IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT MEMPHIS
June 19, 2017 Session

JONATHAN ENGLER v. ABLE MOVING COMPANY, ET AL.

Appeal from the Court of Workers' Compensation Claims
No. 2014-08-0022

No. W2016-02125-SC-R3-WC – Mailed September 29, 2017; Filed October 30, 2017

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. *See* Tenn. Sup. Ct. R. 51. Employee injured his back at work and subsequently developed a serious infection that required hospitalization and treatment. He filed a petition seeking to recover temporary total disability benefits and his medical expenses. The Court of Workers' Compensation Claims determined Employee "failed to prove by a preponderance of the evidence that he sustained a compensable injury primarily arising out of and in the course and scope of his employment." After reviewing the record and applicable authority, we affirm the judgment.

Tenn. Code Ann. § 50-6-225(a) Appeal as of Right;
Judgment of the Court of Workers' Compensation Claims Affirmed

RHYNETTE N. HURD, J., delivered the opinion of the court, in which HOLLY KIRBY, J. and JAMES F. RUSSELL, J., joined.

Richard Dolan Click, Memphis, Tennessee, for the appellant, Jonathan Engler.

Jared Seger Renfroe, Memphis, Tennessee, for the appellees, Able Moving Company and Benchmark Insurance Company.

OPINION

Background

Jonathan Engler ("Employee"), age forty-five at the time of the trial, is a high school graduate. After working as an electrician for fourteen years, he began working for Able Moving Company ("Employer"), a company his father owned. Employee's responsibilities included lifting, packing trucks, managing other employees, and doing "whatever else was needed."

On August 29, 2014, Employee, while moving a piano, felt a "pop" in his lower back. For several days, he experienced a "dull pain," which he treated with hot baths, muscle rub, ibuprofen, and rest. After he returned to work on September 2, 2014, the pain in his back worsened when he lifted heavy boxes. The next day, Employee developed a headache and a fever; he felt as if he were getting the flu or had a kidney stone. Although he took ibuprofen and an ice bath, he continued to have a high temperature.

On September 5, 2014, Employee called his primary care physician, Dr. Cary Finn, and reported his symptoms. Dr. Finn instructed Employee to go to the hospital. At the hospital, Employee's symptoms included back pain, left hip pain, and a high fever. After obtaining blood cultures and reviewing an MRI of Employee's spine, Dr. Finn and Dr. William Mason, an infectious disease doctor, determined Employee had diabetes and methicillin-resistant staphylococcus aureus ("MRSA"). They treated Employee with intravenous antibiotics for seven days and then released him with orders to continue the intravenous antibiotic treatments at home for six weeks. Employee later acknowledged he had a nasal abscess several months before suffering the staph infection and he had insect bites on his feet when he was admitted to the hospital. He testified he returned to work on October 31, 2014, and he continued to have some back pain. He also testified he had had no prior problems with diabetes.

Dr. Finn, who is board-certified in internal medicine, testified Employee presented at the hospital with "extreme left hip pain and high fever of 103 as well as acute low back pain." Blood cultures revealed Employee had "methicillin-resistant staph." An MRI indicated Employee had "paraspinal muscle inflammation" with "fluid signal intensity collections, which would suggest possibly an abscess." Employee was treated with antibiotics, which reduced his fever. Because Employee's fever went down, Dr. Finn did not order a biopsy to determine whether an abscess was present or any tests to determine where the infection originated. Dr. Finn stated, "[I]t was the lifting that caused [Employee's] back to end up

getting inflamed, infected, and then caused the bacteremia." He opined Employee's employment "contributed more than fifty percent in causing an injury which caused the staph infection [and] resulted in the need for . . . medical treatment." Dr. Finn acknowledged that developing a staph infection from inflammation "is not the most typical thing in the world," and "undiagnosed diabetes would be an increased risk factor" for infection.

Dr. Mason, who is board-certified in internal medicine and infectious diseases, testified Employee had back pain, a fever, and positive blood cultures. Employee reported "heavy lifting and moving," but "he denied any acute debilitating pain." Although a radiologist initially described the MRI as negative, Dr. Mason stated that "further review of the images show[ed] an ill-defined T2 hyperintensity in the medial aspects of the paraspinous muscles bilaterally, consistent with myositis." He explained that, because Employee "was complaining of low back pain, we were suspicious of some type of back infection." Employee was treated with intravenous antibiotics.

Dr. Mason opined Employee's work-related injury contributed more than fifty percent in causing his infection. He explained the injury caused inflammation in Employee's paraspinal muscles, which allowed the infection to develop. He further stated as follows:

> [M]y opinion would be that he had some type of either a microscopic tear or strain or stress to those particular muscles as a result of his lifting and moving without having acute debilitating back pain like a slipped disc or something, and it is my opinion that that particular issue is what led to . . . an infection to grab a hold and set up an infection in that area. . . ."

