IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 26, 2007 Session

BI-LO, LLC v. LARRY VAN FOSSEN

Direct Appeal from the Circuit Court for Hamilton County
No. 04C1107 Neil Thomas, Judge

Filed July 13, 2007

E2006-00709-WC-R3-WC - Mailed June 12, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the 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. The employer asserts that the trial court erred in (1) finding that the employee's work injury of October 15, 2003, rather than his non-work injury of March 2004 caused his permanent disability; (2) assessing 60 percent vocational disability for the employee's injury; and (3) assessing the employer for the medical treatment received by the employee by Doctors Smith and Hodges. We agree with the findings of the trial court and in accordance with Tennessee Code Annotated section 50-6-225(2), affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Circuit Court Affirmed

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C. J. and J. S. (STEVE) DANIEL, SR. J., joined.

Thomas O. Sippel, Chattanooga, Tennessee, for Appellant Bi-Lo, LLC.

Michael A. Anderson, Chattanooga, Tennessee, for Appellee, Larry Van Fossen.

MEMORANDUM OPINION

Larry Van Fossen [hereinafter "the employee"] was employed as a truck driver for Bi-Lo [hereinafter "the employer"]. He had been employed in this capacity since 1988. On October 15, 2003, the employee was unloading and delivering at a Bi-Lo Store in Ellijay, Georgia. A pallet of meat had shifted and the employee was attempting to straighten the pallet. He put his right shoulder and back against the pallet and began to shove the pallet back in place. The employee testified that he experienced "an excruciating, tearing pain and it put me to my knees," that the pain was unlike

any pain he had previously felt with his back, and that he laid on a paper bale for forty minutes while the truck was unloaded. The employee then drove the truck back to Chattanooga and reported the incident to his dispatcher. He was sent to Physician Care, a clinic specializing in urgent care and occupational medicine. The employee testified that he was suffering pain in the lower part of his back, radiating to other parts of his body.

At Physician Care, the employee was seen by Dr. William Meadows who ordered a thoracic x-ray and gave him medication for pain. Dr. Meadows diagnosed a pulled muscle and ordered a thirty-pound lifting restriction. The employee returned to work the next day. The employee returned to Physicians Care on October 24, 2004, and was seen by Dr. Rymer who diagnosed a muscle strain, and continued him on light duty. The employee had one last visit to Physician Care and was seen by a nurse practitioner. After this visit, he was released to return to normal duty. He performed his normal duties for five months although he testified he was in pain every day, slept on the floor with his legs up and took Aleve, an over-the-counter pain medication.

This condition persisted until March 21, 2004 when, as the employee was scooping some dog food from a bag, he experienced pain in his back that was significant and similar to the pain he felt in October 2003. He went to work the next day and drove to Knoxville. When he returned, he went to see Dr. David Smith without seeking permission of the employer. Dr. Smith was the chiropractor who had treated him in the past.

Dr. Smith performed a physical exam and ordered an x-ray of the lumbar spine. Dr. Smith diagnosed facet syndrome and a decrease in the disk space at L5-S1. The employee was treated by Dr. Smith for some months, but did not improve. Dr. Smith referred the employee to Dr. Scott Hodges, an orthopedic surgeon and spine specialist.

Dr. Hodges reviewed the prior x-rays and ordered an MRI of the lumbar spine which was performed on April 9, 2004. Dr. Hodges diagnosed mild protrusion at T11-12 and L4-5, which he treated with epidural injections. A discogram was ordered and, after a review of the various x-rays, MRIs and discogram, Dr. Hodges diagnosed the employee with a L4-5 disc protrusion with annular tear. The employee was referred to Dr. Catlin for pain management. The employee's last visit to Dr. Hodges was in June 2005. At that time, Dr. Hodges informed the employee that he was a candidate for a lumbar fusion.

After the March 21, 2004 incident at his home, the employee did not return to Bi-Lo. In May or June 2004, the employee and a friend started a fence building business in which he participates part time in the actual construction of the fences. The employee testified that he had suffered injuries to his back prior to the October 15, 2003 incident; that he was seen by Dr. Smith in April for back pain he experienced while putting up a fence; that he saw Dr. Smith in May 2004 when he slipped at home and hit the commode. He called his dispatcher to report that injury, but was told that since he suffered the injury at home, it would be covered by disability insurance. The employee filed a disability claim with UnumProvident and received benefits until Unum was notified that the injury might be work related. The employee continues to work part time in a fence building business.

Medical Evidence

Dr. Meadows of Physician Care testified by deposition that he diagnosed the employee with a muscle strain. He ordered an x-ray of the thoracic area, but did not order an x-ray of the lumbar or sacral spine. Dr. Meadows further testified that if the employee was suffering from a bulging disc at L5-S1 with radiculopathy, that would not be the condition he treated on October 15, 2003.

Dr. Hodges testified by deposition that he reviewed the employee's medical records including those of Dr. Smith and that he was aware of the back problems the employee had experienced prior to the October incident. Dr. Hodges opined that it was more likely than not that the employee's back problem occurred from his work injury. He stated that the October 15, 2003 event was clearly the most significant mechanical event to the employee's spine among the events in employee's history. Dr. Hodges testified further that the March 21, 2004, incident did not cause a new injury, but was related to the earlier injury suffered at work. Dr. Hodges opined that, at the very least, the work incident was an aggravation of a pre-existing injury.

Ruling of the Trial Court

The trial court found that the employee's injury was work-related and caused by the incident of October 15, 2003. The trial court awarded 60 percent permanent partial disability to the body as a whole and further ordered the employer to pay the medical expenses of Doctors Smith and Hodges.

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 findings, unless the preponderance of the 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's demeanor and hear the in-court testimony. Long v. Tri-Con Indus., LTD, 996 S.W.2d 173, 178 (Tenn. 1999); Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility to be drawn from the contents of the depositions and the reviewing court may draw its own conclusion with regard to those issues. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

Analysis - Causation

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 (12). 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 System, Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Although causation cannot be based merely on speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. Id. It is well settled in this state that a plaintiff in a workers' compensation case has the burden of proving every element of his or her case by a preponderance of the evidence. Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992). Causation and permanency of an injury must be established in most cases by expert medical testimony. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Dr. Meadows' testimony was based upon his physical examination; a thoracic x-ray and records of two other visits to Physician Care by the employee. Physician Care specializes in urgent care and occupational injuries. Dr. Meadows never ordered an x-ray of the lumbar spine. Dr. Meadows testified that he considered Dr. Hodges to be a competent physician.

Dr. Hodges reviewed the records of Dr. Scott and Dr. Meadows. Those records included x-rays of the lumbar spine and an MRI. Dr. Hodges also ordered a discogram. Dr. Hodges opined that the work injury more likely than not caused the disc protrusion, annular tears and pain that the employee was experiencing. In addition, the employee testified that the pain he experienced in the March 2004 incident seemed to be in the same place he suffered from the October 2003 injury. The employee further testified, that although he returned to work after the October 2003 injury, he suffered pain each day.

Having conducted an independent review, we find that the record does not preponderate against the trial court's finding that the employee's injury was caused by the accident of October 15, 2003.

Analysis - Impairment

The only evidence in the record regarding impairment was Dr. Hodges opinion that the employee had suffered a 10 to 13 percent impairment to the body as a whole. Dr. Hodges opined that this rating would increase to 20 percent if the employee had fusion surgery and that after the surgery, the employee would have a lifting restriction of no greater than 60 pounds. The employee's motion to consider post judgment facts indicated that subsequent to the trial court hearing, the employee had the recommended surgery.

The employee was 43 years old at the time of trial, had a high school degree, was trained at the Chattanooga State Truck Driving School and had been employed for over 16 years as a truck driver. The employee's work as a truck driver was physical. His only other experience was as an auto mechanic, but he testified that this experience could not be utilized with today's automobiles.

The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court, and are reviewed de novo accompanied by a presumption of

correctness unless the preponderance of the evidence is otherwise. Whirlpool Corp. v. NaKoneneh, 65 S.W.3d 164, 170 (Tenn. 2002); Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). In assessing the extent of the employee's vocational disability, the trial "court shall consider all the pertinent factors including lay and expert testimony, employee's age, education, skill and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition." Tenn Code Ann. § 50-6-241(b) (1999); Worthington v. Medine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Robertson v. Lretta Casket Co., 772 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 778 (Tenn. 1972).

Having conducted an independent review of the record, we conclude that the evidence does not preponderate against the trial court's finding that the employee suffered a 60 percent permanent partial disability to the body as a whole.

Analysis - Medical Expenses

The employer treated the March 21, 2004 incident as a non-work-related injury. They failed to propose a panel of physicians and to pay the medical expenses of Dr. Smith and Dr. Hodges that were then incurred by the employee. The employer claims that Dr. Meadow's had released the employee without any restrictions and that the employee never requested additional medical treatment during the five months he returned to work.

When the covered employee suffers an injury by accident arising out of and in the course of his employment, his employer is required to provide free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Tenn. Code Ann. § 50-6-204(a)(1). An employer who denies liability for a compensable injury is in no position to insist upon the statutory provisions regarding the choosing of physicians. CNA Ins. Co. v. Transou, 614 S.W.2d 335, 337-8 (Tenn. 1981); GAF Building Material v. George, 47 S.W.3d 430, 433 (Tenn. Workers' Comp. Panel-2001). Accordingly, the trial court's order is affirmed.

Conclusion

We affirm the judgment of the trial court finding that the evidence does not preponderate against the trial court's ruling (1) finding that the employee's work injury of October 15, 2003, rather than his non-work injury of March 2004 caused his permanent disability; (2) assessing 60 percent vocational disability for the employee's injury; and (3) assessing the employer for the medical treatment received by the employee by Doctors Smith and Hodges. The cost of this cause shall be taxed against Bi-Lo, LLC, and its surety, for which execution may issue, if necessary.

JON KERRY BLACKWOOD, 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Bi-Lo, LLC, for which execution may issue if necessary.