IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 24, 2011 Session

COURIER PRINTING COMPANY ET AL. v. WANDA SIMS, EX REL ROBERT STEVE BLY ET AL.

Appeal from the Circuit Court for Rutherford County
No. 55576 J. Mark Rogers, Judge

No. M2010-01279-WC-R3-WC - Mailed - April 11, 2011
Filed - July 15, 2011

In this Workers' Compensation case, the trial court held that the employee had sustained a gradual injury to his lower back, and that he was permanently and totally disabled as a result of that injury. The employer has appealed, contending that the trial court erred by permitting the employee to use a physician who provided an impairment rating through the Medical Impairment Registry process as a medical expert on the issue of causation and by finding that the employee sustained a compensable injury. In the alternative, the employer contends that the trial court erred by awarding permanent total disability, and also in its alternative finding that the employee had proven three of the four elements set out in Tennessee Code Annotated section 50-6-242, and was thereby able to recover a permanent partial disability award in excess of six times the medical impairment.[1] We find no error and affirm the judgment.

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 E. RILEY ANDERSON, SP. J., joined.

John Thomas Feeney, Nashville, Tennessee, for the appellants, Courier Printing Company and Sentry Insurance.

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[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.

Van French, Murfreesboro, Tennessee, for the appellees, Wanda Sims, as power of attorney for Robert Steve Bly, and Robert Steve Bly.

MEMORANDUM OPINION

Factual and Procedural Background

Robert Steve Bly began working for Courier Printing Company ("Courier") in January 1988. He resigned in November 2006, alleging that he was no longer able to perform his job due to low back pain caused by an April 2006 work injury. This case presents unusual challenges because of Mr. Bly's mental status. The record contains a C-32 Standard Form Medical Report for Industrial Injuries from both Dr. James Walker, a neuropsychologist, and Dr. Greg Kyser, a psychiatrist, which establish that Mr. Bly had several intellectual disabilities from birth, including autism and mild mental retardation. He was essentially unable to read or write, and functioned socially at the level of a three year old child. He was able to live independently, however, had a driver's license and operated a motor vehicle. Both doctors were of the opinion that his mental and emotional conditions limited his ability to maintain employment. Mr. Bly was able to perform simple one- or two-step tasks, but was unable to work with the general public and would have difficulty getting along with supervisors and co-workers. He was not competent to manage his financial affairs. His mother managed his finances for him until her death in 2000. Thereafter, his aunt, Wanda Sims, provided that assistance, first pursuant to a power of attorney, and later as his appointed conservator.

Mr. Bly's mother worked for Courier for many years prior to her death. The evidence indicates that Mr. Bly was hired as a janitor as a favor to her. Later, he was a bindery assistant, working with another employee who operated a binding machine. His performance evaluations for the last two years of his employment, introduced through the testimony of his supervisor, state that he performed his job satisfactorily, but also that he frequently expressed dissatisfaction with either Courier or his job.

Mr. Bly had injured his back in 1995, when he fell from a dumpster at work. He received some medical treatment and returned to work. There is no indication that he sustained a permanent impairment after that injury. Histories given to subsequent physicians by Mr. Bly or his aunt indicate that he continued to experience pain after that event. Another event occurred in 2002. Mr. Bly alleged at that time that he had again injured his lower back. The claim was denied by Courier's insurance carrier, apparently due to questions about the date of the injury. Mr. Bly received treatment from Dr. T. Allen Polk. According to some of the records, and the testimony of Mr. Bly's aunt, either the physical therapy

recommended or the chiropractic treatment administered by Dr. Polk caused an increase in his pain and treatment was discontinued.

Mr. Bly testified that in April 2006:

> I just remember bending over -- I think I was doing the job where you have to pack all that paper in the gaylords[2] and constant bending over. I just had pain. Then I made a -- I told Donald [Griffin, Mr. Bly's supervisor] and then I called my aunt.

Later in April, Mr. Bly's aunt spoke with Rachel Latham, who worked in Courier's personnel department. An Employer's First Report of Injury was made. Mr. Bly's aunt testified that she and Ms. Latham arrived at an injury date of April 10 after some discussion. Mr. Bly was referred to a primary care clinic where medication was prescribed and an MRI was ordered. He was then referred to Dr. Robert Dimick, an orthopaedic surgeon, on June 14, 2006. Dr. Dimick testified by deposition. He believed that Mr. Bly had degenerative disc disease consistent with his age (fifty-two years at the time). Dr. Dimick found no evidence of an acute injury. He recommended physical therapy, assigned no impairment to Mr. Bly, and placed no restrictions on his activities.

Mr. Bly, through his aunt, applied for and received short-term disability benefits through Courier. During this time he sought treatment from his primary care physician. The evidence in the record concerning that course of treatment is limited. At the time Mr. Bly's disability payments ended, he and his aunt believed he was not capable of returning to his job at Courier because he was still experiencing back pain, and his job required repetitive lifting, bending and twisting. His aunt, after several discussions with Courier, submitted a letter of resignation on his behalf in November 2006.

Mr. Bly was evaluated by Dr. Walter Wheelhouse at the request of his attorney at the time.[3] Dr. Wheelhouse issued a report in which he assigned permanent impairment to Mr. Bly.[4] As a result of the discrepancy between Dr. Dimick's and Dr. Wheelhouse's findings, Courier initiated the Medical Impairment Registry process provided for in Tennessee Code

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[2]According to other testimony, a "gaylord" is a very large container used to hold and transport printed material.

[3]Employee later changed attorneys.

[4]Dr. Wheelhouse did not testify. A copy of his report was attached to the MIR report of Dr. David Gaw. The trial court did not consider that report in reaching its conclusions. We find that it acted correctly by doing so. See Arias v. Duro Standard Prods. Co., 303 S.W.3d 256, 262-63 (Tenn. 2010).

Annotated section 50-6-204(d)(5)-(6) (2008 and Supp. 2010). Dr. David Gaw was selected. His report, issued on December 10, 2007, was approved by the Department of Labor and Workforce Development. In his report, Dr. Gaw stated his opinion that Mr. Bly retained a 5% anatomical impairment to the body as a whole.

Suit was brought in the court below by Courier. After Mr. Bly filed a counterclaim averring he was permanently and totally disabled, Courier added the Tennessee Department of Labor and Workforce Development Second Injury Fund as a party defendant to the lawsuit. The Second Injury Fund filed a motion for summary judgment alleging, among other things, that Tennessee Code Annotated, section50-6-208(a)(1) does not apply to pre-existing mental disabilities. That Code section provides:

> If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, the employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation to which the employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to the compensation for a subsequent injury, and after completion of the payments for the subsequent injury, then the employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the second injury fund.

The trial court agreed this statute did not apply to pre-existing mental disabilities based upon Bryant v. Genco Stamping & Mfg. Co. 33 S.W. 3d 761 (Tenn. 2000) and granted summary judgment with regard to that issue. That ruling of the trial court has not been appealed.

The case was set for trial on January 27, 2009. The court and counsel had an extensive discussion concerning the evidence to be presented concerning causation. Mr. Bly made an oral motion for a continuance of the trial, which was granted. Mr. Bly then obtained new counsel. New counsel contacted Dr. Gaw to determine whether he had an opinion concerning the causation of Mr. Bly's injuries. He then took Dr. Gaw's deposition to be used as evidence at trial. At the outset of the deposition, counsel for Employer objected, arguing that it was improper, under the statute establishing the Medical Impairment Registry program, and under the rules of the program, Tenn. Comp. R. & Regs. 0800-02-20-.01 to -.17 (2006), for Dr. Gaw to testify concerning the issue of causation. Dr. Gaw agreed with Dr. Dimick's diagnosis that Mr. Bly had chronic degenerative disc disease. He testified that "increased stress on a degenerative back [such as repetitive bending, stooping and lifting]

would be more likely than not to cause an increase in pain." Concerning the types of work Mr. Bly was able to do, Dr. Gaw stated, "I would tell him he has a condition that's painful but not harmful and to find the easiest thing he can do to make a living." Prior to trial, Courier filed a motion in limine requesting that Dr. Gaw's testimony concerning causation be excluded from evidence for the same reasons given at the time of the deposition. The trial court overruled the motion and permitted the testimony to be introduced.

Mr. Bly was fifty-five years old on the date of the trial. He had attended school for only a few days in his lifetime. He was able to sign and read his name, but was otherwise illiterate. He testified that he was no longer able to perform his job for Courier because of back pain. His aunt testified that he was no longer able to mow his lawn, plant flowers or vegetables, ride his bicycle or go to concerts. She did not believe he was able to work.

The trial took place on several days, beginning in October 2009 and concluding in April 2010. The trial court issued its ruling from the bench. It held that Mr. Bly had sustained a compensable injury to his lower back. It found that he was permanently and totally disabled. It made an alternative ruling that, if he was found not to be permanently and totally disabled on appeal, he had proven three of the four elements listed in Tennessee Code Annotated section 50-6-242 (2008 & Supp. 2010) by clear and convincing evidence, and a permanent partial disability recovery would not be limited to six times the anatomical impairment pursuant to Tennessee Code Annotated section 50-6-241(d) (2008 & Supp. 2010). It made an alternative award of 100% permanent partial disability. Courier has appealed, contending that the trial court erred by admitting Dr. Gaw's causation testimony into evidence, and by finding that Mr. Bly sustained a compensable injury. In the alternative, Courier argues that the evidence preponderates against the trial court's finding that Mr. Bly is permanently and totally disabled, and also against the alternative ruling that Employee had sustained his burden under Tennessee Code Annotated section 50-6-242.

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. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). When 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 depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560,

571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. Admission of Dr. Gaw's Testimony

Courier's first contention is that the trial court erred by permitting the introduction of Dr. Gaw's testimony on the subject of causation. In support of that position, it makes specific reference to Tennessee Department of Labor and Workforce Development Rule 0800-02-20-.02(2), which states:

> Scope. The MIR Registry is available to any party with a dispute of the degree of medical impairment rating as defined herein for injuries or any occupational disease which occurred on or after July 1, 2005. The only aspect considered by a MIR Registry physician shall be the degree of permanent medical impairment.

In response, Mr. Bly contends that the above-referenced limitation applies only to the initial written report of the Medical Impairment Registry physician, and that there is no language in either the statute or regulations which prohibits a physician from testifying on other subjects, if called upon to do so by either party. The trial court relied upon the absence of a specific statutory prohibition in reaching its decision to admit the testimony.

This is an issue of first impression. As a starting point, we look to Williams v. United Parcel Serv., 328 S.W.3d 497 (Tenn. Workers' Comp. Panel 2010), a recent decision of the Special Workers' Compensation Appeals Panel which addressed the purpose and operation of the Medical Impairment Registry program. In that case, the Panel observed:

> The MIR report procedure in Tenn. Code Ann. § 50-6-204(d)(5) provides a process for obtaining a definitive medical examination by an independent medical examiner regarding the extent of an injured employee's impairment. As required by Tenn. Code Ann. § 50-6-204(d)(6), the Commissioner of the Department of Labor and Workforce Development has promulgated a comprehensive set of rules (1) establishing the qualifications for physicians to be included on the registry, (2) providing procedures for requesting an MIR evaluation, (3) defining the requirements for conducting the evaluations, (4) prescribing the form in which the recommendations must be submitted,

> (5) establishing the time within which the actions required by the statute must be taken, (6) setting the physicians' fees for the evaluations, and (7) prescribing the procedures for the review, acceptance, and distribution of the MIR reports by the Commissioner.

Id. at 502.

The regulations adopted by the Department of Labor and Workforce Development pursuant to Tennessee Code Annotated section 50-6-204(d)(6) explicitly note that the purpose of the program is to provide "high-quality independent medical impairment evaluations" concerning disputed issues of impairment. Tenn. Comp. R. & Regs. 0800-02-20-.02(1). To that end, the regulations limit the Medical Impairment Registry examiner's opinion in his or her report to the subject of impairment. Id. 0800-02-20-.02(2). They require an examiner to "[c]onduct MIR evaluations in an objective and impartial manner." Id. 0800-02-20-.05(2)(f). They prohibit the examiner from referring "any MIR Registry claimant to another specific physician for any treatment or testing nor suggest[ing] referral or treatment," or "becom[ing] the treating physician for the claimant regarding the work-related injury." Id. 0800-02-20-.05(g)-(h). In addition, an MIR examiner may "[n]ot evaluate an MIR Registry claimant if a conflict of interest exists." Id. 0800-02-20-05(i). "For each MIR Registry case assigned, [the examiner shall] address only the issue of permanent impairment rating." Id. 0800-02-20-.05(l). In addition to these restrictions, the regulations also prohibit communication between the examining physician and the parties prior to the evaluation. Id. 0800-02-20-.09(2).

We conclude that, viewed as a whole, these regulations demonstrate that neutrality, impartiality and independence of examining physicians are important to the success of the program. Those concerns are wholly consistent with the presumption of correctness attached to an examiner's findings, which may be overcome only by clear and convincing evidence. Tenn. Code. Ann. § 50-6-204(d)(5). To permit a party to contract with an MIR physician to provide testimony in support of that party's position concerning some other disputed issue in the case seems inconsistent with the appearance of neutrality, impartiality and independence.

We, however, are bound by the Tennessee Rules of Evidence. Rule 402, Tennessee Rules of Evidence, provides "[a]ll relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee." Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In the case before us, the record indicates that after Dr. Gaw had

filed his impairment report, he was contacted by Mr. Bly's attorney. Dr. Gaw was asked whether, based upon the examination he had already done, he was able to state an opinion as to the cause of Mr. Bly's injury. Dr. Gaw stated that he was and arrangements were made for the taking of his deposition. That evidence is certainly relevant and, as the trial court noted, there is no specific prohibition of the use of such evidence in the statute that created the Medical Impairment Registry or the rules which promulgate it. The trial court, therefore, was correct in its ruling that the deposition testimony of Dr. Gaw was admissible. Opinions stated by a Medical Impairment Registry physician on matters other than the degree of impairment do not carry the presumption of correctness afforded by the statute to the impairment rating. There, is no indication in the record before us that the trial court considered Dr. Gaw's opinion as to causation anything other than normal medical evidence.

2. Causation

Mr. Bly asserts that the record is sufficient to support the trial court's finding that he sustained a compensable injury, even in the absence of Dr. Gaw's testimony. He relies upon several statements made by Dr. Dimick during cross-examination. Dr. Dimick agreed that degenerative disc disease "is more likely to become painful or symptomatic for a person who's doing heavy lifting or physical labor that involves twisting and bending over than [for] a person who is doing sedentary work[.]" In response to a question whether it was "probable that [Mr. Bly's] degenerative condition was accelerated, exacerbated, or made worse as a result of his physical labor at work," Dr. Dimick stated, "It's a trade off. Most physicians recommend to their patients to be active, to maintain their health. Physical activity maintains structural health, bone health, circulatory health. . . . Heavy activity can be associated with earlier onset of symptoms, back pains." He was also asked if Employee's "work activities did cause him to be symptomatic," and answered that "I could agree with that to the degree of possibly, but I don't really have enough information to say it probably happened, or within medical probability."

Courier argues that this testimony and the testimony of Dr. Gaw, amounts to nothing more than evidence that Mr. Bly's work activities may have caused an increase in the painful symptoms he had been suffering for several years, and his injury was, therefore, not compensable. See Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 607 (Tenn. 2008).

We take note of the long-standing and familiar standards for evaluating causation issues. An "injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." Phillips v. A. & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). The trial court was required, as are we,

to resolve all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment in favor of the employee. Id.; Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Our courts have "consistently held that an award may properly be based upon medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury." Reeser, 938 S.W.2d at 692; accord Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999); P & L Constr. Co. v. Lankford, 559 S.W.2d 793, 794 (Tenn. 1978); GAF Bldg. Materials v. George, 47 S.W.3d 430, 432-33 (Tenn. Workers' Comp. Panel 2001).

That is the background against which the evidence in this case must be evaluated. That evidence demonstrates that Mr. Bly's job required frequent lifting, bending, and twisting. These activities can, according to Dr. Dimick, cause pre-existing spinal degeneration to become symptomatic and accelerate its course. While Dr. Dimick testified that he was unable to state with medical certainty that Mr. Bly's arthritic condition was accelerated by his work activities, he saw Mr. Bly on one occasion and did not review the records of Dr. E. C. Tolbert, Mr. Bly's personal physician, or other available medical records. Moreover, he recommended in his written report that Mr. Bly consider "alternative training" in order to avoid future injury which we view as an acknowledgment that Mr. Bly,s condition is likely to be aggravated by the type work he was doing. Dr. Gaw testified that the objective findings on the May 2006 MRI (an annular tear at L-4/L-5, foraminal narrowing, and a mild to broad disc bulge at L-4/L-5), coupled with Mr. Bly's complaints of pain were consistent with an aggravation of his pre-existing condition.

Clearly, Mr. Bly was able to perform his job adequately until some time in April 2006. He testified that, at that time, the pain in his lower back caused by bending and lifting activities became so severe that he was unable to continue. He reported the situation promptly to his supervisor. The trial court, Dr. Dimick, Dr. Gaw, Dr. Walker and Dr. Kyser all found Mr. Bly to be credible in his descriptions of symptoms and events. He has been unable to return to his prior activities since that date. Dr. Gaw testified there was no evidence in Mr. Bly's medical records that he had been viewed as being impaired as a result of the condition of his back prior to April 2006. Considering these factors in light of the applicable standards, we are unable to conclude that the evidence preponderates against the trial court's finding on this issue.

3. Permanent Total Disability

Courier asserts that the evidence preponderates against the trial court's finding that Mr. Bly is permanently and totally disabled. The gist of its argument appears to be that the trial court should not have considered Mr. Bly's pre-existing mental disabilities in its

assessment of the extent of disability caused by his work injury. This assertion is based upon a misapprehension of the law. Tennessee Code. Annotated section 50-6-241(d)(2)(A) requires courts to consider "all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." In order for a trial or appellate court to assess accurately the effect of a particular injury on an individual's ability to find and keep employment, it must take into account the employee's ability to find and keep employment prior to the injury. In the present case, there can be no realistic dispute that, even at optimal health, Mr. Bly was limited to a very narrow range of jobs by virtue of his inability to read and write, his ability to perform only simple one- or two-step tasks, and his difficulties in interacting with members of the public and co-workers because of his autism. He has an IQ of 67, writes at a kindergarten level, reads at a 1.4 grade level, performs math functions at a 2.3 grade level and has the communication and socialization skills of a three year old. Thus, even a relatively small reduction in his ability to perform physical labor would dramatically decrease the already small number of employment opportunities available to him. The lay testimony of Mr. Bly and his aunt, accredited by the trial court, provides a reasonable basis for the conclusion that he was no longer able to perform physical labor on a regular, sustained basis. Accordingly, we find that the evidence does not preponderate against the trial court's determination that Mr. Bly is permanently and totally disabled.

In light of the findings set out above, we find it unnecessary to address the remaining issues raised by Courier.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Courier Printing Company and Sentry Insurance, and their surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

COURIER PRINTING COMPANY ET AL. v. WANDA SIMS EX REL. ROBERT STEVE BLY ET AL.

Circuit Court for Rutherford County
No. 55576

No. M2010-01279-SC-WCM-WC - Filed - July 15, 2011

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Courier Printing Company and Sentry Insurance, pursuant to Tenn. Code Ann. § 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 and motion to join Second Injury Fund are not well-taken and are 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 Courier Printing Company and Sentry Insurance, and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

WILLIAM C. KOCH, JR., J., not participating