IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 24, 2009 Session

ARNOLD LYNN BOMAR v. HART & COOLEY FLEX DIVISION ET AL.

Direct Appeal from the Chancery Court for Madison County
No. 50703 RD James F. Butler, Chancellor

No. W2008-02827-WC-R3-WC - Mailed November 17, 2009; Filed December 23, 2009

Employee received an award of workers' compensation benefits for a 1994 injury that aggravated a pre-existing condition, Legg-Perthes disease. He received medical care for the condition thereafter through workers' compensation. In 2007, his treating physician recommended hip replacement surgery. The trial court found that the necessity for surgery was not caused by the original injury. Employee has appealed. We affirm the judgment. [1]

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

ROGER A. PAGE, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, C. J., and ALLEN W. WALLACE, SR. J., joined.

William Frederick Kendall and Hailey Hopper David, Jackson, Tennessee, for the appellant, Arnold Lynn Bomar.

Robert Otis Binkley, Jr., and James Vernon Thompson for the appellees, Hart & Cooley Flex Division and CIGNA Property and Casualty Companies.

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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) for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

Arnold Lynn Bomar ("Employee") suffered a compensable injury on August 4, 1994, when a forklift ran over his right ankle and knocked him to the ground while he was working for Hart & Cooley ("Employer"). He alleged that the accident injured his left ankle, right knee, and right hip. Employer admitted compensability of the knee and ankle problems but denied that Employee had any permanent disability of his hip as a result of the incident.

The treating physician, Dr. James Harkess, testified that Employee had arthritis of the hip joint. He also had a congenital condition known as Legg-Perthes disease. This condition is a deformity of the ball portion of the hip joint, which is caused by an insufficient blood supply to the area during childhood. Dr. Harkess testified that it was "possible that the arthritic problems of [Employee's] hip were aggravated by the injury, but I have no real way of proving that." Dr. Harkess further testified that Employee had diminished range of motion in his hip and assigned 5% impairment to the right leg (2% to the body as a whole) as a result.

The case was tried in 1996. The trial court entered an order that found, inter alia, that Employee had sustained a hip injury as result of his work accident. The order did not specifically state that permanent disability resulted from that event. The court awarded 28% permanent partial disability ("PPD") to the left foot and 75% PPD to the right leg. Employer was ordered to provide future medical care.

Disputes arose in 1997 and 1999 regarding chiropractic treatment for low back pain. Employee alleged that this pain was caused by his hip injury, and his treatment should therefore be provided by Employer. Employer denied the claims. Hearings were held, and in each case, Employer was ordered to provide medical care.

In 2003, Employee consulted Dr. Harkess concerning his right hip. He reported that it was not causing significant difficulty at that time. In 2005, he returned to Dr. Harkess with increased pain in his hip. Dr. Harkess noted that he would require a hip replacement in the future but recommended that conservative treatment be continued for the time being. In 2007, Employee returned to Dr. Harkess again. His hip pain had worsened substantially. Dr. Harkess concluded that a hip replacement was appropriate. Employee requested that CIGNA ("Insurer"[2]) pay for the procedure under the 1996 workers' compensation judgment. Insurer declined to do so.

Employee filed a motion to compel Insurer to pay for the surgery. The motion was heard on August 28, 2008. The proof consisted of brief testimony by Employee; copies of pleadings, orders, and exhibits from the 1996 trial and post-trial motions; the 1996 deposition of Dr. Harkess; and medical records of Dr. Harkess generated subsequent to that deposition.

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[2] Employer had apparently gone out of business.

The trial court found that Employee had failed to sustain his burden of proof to establish that the necessity for hip replacement surgery was caused by the work injury. His motion was therefore denied. Employee has appealed, contending that the trial court's ruling was erroneous.

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) (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 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). 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, 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

Employee apparently contends that the 1996 judgment and subsequent orders requiring Employer to provide medical care for his hip and lower back pain are sufficient, without additional evidence, to establish that the proposed hip replacement surgery was a natural consequence of his 1994 work injury. He asserts that Insurer did not demonstrate an independent intervening cause for the surgery and that its refusal to pay for the procedure amounts to an attempt to relitigate the issues decided in the previous proceedings.

Insurer contends that the medical evidence, specifically the testimony of Dr. Harkess in 1996 and his notes from 2005 and 2007, establishes that Employee's pre-existing Legg-Perthes disease is the sole cause of his need for surgery.

The relevant medical evidence begins with Dr. Harkess' clinical note of June 11, 1996, which states in part:

> In my opinion, his current symptoms are those of early arthritis of the hip. These changes were clearly present prior to his injury, although they may have been exacerbated by the trauma. I suspect he would have eventually developed such symptoms in the absence of an injury, although I have no way of determining when this might have occurred had an injury not occurred. At present, I would recommend deferring any surgical intervention for the hip. I suspect he will eventually come to total hip replacement. This would have been necessary even if he had not had a recent injury.

In his 1996 deposition, Dr. Harkess testified as follows:

> [Direct Examination]
>
> [Employee] unquestionably had the Legg-Perthes disease and the arthritis of the hip prior to the accident. He states that the hip became painful afterward, so it is possible that the arthritic problems of the hip were aggravated by the injury, but I have no real way of proving that.
>
> Q: In your opinion, based upon a reasonable degree of medical certainty . . . could a trauma [such as that sustained by Employee] aggravate [his] Legg-Perthes disease so as to cause his present right hip problems?
>
> [Objection by counsel omitted.]
>
> A: That's possible.
>
> * * *
>
> [Cross Examination]
>
> Q: Is there any way for you to state with any degree of medical certainty about whether [Employee] has had any change in the motion of his hip because of [his work injury]?
>
> A: No, I can't state that.
>
> * * *
>
> Q: Now, you had made some mention about possible hip replacement surgery in the future.
>
> A: Yes.
>
> Q: If this hip replacement surgery does take place years from now, would that have resulted whether or not he had had this . . . injury, in your medical opinion?
>
> A: I think that's likely.
>
> * * *

> Q: But as far as whether there is any anatomical change or worsening or anything like that, you cannot see that?
>
> A: He's just got an arthritic hip. And whether or not any portion of that is due to a work-related injury, I can't determine that.

Dr. Harkess recommended on January 11, 2007, that Employee proceed with hip replacement surgery. His clinical note of that date states in pertinent part: "We have again discussed the fact that I do not believe this is really a workers' compensation injury and his arthritic changes are secondary to the prior Perthes disease rather than a work-related injury in my opinion."

On the basis of this evidence, Insurer argues that the evidence may have been sufficient to establish that symptomatic treatment of Employee's hip pain was related to his work injury but is not sufficient to establish that the proposed hip replacement was caused by, or related to, that injury.

Tennessee Code Annotated section 50-6-204(a) requires an employer to provide all medical treatment "made reasonably necessary" by a compensable injury, without regard to any time frame. In general, the causal relationship between the need for a particular medical procedure or course of treatment and the work-related injury should be considered at the time such treatment is sought. See Underwood v. Liberty Mut. Ins. Co., 782 S.W.2d 175, 176 (Tenn.1989). Whether or not a particular medical treatment is "made reasonably necessary" by Employee's work for an Employer prior to 2003 is a question which must be answered based upon the proof presented at the time the treatment is proposed. Id.; see also, Roark v. Liberty Mut. Ins. Co., 793 S.W.2d 932, 935 (Tenn. 1990).

Summers v. Nissan North America, Inc., No. M2008-00391-WC-R3-WC, 2009 WL 1260321 (Tenn. Workers' Comp. Panel, May 8, 2009), like the present case, involved an employee with Legg-Perthes disease. The issue before the trial court was whether or not the employee's work activities accelerated the need for hip replacement surgery. The treating physician testified, inter alia, that "'high demand activity,' such as Employee's work for Employer, 'can certainly aggravate' osteoarthritis caused by Perthes disease," and also that a person with "a sedentary job" was less likely to develop advanced arthritis as soon as a person with "a very active job or lifestyle." Id. at *4. The trial court found the testimony set forth above sufficient to establish a causal relationship between the employment and the surgery. The Panel found that the evidence did not preponderate against that finding. Id.; see also Kobus v. Colonial Moving Co., No. M1999-00034-WC-R3-CV, 2000 WL 361949 (Tenn. Workers' Comp. Panel, June 13, 2007) (holding that, provided that the injury accelerated the timing of the need for the procedure, knee replacement surgery was compensable even though it was an inevitable result of a knee condition that pre-existed the work place injury).

In the present case, the only medical evidence is this record is the 1996 deposition of Dr. Harkess and his subsequent records. The relevant portions are set out at length above. His

opinion may be fairly characterized as equivocal on the issue of whether or not an aggravation of Employee's underlying disease occurred in 1994, but unequivocal on the issue of whether hip replacement surgery was the inevitable result of the disease itself. In contrast to Summers and Kobus, there is no evidence whatsoever in this record that Employee's need for surgery was hastened in any way by the 1994 injury. Based upon this evidence, we conclude that the trial court correctly ruled that Employee failed to sustain his burden of proof.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Arnold Lynn Bomar and his surety, for which execution may issue, if necessary.

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ROGER A. PAGE, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Arnold Lynn Bomar and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM