IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 23, 2013 Session

ARAMARK ET AL. v. JEREMY NIX

Appeal from the Circuit Court for Davidson County
No. 11C-339 Carol Soloman, Judge

No. M2012-02608-WC-R3-WC - Mailed December 11, 2013
Filed January 14, 2014

An employee alleged he suffered a compensable injury to his lower back. His employer disputed a compensable injury occurred. In the alternative, the employer asserted any award of permanent disability benefits should be limited to one and one-half times the medical impairment because the employee had been terminated for misconduct. The trial court found employee had sustained a compensable injury and did not have a meaningful return to work. It awarded 42% permanent partial disability ("PPD"), six times the medical impairment. The employer has appealed, asserting the evidence preponderates against the trial court's findings. The employer also contends the award was excessive and the trial court erred by denying its motion to stay a portion of the judgment requiring payment of certain medical expenses. The 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

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

DON R. ASH, SR. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J., and E. RILEY ANDERSON, SP. J., joined.

Courtney R. Smith, Nashville, Tennessee, for the appellants, Aramark and Indemnity Insurance of North America.

Mandy Preston Parl, Nashville, Tennessee, for the appellee, Jeremy Nix.

OPINION

Factual and Procedural Background

Jeremy Nix ("Employee") came to work for Aramark ("Employer") in November 2008. Employer provided environmental services at what was then known as Baptist Hospital in Nashville. His job included walking the grounds, facilitating the needs of the patients, speaking with doctors and patients, interviewing patients, and assuring the grounds were kept accordingly. He alleged he injured his lower back on April 23, 2009, when he slipped while walking in an area near Employer's offices and break room. He was able to recover his balance without falling to the floor. He did not report the incident at the time because it was near the end of his shift and he "didn't feel anything break." The incident occurred on a Thursday.

At home on Thursday night, Employee fell asleep in his recliner. When he awoke the next morning, he had a difficult time getting out of the chair because of back pain. He considered going to an emergency room, but did not. His condition did not improve over the weekend. Mondays and Fridays were his regular days off at the time. On Monday, April 27, he went to see his primary healthcare provider,

Keith Caldwell.[1] Mr. Caldwell's note contains the history, "low back pain on the right and abdominal pain for about a month." Mr. Caldwell ordered a CT scan. According to Employee, the result of the scan was negative. He had a conversation with Mr. Caldwell, during which he told him about the April 23, 2009 incident. Mr. Caldwell recommended an examination by an orthopaedic physician. Employee had previously been seen by a physician's assistant at Tennessee Orthopaedic Alliance ("TOA") for a complaint of neck and low back pain on March 26, 2009.

In the meantime, Employee reported the April 23 incident to Ray Vaughns, a supervisor for Employer. He also discussed the matter with his direct supervisor, Richard Jordan, and an incident report was completed. Employer's work rules required any incident, however minor, should be reported immediately. Employee testified, although he had received an employee handbook, he was not familiar with all of Employer's work rules due to poor training. According to Employee, Mr. Jordan thereafter "made it a point to let me know that everything I was doing and getting all these tests was a joke." After the incident report was made, Employer did not offer medical treatment to Employee. At a meeting on May 14, 2009, Employee was terminated, effective May 11. The particulars of the meeting are addressed in detail in a later section of this opinion.

[1]Mr. Caldwell was a nurse practitioner at White House Clinic.

Employee saw Dr. Stanley Hopp, an orthopaedic surgeon specializing in spine surgery at TOA, on June 25, 2009. Dr. Hopp had treated him several years earlier for a neck injury. Dr. Hopp's examination revealed pain on bending, a left leg limp and weakness in the left leg. On June 25, 2009, Employee did not mention to Dr. Hopp any work injury. Dr. Hopp opined Employee's symptoms on June 25 were a continuation of the same problems described in the March 26, 2009 examination by the TOA physician's assistant. Dr. Hopp stated an event in the interval between March 26 and June 25 could have aggravated Employee's pre-existing condition or caused a new area of his spine to hurt.

Dr. Hopp testified the note pertaining to employee's March 26, 2009 visit to TOA did not mention any radicular symptoms, and, on March 26, 2009, Employee's physical examination had been basically normal. By June 25, 2009, Employee had definite radicular symptoms and findings. Employee's symptoms did not improve by the time of his next visit with Dr. Hopp on July 23, 2009, which was Dr. Hopp's last encounter with Employee. At this appointment, Dr. Hopp discussed the possibility of surgery.

Employee continued to have problems with his back and leg. He subsequently made an appointment on his own with Dr. Scott Standard, a neurosurgeon. He first saw Dr. Standard on August 12, 2009. Dr. Standard described Employee's symptoms

as "classic" for lumbar radiculopathy. Dr. Standard ordered an MRI, which showed a clear disc rupture with pressure on the L5 nerve. Dr. Standard recommended surgery to repair the disc, which was carried out on September 10, 2009. Employee testified the surgery relieved much of his pain, and he felt "tremendously better" afterward. He had some back pain in October 2009. Dr. Standard ordered a follow-up MRI, which showed no new problems. He continued to follow Employee until May 5, 2010, when he released him to return on an "as needed" basis.

Employee sought relief through the Department of Labor and Workforce Development after Employer denied his claim. On September 22, 2010, the Department ordered Employer to provided medical treatment and pay temporary disability benefits. The parties subsequently participated in a Benefit Review Conference and were unable to resolve their differences. Employer filed this action in the Circuit Court of Davidson County on January 26, 2011.

Dr. Standard recommended Employee be permanently restricted from lifting more than thirty-five to fifty pounds and should avoid prolonged bending and twisting. He assigned 7% permanent impairment to the body as a whole for the injury and surgery, based upon the Sixth Edition of the AMA Guides. He opined the April 23, 2009, work incident was the cause of the disc rupture and created the need for the September 2009 surgery. Although he had not been aware of Dr. Hopp's causation

opinion, Dr. Standard's opinion was not changed when information was provided to him during the deposition. Further, his causation opinion was not changed by the information Employee merely twisted his back, but did not fall to the floor, on April 23, 2009. Dr. Hopp considered the notation of back pain contained in the TOA physician's assistant's note of March 26, 2009 to be incidental to reports of neck and upper back pain contained in the same note. He testified his notes reflected Employee remained very active in sports after recovering from surgery.

Anna Maddox, who had been an area Human Resources Manager for Employer at the time, testified Employee was terminated during a meeting held on May 14, 2009. She had been working for Employer only a short time when the meeting occurred. She attended the meeting, along with Employee, his immediate supervisor, Richard Jordan, and another supervisor, Ray Vaughns. The summary of the meeting Ms. Maddox prepared was placed into evidence. The stated reasons for the termination were continuing problems with absenteeism and tardiness, an inappropriate altercation with another employee, and a workplace safety violation.[2] Ms. Maddox had no personal knowledge of the first two allegations. She testified failure to timely report an injury, standing alone, would not normally result in

[2] Mr. Vaughns clarified in his testimony this workplace safety violation was Employee's failure to notify Employer immediately of the incident on April 23, 2009.

termination.

Mr. Vaughns, who also attended the meeting, testified he was acquainted with Employee, but worked on a different shift, and therefore had only limited knowledge of his job performance. Mr. Jordan, Employee's immediate supervisor, resided in Florida at the time of the trial and did not testify. Employee denied receiving any warning or counseling concerning his job performance prior to the termination meeting. He initially denied the alleged altercation had occurred, then stated he remembered the event vividly and had given a written statement with the expectation the other employee would be disciplined. He denied receiving an April 13 email from Michael Mercer, District Manager, concerning attendance and tardiness, stating he did not check his work email account. During his deposition, he testified he did not think he had been terminated because of his work injury.

Employee was thirty-six years old at the time of the trial. He is a high school graduate and also completed two years of vocational training at Volunteer State Community College. Prior to November 2008, he had managed a family trucking business, had worked for Pearl Drums as a shipping and receiving manager and later as a warehouse supervisor, and had worked "in the mortgage industry" until the 2008 economic crisis. While working for Employer, he had also been employed by Bank of America. After being terminated by Employer, he worked for Prime Lending as

a mortgage agent and Superior Bank as a mortgage agent or loan officer. At the time of the trial, he was employed by First Community Mortgage as a loan originator.

Employee testified he had played softball four or five times a week, played golf every Friday, jogged two or three miles per day, and worked out at the YMCA four times per week prior to the April 23, 2009 injury. Since the injury his activities were limited. He was able to swing a golf club, but could not play a full round. He was still able to mow his eight-acre lawn with a riding lawnmower, but could not use a weedeater. He no longer played pickup basketball and takes precautions with his activities.

During cross-examination, Employee admitted he underwent surgery in 2008 due to a neck injury. At trial, he testified the neck injury was initially caused by a motor vehicle accident many years earlier, but his neck injury could have also been from sports activity. However, during his deposition, he had testified the neck injury occurred while working out at the gym. In addition, Employee testified he had undergone a rotator cuff repair in the past. Employee's mother Vicki Nix and Employee's wife Christina Nix both testified at trial and generally confirmed his testimony about the effects of his back injury.

The trial court issued its findings in a written memorandum. It found Employee had sustained a compensable injury to his lower back from the April 23,

2009 incident. It further held he did not have a meaningful return to work, basing its ruling on Employer's failure to demonstrate Employee had received any warnings prior to his termination. It then awarded the maximum permissible amount of permanent disability benefits, 42% to the body as a whole. The judgment was entered on November 20, 2012. Employee made a motion requesting additional specific findings of fact which was granted by the trial court on January 18, 2013. Employer has appealed from the judgment, asserting the trial court erred by finding a compensable injury occurred, by finding Employee did not have a meaningful return to work, by granting an excessive award, and by denying Employer's motion to stay enforcement of a portion of the judgment.

Standard of Review

Courts reviewing an award of workers' compensation benefits 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 conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008) requires the reviewing court to "[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." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight should be given to their testimony. *Tryon v. Saturn Corp*., 254 S.W.3d. 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc*., 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009) (interpretation of law is reviewed without a presumption of correctness).

Analysis

Causation

Employer's first argument is the evidence preponderates against the trial court's finding the Employee's back injury was causally related to his employment. In support of this argument, Employer relies on Dr. Hopp's testimony the Employee's

symptoms on June 25, 2009, were a continuation of the problems described in the TOA physician's assistant note dated March 26, 2009. Employer further asserts Dr. Standard's opinion about causation was unreliable because Dr. Standard's opinion was based upon an inaccurate and incomplete medical history provided by Employee. Employer also suggests Employee's testimony was inconsistent with regard to his symptoms and pain.

Our Supreme Court succinctly described the standards applicable to resolving issues of causation in workers' compensation cases in *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 274-75 (Tenn. 2009):

> Generally speaking, a workers' compensation claimant must establish by expert medical evidence the causal relationship between the alleged injury and the claimant's employment activity, "[e]xcept in the most obvious, simple and routine cases." *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008) (quoting *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)). The claimant must establish causation by the preponderance of the expert medical testimony, as supplemented by the

evidence of lay witnesses. *Id*. As we observed in *Cloyd*, the claimant is granted the benefit of all reasonable doubts regarding causation of his or her injury:

> "Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain . . ." *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004); *see also Glisson v. Mohon Int'l, Inc./ Campbell Ray*, 185 S.W.3d 348, 354 (Tenn. 2006). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. *Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004).

Id.; *see also Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). The trial court may properly award

> benefits based upon medical testimony that the employment "could or might have been the cause" of the employee's injury when there is also lay testimony supporting a reasonable inference of causation. *Fritts*, 163 S.W.3d at 678.

We examine the evidence in light of the standard described in *Excel Polymers, LLC v. Broyles*, 302 S.W.3d at 274-75. Dr. Hopp initially opined the symptoms he observed on June 25, 2009, were a continuation of the condition observed by his assistant three months earlier. However, he then conceded an intervening event could have worsened or advanced the pre-existing condition. Dr. Hopp testified Employee's physical examination on March 26 was essentially normal and no radicular symptoms were noted. By June 25, Employee was walking with a limp and demonstrated radicular weakness in his left leg.

Employee testified he slipped and twisted his back on April 23, 2009. No evidence in the record contradicts, or casts doubt upon, Employee's testimony of his fall. The parties stipulated the incident was reported to a supervisor on April 29, 2009. While the report was not timely according to Employer's internal standards, it was well within the time period permitted by Tenn. Code. Ann. § 50-6-201(a), and

was made on the first day Employee returned to work after the incident. Thus, the evidence supports a finding the incident occurred, and Dr. Hopp's testimony concedes such an incident could have caused an injury or aggravated a pre-existing condition.

Dr. Standard testified Employee displayed "classic" symptoms of radiculopathy as of August 12, 2009. Subsequent MRI testing by Dr. Standard revealed the existence of a ruptured disc placing pressure on the L5 nerve, consistent with those symptoms. Surgical repair of the disc provided substantial, though not complete, relief of Employee's radicular symptoms. Dr. Standard testified affirmatively and repeatedly the disc injury was causally related to the work event. Neither the record of the March 26 examination, nor Dr. Hopp's testimony, changed his opinion. We conclude the evidence in this record does not preponderate against the trial court's finding Employee sustained a compensable injury as alleged.

Meaningful Return to Work

Second, Employer asserts the trial court erred by finding Employee did not have a meaningful return to work and his award of permanent disability benefits was not consequently limited to one and one-half times the medical impairment pursuant

to Tenn. Code. Ann. § 50-6-241(d)(1)(A). Specifically, it asserts Employee was terminated for misconduct unrelated to his work injury. Tenn. Code Ann. § 50-6-241 (d)(1)(B)(iii)(b) provides: "Notwithstanding the provisions of this subdivision (d)(1)(B), under no circumstances shall an employee be entitled to reconsideration when the loss of employment is due to . . . [t]he employee's misconduct connected with the employee's employment." *See also Carter v. First Source Furniture Grp.*, 92 S.W.3d 367, 372 (Tenn. 2002) (lower cap applies to claim of employee terminated for misconduct prior to recovery from work injury).

Employer submits Employee was terminated for various acts of misconduct, including absenteeism, tardiness, an alleged altercation with his fellow employee, and his failure to report his injury-causing incident within the time required by Employer's internal rules. In support of its position on this issue, Employer presented the testimony of Ms. Maddox, who was present at the termination meeting and prepared a summary of the allegations discussed. However, Employee denied all allegations of misconduct other than the late injury report. Ms. Maddox testified this violation, standing alone, would not normally provide a basis for termination. At the time of trial, Ms. Maddox no longer worked for Employer, and the sources of her information were second- and third-hand reports. She was not a custodian of documents for Employer and could not authenticate any prior discipline. Mr.

Vaughns, who continued to work for Employer when the trial occurred, had no personal knowledge of the allegations against Employee other than the late injury report. Mr. Jordan, the immediate supervisor, did not testify at trial. No business records documenting the allegations of misconduct were authenticated or introduced into evidence. Based on this record, we are unable to conclude the evidence preponderates against the trial court's conclusion the Employee did not have a meaningful return to work.

Excessive Award

The trial court awarded a permanent partial disability of six times the medical impairment, the maximum permitted by Tenn. Code Ann. § 50-6-241(d)(2)(A). Employer contends the award is excessive. In support, Employer provides Employee is relatively young, completed two years of education beyond high school, worked in a white-collar job prior to his injury, and continues to do so after returning to the workforce.

The extent of an injured worker's permanent disability is a question of fact. *Lang v. Nissan North America, Inc*., 170 S.W.3d 564, 569 (Tenn. 2005) (citing *Jaske v. Murray Ohio Mfg. Co.,* 750 S.W.2d 150, 151 (Tenn. 1988)). 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 her capacity to work at the kinds of employment available in her disabled condition. Tenn. Code Ann. § 50-6-241(d)(2)(A); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990); *Robertson v. Loretta Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's 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).

In the present case, Employee's work history consisted of both manual and more skilled work. The permanent restrictions placed upon him by Dr. Standard effectively eliminated him from consideration for any types of employment requiring more than moderate exertion. Employee testified he continued to have pain in his lower back. The undisputed evidence showed Employee had a vigorous lifestyle prior to the injury at issue. Although he continued to participate in many activities, his testimony, as well as the testimony of his wife and mother, established his post-injury participation in those activities was substantially reduced. In its supplemental findings, the trial court noted Employee was limited in his ability to sit for extended periods of time and had difficulty sleeping due to back pain. We conclude the

evidence supported a range of potential permanent partial disability, and the trial court's award was not outside of that range.

Payment of Medical Expense of April 27, 2009

Employer also argues the trial court erred by requiring it to pay for the medical treatment administered by Mr. Caldwell to Employee on April 27, 2009, rather than granting the Motion to Stay pursuant to this appeal. Employer cites *Clifton v. Nissan North America,* No. M2008-01640-WC-R3-WC, 2009 WL 2502044 (Tenn. Workers Comp. Panel, Aug. 18, 2009), wherein the trial court required Nissan North America to pay an award for temporary total disability benefits pending appeal. The Panel ultimately decided in *Clifton* the trial court erred, but such error was harmless, as Nissan North America would receive a credit against the permanent disability portion of the judgment. As referenced in *Clifton v. Nissan North America,* Tennessee Rule of Civil Procedure 62.04 provides the appropriate procedure to obtain a stay on appeal. In the present case, Employer obtained a bond and a review of the record shows no evidence which would suggest exceptional circumstances limiting a stay. As such, we find the court erred, but, based on the facts of this case, the error was harmless.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Aramark, Indemnity Insurance of North America and their surety, for which execution may issue if necessary.

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DON R. ASH, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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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 will be paid by Aramark, Indemnity Insurance of North America and their surety, for which execution may issue if necessary.

PER CURIAM