IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 26, 2009 Session

CHARLES M. MORRISON v. LOGAN-MOORE, LLC

Direct Appeal from the Chancery Court for Hamilton County
No. 06-0857 W. Frank Brown, III, Chancellor

Filed May 13, 2009

No. E2008-00676-WC-R3-WC - Mailed April 13, 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. Employee sought permanent disability benefits for separate injuries, one to his neck and left shoulder and the other to his right knee. His authorized treating physician initially opined that he had sustained permanent impairment as a result of his work injuries. However, on cross-examination, the doctor stated that he was unaware that Employee had been receiving treatment for neck and shoulder symptoms for more than ten years prior to the work injury. He testified that, if true, such information would change his opinion. He also testified that a comparison of pre- and post-injury MRI's of the right knee left him unable to opine with reasonable medical certainty concerning that injury. A second doctor, who later performed surgery on the knee, opined that Employee had a work-related injury. The trial court found that Employee had failed to sustain his burden of proof. Employee has appealed, contending that the evidence preponderates against the trial court's findings. We affirm the judgment as to the alleged neck and shoulder injury and reverse as to the knee injury.

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

VERNON NEAL, SP. J., delivered the opinion of the court, in which GARY R. WADE, J., and DONALD P. HARRIS, SR. J., joined.

C. Mark Warren, Chattanooga, Tennessee, for the appellant, Charles M. Morrison.

C. Douglas Dooley and James F. Exum, III, Chattanooga, Tennessee, for the appellee, Logan-Moore, LLC.

MEMORANDUM OPINION

Factual and Procedural Background

This action concerns two separate injuries: a left shoulder/neck injury and a right knee injury.

Charles Morrison ("Employee") worked as a drywall finisher and foreman for Logan-Moore, LLC ("Employer"). He testified that he injured his left shoulder on April 3, 2006. He stated that as he was removing a large tool box from his pickup truck, he felt a popping sensation in his shoulder. He advised his supervisor of the incident on the next day. He was provided with a panel of physicians in accordance with Tennessee Code Annotated section 50-6-204 (2008). He selected Dr. John Gracy, an orthopaedic surgeon. Employee first saw Dr. Gracy on April 20, 2006. Dr. Gracy's initial impression was that Employee had a possible rotator cuff injury, and also a possible cervical radiculopathy. He prescribed medication and physical therapy and placed Employee on light duty. He also ordered MRI scans which showed degenerative changes in Employee's cervical spine and a partial thickness rotator cuff tear of the left shoulder.

While Employee was working in a light duty status on June 18, 2006, he tripped on some extension cords, twisting his right knee. Again, he reported the incident to his supervisor the next day. He was provided a second panel of physicians, from which he selected Dr. Gracy again. After examining Employee, Dr. Gracy's diagnosis was that Employee had an "ACL deficient knee, which meant his ACL was torn."[1] He recommended conservative treatment, which was carried out until September 2006. Employee had minimal improvement during this time. Dr. Gracy did not believe Employee would benefit from surgery, so he ordered a Functional Capacity Evaluation. Based upon that evaluation, he placed a fifty-five-pound lifting restriction on Employee. Because his job required lifting weights of up to sixty-two pounds, Employee was eventually laid off as a result of this restriction. Dr. Gracy also referred Employee to a pain management specialist.

Dr. Gracy testified by deposition. On direct examination, he opined that Employee had sustained permanent impairments of 8% to the body as a whole for his shoulder and neck, and 5% to the body as a whole due to his knee injury. He opined that these injuries were caused by the incidents of April 3 and June 18, 2006. On cross-examination, Dr. Gracy testified that Employee had not advised him of any previous medical treatment for his neck or left shoulder. In response to a hypothetical question, he agreed that, if Employee had chronic neck and bilateral shoulder problems over a period of ten years prior to April 2006 and had received treatment within six or seven months of that date, his opinions concerning impairment and diagnosis would be changed. Also on cross-examination, Dr. Gracy was asked to compare MRI scans of Employee's right knee from 2004 and 2007. Based upon that comparison, he testified that it was "very difficult" to state that any impairment of Employee's knee was caused by the June 2006 incident; however, he stated that the post-injury MRI might show a meniscus tear that was not present in the pre-injury MRI.

Dr. Glenn Beasley was Employee's primary care physician. He also testified by deposition. He testified that he saw Employee for shoulder pain in March 1998, May 1998, October 1999, and August 2004. In September 2005, Dr. Beasley referred Employee to Dr. Catlin, a pain management specialist. Dr. Catlin examined Employee on September 30, 2005. His report was contained in Dr. Beasley's records and attached as an exhibit to his deposition. In that report, Dr. Catlin reported that

---

[1] Employee had two prior right knee surgeries. Dr. Eric Clarke, a former partner of Dr. Gracy, had performed a meniscus repair in 2002. Dr. Rick Hammesfahr, an orthopaedic surgeon in Atlanta, had performed an ACL reconstruction in 2004. "ACL" refers to the anterior cruciate ligament.

Employee gave a history of ten years of neck and bilateral shoulder pain. Employee described "a constant, aching, throbbing sensation with numbness of the left arm." (Emphasis in original.) The report further stated that Employee's pain interfered with his sleep, sexual activity and household tasks.

Dr. Michael Wolff, a chiropractor, also testified by deposition. He had provided chiropractic treatment to Employee beginning in 1993 and continuing into July 2007. His records indicated that Employee had presented with complaints of neck pain or shoulder pain on dozens of occasions during that period of time. In approximately twelve instances, his records specifically mentioned left shoulder symptoms, while on other occasions the records referred only to "shoulders," or "shoulder."

Dr. Rick Hammesfahr also testified by deposition. He had performed a surgical procedure on Employee's right knee in April 2004, removing a portion of the medial meniscus, reconstructing the ACL and also smoothing down an arthritic area of the knee. In January 2005, Employee had reported instability and looseness in the knee. However, Dr. Hammesfahr's examination at that time did not reveal any instability. In April 2005, Employee continued to have symptoms in the knee. At that time, Dr. Hammesfahr thought that Employee would require another arthroscopic surgical procedure, because he had "failed a nonoperative program" of treatment.

Employee returned to Dr. Hammesfahr in April 2007. At that time, he described his June 2006 work injury to the doctor. In September, he reported two instances of falling due to his knee giving out. Dr. Hammesfahr performed arthroscopic surgery later in September. During that procedure, he found a medial meniscus tear and removed the damaged tissue. He opined that Employee retained a permanent impairment of 2% to the right leg, or 1% to the body as a whole, due to that condition.

At the date of the trial, Employee was fifty-one years old. He had attended school through the eighth grade. He had been a drywall finisher for more than ten years prior to his injury. Before that, he worked in a warehouse and in a grocery store. He had not worked since being terminated by Employer. He testified that his right leg became numb if he had to be on his feet for forty-five minutes to an hour. He also stated he was unable to perform household chores or lift more than ten pounds with his left arm due to shoulder pain. He reported that he was taking Oxycontin twice a day and Percocet four times per day for pain.

The trial court issued written findings and conclusions. In that decision, it listed various issues concerning Employee's credibility, but made no explicit finding on that subject. It reviewed the medical evidence at length and found that employee had failed to prove that he had sustained an injury to his neck; it found that Employee had not met his burden of proof that he had suffered a permanent impairment due to the shoulder injury; and it found that he had failed to prove causation as to the right knee injury. The court made an alternative finding that, if Employee's knee injury was compensable, he sustained an 8% permanent partial disability to the leg as a result. Employee has appealed, asserting that the trial court erred by finding that Employee failed to sustain his burden of proof.

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) (2008). 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. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). 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); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

1. Neck/Shoulder Injury

Employee contends that the trial court's conclusions regarding his neck and shoulder injury were erroneously based on the answers to an improper hypothetical question that Employer asked Dr. Gracy. "[I]t is not proper for a hypothetical question to assume facts that are not supported by evidence at the trial." *Cortrim Mfg. Co. v. Smith*, 570 S.W.2d 854, 856 (Tenn. 1978). However, the use of a hypothetical question is permissible if the question is appropriately phrased and supported:

> In determining the propriety of a hypothetical question, the issue should not be resolved by searching an entire record to determine whether every possible fact was listed in the question. Nor should the hypothetical question be tested solely against the evidence presented by the opposing party . . . . Rather, the issue should be resolved by determining whether the question contained enough facts, supported by evidence, to permit an expert to give a reasonable opinion which is not based on mere speculation or conjecture and which is not misleading to a trier of fact.

Pentecost v. Anchor Wire Corp., 662 S.W.2d 327, 328-29 (Tenn. 1983).

During cross examination, Dr. Gracy was asked the following concerning Employee's neck and shoulder injury:

> Q: And, if you assume, hypothetically, Dr. Gracy, that [Employee] had had chronic neck pain and bilateral shoulder problems for over ten years before he came into your office, and that those complaints were symptomatic and receiving medical treatment within six to seven months of your last visit, could you say, with a reasonable degree of medical certainty, that the impairment attributable to his condition was in any way related to the work injury he reported?

A: I don't like hypothetical questions –

Q: Yeah, I understand.

A: – but it would change my diagnosis and probably change my impairment.

There are two factual assumptions contained in the question – that Employee had been receiving treatment for ten years, and that he had been symptomatic and received medical treatment within six months prior to the work injury. Both of these assumptions are supported by uncontroverted evidence. As set out above, Employee had seen his primary care physician, Dr. Beasley, for problems with his shoulders in 1998, 1999, 2004 and 2005. Dr. Beasley ultimately referred him to Dr. Catlin for pain management in September 2005. In addition, Dr. Wolff's records indicate that Employee had received treatment for complaints of neck and/or shoulder pain on more than eighty occasions beginning in February 1994 and continuing until March 30, 2006, three days before his work injury. The question was a reasonably accurate summary of the evidence that was eventually produced at trial. Thus, the trial court's reliance on Dr. Gracy's answer to the hypothetical question was proper. We are unable to conclude that the evidence in this record preponderates against the trial court's finding that Employee failed to sustain his burden of proof concerning his alleged neck and shoulder injury.

2. Right Knee Injury

Employee further contends that the trial court erred in its finding that he did not sustain his burden of proof concerning causation of his right knee injury. After carefully reviewing the record and especially the depositions of Dr. Gracy and Dr. Hammesfahr, we agree.

It appears that it is uncontroverted that Employee fell when he tripped on an extension cord while working on June 19, 2006. He was seen at Memorial Hospital immediately after the fall where he was given Lortab and released. Subsequently, on July 13, 2006, he saw Dr. Gracy. At that time he reported the new injury to Dr. Gracy and gave him a history of where, when and how he injured his right leg. Dr. Gracy performed a physical exam on plaintiff's knee. Employee had a mild effusion and a positive Lachman test, which is a test for ligament damage. He had some scars consistent with his previous surgery. The doctor took x-rays, which showed a tunnel in the tibia consistent with an ACL reconstruction and minimal arthritic changes. Dr. Gracy felt the ACL was torn. The following question and answer follow in his deposition:

Q. Do you have an opinion to a reasonable degree of medical certainty as to what caused that?

A. His injury at Alexian Village on 6/19/06.

Dr. Gracy recommended physical therapy and later placed a weight limitation of a maximum of fifty-five pounds on an occasional basis based on his knee problems. Because of chronic pain complaints, Dr. Gracy arranged for him to see someone in pain management. Prior to that, Dr. Gracy had ordered a functional capacity evaluation. The evaluation indicated he was reliable at fiftyfour out of fifty-six which indicated that, as far as the doctor could tell, he was not exaggerating or faking his symptoms.

After arranging for Employee to receive pain management, Dr. Gracy assigned an impairment rating of 5% to the body as a whole for his knee. It would appear that the doctor rated the knee injury to the body as a whole because he had also rated his neck and shoulder problems to the body as a whole. Dr. Gracy stated that the impairment rating to the knee was based upon the AMA Guidelines 5th Edition and was based on a reasonable degree of medical certainty.

Employee saw Dr. Ball for his pain management, and, because Employee stated his knee pain was getting worse, the doctor ordered an MRI. Soon thereafter he saw Dr. Gracy for the last time on March 13, 2007. At that time a physical exam was performed. Employee had swelling on the knee and a hinged knee brace. The MRI appeared to show a repair of the ACL and a tear at the medial meniscus. Dr. Gracy was not sure if the MRI changes represented something from an injury or if they were post-surgical changes. He concluded that he might have a meniscus tear, and that Dr. Hammesfahr needed to evaluate him. Prior to this time, Dr. Gracy felt that, based on Employee's age and lack of ACL instability, surgery was not necessary; however, he now felt that that decision would be better made by Dr. Hammesfahr.

Dr. Gracy had originally rated the knee at 7% to the body as a whole and attributed 2% as being pre-existing leaving 5% impairment as herein above referred to. On cross examination, defense counsel posed a hypothetical question presupposing that Employee had looseness and instability in the knee as a result of his prior ACL reconstruction. Dr. Gracy said that, in such a situation, it would be difficult for him to determine the portion of the impairment which preexisted and the portion that resulted from the subject knee injury. He said it would require some speculation or educated guessing on his part.

Employee did feel that he was getting worse and that he had looseness and instability in the knee. However, neither Dr. Gracy nor Dr. Hammesfahr found instability. In his deposition Dr. Gracy responded to a question regarding instability.

> Q. I mean, you did not feel like surgery was necessary because it was not unstable?
>
> A. I didn't feel like surgery was necessary, given his lack of instability and his age, but that Dr. Hammesfahr could make his own determination.

On examination by defense counsel, Dr. Hammesfahr stated that Employee's ACL was intact. He was asked about possible looseness and instability in the right knee apparent during his examination of the patient on January 14, 2005, some nine months after the ACL reconstruction:

> Q. Did Mr. Morrison report that his pain in his right knee was gradually getting worse?
>
> A. On this particular day, he did.

Q. And from your physical examination, did he also have symptoms of instability and looseness in his right knee?

A. No, sir.

The hypothetical posed to Dr. Gracy presupposed that looseness and instability existed in Employee's right knee some ten months after the ACL reconstruction. The only evidence in the record that would remotely validate the hypothetical was that Employee reported to Dr. Hammesfahr symptoms of looseness and instability, but the doctor clearly stated that on examination, he did not find any.

Employee saw Dr. Hammesfahr on April 11, 2007, at which time he gave a history of having tripped on an extension cord causing his left leg to go out from under him while he caught himself with high right leg resulting in a pop and rapid swelling. His history indicated the injury occurred on June 19, 2006 on the job site.

Dr. Hammesfahr had performed surgery on Morrison on April 29, 2004, for a torn medial meniscus and a torn ACL. He reconstructed the ACL and removed the portion of the medial meniscus that was damaged. When the surgeon next saw the patient on January 14, 2005, he performed a physical exam on the right knee and found that Employee was gradually getting worse with no symptoms of looseness on instability in the right knee.

On April 11, 2007, after having determined that the ACL was not ruptured and was intact, Dr. Hammesfahr concluded that Employee had fluid in the joint and that he had a medial meniscus tear with MRI evidence of an ACL injury or sprain. He opined that the meniscus tear was work-related:

Q. Do you have an opinion to a reasonable degree of medical certainty as to what caused the medial meniscus tear?

A. The history and the mechanism of injury that Charles described would have been consistent with the mechanism of injury for the medial meniscus tear.

Q. Are you referring to the work injury in June 2006?

A. Yes, I am.

[. . . .]

Q. Do you have an opinion Doctor to a reasonable degree of medical certainty as to whether or not Mr. Morrison sustained a permanent injury as a result of the work accident on June 19, 2006.

A. He has certainly had a permanent loss of the medial meniscus if that answers your question.

On September 27, 2007, Dr. Hammesfahr performed an arthroscopic surgery on the right knee in an attempt to repair the torn meniscus. It was not repairable and had to be completely removed; it is not replaceable.

Dr. Hammesfahr last saw Employee on October 17, 2007. Although he had not then reached maximum medical improvement, the doctor stated that that usually occurred some three months after surgery. He rated the patient's medical impairment on that date in accordance with the AMA Guidelines, 5^{th} Ed., and opined that Employee had sustained a 2% impairment to the right leg.

In this case two qualified orthopaedic surgeons initially found that Employee sustained a work related injury to his right knee on June 19, 2006. Both found he had a medical impairment to his right leg. Dr Hammesfahr found a medial meniscus tear. Although Dr. Gracy had some apparent difficulty in ascertaining whether or not Employee suffered a meniscus tear and determining, in light of his difficulty in reading Employee's MRI, what impairment was attributable to the new injury as opposed to what portion might have preexisted, Dr. Hammesfahr had no difficulty in either identifying the tear or assigning an impairment rating to the subject injury.

In denying Employee's claim for the right knee injury, the trial court emphasized that he was found to have had a prior meniscus tear that had resulted in a 2% medical impairment due to a meniscus tear surgery which Dr. Clarke performed in 2002. It should be noted, however, that Dr. Hammesfahr's opinion of medical impairment is based solely on the injury at issue. It is also noteworthy that Employee's past meniscus surgery was repairable but the tear from the work injury at issue was not repairable, and Employee now has to perform without a medial meniscus.

For the foregoing reasons, we conclude that the evidence preponderates against the ruling of the trial court regarding the right knee injury. We therefore reverse that portion of the judgment and adopt its alternative judgment awarding 8% permanent partial disability to the right leg.

Conclusion

The judgment of the trial court is modified to award 8% permanent partial disability to the right leg to Employee. Costs are taxed to Logan-Moore, LLC, for which execution may issue if necessary.

VERNON NEAL, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

CHARLES M. MORRISON V. LOGAN-MOORE, INC.
Hamilton County Chancery Court
No. 06-0857

Filed May 13, 2009

No. E2008- 00676-WC-R3-WC

JUDGMENT

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellee, Logan-Moore, LLC, and its surety, for which execution may issue if necessary.