IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 25, 2008 Session

GEORGE LOCKARD v. ESTES EXPRESS LINES, INC.

Direct Appeal from the Chancery Court for Madison County
No. 62993 James F. Butler, Chancellor

No. W2007-01570-WC-R3-WC - Mailed December 29, 2008; Filed January 28, 2009

The employee worked as a long-haul truck driver for the employer, a carrier of motor freight. While operating a truck, the employee was struck in the rear of his trailer by another vehicle. Medical treatment was not deemed necessary at the time of the collision. Shortly thereafter, the employee reported pain in his neck and lower back. The trial court awarded 90% permanent partial disability. On appeal, the employer raises the following issues: (1) whether the employee's medical condition is causally connected to the vehicular accident; (2) whether the employee has sustained permanent impairment; (3) whether the employee is 90% disabled; and (4) whether the trial court's award for the payment of medical expenses to Dr. Curlee, an unauthorized medical provider, is proper. The employee also appeals arguing that he is totally and permanently disabled. After review, the judgment of the trial court is affirmed.[1]

Tenn. Code Ann. § 50-6-225(e)(3) (Supp. 2007) Appeal as of Right;
Judgment of the Chancery Court Affirmed

DAVID G. HAYES, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, C. J., and DONALD P. HARRIS, SR. J., joined.

Gregory D. Jordan and Jesse D. Nelson, Jackson, Tennessee for the appellant, Estes Express Lines, Inc.

David Hardee, Jackson, Tennessee for the appellee, George Lockard.

Juan Villasenor, Nashville, Tennessee, for appellee/intervenor, The Second Injury Fund.

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[1]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) (Supp. 2007).

MEMORANDUM OPINION

Factual and Procedural Background

The employee, George Lockard, was an over-the-road truck driver. On May 19, 2004, the employee was pulling an empty tandem trailer when he was struck in the rear by an SUV. Both vehicles were moving at the time of the collision. The employee testified that he was "flung . . . around like a little rag doll" in the cab of the truck. The employee promptly reported the accident to the employer, Estes Express Lines, Inc., stating that he had pain in his neck and lower back.

Prior to the injury in this case, the employee had two surgeries on his lower back. The first was in 1993; the second was in 1998. Both procedures were performed by Dr. Kevin Foley, a neurosurgeon. The employee testified that he had done well after each surgery. He did, however, have occasional back pain, for which he consulted his primary care physician, Dr. Warren. Approximately one month before the May 2004 incident, the employee told Dr. Warren that he had injured his back. Dr. Warren ordered an MRI scan, performed on April 14, 2004, that showed degenerative and post-surgical changes.

After the May 2004 incident, the employee was initially referred to Dr. Stewart, a primary care physician, who prescribed medication and physical therapy. The employee was then given a panel of physicians from which he selected Dr. Lowell Stonecipher, an orthopaedic surgeon, who had previously treated the employee for a low back injury in 1993. Dr. Stonecipher saw the employee on June 3, and June 8, 2004. He prescribed medication and physical therapy and ordered an MRI scan. The MRI scan showed a slight abnormality at the L4-5 level. Dr. Stonecipher recommended additional conservative treatment. The employee wanted Dr. Stonecipher to perform surgery, but Dr. Stonecipher did not believe that surgery was warranted. As a result of this disagreement, he suggested that the employee be referred to another physician.

The employee was then referred to Dr. Fereidoon Parisoon, a neurosurgeon. He first saw Dr. Parisoon on July 6, 2004. Dr. Parisoon ordered a myelogram and post-myelogram CT scan of the employee's lower back. He also reviewed the April and May 2004 MRI scans. He opined that there was no significant difference between the two MRI scans. His impression was that the employee had a muscular back strain. Dr. Parisoon continued to follow the employee until October 7, 2004. He prescribed medication and referred the employee to a work hardening program. He ordered an EMG study, the results of which were normal. He recommended that the employee be returned to work without restrictions. Dr. Parisoon opined that the employee reached maximum medical improvement on October 7, 2004. He assigned 0% impairment for the May 2004 injury and placed no permanent restrictions upon the employee's activities. At that point in time, the employer's workers' compensation insurer declined to provide additional medical treatment or pay further benefits.

Prior to being released by Dr. Parisoon, the employee had returned to Dr. Foley, the neurosurgeon who performed both the 1993 and 1998 operations on his lower back. Dr. Foley

examined the employee in August 2004, reviewed the MRI previously ordered by Dr. Stonecipher, and reports of the other diagnostics tests that the employee had recently undergone. He opined that there was no significant difference between the pre-accident and post-accident studies. His diagnosis was a lumbar strain with a recommendation of non-operative treatment.