He acknowledged a staph infection can cause inflammation such as myositis.

Dr. Mason admitted diabetes can contribute to the development of an infection like MRSA, and that staph infections are most often contracted through skin and soft tissue infections or abscesses. He admitted no procedures were performed to determine whether Employee had an abscess. Although he acknowledged Employee had been treated for "infected chigger bites" two months before injuring his back, Dr. Mason did not detect an active infection. Dr. Mason stated "staph infections of this nature and bloodstream infections typically develop over the course of hours to maybe a day." He stated he has had patients who suffered a back injury followed by an infection and he sees such cases "once a month to every four months."

Following his release from the hospital, Employee selected Dr. James Varner from a panel of orthopedic physicians provided by Employer. After examining Employee on October 29, 2014, Dr. Varner determined Employee's symptoms had resolved, and he

released Employee to work with no restrictions. Dr. Varner's notes indicated Employee's lumbar strain "may have resulted in myositis with secondary staph infection or the other possibility is a primary staph infection with attendant symptoms while on the job." Dr. Varner could not state which possible scenario was applicable within a "reasonable degree of medical certainty."

Dr. Varner referred Employee to Dr. John Brophy, a board-certified neurosurgeon who examined Employee on December 15, 2014. According to Dr. Brophy, the MRI taken at the hospital indicated "signal changes in paraspinal muscles from L4 through S1 consistent with myositis." Although Dr. Brophy observed "degenerative changes with a disc bulge at L4-5 and L5-S1," he saw "no evidence of a herniated disc or nerve root compression." He found Employee had "back pain secondary to lumbar myositis" and that "the myositis is considered secondary to his new onset diabetes and recent MRSA sepsis." He stated Employee's work "did not contribute more than 50 percent to his need for hospitalization and treatment." Instead, he believed Employee's staph infection was "related to his diabetes" and "likely caused the myositis." Dr. Brophy explained he had never seen an infection result from lifting without a severe injury such as a "fall from a great height" or "[being] struck by a forklift."

Dr. Fereidoon Parsioon, a board-certified neurosurgeon, testified he reviewed Employee's medical records. The MRI of the lumbar spine showed "a small couple of bulges . . . without any impairment." The MRI did not reveal an abscess inside the spine, a ruptured disc, a fracture, or any impingement of the neurostructure. He stated Employee had "septicemia, which is a serious blood infection," but that "there was no finding on [the] MRI to support a source of infection or the origin of sepsis." Dr. Parsioon stated that "it is very common for diabetic people to get infection." He concluded within a reasonable degree of medical certainty that "it is not more likely than not that Employee's employment contributed more than fifty percent to the staph infection. . . ."

Dr. Michael Gelfand, a Professor of Medicine at the University of Tennessee and Chief of Infectious Diseases at the Methodist University Hospital, testified he reviewed Employee's medical records and concluded "within a reasonable medical certainty that [Employee's] infection . . . was not related to any accident or trauma on September 2, 2014." He explained as follows:

> [M]y conclusion was based on the fact that when [Employee] was initially evaluated in the hospital there was no history of trauma. It was denied by the patient when questioned and subsequently in Dr. Mason's deposition he confirmed that there was no divert episode of trauma such as distinct injury to the back or the episode where the patient informed anybody of the pain

> developing immediately.
>
> Moreover, if any trauma were to occur on [September 2], *it is medically improbable for the infection to manifest itself on [September 3] within 24 hours with a fever* because . . . it would take several days for [germs] to proliferate before they would manifest themselves with a clinical illness of fever, back pain and bacteremia.

(emphasis added). Dr. Gelfand stated that "the relationship between trauma and this infection is highly speculative and is really not supported by the general medical literature." In contrast, he noted that "diabetes is a well-recognized risk factor . . . and is viewed as such in the medical literature. . . ." In addition, he observed Employee's medical history included a nasal abscess approximately one month before his back injury and "infected skin lesions or insect bites" that had been treated with an antibiotic. He also observed that "diabetes is a well-recognized risk factor [for] basic staph infection."

After considering Employee's testimony and the medical evidence, the Court of Workers' Compensation Claims determined Employee "failed to prove by a preponderance of the evidence that he sustained a compensable injury primarily arising out of and in the course and scope of his employment" and denied Employee's request for temporary total disability benefits and medical expenses. Employee has appealed. After reviewing the record and applicable authority, we affirm the judgment.

Standard of Review

"Review of the workers' compensation court's findings of fact shall be de novo upon the record of the workers' compensation court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(a)(2). Factual findings relating to the credibility of witnesses and the weight to be given their in-court testimony are given considerable deference. *Richards v. Liberty Mut. Ins. Co.,* 70 S.W.3d 729, 733 (Tenn. 2002). 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 argues he established a compensable injury and was entitled to recover his medical expenses and temporary total disability benefits. Employer argues the Court of Workers' Compensation Claims correctly found the injury did not arise "primarily out of and in the course and scope of employment."

To be compensable, an employee must demonstrate an injury arose "primarily out of and in the course and scope of employment. . . ." Tenn. Code Ann. § 50-6-102(14). An injury "'arises primarily out of and in the course and scope of employment' only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes[.]'" *Id.* § 50-6-102(14)(B); *see also id.* § 50-6-239(c)(6) (stating that "employee shall bear the burden of providing each and every element of the claim by a preponderance of the evidence"). An injury causes the need for medical treatment "only if it has been shown to a reasonable degree of medical certainty that it contributed more than fifty percent (50%) in causing the death, disablement or need for medical treatment, considering all causes[.]" *Id.* § 50-6-102(14)(C). A reasonable degree of medical certainty "means that, in the opinion of the physician, it is more likely than not considering all causes, as opposed to speculation or possibility[.]" *Id.* § 50-6-102(14)(D).

Pursuant to statute, "[t]he opinion of the treating physician, selected by the employee from the employer's designated panel of physicians pursuant to § 50-6-204(a)(3), shall be presumed correct on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence." *Id.* § 50-6-102(14)(E). In addition:

> [i]n all cases where the treating physician has referred the employee to a specialist physician, surgeon, chiropractor or specialty practice group, the specialist physician, surgeon, or chiropractor to which the employee has been referred, or selected by the employee from a panel provided by the employer, shall become the treating physician until treatment by the specialist physician, surgeon, or chiropractor concludes and the employee has been referred back to the treating physician selected by the employee from the initial panel provided by the employer under subdivision (a)(3)(A).

Id. § 50-6-204(a)(3)(E).

As the lower court correctly observed, the physicians who testified in the present case are highly qualified and accomplished professionals. They agreed Employee was admitted to the hospital with back pain and a high fever. They also agreed Employee developed a serious infection that was appropriately treated by Dr. Finn and Dr. Mason with intravenous

antibiotics. Finally, they agreed Employee also had diabetes, which is a common source for infections. They disagreed, however, with respect to the key issue in this case: whether Employee sustained a compensable injury "primarily arising out of and in the course and scope of his employment."

Dr. Finn and Dr. Mason, who both treated Employee at the hospital, opined that Employee's employment "contributed more than fifty percent in causing an injury which caused the staph infection [and] resulted in the need for . . . medical treatment." In particular, Dr. Mason stated Employee's work-related back injury caused inflammation in Employee's paraspinal muscles that allowed the infection to develop. Both Dr. Finn and Dr. Mason acknowledged that, because Employee's fever abated when he was treated with antibiotics, they performed no additional tests to identify the source or origin of the infection. Although Dr. Mason has had other patients with similar conditions, Dr. Finn conceded it is not common to develop an infection from muscle inflammation.

In contrast, Dr. Brophy, a treating physician by virtue of his referral from Dr. Varner, testified Employee suffered "back pain secondary to lumbar myositis" and the myositis was "secondary to his new onset diabetes and recent MRSA sepsis." Dr. Brophy explained he had never seen an infection result from lifting without a severe injury, and he concluded Employee's work "did not contribute more than 50 percent to his need for hospitalization and treatment." He believed Employee's staph infection was "related to his diabetes."

In addition to being afforded a presumption of correctness as the treating physician, *see* Tenn. Code Ann. § 50-6-204(a)(3)(E), Dr. Brophy's opinion is buttressed by the conclusions of Dr. Parsioon, a neurosurgeon, and Dr. Gelfand, an infectious disease specialist. Dr. Parsioon testified Employee did not have an abscess inside the spine, a ruptured disc, a fracture or any impingement of the neuro-structure. He concluded Employee had a serious blood infection not caused by lifting. Similarly, Dr. Gelfand testified "within a reasonable medical certainty" that Employee's infection "was not related to any accident or trauma on September 2, 2014." He emphasized there was no evidence Employee suffered a traumatic injury and that, in any event, the "relationship between trauma and this infection is highly speculative and is really not supported by the general medical literature." He further explained an incident on September 2 would not have manifested in a fever within twenty-four hours.

Having carefully reviewed the evidence, we conclude Employee established his infection was *possibly* related to his work-related back injury. Evidence establishing a mere possibility, however, is insufficient to establish causation. We agree with the determination of the Court of Workers' Compensation Claims that Employee "failed to prove by a preponderance of the evidence he sustained a compensable injury primarily arising out of and

in the course and scope of his employment."

Conclusion

For the foregoing reasons, the judgment of the Court of Workers' Compensation Claims is affirmed. Costs are assessed to Employee, for which execution shall issue if necessary.

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RHYNETTE N. HURD, JUDGE

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

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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 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 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 assessed to Employee, Jonathan Engler, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM