

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

January 28, 2008 Session

**BOBBIE FOLAND PETERS v. WHITE COUNTY COMMUNITY
HOSPITAL**

**Direct Appeal from the Circuit Court for White County
No. CC1544 John Maddux, Judge**

**No. M2007-00870-WC-R3-WC - Mailed - March 18, 2008
Filed - May 30, 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 section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The Employee received medical treatment for low back pain in March 2004. She was pushed to the floor by a patient in April 2004. She had back surgery in July 2004 and returned to work in September 2004. She continued to have symptoms. In February 2005, she was involved in a serious automobile accident, unrelated to her employment. She had a another surgery in July 2005 and did not return to work thereafter. She filed suit, contending that both surgeries were caused by the April 2004 incident. The Employer denied liability, contending that the first surgery was the result of her pre-existing condition and the second surgery was the result of the motor vehicle accident. The trial court found both surgeries to be compensable and awarded 45% permanent partial disability to the body as a whole. The Employer has appealed. We find that the evidence does not preponderate against the trial court's finding concerning the first surgery but does preponderate against its finding concerning the second surgery. We also find that Employee had a meaningful return to work after the first surgery, and we therefore, affirm in part and reverse in part and remand to the trial court for recalculation of the Employee's permanent partial disability.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Circuit
Court Affirmed in Part, Reversed in Part and Remanded**

JERRY SCOTT, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

D. Randall Mantooth, Nashville, Tennessee, for the appellant, White County Community Hospital.

Henry D. Fincher, Cookeville, Tennessee, for the appellee, Bobbie Foland Peters.

OPINION

Factual and Procedural Background

On the date of trial, the employee, Bobbie Peters, was thirty-five years old. She was a high school graduate. She had also received an associate's degree in medical laboratory technology, and had taken some additional classes at Roane State Community College. She began working for White County Community Hospital as a laboratory technologist in March 2003.

On March 23, 2004, Ms. Peters sought treatment from her primary care physician, Dr. Randy Denton. His notation in her chart that day states that her symptoms included "exquisite back pain," left leg radiculopathy and muscle spasm on the left side of her low back. Dr. Denton prescribed a cortisone dose pack, pain medication and muscle relaxers. On March 29, 2004, Ms. Peters had an MRI, which revealed a herniated vertebral disc at the L5-S1 level, on the left side.¹

On April 1, 2004, Ms. Peters was seen by Dr. Craig Humphreys, an orthopaedic surgeon in Chattanooga. According to his note, she reported pain in her back and left leg for approximately three weeks. She stated that her pain was "7/10 for today and 7/10 for a typical day, as measured by our 0/10 pain scale." Dr. Humphreys examined the MRI and conducted an examination. His diagnoses were "L4-5 disc dessication" and "herniated nucleus pulposis L5-S1." He recommended a steroid injection and prescribed pain medication. The injection was administered on April 23, 2004, by Dr. Steven Dreskin.

The injury at issue in this case occurred at 4:00 a.m. on April 28, 2004, when Ms. Peters was pushed backward by a male patient with Down's Syndrome. She testified that she fell "flat on my butt and against the wall and the bed." She notified her supervisor and was sent to the Hospital's Emergency Room. The record of that encounter states that she had swelling over her lower back, and a contusion on her right hip. She experienced "immediate pain on impact." Radiating pain began within a few days and she began to experience difficulty urinating six or seven days later.

On May 12, 2004, Ms. Peters returned to Dr. Humphreys. According to his entry in his records for that date, she advised him of the April 28 incident. She stated that her "overall pain symptoms [were] worse[,]" and that she was having pain in her right leg. She also told him that the steroid injection "was of no help in pain relief," and that her pain was "7/10." Dr. Humphreys recommended physical therapy and a follow-up visit in three to four weeks.

On May 20, 2004, Ms. Peters returned to Dr. Denton, her primary care physician. She told him she was "in agony." Dr. Denton's note in his chart for that day did not mention the April 28 incident. Based upon her symptoms and the MRI results, he thought that she should see a neurosurgeon. He prescribed additional pain medication, and his office staff arranged a referral to Dr. Joseph Jestus, who saw her on May 28, 2004.

¹Ms. Peters testified that the MRI was not ordered by Dr. Denton, but that she had made the arrangements herself, through a friend who was a nurse working for an orthopaedic surgeon.

The history contained in Dr. Jestus' chart states that Ms. Peters had "an approximate two month history of acute low back pain which began sometime at the end of March." Her history also states that she "got about 30% better for a week" after the epidural steroid injection. There was no mention of the April 28 incident in Dr. Jestus' records. Dr. Jestus recommended a second steroid injection and additional conservative treatment before surgery would be considered.

Ms. Peters returned to Dr. Denton on June 2, 2004, reporting that she was "miserable." Dr. Denton arranged for a second neurosurgical opinion with Dr. Eugenio Vargas, who testified by deposition. He initially saw Ms. Peters on July 19, 2004. She told him that "her symptoms started on March 26, 2004. She cannot think of anything specific that could have set them off." Her history notes that her symptoms had increased since that time, but does not mention the April 28 incident. Dr. Vargas noted that she had difficulty in initiating urination. After conducting a physical examination and reviewing her MRI, Dr. Vargas recommended surgery to remove the ruptured disc material at L5-S1. That procedure was performed on July 22, 2004.

Ms. Peters completed an intake questionnaire at Dr. Vargas' office. In response to various questions in that document, she indicated that her problem was not due to an accident, and was not work-related. She reported that her symptoms started on March 26, 2004. She did not mention the April 28, 2004 incident. She testified at trial that she answered the questions in that manner because she was told by staff members in her employer's human resources department to seek treatment under her health insurance "until they could figure out what was going on. They didn't have any paperwork." In addition, Ms. Peters testified that a nurse at Dr. Vargas' office told her that if she requested treatment under workers' compensation, her appointment would be delayed. Kim Trapp and Rebecca Young, who worked in the Hospital's HR department at the time, testified at trial and denied making the statements attributed to them by Ms. Peters.

Dr. Vargas allowed Ms. Peters to return to work on September 3, 2004, and she did so. In late October, she was seen at an emergency room for back pain. An MRI was performed, which showed pre-existing degenerative problems at L4-5 and scarring at L5-S1, but no recurrent disc herniation. When she returned to Dr. Vargas on November 29, 2004, she reported that her symptoms had improved. On December 3, 2004, she called his office to report that she had "slipped and caught herself" and was "in a lot of pain." Dr. Vargas, again, prescribed pain medication. Ms. Peters returned to Dr. Denton on December 15, 2004 to discuss stress issues arising from her divorce, and continuing back pain. On February 9, 2005, she saw Dr. Denton again, reporting that she had fallen off her front porch. Dr. Denton noted swelling and tenderness at the sacrum, but no new radicular symptoms.

On February 28, 2005, Ms. Peters was involved in a motor vehicle accident. She was stopped at a traffic signal when her vehicle was rear-ended by a vehicle traveling at high speed. Her head hit the windshield and steering column. She sustained a herniated disc in her neck, which Dr. Vargas surgically repaired on May 12, 2005. Ms. Peters also reported to Dr. Vargas that her low back pain had "gone from mild and intermittent to severe constant, pain." At trial, however, she testified that there was "not a definitive difference" in her back pain after the motor vehicle accident, but that her pain was in "pretty much the same place, just sharper." Dr. Vargas interpreted MRI

studies taken after the accident as showing a recurrent disc herniation at L5-S1, on the left side. He performed a lumbar fusion to repair that condition on July 26, 2005.

Until the motor vehicle accident, Ms. Peters had been working for her employer in the same job she had previously held. She did not return to work after the motor vehicle accident, and she was terminated in December 2005 for excessive absenteeism. She had received a written reprimand for absenteeism a few days before the motor vehicle accident occurred.

On March 6, 2005, counsel for Ms. Peters sent a letter to her employer requesting retroactive payment of temporary total disability benefits and that Ms. Peters be provided with a panel of neurosurgeons to treat her lower back. Suit was filed on April 5, 2005. A motion to require the Hospital to provide medical treatment was filed on the same date. The motion was heard by the trial court on April 29, 2005, and the court ordered Ms. Peters' employer to pay for all future medical treatment by Dr. Vargas. Her employer paid for the July 2005 surgery.

Dr. Vargas opined that the July 2004 surgery "was needed for the disc herniation that was evident on the MRI scan of March 29th of the year 2004." He also expressed the opinion that the April 28, 2004 incident did not aggravate Ms. Peters' pre-existing condition. He placed no restrictions on her activities after she recovered from the surgery. He wrote a letter expressing the opinion that she had an impairment of 10% to the body as a whole after the surgery.

Dr. Vargas also testified that the February 28, 2005 accident caused a new injury to Ms. Peters' lower back, and that it caused anatomical changes in her back. Those changes were a recurrent disc herniation at L5 and a worsening of the degeneration in her lower back.

Dr. David Gaw, an orthopaedic surgeon, conducted an independent medical examination (IME) at the request of counsel for Ms. Peters in March 2006. Based upon his clinical examination, the history which she provided to him and a review of various medical records, he opined that the April 28, 2004 work injury "had aggravated a condition that was pre-existing, but it made it more symptomatic resulting in the [first] surgery." He also stated that "the motor vehicle accident on 2-28-05 and the incident at work on 4-28-04 would be equally responsible for the need for the second surgery on her back." Dr. Gaw testified that Ms. Peters retained an impairment of 10% to the body as a whole after the first surgery, and a total impairment of 19% to the body as a whole after the second surgery.

Dr. Robert Dimick performed an IME at the request of counsel for the employer. Dr. Dimick opined that the April 28, 2004 incident did not result in a permanent injury, nor did it aggravate her pre-existing condition; that she retained no impairment as a result of that incident; and that neither of the lumbar surgeries performed by Dr. Vargas were necessary because of that incident.

Kim Trapp was the Hospital's Human Resources Director beginning in June 2004. She testified that, on her first day on the job, she met with Ms. Peters and the interim HR director, Rebecca Young. The subject of that meeting was Federal Medical Leave Act (FMLA) leave in connection with her back problems. She testified that the first time she was aware that Ms. Peters was making a workers' compensation claim concerning her low back problems was when she

received a letter from Ms. Peters' counsel dated March 6, 2005.

Ms. Young was the interim HR director on April 28, 2004. She testified that Ms. Peters advised her of that incident on the day it occurred. She also testified that Ms. Peters did not mention that incident during the June 2004 meeting concerning FMLA leave.

Ms. Peters testified in rebuttal that she told Ms. Trapp that she wanted to file a workers' compensation claim concerning her back at the time she first saw Dr. Vargas on July 19, 2004. She said that Ms. Trapp told her at that time to "file it on [your] primary care insurance." She also testified that Ms. Trapp called her, around the time of the March 6, 2005 letter, and told her she "was used to screwing people out of workers' comp[ensation]." She had not mentioned this in her earlier testimony because "there are a lot of nerves and everything else involved, and you tend to forget things."

The trial court found that Ms. Peters and her lay witness were credible and that the witnesses who were called by the employer were not credible. The court further found that the April 28, 2004 incident worsened Ms. Peters' pre-existing back problems, and that both surgeries were the result of that injury. The Court awarded 45% permanent partial disability to the body as a whole and also temporary total disability benefits. The employer has appealed.

Issues Presented

The Hospital raised three issues on appeal:

(1) Did the trial court err by finding that Ms. Peters sustained permanent partial disability as a result of her April 28, 2004 injury?

(2) If so, did the trial court err by finding that Ms. Peters' July 2005 surgery was the result of her April 28, 2004 injury, rather than her February 2005 motor vehicle accident?

(3) If the July 2005 surgery was not caused by the April 2004 injury, did Ms. Peters have a meaningful return to work?

Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). When expert medical testimony differs,

it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. Gray v. Cullom Mach., Tool & Die, Inc., 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

1. Causation: April 28, 2004 Injury

It is not disputed that Ms. Peters had a ruptured lumbar disc as of March 29, 2004. It is also not disputed that she was pushed by a patient, and fell backward against a bed, the wall and the floor on April 28, 2004. Her employer argues that the evidence preponderates against the trial court's finding that the April 28 incident worsened the pre-existing condition. In support of its contention, the employer notes that there are discrepancies between Ms. Peters' trial testimony concerning her condition before and after April 28 and the medical records generated during that period of time, including some documents completed by Ms. Peters in her own hand. Ms. Peters explained some of those discrepancies by testifying that she was instructed by agents of her employer and Dr. Vargas not to report her injury as work-related. Insofar as this issue involves an assessment of Ms. Peters' credibility, the trial court found in her favor on that issue, and the court's finding is entitled to considerable deference on appeal.

However, in all but the most obvious cases, causation must be proven through expert medical testimony. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). In this case, all of the medical evidence was presented in the form of depositions or medical records, which this Panel can evaluate as well as the trial court. Krick, 945 S.W.2d at 712. Dr. Vargas testified that the April 28 incident did not aggravate the pre-existing problem. Dr. Gaw testified that it did.

Dr. Vargas was the treating physician. He was in a relatively neutral position, in that he was selected by Ms. Peters outside the workers' compensation system. He evaluated and treated her near the time of the injury at issue, and over a long period of time thereafter. During the surgical procedures, he was able to view the internal anatomy of Ms. Peters' back and compare what he saw to the March 29, 2004 MRI. Some of the medical records, from Dr. Vargas and others, contain reports of symptoms (as opposed to reports of events or actions) by Ms. Peters which were similar both before and after the April 28, 2004 injury.

However, Dr. Vargas' opinion was based upon incomplete or incorrect information, in that Ms. Peters did not disclose the April 28, 2004 injury to him. Some of the medical records contain reports that Ms. Peters' symptoms changed after the April 28 incident. Ms. Peters reported to Dr. Gaw that she had been pain free for several days prior to April 28, 2004. She asserts that the fact she was pain free demonstrates that the epidural steroid injection of April 23, 2004 had completely cured her previous symptoms.

Workers' compensation laws "should be rationally but liberally construed to promote and adhere to the [Workers' Compensation] Act's purposes of securing benefits to those workers who fall within its coverage." Martin v. Lear Corp., 90 S.W.3d 626, 629 (Tenn. 2002). Nonetheless, the burden of proving each element of her cause of action rests upon the employee in every workers' compensation case. Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004); Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). 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, 938 S.W.2d at 692; 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). The element of causation is satisfied where the "injury has a rational, causal connection to the work," Braden v. Sears, Roebuck and Co., 833 S.W.2d 496, 498 (Tenn. 1992).

The evidence in this matter presents a close case, even in light of these standards. Ms. Peters clearly had a serious low back problem prior to April 28, 2004. Likewise, there is no question that she was pushed to the floor by a patient on that date, reported the incident and received immediate medical treatment. Dr. Vargas testified that the condition repaired by the July 2004 surgery was evident on the MRI performed before the incident at work. Ms. Peters and Dr. Gaw testified that the work incident definitely worsened her condition. Taking all of these factors into consideration, we are unable to find that the evidence preponderates against the trial court's finding on the issue of whether the fall caused by the patient made her condition worse.

2. Causation: July 2005 Surgery

The employer contends that the evidence preponderates against the trial court's finding that the July 2005 surgery was made necessary by the April 2004 incident, and that it should therefore not be liable for medical expenses or additional disability resulting from that procedure. In support of its position, the employer argues that the evidence strongly supports a conclusion that the February 28, 2005 motor vehicle accident was the event which made that procedure necessary. On that point, Dr. Vargas testified that the automobile accident was the precipitating cause. His testimony is supported by a comparison of the MRI studies taken before the accident, which show no disc herniation, to MRI studies taken after the accident, which show the herniation. In addition, his notes and those of Dr. Denton record a dramatic increase in symptoms after the accident.

In contrast to Dr. Vargas, Dr. Gaw's testimony is equivocal. He was unwilling to say that it was more likely than not that the second surgery would have been necessary if the automobile accident had not occurred. His opinion was premised, in large measure, upon the history given to him by Ms. Peters that her low back was symptomatic before the accident, and that those symptoms did not change significantly afterward. The former assertion is supported by the contemporaneous medical records; the latter is contradicted by those records. Ms. Peters described the auto accident as being quite violent, which is consistent with the increase in symptoms reflected in those records. She provided no explanation for those discrepancies.

The testimony of Dr. Vargas on this issue is more consistent with the other evidence in the record than Dr. Gaw's testimony. For that reason, we are compelled to conclude that the evidence preponderates against the trial court's finding concerning the precipitating cause of the July 2005 surgery. That finding is, therefore, reversed.

3. Meaningful Return to Work

The employer argues that Ms. Peters' recovery should be limited to 25% permanent partial disability to the body as a whole because she had a meaningful return to work after her April 2004 injury and subsequent surgery. It is undisputed that she returned to her previous job after recovering from that surgery. Likewise, it is not disputed that she was terminated in December 2005 for absenteeism, primarily due to being out of work after the February 2005 motor vehicle accident, which was not related to her employment. Her employer's position is consistent with Tennessee Code Annotated section 50-6-241(a)(1)(1999), in that the reason for her termination was unrelated to either the injury or her employment. In accordance with that section, her recovery for the April 28, 2004 work injury is limited to 2.5 times the anatomical impairment of 10% to the body as a whole. The judgment is modified accordingly.

Conclusion

The trial court's finding that the April 28, 2004 injury is compensable is affirmed. The finding that the July 2005 surgery was made necessary by the April 28, 2004 injury is reversed, and this cause is remanded to the trial court for recalculation of Ms. Peters' permanent partial disability. Costs are taxed one-half to appellant and its surety, and one-half to appellee, for which execution may issue if necessary.

JERRY SCOTT, SENIOR JUDGE

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**Circuit Court for White County
No. CC1544**

No. M2007-00870-SC-WCM-WC - Filed May 30, 2008

JUDGMENT

This case is before the Court upon the motion for review filed by Bobbie Foland Peters 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 one-half to appellant and its surety, and one-half to appellee, for which execution may issue if necessary.

CLARK, J., NOT PARTICIPATING