The employee continued to have symptoms. In September 2004, he consulted Dr. Ray Gardocki. Dr. Gardocki ordered additional testing. A CT scan revealed a possible non-union of the 1998 fusion surgery and a pars articularis defect at the L2 level. Dr. Gardocki referred the employee to one of his partners, Dr. Patrick Curlee, a spine specialist. Dr. Curlee concluded that the employee had a non-union at L3-4. To correct this condition, Dr. Curlee performed a surgical procedure in February 2005 that removed and replaced the 1998 hardware and extended the fusion to the L2-3 level. This procedure provided only temporary relief. Dr. Curlee performed another procedure, the employee's fourth low- back surgery, in August 2005, which extended the previous L2-3 fusion to the L5-S1 level. This surgery improved some of the employee's back pain, but did not improve his radicular symptoms.

In October 2005, the employee reported to Dr. Curlee that he had "neck and shoulder and predominantly left arm pain dysesthesias since [the May 2004 accident]." Dr. Curlee ordered testing of the employee's cervical spine , which revealed "severe degenerative disc disease at C4-5 and the C5-6 level." In January 2006, Dr. Curlee performed an anterior surgical fusion of those two levels of the spine. The employee's symptoms continued. A second procedure was carried out in November 2006.

Dr. Curlee opined that the employee had a 28% impairment to the body as a whole due to the lumbar fusion surgery. He testified that this was the same impairment the employee would have had prior to May 2004, and therefore there was no increase in impairment. Dr. Curlee further opined that the employee had a 28% impairment to the body as a whole due to the cervical fusion surgery. Regarding causation of the employee's low back problems, he testified "[i]t's possible that – as a result of that motor vehicle accident that he could have sustained the [L2] pars fracture. Other than that, I would not relate any particular structural abnormality or injury to that motor vehicle accident." Concerning the cervical spine, he stated that the employee had "significant underlying degenerative disc disease at multiple levels . . . . [My] opinion would be his neck and arm pain are a result of exacerbation of underlying degenerative disease in the neck as a result of that motor vehicle accident." Dr. Curlee also expressed the opinion that the employee was permanently and totally disabled.

Dr. David Gaw conducted an independent medical examination at the request of the employee's attorney. He testified that the employee had an anatomical impairment of 44% to the body as a whole attributable to the May 2004 motor vehicle accident. He opined that the accident had aggravated the underlying degenerative conditions in the employee's spine. He recommended that the employee limit lifting to thirty to forty pounds occasionally, and ten to fifteen pounds frequently. He also recommended that the employee avoid bending and awkward positions of the

back and neck and avoid jarring or vibratory activities such as riding on rough terrain. He considered it unlikely that the employee would be able to return to gainful employment.

Two vocational evaluators testified at trial. Dr. Lorne Semrau testified for the employee. He testified that the employee's intelligence was in the normal range and that he was able to read, write, and perform arithmetic at a high school level. He found that the employee had difficulty concentrating. Based upon his testing and the physical restrictions suggested by Dr. Curlee and Dr. Gaw, he stated that the employee would be limited to work in the light and sedentary classifications. His medications, anxiety and depression would further limit his ability to work. On cross-examination, he stated that the employee would be "eligible" for 15-18% of the jobs in the market.

Ms. Patsy Bramlett testified for the employer. Her assessment of the employee's intellectual ability was consistent with Dr. Semrau's. She opined that, as a result of the May 2004 accident, he had no additional vocational disability beyond that which resulted from his earlier injuries and surgeries.

The employee was forty-five years old at the time of the trial. He is a high school graduate. He has worked primarily as a truck driver all his adult life. At one time, he had owned his own business, which involved several tractor-trailers and other equipment; however, that business went bankrupt after approximately four years. He worked for the employer from 2000 until the accident and has not worked since. He testified that he has burning pain in his legs, and also pain in his neck and right arm. He has trouble turning his neck, cannot sit or stand for extended periods, and takes narcotic pain medication on a daily basis.

The trial court ruled that the employee had sustained compensable injuries to his neck and low back as a result of the May 2004 motor vehicle incident. The court awarded 90% permanent partial disability to the body as a whole. On appeal, The employer contends that the trial court erred (1) by finding that the motor vehicle incident of May 19, 2004 caused a permanent injury or advancement of the employee's pre-existing condition; (2) by finding that the employee had sustained permanent impairment as a result of that event; that the award of 90% disability was excessive; and (3) by ordering the payment of unauthorized medical expenses.

Standard of Review

In a workers' compensation case, we review the trial court's factual findings de novo upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); *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); *see Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004). 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). This 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 Machine, Tool & Die, Inc.*, 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

I. Causation and Impairment

The employer contends that the evidence preponderates against the trial court's finding that the employee sustained permanent injuries, permanent aggravation of his pre-existing conditions, or permanent anatomical impairment as a result of the May 2004 incident. In support of its position, the employer notes that the employee had two prior significant low back injuries. According to his own testimony, the employee had occasional back pain, including an episode one month prior to the accident that required treatment by his physician, including an MRI scan. The employer further notes that several physicians concluded that there was no significant difference between the MRI scans taken before the accident and those taken after the accident.

The employer further relies upon the testimony of Drs. Stonecipher, Parisoon, and Foley that the employee sustained only a low back strain from the incident, which did not require surgery. Further, the employer argues that Dr. Curlee's testimony regarding whether the pars fracture was caused by the May 2004 incident or by the employee's underlying degenerative condition was equivocal at best.

Concerning the alleged neck injury, the employer notes that after the employee's initial report of neck pain immediately following the incident, the employee's medical records do not mention any symptoms of neck pain until Dr. Curlee's note on October 10, 2005, an interval of approximately seventeen months. Finally, the employer points out that Dr. Curlee testified that the employee's low back impairment after the two surgeries was the same as it was prior to the incident, while Drs. Parisoon and Foley testified that the employee had no additional impairment prior to the surgeries.

In support of causation, the employee relies upon Dr. Curlee's testimony during cross-examination and the testimony of Dr. Gaw, in conjunction with the employee's testimony about the dramatic change in his symptoms following the accident. We would acknowledge that Dr. Curlee's testimony on direct examination, with regard to causation, was at times equivocal. During cross examination, however, Dr. Curlee testified that it was quite possible that the May 2004 incident caused the pars fracture and that the incident aggravated the employee's preexisting degenerative disease, causing his neck pain.

The Workers' Compensation laws should be "liberally construed to promote and adhere to the 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) (quoting *Watt v. Lumbermens Mut. Cas. Ins. Co.*, 62

S.W.3d 123, 128 (Tenn. 2001)). Nonetheless, the burden of proving each element of his cause of action rests upon the The employee in every worker's compensation case. *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 487 (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 v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997); *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).

In considering this evidence, we are mindful of both our obligation to resolve all reasonable doubts as to causation in favor of the The employee, *Phillips v. A. & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004), and of the presumption of correctness which attaches to the trial court's findings, *Skinner v. CNA Ins. Co.*, 824 S.W.2d 164, 166 (Tenn. 1992). Following review, we are unable to conclude that the evidence preponderates against the trial court's finding of medical causation.

II. Excessive Award

The employer contends that the award of 90% permanent partial disability is excessive, in light of the employee's intelligence level and experience in owning and operating a business. The employee contends that the trial court's award is clearly supported by both lay testimony and the expert testimony of Dr. Curlee, Dr. Gaw, and of the vocational evaluator, Dr. Semrau.

The extent of vocational disability is a question of fact to be decided by the trial judge. *Collins v. Howmet*, 970 S.W.2d 941, 943 (Tenn. 1998). In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and his capacity to work at the types of employment available in his disabled condition. Tenn. Code Ann. § 50-6-241(b) (2008); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his 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, 777 (Tenn. 1972). The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability but should consider all the evidence, both expert and lay testimony, in deciding the extent of an employee's disability. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 677 (Tenn. 1983).

The evidence before the trial court concerning the issue of disability presented a full range of possible results. Ms. Bramlett testified that the employee had no increase over his prior disability due to the May 2004 accident, while Dr. Semrau opined that the employee was incapable of working. Reviewing the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's finding of 90% permanent partial disability. Therefore, the employee's argument on appeal that he should have been awarded permanent and total disability is also without merit.

III. Medical Expenses

The trial court ordered the employer to pay all medical expenses for the treatment rendered to the employee after his benefits were terminated. The employer argues that it complied with its obligation under Tennessee Code Annotated section 50-6-204 by providing panels from which the employee selected Drs. Stonecipher and Parisoon. In addition, the employer notes that the employee sought other medical treatment from Dr. Foley before Dr. Parisoon released him. The employer also asserts that the four subsequent surgeries by Dr. Curlee were unnecessary, based upon the opinions of Drs. Stonecipher, Parisoon, and Foley.

The employee contends that the trial court correctly awarded these medical expenses because he complied with his obligation to consult with the employer regarding additional treatment through a request that the employer pay for the procedures proposed by Dr. Curlee. *See Emerson Elec. Co. v. Forrest*, 536 S.W.2d 343, 346 (Tenn. 1976).

Tennessee Code Annotated section 50-6-204(a)(1) (2008) requires an employer to "furnish free of charge to the employee such medical and surgical treatment, medicine, medical and surgical supplies . . . as may be reasonably required" by a compensable injury. This obligation begins at the time the injury occurs and continues indefinitely. *See Underwood v. Liberty Mut. Ins. Co.*, 782 S.W.2d 175, 176 (Tenn. 1989). The trial court found that the medical treatment at issue was necessitated by the May 19, 2004 motor vehicle incident. Because we affirmed the trial court on the issue of causation, we also affirm the trial court's award of medical expenses incurred by the employee after the employer terminated his benefits.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, Estes Express Lines, Inc. and its surety, for which execution may issue if necessary.

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DAVID G. HAYES, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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Chancery Court for Madison County
No. 62993

No. W2007-01570-WC-R3-WC - Filed January 28, 2009

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 Appellant, Estes Express Lines, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM