidence, every element of a case. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987). The trial court's determination on the element of causation is a factual finding, to which reviewing courts are generally bound. *Id.* Medical testimony is generally required to establish causation, and this evidence "must not be speculative or so uncertain regarding the cause of the injury that attributing it to the plaintiff's employment would be an arbitrary determination or a mere possibility." *Id.*

The medical testimony in this case is conflicting. Where expert medical testimony conflicts in a workers' compensation case, it is within the sound discretion of the trial judge to conclude that the opinion of a certain physician should be accepted over that of another. *Story v. Legion Ins. Co.*, 3 S.W.3d 450, 455 (Tenn. 1999); *Orman v. Williams Sonoma Inc.*, 803 S.W.2d 672, 675 (Tenn. 1991); *Hinson v. Wal-Mart Stores Inc.*, 654 S.W.2d 675, 677 (Tenn. 1983); *Combustion Engineering Inc. v. Kennedy*, 562 S.W.2d 202, 204 (Tenn. 1978). Where the medical evidence is contained in deposition testimony, we are in a position to review that testimony and draw our own conclusions about the weight of the evidence. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997).

In this case, the Employee presents no competent evidence that his employment caused the C6-7 disc herniation and resulting surgery. The Employee cites one incident, the collision with the bay pole, as the contributing factor to this injury. The medical testimony of Dr. Zellem undermines this argument, since the Employee's complaints of pain on his left side prompted tests revealing a small bulging disc on this level not long after his surgery in 1999. Further, the Employee did not inform Dr. Zellem, his treating physician, about the collision with the bay pole when questioned directly, or on his medical history form. Because the evidence suggests that the Employee suffered from a bulging or herniated disc at the C6-7 level before the collision with the bay pole occurred, and because he has failed to allege any other work-related incident which may have caused this injury, he has failed to prove causation in this case.

The trial court credited the testimony of Dr. Zellem, the long-time treating physician in this case, on the determinative issue of causation. After a thorough review of the evidence, we find no compelling reason to disagree with this factual finding. Any other holding would amount to the impermissible substitution of our judgment for that of the trial judge.

The Employee has already been compensated for the 1999 injury, and all future medical bills are covered under this settlement agreement. The Employee's alternative arguments are without merit, since the cause of the injury is the determinative factor in this case.

We are unable to find that the evidence preponderates against the judgment of the trial court. The judgment of the trial court, dismissing this case, is affirmed. Costs on appeal are assessed to the Appellant.

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WILLIAM H. INMAN, SENIOR JUDGE

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ROBERT E. CORLEW, Dissenting.

I respectfully dissent because I feel that the majority has failed to properly consider that the aggravation of a pre-existing condition in this case is itself a new injury and that the Employee is then entitled to compensation for the new injury, rather than simply being entitled to receive continued medical treatment.

Before the court is a suit alleging a neck injury of May 27, 2003. It is undisputed that the Employee, while driving a towmotor within the course and scope of his duties for the Employer, accidentally collided with a bay pole or a support pole within the Employer's warehouse. It is further undisputed that treatment was subsequently required. It is disputed as to whether that treatment was caused by the collision with the bay pole or by an old injury, but it is undisputed that the Employee sustained further anatomical impairment affecting another part of his neck and that there was no evidence of the occurrence of any other traumatic event which could have caused this new injury.

This case is unusual because there are objective diagnostic tests of the Employee's neck shortly before the reported injury now before the court and shortly after that injury. The evidence contains an objective diagnostic test conducted on the Employee's neck on March 1, 2002, some fifteen months prior to the alleged injury which may be compared with those tests conducted on August 15, 2003, less than three months after the injury. It is this comparison in diagnostic tests which objectively establishes that the Employee sustained a new injury.

The proof is undisputed that while working for the Employer on May 27, 2003, the Employee, while operating a tow motor, a device used to pick up and carry heavy loads, hit or bumped a bay pole. Although the extent of the impact is disputed, it is undisputed that the Employee immediately reported a work-related injury as a result of his striking the pole. The Employer provided medical care for this injury, and the Employee was sent to Robert E. Clendenin, III, M.D.

for treatment. Dr. Clendenin's records show that the Employee addressed his collision with the pole with Dr. Clendenin. Subsequently, however, on July 14, 2003, the Employee sought further treatment from Dr. Ronald Zellum, the same doctor who had treated him for a compensable neck injury in 1999. At that visit, Dr. Zellum's records do not reflect a mention by the Employee of the new accident with the bay pole, and Dr. Zellum's records show that he was of the impression that the Employee was again seeking follow-up treatment for the 1999. injury. An intake document completed by the Employee states that the required treatment is work-related, but caused by the 1999 injury.

When the Employee previously suffered the neck injury in 1999, medical care was provided, and the Employee received compensation for his permanent partial disability. It is undisputed that subsequent medical care for the neck injury was required on several occasions and was provided by Dr. Zellum at the cost of the Employer. As a part of that treatment, Dr. Zellum viewed the myelogram conducted on March 1, 2002. The Report from that myelogram was exhibited to Dr. Zellum's deposition, and it shows, in part, the following:

> At C5-6, there is anterior plate and screw transfixing these levels. No loosening of the hardware is demonstrated. No significant spinal canal stenosis or neuroforaminal stenosis is demonstrated at this level.
>
> At C6-7, there appears to be a small left paracentral disc protrusion, mild mass effect on the left lateral recess. No significant left neuroforaminal stenosis is demonstrated. No significant spinal canal stenosis is seen.

Radiology Report of March 1, 2002, from Hendersonville Medical Center, Exhibit 3, to the Deposition of Ronald Zellum, M.D.

Further diagnostic testing was conducted on August 15, 2003 which was also exhibited to Dr. Zellum's testimony:

> C5-6: Changes of anterior cervical diskectomy and fusion are present. There is no screw or plate loosening. There is mild-to-moderate thecal sac compression.
>
> C6-7: There is the large disk herniation to the left. This results in severe thecal sac compression. Cord and the left nerve root compression are present. There is cephalad migration of the disk to the mid C 6 level.

Radiology Report of August 15, 2003, from Hendersonville Medical Center, Exhibit 3, to the Deposition of Ronald Zellum, M.D.

Thus, on March 1, 2002, the record shows a "*small* ... disc *protrusion*" while the August 15, 2003 record shows a "*large* disk *herniation*"[emphasis added]. Dr. Zellum was asked to compare the test results from March 1, 2002, prior to the Employee's collision with the bay pole, with those

from August 15, 2003, after the collision, and he considered that there was an anatomical change "of significant magnitude." Treatment was then further provided for the Employee for the newly reported injury, which included another fusion.

This court is required to conduct an independent examination of the record to determine the preponderance of the evidence. In determining the preponderance of the evidence, we must consider the evidence presented. When the medical proof is presented by deposition, we must determine the weight to be given to the expert testimony and draw our own conclusions with regard to the issues of credibility with respect to the expert proof. *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004); *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Elmore v. Traveler's Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992). Conclusions of law established by the trial court come to us without any presumption of correctness. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825 (Tenn. 2003).

The proof is undisputed that the original 1999 injury suffered by the Employee resulted in a herniation at the C5-6 level. The Employee continued to need periodic treatment for this injury, and treatment was provided for the C5-6 issues. There was no original injury to the C6-7 level. Even as late as the imaging test of March 1, 2002, there was no issue as to the C6-7 level. The imaging tests on August 15, 2003, however, show that the Employee suffered a large disk herniation at the C6-7 level which had not been present at the time of the 1999 injury and were not present even at the time of the myelogram in March of 2002. The unmistakable evidence, then, is that there was an anatomical change at the C6-7 level between the imaging test of March 1, 2002 and the diagnostic testing conducted on August 15, 2003. Generally, where there is a prior injury and a subsequent anatomical change in the Employee, the law holds that there is an aggravation of the prior injury, which, itself is a new injury. *E.g., Fritts v. Safety Nat. Cas. Corp.*, 163 S.W.3d 673, 679 (Tenn. 2005); *Brewer v. Lincoln Brass Works, Inc.*, 991 S.W.2d 226, 229 (Tenn. 1999); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 233 (Tenn. 1990). Here, not only was there an anatomical change in the Employee, but there was also a new part of the neck affected. Treatment was necessary after the bay pole accident for issues at the C6-7 level. At that level, there was severe thecal sac compression, a condition which had not been present before. Further, at this new level, there was compression of the spinal cord with the presence of left nerve root compression.

There is undisputed proof that an incident occurred where the Employee hit a bay pole on May 27, 2003. He reported it, and received medical care. Whether the incident was one which "jarred his neck on impact," as the Employee told Dr. Gaw, or whether he experienced "no specific injury although while driving the fork lift, he did strike an object having a small jolt to his neck," as he told Dr. Clendenin on June 3, 2003, it is undisputed that the Employee hit a pole. In his testimony before the Court, the Employee testified that "the bay pole was right there and I just popped it. So it give [sic] me a pretty good little shock right there. ... It was a stinging, but it felt like I could just kind of shake it off." The Employee didn't discuss the incident with Dr. Zellum, to whom he was referred by Dr. Clendenin. However, while the Employee testified that he told the nurse at Dr. Zellum's office about the bay pole accident, no mention of the pole was listed in the medical records or came to the attention of Dr. Zellum until after surgery. In considering this apparent conflict in

medical histories, however, we must recognize that the Employee had previously sought treatment from Dr. Zellum. All of the treatment from Dr. Zellum for the years 1999 until the July 14, 2003 visit were for treatment for the 1999 injury. Dr. Zellum was thus familiar with the patient and familiar with the fact that for years the Employee had sought neck treatment for problems resulting from the 1999 injury. Once again, Dr. Zellum was asked to treat a neck injury, and, thus, in context, we feel that the omission of an indication of a new injury in Dr. Zellum's file is less significant than the objective test results demonstrating an anatomical change which Dr. Zellum considered to be "of significant magnitude."

Only two physicians presented opinions as to causation of the Employee's problems. Dr. Gaw presented his opinion, given the medical history provided by the Employee, that the collision with the bay pole **was** the cause of the Employee's new injury. Dr. Zellum expressed his opinion, considering the medical history provided to him, that the collision with the bay pole was not significant and was not the cause of the Employee's injury, but he acknowledged that it was "possible" that the collision "could be the etiology of the large herniated disk."

I would determine that the Employee has suffered a new injury based upon the undisputed report of the new injury and the undisputed medical records demonstrating a significant anatomical change. I would recognize that the workers' compensation laws should be "liberally construed to promote and adhere to the [purposes of the Workers' Compensation] Act of securing benefits to those workers who fall within its coverage." *Martin v. Lear Corp.,* 90 S.W.3d 626, 629 (Tenn. 2002). Our courts have "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). *Accord, Long v. Tri-Con Indus., Ltd.*, 996 S.W.2d 173, 177 (Tenn. 1999); *P & L Constr. Co. v. Lankford,* 559 S.W.2d 793, 794 (Tenn. 1978); *GAF Bldg. Materials v. George*, 47 S.W.3d 430, 433 (Tenn. Worker's Comp. Panel 2001). *But see Tindall v. Waring Park Ass'n,* 275 S.W.2d 935, 938 (Tenn. 1987).

The proof is undisputed that there was an anatomical change in the Employee's neck. Thus, there is an exacerbation of a prior condition which is itself a new injury. There being no evidence of any other triggering event, I would find that the evidence demonstrates by a preponderance that the collision with the bay pole exacerbated his prior condition. The lay testimony presented by the Employee concerning the bay pole accident, as well as evidence concerning his duties and the awkward positions in which he must turn his neck, the medical proof from Dr. Gaw regarding the jarring and vibration, and the testimony of Dr. Zellum that the Employee is more susceptible to injury because of his first work-related injury, all point to an unmistakable conclusion that there is a new C6-7 level injury.

While I hold the greatest respect for the majority and for the trial judge herein, I would find the injury to be work-related, and having considered the fact that the trial court made no alternative

findings concerning vocational disability, I would remand the action to the trial court for findings concerning vocational disability.

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ROBERT E. CORLEW, SPECIAL JUDGE

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No. M2005-00041-SC-WCM-CV - August 15, 2006

ORDER

This case is before the Court upon the motion for review filed by James R. Whited 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 James R. Whited, for which execution may issue if necessary.

PER CURIAM

Cornelia A. Clark, J.- Not Participating