IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 25, 2010 Session

JACK KELTON v. BRIDGESTONE AMERICAS HOLDING, INC., ET AL.

Appeal from the Circuit Court for Rutherford County
No. 56714 Royce Taylor, Judge

No. M2009-01026-WC-R3-WC - Mailed - June 2, 2010
Filed - July 8, 2010

In this workers' compensation action, the employee alleged that he sustained compensable injuries to his neck and lower back. His employer asserted that his injuries were the result of pre-existing degenerative conditions, or in the alternative, were worsened by an automobile accident which occurred after the alleged work injuries. The trial court found the neck injury to be compensable, but denied recovery for the alleged lower back injury. It awarded 85% permanent partial disability benefits, temporary total disability benefits, and required the employer to provide medical care for the neck injury. The employer has appealed arguing that the evidence preponderates against the trial court's findings. We affirm the judgment.[1]

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

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and WALTER C. KURTZ, SR. J., joined.

Terry Hill and Lauren Disspayne, Nashville, Tennessee, for the appellants, Bridgestone Americas Holding, Inc. and Old Republic Insurance Company.

Steven Waldron, Murfreesboro, Tennessee, for the appellee, Jack Kelton.

---

[1]Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

Jack Kelton was a production worker for Bridgestone, a tire manufacturer, from 1975 until 2007. He worked in several departments during that time. Mr. Kelton alleged that he injured his neck and lower back on the job on September 2, 2007, while pulling a rubber "liner" from a roll. As he was forcefully pulling it, the roll locked up causing him pain in the left arm, shoulder and neck. The pain in the area became increasingly severe over the next two days and, thinking he may be having a heart attack, Mr. Kelton visited the office of his primary care physician, Dr. David Ours, on September 4, 2007. When he learned it was not a problem with his heart, but an injury to his neck and shoulder, Mr. Kelton reported the injury to Bridgestone. Eventually, after attempting to work for several days, Mr. Kelton asked to see a doctor and was provided with a panel of physicians. He selected Dr. Janet Pelmore, also a primary care physician. After three visits with Dr. Pelmore, Mr. Kelton was released but his pain continued to worsen. At the suggestion of Bridgestone, Mr. Kelton saw Dr. Lane Tippens, who maintains an office in the Bridgestone plant, for a second opinion. Dr. Tippens ordered an MRI of the cervical spine. This study showed a defect at the C7–T1 level on the left side, and degenerative changes throughout the neck. Dr. Tippens provided Mr. Kelton with a panel of neurosurgeons for further evaluation and treatment and he selected Dr. Robert M. Weiss from that list.

Dr. Weiss testified by deposition. He first saw Mr. Kelton on October 17, 2007. His initial diagnoses were cervical spondylosis (degenerative changes) and a disc protrusion at C7-T1. He ordered a CT/Myelogram study, which confirmed those diagnoses. He provided conservative treatment. Initially, he discussed the possibility of surgical treatment for the C7-T1 disc protrusion with Mr. Kelton. When Mr. Kelton's symptoms became more widespread, involving his right arm, shoulders, and other parts of his body, Dr. Weiss became less optimistic about the success of a potential surgical procedure and ultimately recommended against it. On November 28, 2007, he recommended that Mr. Kelton seek additional medical opinions.

On November 29, Mr. Kelton was involved in a motor vehicle accident. His truck was rear-ended while stopped at an entrance ramp, causing his head to hit the windshield. He was taken to an emergency room, and spent the night in the hospital. He returned to Dr. Weiss on December 6, reporting increased neck pain and low back pain. Dr. Weiss ordered cervical and lumbar MRI scans. The cervical scan showed no significant changes from the previous studies that Dr. Weiss had ordered. Dr. Weiss believed the cervical injury was caused by the September 2, 2007 work incident and assigned a 7% permanent anatomical impairment. He did not consider it probable that the incident had caused any anatomical advancement of the spondylosis elsewhere in Mr. Kelton's cervical spine. Mr. Kelton filed a civil lawsuit concerning the automobile accident. He testified that his claim was settled for approximately $19,000.00.

Mr. Kelton sought a second opinion from Dr. Michael Moran, a neurosurgeon in Murfreesboro. Dr. Moran did not testify, and his report does not appear to be in the record. Mr.

Kelton sought a third opinion. Dr. Ours referred him to Dr. Timothy Schoettle, a neurosurgeon practicing in Nashville. After examining Mr. Kelton and reviewing the available medical data, Dr. Schoettle recommended a surgical fusion of the C6 and C7 vertebrae in order to relieve spinal cord compression caused by severe disc protrusions at those levels. Dr. Schoettle also hoped to remove the defect at C7-T1 at the same time, but was unsure if he would be able to do so, due to the location of that defect relative to the surgical incision. Dr. Schoettle performed the fusion on March 5, 2008. He fused the C6 and C7 vertebrae, but was unable to remove the disc protrusion below that level.

Dr. Schoettle testified by deposition. He assigned 26% permanent impairment to the body as a whole due to the surgical fusion of Mr. Kelton's neck. He testified that in his opinion the September 2, 2007 incident had aggravated the underlying degenerative condition by making it symptomatic, and that the underlying degenerative condition had been caused or advanced by Mr. Kelton's years of heavy work for Bridgestone. Dr. Schoettle also assigned 10% impairment for degenerative changes in Mr. Kelton's lumbar spine. However, he was less certain about the effect of the September 2007 event on that condition. He also believed that the November 2007 automobile accident had worsened it.

Dr. Schoettle testified that Mr. Kelton had done extremely well after his surgery. However, due to the overall condition of the spine, he prescribed permanent activity restrictions. On direct examination, he stated that Mr. Kelton should limit his lifting to ten pounds or less. On cross examination, he modified that, stating that Mr. Kelton could occasionally lift up to twenty pounds, "if he could lift it without pulling, twisting, that type thing, he might be able to do that with the neck. But I think, really, trying to get to the neck alone, I really want him doing sedentary work as opposed to factory work of the type I'm aware of [at Bridgestone]."

After the September 2, 2007 injury, Mr. Kelton's various physicians had placed him in a light duty status. He was able to continue working at a "reduced pace." According to Mr. Kelton, he did not perform his regular job during this period and often did little at all. That testimony was not contradicted. After the November 27, 2007 motor vehicle accident, he did not return to work for Bridgestone in any capacity. He applied for and was granted a disability retirement.

Mr. Kelton testified that he believed he was unable to work at all. He took several medications for conditions unrelated to his work injuries. He found it necessary to lie down for two hours at a time. He found it difficult to stand or walk for long periods. He was able to perform some chores around the house. He stated that he generally did well if he stayed within the restrictions imposed upon him by Dr. Schoettle.

Rebecca Williams, a vocational evaluator, examined Mr. Kelton at the request of his attorney. Her testing revealed that he was able to read above a twelfth-grade level and was able to perform arithmetic at a ninth grade level. Ms. Williams concluded that he had no transferrable work skills. She opined that Mr. Kelton had a 90% vocational disability based upon Dr. Schoettle's restrictions, and a 100% disability based upon his own description of his capabilities.

John Whitaker, also a vocational evaluator, conducted an evaluation of Mr. Kelton at the request of Bridgestone. He did not meet Mr. Kelton personally but read his discovery deposition and reviewed the medical records and the testing performed by Ms. Williams. Based upon the information that was available to him, he believed that Mr. Kelton had a 55% vocational disability.

Harold Loux, a private investigator, conducted surveillance of Mr. Kelton on several occasions prior to the trial. He showed the court a video recording which depicted him working on a section of chain link fence in the bed of his pickup truck. Mr. Loux testified that this activity was the most physically vigorous that he observed while surveilling Mr. Kelton.

Mr. Kelton was fifty-one years old when the trial occurred. He was a high school graduate and had worked for Bridgestone for thirty-two years at the time he retired. His jobs there all required heavy or medium effort and involved operating machines used in the tire-making process. He had no specialized skills or training and believed that he was completely unable to work. Consistent with that opinion, he had not sought employment since his retirement.

The trial court issued its findings in the form of a written memorandum. It held that Mr. Kelton had sustained a compensable injury to his neck, but that he had not proven that his lower back injury was work-related. The trial court found that the November 2007 motor vehicle accident was not an independent intervening cause of Mr. Kelton's disability and awarded 85% permanent partial disability benefits, temporary total disability benefits from November 29, 2007, the date of the motor vehicle accident after which Mr. Kelton did not return to work, until May 2, 2008, the date of maximum medical improvement. Finally, it ordered that Bridgestone hold Mr. Kelton harmless for any medical expenses related to Dr. Schoettle's treatment of his neck injury and that Dr. Schoettle be authorized to provided future medical treatment. Bridgestone has appealed, contending that the trial court erred by finding that Mr. Kelton suffered a compensable aggravation of pre-existing degenerative changes in his neck, by failing to apply the intervening, independent cause rule, by awarding temporary total disability benefits, and by holding defendant liable for medical expenses associated with the medical treatment rendered by Dr. Schoettle. Bridgestone also contends that the award is excessive.

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 to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the deposition, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore

v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

1. *Causation*

In its brief, Bridgestone argues that the evidence preponderates against the trial court's finding that Mr. Kelton's neck injury was work-related. Bridgestone contends that Mr. Kelton's anatomical impairment and vocational disability were primarily caused by pre-existing degenerative changes in his cervical spine. It points to the testimony of Dr. Weiss that those degenerative changes were the result of the aging process, and were neither caused nor aggravated by the September 2007 incident. Dr. Weiss, however, as Bridgestone has conceded, considered it probable that the C7-T1 disc protrusion was caused or worsened by the September 2, 2007 work event, and that Mr. Kelton retained a 7% impairment as a result of that condition. Based solely upon Dr. Weiss' testimony, Mr. Kelton would still be entitled to permanent partial disability benefits for that injury.

In contrast, Dr. Schoettle testified that Mr. Kelton had severe disc protrusions that were a combination of soft discs and calcified discs with significant spinal cord compression at C5-6 and C6-7 and a focal herniated disc at C7-T1. Dr. Schoettle was of the opinion those degenerative changes had been caused, or at least accelerated, by years of heavy work for Bridgestone, and had been aggravated into an ongoing disability by the specific work injury. That opinion is consistent with the sudden onset of symptoms on September 2, 2007, when the work injury occurred, and with the absence of evidence that he had any medical problems or symptoms involving his neck at any time prior to that date.

Dr. Weiss and Dr. Schoettle expressed conflicting opinions regarding the anatomical effects of 32 years of performing heavy labor at Bridgestone and of the September 2, 2007 injury. Because both doctors testified by deposition, we are able to review that evidence and reach our own conclusions concerning their relative weight, without deference to the findings of the trial court. Bohanan, 136 S.W.3d at 624. In comparing that testimony, we may "consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." Orman v. Williams Sonoma, Inc. 803 S.W.2d 672, 676 (Tenn. 1991). Both doctors are experienced neurosurgeons with excellent qualifications. Dr. Weiss examined Mr. Kelton nearer in time to his work injury. Dr. Schoettle had the opportunity to observe the anatomy of Mr. Kelton's spine during surgery and followed him for a substantial period of time. Each doctor presented a plausible explanation for his opinion. On balance, we are unable to conclude that the evidence preponderates against the trial court's decision to accept Dr. Schoettle's opinion over Dr. Weiss's. We therefore conclude that the trial court did not err by finding that the degenerative condition of Mr. Kelton's cervical spine was either caused or advanced by his 32 years of working at Bridgestone and became disabling after the September

2007 event, based upon the testimony of Dr. Schoettle. It follows that the trial court did not err by also adopting the impairment rating assigned by Dr. Schoettle.

2. *Independent Intervening Event*

Citing Anderson v. Westfield Group, 259 S.W.3d 690, 696 (Tenn. 2008), Bridgestone next contends that the November 2007 motor vehicle accident was an independent intervening cause of Mr. Kelton's injury and disability. The contention is based primarily upon the fact that he was working, albeit at a reduced level, until that event and did not work thereafter. As pointed out above, Mr. Kelton gave uncontradicted testimony that he was performing only menial tasks at work prior to the accident. There is evidence in the record that he sustained an increase in symptoms, at least temporarily, after the accident. Dr. Weiss, however, had a second MRI performed after the accident and expressed the opinion that the study showed no significant change from pre-accident films. Both Dr. Schoettle and Dr. Weiss testified that such an accident could have caused a permanent injury. Neither testified that this accident actually did so or even that it was probable that such an aggravation had occurred. We therefore conclude that the trial court correctly declined to applying the independent intervening injury rule to the facts of this case.

3. *Excessive Award*

Dr. Schoettle permanently restricted Mr. Kelton from lifting more than ten pounds, except in very limited circumstances. He also recommended that Mr. Kelton not return to factory work and should, in fact, be limited to sedentary work in the future. Mr. Kelton was fifty-one years old, and had worked in a factory, for a single employer, all of his adult life. He had the ability to read above high school level, and thereby the ability to learn new skills in line with his physical limitations. We conclude that the evidence does not preponderate against the trial court's assessment of his disability.

Bridgestone also argues that it is entitled to a set off, pursuant to Tennessee Code Annotated § 50-6-114, for payments made to Mr. Kelton through its disability insurance plan. Mr. Kelton agrees that Bridgestone is entitled to receive the set off and notes that the judgment includes such a provision although it is applied to the temporary total disability award rather than the permanent partial disability award. We do not find that the trial court erred in its method of accounting for this credit.

4. *Temporary Disability Benefits*

Bridgestone argues that because Dr. Schoettle was not an authorized treating physician, Mr. Kelton should not be able to recover benefits based upon his inability to work due to that treatment. It also argues that the automobile accident was the true cause of Mr. Kelton's inability to work, noting that he had been working until that event occurred. The award of temporary total disability benefits is supported by the same evidence which supported the trial court's findings concerning causation and impairment. For the same reasons that we have affirmed those findings, we conclude that the trial court did not err by awarding temporary disability benefits.

5. *Medical Expenses*

Bridgestone argues that it should not be liable for medical expenses associated with the treatment rendered by Dr. Schoettle because Mr. Kelton did not consult with it prior to incurring those expenses. Exhibits in the record indicate that Mr. Kelton filed a request for assistance with the Tennessee Department of Labor, seeking medical treatment, on December 17, 2007, and that Bridgestone opposed that request. The Department of Labor ultimately denied the request. In light of Bridgestone's decision to deny additional medical treatment, Mr. Kelton's actions were reasonable. For the reasons set out above, the treatment rendered by Dr. Schoettle was related to the work injury. Bridgestone is therefore liable for those expenses in accordance with Tennessee Code Annotated § 50-6-204.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellants, Bridgestone Americas Holding, Inc. and Old Republic Insurance Company, and their sureties, for which execution may issue if necessary.

_____
DONALD P. HARRIS, SENIOR JUDGE

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

JACK KELTON v. BRIDGESTONE AMERICAS HOLDING, INC., ET AL.

Circuit Court for Rutherford County
No. 56714

No. M2009-01026-WC-R3-WC - Filed - July 8, 2010

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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs are taxed to the appellants, Bridgestone Americas Holding, Inc. and Old Republic Insurance Company, and their sureties, for which execution may issue if necessary.

PER CURIAM