

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
September 24, 2007 Session

LYNN ADAMS v. ACE TRUCKING COMPANY ET AL.

**Direct Appeal from the Chancery Court for Madison County
No. 62275 James F. Butler, Chancellor**

No. W2006-02604-WC-R3-WC - Mailed January 16, 2008; Filed February 20, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee, Lynn Adams, injured his lower back in the course of his employment in October 2002. The employer, Ace Trucking Company, accepted the injury as compensable. Mr. Adams received temporary total disability benefits and medical treatment. He was released to full duty in February 2003. However, he was unable to return to work for reasons unrelated to his employment. In April 2004, he sought, and received, additional medical treatment for his back injury. He was referred to a neurosurgeon, who concluded that his symptoms were not caused by his work injury. Mr. Adams had an independent medical examination in August 2005. The evaluating physician concluded that Mr. Adams had sustained a permanent impairment of 8% to the body as a whole as a result of the October 2002 injury. The trial court found that Mr. Adams had suffered a permanent injury, and awarded 20% permanent partial disability to the body as a whole. Ace Trucking appealed, contending that the evidence preponderates against the trial court's finding. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Affirmed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and D. J. ALISSANDRATOS, SP. J., joined.

James P. Catalano, and Désirée I. Hill, Nashville, Tennessee for the appellants, Ace Trucking Company and Professional Insurance Underwriters.

Louis W. Ringger, Jackson, Tennessee for the appellee, Lynn Adams.

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Lynn Adams was an over-the-road truck driver for Ace Trucking. He was injured in Bloomington, Illinois, on October 17, 2002, while shifting the tandem axles on the trailer of his vehicle. This task required him to move a lever and raise a metal bar in order to release metal pins which hold the trailer in place. On this occasion, the pins released suddenly, causing Mr. Adams to fall over backwards, striking his lower back on a railroad tie that was being used for landscaping. Mr. Adams testified that he also experienced pain in his upper back.

After a short time, Mr. Adams was able to finish shifting the axles. He then drove to Rome, Georgia, and delivered his load. At that time, he called an appropriate official of Ace Trucking and informed her of the incident. He was instructed to return to Jackson, Tennessee, where he had been dispatched. He returned as instructed and initially sought medical treatment from his personal physician. Shortly thereafter, he was provided with a panel of doctors by Ace Trucking. He selected Dr. Kenneth Warren, a primary care physician.

Mr. Adams was examined by Mary Ann Spain, a nurse practitioner who worked under Dr. Warren's supervision, on November 11, 2002. Ms. Spain prescribed medication and physical therapy. Mr. Adams was seen again by Ms. Spain on December 2, 2002, during which visit she first noted that he complained of low back pain. He was released to full duty on February 17, 2003. Ms. Spain's notes of that date state that Mr. Adams reported that he was "100% better in the thoracic spine and 99% improved in the lumbar spine." At trial, Mr. Adams denied that he made that statement to Ms. Spain. Based on Ms. Spain's notes, Dr. Warren opined that Mr. Adams was at maximum medical improvement on February 17, 2003, and that he retained no permanent impairment. Ms. Spain did not testify at trial.

Mr. Adams attempted to return to work for Ace Trucking. His pre-existing diabetes condition, however, had advanced to the point that he required the use of insulin. Federal regulations prohibited a person using insulin from interstate driving. Ace Trucking had a limited number of positions for intrastate drivers, but did not have any such position open at that time. Mr. Adams has not applied for work elsewhere.

In April 2004, Mr. Adams sought additional medical treatment. He saw Dr. Warren and reported continued problems with low back pain. Dr. Warren prescribed additional physical therapy, but Mr. Adams' symptoms did not significantly improve. As a result, Dr. Warren referred Mr. Adams to Dr. John Brophy, a neurosurgeon, for additional evaluation.

Dr. Brophy examined Mr. Adams on two occasions in October and November 2004. He ordered an MRI of Mr. Adams's lumbar spine. The radiology report of that test contained the following language:

The central spinal canal is somewhat narrow on a congenital basis from L2-3 through L4-5. Superimposed upon this are changes of severe hypertrophic degenerative arthropathy involving the facet joints bilaterally at L4-5 with hypertrophy/bulging of the ligamentum flavum at this level. This results in an overall mild degree of central spinal stenosis at the L4-5 level and stenosis of both subarticular recesses of the spinal canal, left slightly greater than right, and possible impingement upon the traversing left and/or right L5 preganglionic nerve root.

The MRI did not demonstrate a herniated disk, and Dr. Brophy did not consider Mr. Adams to be a candidate for surgery. Based upon the MRI, his own examination of Mr. Adams, and Dr. Warren's records, Dr. Brophy concluded that Mr. Adams' symptoms were not related to the October 2002 injury. This opinion was based, in part, on Mr. Adams' failure to complain of lower back pain until December 2, 2002, which was almost two months after his injury.

Dr. Joseph Boals performed an independent medical examination of Mr. Adams in August 2005. In Dr. Boals' opinion, Mr. Adams suffered a soft tissue injury as a result of the October 17, 2002 incident. Dr. Boals testified that while these injuries normally subside over time, because of Mr. Adams pre-existing arthritic condition, the injury did not heal and would continue to cause Mr. Adams problems. According to Dr. Boals, the pre-existing arthritis coupled with the persistent soft tissue injury and the scar tissue from that injury caused a "mechanical deficiency" in Mr. Adams back. Based upon the AMA Guides, Dr. Boals assigned Mr. Adams a permanent impairment of 8% to the body as a whole as a result of the injury. Because Dr. Boals was not a treating physician, he did not place restrictions on Mr. Adams' activities, but suggested that he avoid "prolonged walking, standing, stooping, squatting, bending, climbing, excessive flexion, extension or rotation of the back."

Plaintiff was fifty-seven years old at the time of trial. He is a high school graduate and attended the Tennessee Basic Law Enforcement Academy. He had worked for the Michigan Department of Corrections and the Gibson County Sheriff's Department. His employment history also includes factory work and retail sales. He began work as a truck driver in 2000.

The trial court issued a thorough and scholarly written decision. It found that Mr. Adams had suffered a permanent injury to his low back and a permanent partial disability of 32% to the body as a whole. However, the court further found that the award should be "capped" at 2.5 times the impairment because Mr. Adams was prevented from returning to work by his diabetes, rather than his injury. Therefore, the trial court awarded 20% permanent partial disability to the body as a whole. Ace Trucking appealed, contending that the trial court erred in finding that Mr. Adams had sustained a permanent disability as a result of his work injury.

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) (2005). When 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). 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). "However, where the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge." Id. (quoting Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997)).

ANALYSIS

Ace Trucking contends that the evidence preponderates against the trial court's finding that Mr. Adams sustained a permanent disability as a result of the October 2002 injury. In support of its position, Ace Trucking points to Ms. Spain's clinical note of February 17, 2003, which stated that Mr. Adams reported at that time that he was "100% better in the thoracic spine and 99% improved in the lumbar spine," the absence of medical treatment during the next fourteen months and the testimony of Dr. Brophy that the symptoms of 2004 were not related to the injury of 2002. In addition, Ace Trucking argues that the testimony of Dr. Boals was equivocal and, therefore, was less persuasive than that of Dr. Warren and Dr. Brophy.

In his testimony, Mr. Adams stated that he reported "extreme" pain in his lower back and "severe" pain in his right shoulder to Ms. Spain on his initial visit to Dr. Warren's office. As stated, Ms. Spain did not testify, but her notes inferentially support the testimony of Mr. Adams. Her note regarding the December 2, 2002 visit states, "[Mr. Adams] states that the shoulder and scapula muscles have improved tremendously, however his low back pain continues." Additionally, Mr. Adams denied making the alleged "100% better" statement to Ms. Spain.

Mr. Adams attributed the gap in his medical treatment to Ace Trucking. He testified that he had unsuccessfully requested the insurer to make a return appointment with Dr. Warren, and ultimately had requested the assistance of the Department of Labor to obtain that appointment. It is not clear from the record when he made his initial request to return, but Dr. Warren's notes repeatedly reflect delays in receiving approval from the workers' compensation insurance carrier for treatment, including approval for Dr. Brophy's consultation.

We note that the trial court made a specific finding that Mr. Adams was a credible witness, and that his testimony concerning his statements to Ms. Spain was not rebutted. We must defer to the trial court's finding on that issue. After careful review of Mr. Adams' testimony and the medical evidence, we are unable to find the evidence preponderates against the trial court's finding that Mr. Adams sustained a compensable work-related injury. Both Dr. Brophy and Dr. Boals concluded that Mr. Adams suffered a soft tissue injury to his back on October 17, 2002. Both concluded that Mr. Adams had significant arthritic changes in his back, and that those changes were the primary source

of his symptoms. Their opinions diverge on the issue of whether the event of October 2002 caused a permanent aggravation of that condition. Dr. Brophy based his opinion that Mr. Adams' low back pain was not caused by the work injury primarily on the fact that Mr. Adams did not report this pain until almost two months after the incident. He therefore concluded that the low back pain was not related to the fall. Dr. Boals based his opinion on the history given him by Mr. Adams that he began experiencing low back pain immediately following the accident. As previously stated, Mr. Adams testified at trial that when he fell, he landed on a railroad cross tie that struck his lower back. He further testified that he immediately experienced low back pain, which he reported to Ms. Spain on his initial visit to Dr. Warren's office. The trial court found Mr. Adams to be a credible witness. Based upon the deference we afford the trial court on issues of credibility, we must conclude that the opinion of Dr. Boals was based on the more accurate foundation. Accordingly, we do not find it was error for the trial court to have relied on Dr. Boals' opinion. We are similarly unable to find the evidence preponderates against the finding of the trial court that Mr. Adams sustained a permanent work-related injury.

Ace Trucking argues that Dr. Boals' testimony concerning causation was equivocal because Dr. Boals testified that if Mr. Adams did not report low back pain during his initial visit to Dr. Warren's office and could not satisfactorily explain his failure to do so, his opinion could not be supported by the facts. The finding of the trial court as to Mr. Adams' credibility does not support this argument.

Ace Trucking also points to Dr. Boals' testimony that it was possible that Mr. Adams' symptoms could be due, in part, to the progression of his diabetic condition. Dr. Boals' acknowledgment that there was another "possible" cause for Mr. Adams' symptoms does not contradict his opinion that Mr. Adams' symptoms were caused by the work-related injury. The Tennessee Supreme Court has "long recognized that . . . absolute certainty on the part of a medical expert is not necessary to support a [workers'] compensation award, for expert opinion must always be more or less uncertain and speculative." Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991) (quoting Jackson v. Greyhound Lines, Inc., 734 S.W.2d 617, 620 (Tenn. 1987)). It does not appear from the record that Dr. Boals retreated from his opinion as to causation because there was another possible explanation for Mr. Adams' symptoms.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to Ace Trucking Company and Professional Insurance Underwriters, and their surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

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JUDGMENT ORDER

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 on appeal are taxed to the Appellants, Ace Trucking Company and Professional Insurance Underwriters and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM