IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2008 Session

AAA COOPER TRANSPORTATION v. J. J. LEWIS

Direct Appeal from the Chancery Court for Hamilton County
No. 06-0872 Howell N. Peoples, Chancellor

Filed May 11, 2009

No. E2008-00705-WC-R3-WC - Mailed January 27, 2009

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 alleged that he sustained a compensable neck injury. His employer denied the claim. The trial court found for the employee and awarded 40% permanent partial disability ("PPD"). The employer has appealed, contending that the evidence preponderates against the trial court's finding that the employee's injury occurred at work. In addition, the employer asserts that the trial court erred by directing a written inquiry concerning causation to be sent to the treating physician and by considering the response to that inquiry. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed

WALTER C. KURTZ, SR. J., delivered the opinion of the court, in which GARY R. WADE, J., and DONALD P. HARRIS, SR. J., joined.

Steven W. Keyt, Chattanooga, Tennessee for the appellant, AAA Cooper Transportation.

Jeffrey M. Atherton, Chattanooga, Tennessee for the appellee, J. J. Lewis.

MEMORANDUM OPINION

Factual and Procedural Background

J. J. Lewis ("Mr. Lewis")worked as a truck driver for AAA Cooper Transportation ("Cooper"). He alleged that he sustained a compensable injury to his neck on March 28, 2006, while attempting to move a large pallet. It is not disputed that he had disc herniations at the C5-6 and C6-7 levels, which were surgically repaired by Dr. Scott Hodges on April 14, 2006.[1]

Mr. Lewis had severe neck pain while working on the morning of Tuesday, March 28, 2006. He called his wife who made arrangements for him to see his personal physician, Dr. Tsui. He informed his supervisor that he was leaving work early for this purpose. Dr. Tsui's records describe Mr. Lewis' chief complaint as follows: "Neck painful and stiff since Sunday. Very limited movement. Seems to be getting worse. Denies other c/o." Dr. Tsui prescribed pain medication and muscle relaxers. Mr. Lewis returned to him on March 31, 2006, and again on April 4, 2006. On the latter day, Dr. Tsui ordered an MRI, which revealed the aforementioned disc herniations. He then referred Mr. Lewis to Dr. Hodges, an orthopaedic surgeon.

While he was still seeing Dr. Tsui, Mr. Lewis consulted Dr. Dwight Twilley, a chiropractor, on March 29, 2006. Documents completed by Mr. Lewis in his own hand for Dr. Twilley state that his "left shoulder (deltoid) feels like a charlie horse." In response to a question concerning when his problem started and what caused it, Mr. Lewis wrote: "Must have slept wrong." In response to the question "Is problem getting better, worse or staying the same," Mr. Lewis wrote "gradually worse since Sunday."

Mr. Lewis first saw Dr. Hodges on April 10, 2006. At that time, the following history was recorded: "Pt. states he has had C-spine & Lt shoulder pain for about 2 ½ weeks. Pt is unsure why this pain started and states that his pain has gradually got worse." Dr. Hodges' records indicate that Mr. Lewis stated his symptoms were not accident-related and was not a workers' compensation matter. Dr. Hodges initially recommended an MRI of the shoulder and suggested that Mr. Lewis return to him in

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[1] Dr. Hodges' 45-page deposition was taken and admitted at trial. A later submitted letter from Dr. Hodges was also considered by the trial judge, and the propriety of procuring and considering this letter will be addressed *infra*.

one week. However, Mr. Lewis had a dramatic increase in his pain level. As a result, surgery was conducted on April 14, 2006. According to Dr. Hodges, the surgery went well and succeeded in relieving most of Mr. Lewis's symptoms.

On May 15, 2006, either Mr. Lewis or his wife delivered a handwritten note to Dr. Hodges' office. The note had been written by Mr. Lewis's wife as a result of a discussion which she had with her husband after his surgery. The note states that he had been under the influence of pain medication at the time of his initial visit. It then describes the event of March 28, 2006, and states that Mr. Lewis had begun the day with what he considered to be a "crick" in his neck, but his symptoms had dramatically worsened after attempting to move the pallet. In his deposition, Dr. Hodges expressed the opinion that, based upon the initial history he received, Mr. Lewis' injury was not work-related. He expressed the further opinion that, based upon the history set out in the May 15,2006 note, the condition was work-related.

Dr. Hodges released Mr. Lewis from his care on August 10, 2006. Based upon the results of a functional capacity evaluation, he placed permanent restrictions upon Mr. Lewis' activities of lifting no more than seventy pounds occasionally or forty pounds frequently. He also opined that Mr. Lewis retained a 25% permanent anatomical impairment to the body as a whole as a result of his injury.

Cooper could not accommodate the restrictions. As a result, Mr. Lewis was terminated. He was able to find a new job, also driving a truck, within a few weeks, and he continued to hold that position at the time of the trial. Mr. Lewis was thirty-five years old. He was a high school graduate and had anteceded three semesters of community college. He had worked for Cooper since 1997, first as a dock worker, then as a driver. His previous employment included working at a hardware store, at an automobile part counter, and as a laborer in his father's trucking business.

At the conclusion of the proof, the trial court determined that "Dr. Hodges should be provided with a full and complete history," which was then dictated into the record. The court then directed that this question be submitted to Dr. Hodges: "[Based] upon the foregoing history and upon [his] training and expertise as a physician, which event is more likely than not the cause of the herniation at C5-6 and C6-7: A. Participation in a 12-year-old son's baseball practice on March 25, 2006; B. Pushing and releasing the 300-pound pallet at work on March 28, 2006; C. Some other? Please Explain."

Cooper filed a motion for additional findings of fact, seeking to clarify what information was to be presented to Dr. Hodges. Counsel for both parties then submitted information and the court's questions to Dr. Hodges in the form of a letter. Dr. Hodges returned an unsigned handwritten document, which had a check beside "B. Pushing and releasing the 300 pound pallet at work on March 28, 2006." The following explanation was provided: "Much more mechanical stress to neck from pushing 300 lb. pallet."

The trial court then entered a memorandum opinion which found that Mr. Lewis had sustained a compensable injury and awarded 40% permanent partial disability to the body as a whole. Cooper has appealed, asserting that the trial court erred by finding that Mr. Lewis sustained a compensable injury and by considering Dr. Scott Hodges' response to the letter. Specifically, the appellant states the issues as follows:

1. The evidence preponderates against the Trial Court's finding that J.J. Lewis sustained an injury by accident arising out of and during the course of his employment with AAA Cooper Transportation on March 28, 2006.
2. The judgment against AAA Cooper Transportation is predicated upon an unsigned letter received by the Court, purporting to be from Dr. Scott Hodges, premised upon an incomplete "history" provided by the Court and responding to an inappropriately narrow question.
    a. The unsigned note purporting to be from Dr. Hodges is not "direct testimony from the physician" admissible pursuant to Tenn. Code Ann. § 50-6-235 and sufficient to support the Court's award of benefits.
    b. The "history" the Court directed to be submitted to Dr. Hodges is incomplete and inadequate, even if it was actually reviewed by Dr. Hodges.
    c. The question put to Dr. Hodges is inappropriate and excludes a possibility that the disc herniations did not result from an accident, a possibility offered by Dr. Hodges

during his deposition.

d. The Trial Court was in error in denying the motion of AAA Cooper Transportation to take a supplemental deposition of Dr. Hodges.

Standard of Review

Review of decisions in workers' compensation cases is governed by Tenn. Code Ann.§ 50-6-225(e)(2) (2008), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As has been observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp*., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

1. Causation.

Cooper contends that the evidence preponderates against the trial court's finding that Mr. Lewis sustained a compensable injury at work. It takes the position that no incident occurred on March 28, 2006. In support of its position, it points to various medical records generated in the first two weeks after March 28, 2006 by Dr. Tsui, Dr. Twilley and Dr. Hodges. None of these records make reference to either a work injury or a pushing-pulling type injury as later described by Mr. Lewis. Cooper also notes that Mr. Lewis had discussions with his supervisor and representatives of the insurer during the same period. Mr. Lewis admitted that he did not mention the March 28,2006, incident during any of those conversations, although he had promptly reported previous on-the-job injuries.

Mr. Lewis admittedly testified that he had a stiff neck beginning on Sunday,

March 26,2006. However, in response to Cooper's assertions, he points out that he also testified that he was not overly impaired or bothered by the problem at the time. This testimony was corroborated by several witnesses who were with him on Sunday. He was able to work eleven hours on Monday without any apparent difficulty. Employees of two customers to whom Mr. Lewis made deliveries early on March 28, 2006, testified that he did not appear to have any physical problems at that time. The evidence also shows that his decision to leave work early in order to see a doctor was, by all accounts, a very unusual event. Mr. Lewis also points to Dr. Hodges' deposition testimony in which he opined that based upon the account in Ms. Lewis' May 15,2006 note, the neck injury occurred at work. This opinion was consistent with his response to the court-directed inquiry that the stress of pushing a very heavy object was more likely to be the cause of Mr. Lewis's injury than any of the other possible causes.

To a large extent, resolution of the issue of causation turns on credibility. Appellant points to many conflicts and impeachments by inconsistencies in the record, all of which were pointed out to the trial judge. The trial court believed Mr. Lewis' account of events as supplemented by the testimony of several disinterested witnesses. Some of the information in the contemporaneous medical records conflicts with that account, but the trial judge who heard the testimony did not infer that Mr. Lewis was a dishonest person. There was substantial testimony from neighbors, and even from Cooper's representative, that Mr. Lewis was a good worker and an honest person. The sequence of events from Sunday, March 26,2006, through the time that Mr. Lewis left work to see Dr. Tsui on Tuesday, March 28,2006, is consistent with a major exacerbation of a relatively minor problem occurring as a result of Mr. Lewis' work activities on the latter date.

Considering the record as a whole, we conclude that the evidence does not preponderate against the trial court's finding that Mr. Lewis injured his neck at work on March 28, 2006.

2. Trial Court's Inquiry to Dr. Hodges.

Cooper contends that the trial court erred in several respects regarding the additional information that it ordered the parties to request from Dr. Hodges. It contends that Tenn. Code Ann.§ 50-6-235 permits only "direct testimony from the physician," and that the trial court's inquiry and Dr. Hodges' response do not satisfy that requirement. Cooper also argues that the history dictated by the trial court for

inclusion in the inquiry was incorrect and that the trial court erred by not permitting an additional deposition of Dr. Hodges.

Cooper asserts that the workers' compensation law permits only three types of medical evidence: live testimony of a physician; a C-32[2]; or an evidentiary deposition. That assertion is not entirely correct. Tenn. Code Ann.§ 50-6-204(d)(5) permits a report from a physician selected from the Medical Impairment Registry to be used as evidence on the issue of impairment, and § 50-6-204(d)(9) permits the trial court to appoint a neutral physician, whose report may likewise be considered, concerning issues other than impairment. Neither of these methods was used here. However, the procedure used by the trial court is similar to them. After initially setting out the inquiry to be sent to Dr. Hodges, the trial court, in response to Cooper's motion, adjusted the information to be included with the inquiry based upon the suggestions of counsel.

The procedure of soliciting a post-trial letter from a testifying doctor to be considered as evidence would usually be error, and it would be in this case if it were not for direct involvement of appellant's counsel in this unusual procedure.

The trial court heard the proof, and then asked counsel to return to court at a later time for him to announce his decision. At that proceeding the Court made extensive oral findings and observations (eight pages of transcript) and then expressed his desire for additional information from Dr. Hodges. Specifically the judge said "that Dr. Hodges, the only physician to testify in this case, did not have a true and complete history from Mr. Lewis when he gave his opinion. His opinion is therefore suspect." The judge then stated:

> That Dr. Hodges should be provided with a full and complete history and the history is as follows [judge sets it out.]

Then the following occurred:

> The question to be submitted to Dr. Hodges is based upon the foregoing history and upon [his] training and expertise as a physician, which event is more likely than not the cause of the herniation at C5-6 and C6-7: A, participation in the 12-year-old son's baseball practice on March 25,

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[2] *See* Tennessee Code Annotated section 50-6-235(c)

2006; B, pushing and releasing the 300-pound pallet at work on March 28, 2006; C, other? Please explain.

In order to resolve the issue of causation from a true medical standpoint based on a true and complete history, the parties are directed to submit the history the Court has recited and the question the Court has given to Dr. Hodges. And when the Court receives his answer, this case can be reconvened, and the Court will make an ultimate complete and final decision with regard to the issues in this case.

Are there any questions?

[Appellee's counsel]: Would Your Honor - - I just want to make sure I'm clear. Would Your Honor prefer that we address this in the context of, for example, in a deposition or just in writing or however [Appellant's counsel] and I can come to an agreement on submission? How would Your Honor prefer it?

The Court: I prefer that he answer specifically based on the history that I have recited and that he answer the question as I proposed it.

[Appellee's counsel]: Okay.

[Appellant's counsel]: If I may suggest, Your Honor.

The Court: Yes.

[Appellant's counsel]: And just make sure that this is okay. I would propose having this opinion transcribed **and drafting a letter** to Dr. Hodges for both of our signatures reciting more or less verbatim the history the Court set out and the question the Court has set out and [Appellee's counsel] and I can then sign that and send it jointly to Dr. Hodges and ask for his response.

[Appellee's counsel]: In terms of the transcription specifically what the Court said, I think that would probably be the best approach.

[The Court]: All right.

[Appellant's counsel]: Thank you, your honor.

Appellant in his brief before this Court fails to mention that the sending of a letter to Dr. Hodges was his idea.

Appellant next filed a motion with the trial court asking for additional findings,

but he did not assert that the request for a letter (his idea) was error. The order entered by the trial court on December 10, 2007 stated:

> This matter was before the Court on Monday, November 26, 2007 upon motion of the Plaintiff, AAA Cooper Transportation, pursuant to Rule 52 of the Tennessee Rules of Civil Procedure for additional findings of fact, amendment of the Court's findings of fact and instructions. After hearing argument of counsel and upon consideration of the record, the Court is of the opinion the motion is not well taken and should be overruled except that counsel may include the entire transcript of the Court's opinion delivered on November 6, 2007, the medical records from Dr. Tsui and the medical records from Chiropractor Twilley with the letter to be addressed to Dr. Hodges. Accordingly, it is hereby
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> **ORDERED, ADJUDGED AND DECREED** counsel for the Plaintiff and counsel for the Defendant shall prepare a letter to Dr. Scott Hodges asking that he answer the question posed by the Court and return his answer to the Court. Counsel are to include with this letter and the question the complete transcript of the Court's opinion of November 6, 2007, the medical records of Dr. Tsui, and the medical records of Chiropractor Twilley.

Appellant in his brief states that the appellant "filed a motion asking the court, among other things, to reconsider and allow counsel to take another deposition of Dr. Hodges." The Court has read the motion - it never mentions taking a deposition. Instead, the motion requests:

> AAA Cooper Transportation, through counsel, respectfully asks the Court for additional findings of fact, to amend one finding of fact concerning the date Mr. Lewis delivered his letter to Dr. Hodges, and clarify to counsel the Court's instructions concerning obtaining additional information from Dr. Hodges for the Court's consideration.

The motion was specifically titled "Motion for Findings of Fact - Rule 52 T.R.C.P." The order addressing the motion is set forth *supra.*

Furthermore, the Court does not find in the record a specific objection to the "letter" procedure used by the court. Again, the letter was appellant's suggestion.

While he later filed a motion to include more information in the letter, appellant never objected to the use of the letter. One cannot benefit from an error to which he has not objected and has even agreed. Tenn. R. Civ. P. 36(a); Neil P. Cohen, Sarah Y. Sheppeard & Donald F. Paine, *Tennessee Lawof Evidence* § 1.03[3][d] (5th ed. 2005).

Cooper justifiably points out that the letter received from the doctor is not signed, and it is not clear whether Dr. Hodges reviewed all of the material submitted with the letter of inquiry. Those concerns would have been alleviated by allowing the parties to take an additional deposition of Dr. Hodges and that would have been the better course. In *Glisson*, 185 S.W.3d at 354, the Supreme Court noted the limitations of medical evidence which is not subject to the normal examination and cross-examination process. However, in this case, Cooper's counsel had cross-examined Dr. Hodges and this examination was before the trial court in the form of his evidentiary deposition. It is not clear what, if any, information Cooper contends would have been elicited from an additional deposition that would or could have led to a different result. Moreover, the record contains sufficient evidence, even without the supplemental response to the court's inquiry, to support its conclusion regarding causation.

Cooper also argues that the history which was recited and directed to be included in the inquiry to Dr. Hodges amounts to findings of fact which are not supported by the evidence. We have therefore reviewed that history in accordance with the applicable standard of review for findings of fact. Based upon the record as a whole, we conclude that the evidence does not preponderate against those findings made by the trial judge.

Based upon the above considerations and the fact that appellant's counsel concurred in this unusual procedure, we hold that the procedure used by the trial court did not constitute reversible error.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to AAA Cooper Transport, and its surety, for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

AAA COOPER TRANSPORTATION v. J.J. LEWIS

Chancery Court for Hamilton County
No. 06-0872

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by AAA Cooper Transportation, pursuant to Tennessee Code Annotated section 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 AAA Cooper Transportation, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

GARY R. WADE, J., not participating.