IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 25, 2007 Session

MICHAEL HOPKINS. v. BRIDGESTONE FIRESTONE NORTH AMERICAN TIRE, LLC

Direct Appeal from the Chancery Court for Coffee County
No. 05-86 L. Craig Johnson, Chancellor

No. M2006-01357-WC-R3-CV - Mailed - October 3, 2007
Filed - December 12, 2007

This worker's compensation appeal has been referred to the Special Worker's 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. Employee alleged that he had sustained a compensable aggravation of a pre-existing condition as a result of his employment. The trial court found that he failed to sustain his burden of proof on causation and dismissed his claim. Employee has appealed; he contends that the trial court erred in holding that he had not sustained a compensable injury. We affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD E. LADD, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J. and DONALD P. HARRIS, SR. J., joined.

Timothy S. Priest, Winchester, Tennessee, for the Appellant, Michael Hopkins

B. Timothy Pirtle, McMinnville, Tennessee, for the Appellee, Bridgestone Firestone North American Tire, LLC

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Michael Hopkins ("Employee") is right-hand dominant. He was 35 years old at the time of trial. Employee has worked in the tire room at Bridgestone Firestone North American Tire, LLC

(Bridgestone) since February 1993 as a tire builder and trucker. As a tire builder, he assembled approximately 152 tires per shift. This involved repetitive reaching, pushing, tearing, and "yanking" with his left arm. It also occasionally required lifting objects weighing up to fifteen pounds above his head and reaching above his head to clear "jam-ups" in tire assembly machines. As a trucker, Employee pushed carts weighing up to 3,000 pounds; he would sometimes attempt to "muscle the cart[s] into place" if they were difficult to move.

Employee testified that he worked in the tire room between three and seven 12 ½ hour shifts per week from 1993 to 2000. He did not mention his work schedule or activities between 2000 to 2003. However, it appears from the record that by June 2003, he was only working as a trucker. In addition to his employment at Bridgestone, Employee worked construction for several years, and around 2001, formed Brothers Construction Company with a co-worker. In 2003, the "high water mark" in their business, Employee personally earned about $15,000 doing construction work.

Employee testified that he initially dislocated his left shoulder in 1989 or 1990 after colliding with a friend during a pick-up football game. He "popped" the shoulder back into place himself. He considered it a "non-issue" and did not seek medical attention at that time. Mr. Hopkins testified that his shoulder may have dislocated one to two more times prior to starting at Bridgestone in 1993 and dislocated a total of three to four times before 1995 or 1996. Thereafter, it began dislocating with progressive frequency. Employee did not seek medical attention for his shoulder until June 2003. By that time, it was dislocating once or twice per week. No new acute injury had occurred to the left shoulder after the initial football injury in 1990.

In June 2003, Employee consulted Dr. Burton Elrod, who diagnosed a Hill-Sachs lesion, a Bankhart lesion, a torn rotator cuff, and stretched ligaments. Dr Elrod recommended surgery. Employee postponed the procedure for personal and financial reasons. By June 2004, the shoulder was dislocating without any activity and was becoming increasingly painful. Employee often required assistance getting it back in place. He again consulted Dr. Elrod and had corrective surgery in July 2004.

Dr. Elrod, an orthopaedic surgeon, testified by deposition. He stated that he had treated Employee on multiple occasions. He was aware of Employee's duties in the tire room at Bridgestone, but concluded that the progression of Employee's left shoulder injury did not result from his employment. He testified that Employee's condition was consistent with a continuing deterioration of the initial traumatic shoulder injury sustained during the football accident in 1990. In support of his findings, Dr. Elrod stated:

> When you dislocate your shoulder when you're that age its very likely that it will continue to get – once it's come out once or twice it's usually about 95, 98 percent chance it will tend to be progressive with normal activities and just get more and more loose and come out with less and less stress.

At no time during the initial treatment, surgery, or follow-up treatment did Dr. Elrod or his staff suggest that Employee might have a work-related injury. Employee testified at trial, "The way

[Dr. Elrod] described it to me was that over time the more [the shoulder] subluxes or pops out, it just wears . . .the bone away basically so that each time it comes out a little easier." A notation from Employee's June 2003 patient chart supports that conclusion: "Dislocated [shoulder] twelve to thirteen years ago, over last three to four months it dislocates every week one to two times per week. Is painful and difficult to get back in place."

Dr. Elrod acknowledged that Employee's shoulder could have dislocated while performing his job functions and responded to several hypothetical questions regarding the effect of Employee's work on his shoulder injury. Dr. Elrod stated, "if his shoulder was coming out on its own at work, it was more likely than not to cause a progression of his condition." However, Dr. Elrod also stated that Employee's shoulder would have naturally deteriorated even with normal activities.

At the request of Employee's attorney, Dr. Richard Fishbein conducted an independent evaluation of Employee and his medical records in July 2005. Dr. Fishbein concluded that Employee's "repetitive duties as a tire builder" probably did cause a progression of his shoulder injury. Dr. Fishbein's opinions were introduced into evidence by means of a C-32 Medical Form; his deposition was not taken.

Employee testified at trial that his shoulder dislocated mainly at work where he spent the majority of his time. The shoulder had dislocated while "yanking" tire material out of the machines or clearing "jam-ups." However, he acknowledged that the shoulder also dislocated outside the workplace. Dr. Elrod commented in his 2003 office notes that Employee had told him the shoulder was "painful with everyday activities." By the time Employee had surgery in 2004, the shoulder was dislocating while he slept and while getting dressed.

Other than Dr. Fishbein, no physician or medical professional ever told Employee that his employment at Bridgestone caused a progression of his condition. Employee did not claim a work-related injury during treatment or surgery. He never suggested to Bridgestone that he thought the injury might be work-related, nor did he indicate on his medical or insurance forms that the injury was work-related. He first considered filing a worker's compensation claim after meeting with his trial counsel on an unrelated matter. Employee noted that, even after counsel suggested he file a worker's compensation claim and he notified Bridgestone, he still did not honestly believe his injury was work-related.

The record indicates that Employee was aware that Bridgestone had its own internal reporting procedures for on-the-job injuries. He had previously reported a work-related injury and a "near miss," and he had attended numerous safety training seminars and refresher courses.

The trial court found that Employee had failed to meet his burden of proof as to causation and held that his condition was a result of "the injury that happened twelve or thirteen years ago and the natural progression of that injury," and was not advanced by his employment at Bridgestone.

II. ISSUES

Employee alleges that the trial court erred in finding that he failed to meet his burden of proof to show that his employment at Bridgestone caused a progression of his pre-existing shoulder injury.

III. 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. Tenn. Code Ann. § 50-6-225(e)(2); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989). Where credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear 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 contents 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). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

IV. ANALYSIS

The aggravation of a pre-existing condition may be compensable if the employment causes an "actual progression" or "anatomical change" in the nature of the prior injury. Sweat v. Superior Indus., Inc., 966 S.W.2d 31, 32 (Tenn. 1998). However, job functions resulting in "increased pain or other symptoms caused by the underlying condition" are not compensable. Id. (emphasis added). The employee bears the burden of proof in showing causation between his employment and the progression of his injury. Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989).

The Court has examined the issue of compensability for aggravation of pre-existing conditions on multiple occasions. Sweat, 966 S.W.2d 31 (affirming trial court's worker's compensation award where employee's previously asymptomatic arthritis became disabling within 18 months at a job requiring "repetitive, weight-bearing activities."); Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d 888 (Tenn. 1991) (affirming the dismissal of a claim for aggravation of pre-existing arthritis and concluding that employee's injury was "progressive in nature, [and] would subject him to increasing pain and disability whether he worked or not."); Townsend v. State of Tennessee, 826 S.W.2d 434 (Tenn. 1992) (dismissing claim where State employee underwent corrective surgery for progressively stretched knee ligaments resulting from a pre-employment motorcycle accident and concluding, "[t]he medical proof demonstrated that what occurred was independently progressive.").

Reviewing the record in the instant case in light of these precedents, we conclude that the evidence does not preponderate against the holding of the trial court.

Dr. Elrod, a treating physician selected by the employee, testified that Employee's initial shoulder injury led to a 95 to 98 percent change of recurring dislocations even with normal activities. He concluded that the progression of Employee's shoulder condition to the point of needing surgery was most likely not caused by his employment at Bridgestone. Dr. Elrod was aware of Employee's duties in the tire room.

Contrary to Dr. Elrod, Dr. Fishbein concluded that the progression of Employee's shoulder injury was caused by the repetitive nature of his employment. However, Dr. Fishbein was not deposed and did not elaborate in his C-32 Form on the factors leading to this conclusion. After examining all of the medical evidence, we find Dr. Elrod's opinion more persuasive in light of his greater personal knowledge of the employee and his explanation of the reasons for his opinion.

In addition to the medical proof, Employee's own testimony also supports the trial court's conclusion. He testified that, although the shoulder dislocated at work, it also dislocated outside the workplace. His medical records show that the shoulder bothered him "with everyday activities." Finally, Employee himself testified that he did not believe his injury was work-related even after he filed a worker's compensation claim with Bridgestone. Although this is not conclusive evidence, an employee's assessment of his or her physical condition does have some probative value and must be considered. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 170 (Tenn. 2002); Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975).

Based upon our independent review of the record, we conclude that the evidence in this case preponderates in favor of the trial court's finding on the issue of causation.

V. CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to Michael Hopkins and his surety, for which execution may issue if necessary.

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RICHARD E. LADD, SPECIAL JUDGE

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ORDER

This case is before the Court upon the motion for review filed by Michael J. Hopkins 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 Michael Hopkins and his surety, for which execution may issue, if necessary.

It is so ORDERED.

PER CURIAM

WILLIAM M. BARKER, C.J., not participating.