IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
October 30, 2017 Session

JAMES GREEN v. KELLOGG COMPANIES, ET AL.

Appeal from the Court of Workers' Compensation Claims
No. 2015-08-0568 Robert V. Durham, Judge

No. W2017-00549-SC-R3-WC – Mailed January 18, 2018; Filed February 20, 2018

James Green ("Employee") alleged that he sustained a compensable injury in the course of his employment with Kellogg Companies ("Employer"). After a compensation hearing, the Court of Workers' Compensation Claims found that Employee did not sustain his burden of proof and dismissed the claim. Employee has appealed from that decision. 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.

Tenn. Code Ann. § 50-6-225(a) (2014 & 2017 Supp.) Appeal as of Right; Judgment of the Court of Workers' Compensation Claims Affirmed

WILLIAM B. ACREE, JR., SR.J., delivered the opinion of the court, in which ROGER A. PAGE, J. and DON R. ASH, SR.J., joined.

Shannon L. Toon and Christopher L. Taylor, Memphis, Tennessee, for the appellant, James Green

Thomas J. Smith and Lance W. Thompson, Nashville, Tennessee, for the appellees, Kellogg Companies, and Old Republic Insurance Company

OPINION

Factual and Procedural Background

James Green ("Employee"), fifty-eight, has worked for Kellogg Companies ("Employer") for twenty-eight years. Employee began as an "iron adjuster" and, for the last seventeen years, he has been a "wheel technician." Employee's job requires him to oversee a "wheel" of over one hundred waffle irons. He has to regulate the batter and heat, replace any irons that are working improperly, perform quality inspections, and periodically add "bits," i.e. small pieces of cinnamon or dried fruit to the batter. To add bits, Employee must use a pallet jack to bring in pallets holding boxes of bits weighing several hundred pounds to his station. Then, he must reach into the box and scoop the bits out with a bucket. After filling the bucket, he lifts it out of the box and carries it up several steps where he dumps it into a hopper that mixes the bits into the batter.

Employee testified that on November 14, 2014, he attempted to scoop bits from a box when he felt sudden and intense pain in his right shoulder. He testified that, while he had previously suffered from aches and pains in his shoulder, he had never experienced this type of pain, missed work, or sought treatment for his right shoulder. Employer offered no evidence to the contrary.

Employee testified that immediately after the incident, he reported it to his supervisors, Jason Jackson and Bill Nabors. They sent him to the company nurse, Pam Ewing. Employee completed an accident report, and Ms. Ewing gave him over-the-counter pain medication. Employee then returned to work and finished his shift.

The next day, Employee began work as usual, but his right-

shoulder pain became so intense that he again sought Ms. Ewing's assistance. She gave him aspirin, and he returned to his job. Employee stated this continued for several weeks. He would daily communicate with Ms. Ewing about his shoulder pain but continued to work full-duty, although with great difficulty and often requiring assistance from co-workers.

Employee testified that on January 21, 2015, he insisted Ms. Ewing provide him with medical treatment. Ms. Ewing provided a panel of physicians and informed Employee that Dr. Lloyd Robinson could see him quickly but that an appointment with one of the other doctors would result in some delay. Employee chose Dr. Robinson.

Employee saw Dr. Robinson, a family practitioner, the next day. In the medical history forms, Employee stated the injury occurred two months earlier, and he never had a similar injury in the past. In his records, Dr. Robinson noted that Employee complained of "acute pain" in his right shoulder after lifting buckets at work.

In his deposition, Dr. Robinson testified Employee did not advise him of a specific work injury occurring on November 14, but stated he suffered worsening right shoulder pain after lifting buckets at work. Dr. Robinson ordered x-rays and noted arthritic damage to Employee's right shoulder. He diagnosed Employee with a shoulder strain, placed him under restrictions, and ordered physical therapy, which the Employer's workers' compensation administrator did not approve.

Dr. Robinson eventually ordered an MRI that showed extensive arthritic damage in Employee's right shoulder. The MRI did not reveal a rotator cuff tear or evidence of an acute injury. At that time, Dr. Robinson opined Employee's underlying arthritis was the primary cause of his symptoms and that it was not a work-related condition. Then, Dr. Robinson released Employee to seek treatment with his primary care

physician. In his deposition, Dr. Robinson stated:

> Q: Okay. Let me ask you about your opinion as to this Mr. Green's injury. In your opinion is it more likely than not that Mr. Green's work at Kellogg contributed more than 50 percent as opposed to speculation or possibility in causing the need for the right shoulder replacement considering all causes?
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> MR. TOON: Objection.[1]
>
> A: At this point in time retroactively or in retrospect I do feel though that the pain that he had was contributed by less than 50 percent by his employment and given the severity of the arthritis that he had.
>
> BY MR. SMITH:
>
> Q: Okay. In saying that do you find that the underlying pre-existing osteoarthritis was the primary cause or was more than 50 percent of the cause?
>
> A: Yes.

Dr. Robinson was not asked and did not give testimony as to an aggravation of the preexisting arthritic condition.

Dr. Robinson discontinued his treatment of Employee after concluding Employee did not suffer a work-related injury. Employer offered no additional treatment.

Employee testified he did not believe Dr. Robinson would provide substantive treatment for his shoulder; therefore, he saw his family practitioner, Dr. Lee McCallum, about a week after he began seeing Dr.

[1] The objection was not raised at trial and was not ruled upon by the trial judge.

Robinson. Dr. McCallum noted, Employee stated the pain began a week earlier when he was "picking up a pail and heard a 'pop.'" Dr. McCallum eventually referred Employee to Dr. Kenneth Weiss, an orthopedist, for specialized treatment. At the time of his referral, Dr. McCallum diagnosed Employee with a "repetitive motion injury" and stated it "seems to be work-related to me."

At Employee's initial visit, Dr. Weiss noted that Employee stated he had a "long history" of shoulder pain, claiming, "it has been hurting through the years." First, Dr. Weiss attempted conservative care. Then, on September 14, 2015, he performed a right-shoulder replacement. He subsequently wrote a letter opining the following:

> Employee is a patient of mine. We have been treating him for his right shoulder pain with glenohumeral arthrosis. We do feel that the diagnosis from which we are treating him is compatible with his duties that he was performing while at [Employer]. We do feel that the shoulder issues and his glenohumeral arthrosis, which required surgery, is consistent with or at least exacerbated by his repetitive pushing, pulling and lifting the arm while at work.

Employee worked full-duty at full pay until his surgery. After surgery, he remained off work until December 27, 2015, when he returned to full-duty with no restrictions. Employee testified he continues to work at Employer as a wheel technician with no restrictions, albeit with some difficulty. He lacks full range of motion in his shoulder and frequently experiences pain as well as numbness and tingling in his right shoulder and arm.

Employee entered the C-32 Medical Report of Samuel Chung, D.O., into evidence. At the request of Employee, Dr. Chung performed an independent medical examination. Dr. Chung's medical reports

provide, in part:

> 6. Considering the nature of Claimant's occupation and medical history along with diagnosis and treatment, does this injury more probably than not arise out of the claimant's employment?
>
> Yes_X_ No___
>
> QUESTION: What is your opinion as to whether the employee's injury "arises primarily out of and in the course and scope of employment" meaning a preponderance of the evidence supports that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes?
>
> _X_Yes, it is ___No, it isn't

Dr. Chung did not place any specific weight restrictions on Employee's right-shoulder use but did recommend he limit climbing, balancing, and working overhead or away from his body. He opined Employee sustained a 14% impairment to the body as a whole pursuant to the AMA Guides, Sixth Edition, as a result of his right-shoulder injury.

Procedural Background

After receiving this evidence, the trial court took the case under advisement. A compensation order was entered on January 19, 2017. The trial court first determined that Dr. Robinson was an authorized treating physician, and his opinion that Employee's shoulder problems were primarily caused by preexisting arthritis was entitled to a presumption of correctness pursuant to Tennessee Code Annotated

section 50-6-102(14)(E) (2017 Supp.).[2] The court then examined the C-32 of Dr. Chung and found it to be unpersuasive. The court set out several reasons for that conclusion. It noted that the C-32 medical report was less effective than Dr. Robinson's deposition because the opinions in the C-32 were not subject to explanation or cross-examination. The court found that, because Dr. Chung is an osteopath, his opinions carry less weight than those of a medical doctor. The court further pointed to clear mistakes in Dr. Chung's report concerning temporary disability and maximum medical improvement "that did little to create confidence in its reliability." The section of the form that was used recited the standard of proof for causation applicable to injuries occurring prior to July 1, 2014. The addendum to the report recited the correct standard, but it was unsigned, and the wording of the operative question was confusing at best.

The trial court further held that the opinions contained in the medical records of Dr. McCallum and Dr. Weiss, stating that Employee's symptoms were consistent with his job duties, did not satisfy the primary cause standard applicable to injuries occurring after July 1, 2014. For those reasons, the trial court denied Employee's claim. Employee has appealed, and the appeal has been assigned to this Panel in accordance with Tennessee Supreme Court Rule 51.

Analysis

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(a) (2014 & 2017 Supp.), which provides that "[r]eview 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

[2] The relevant portion of the current statute is identical in substance and language to the one that was in effect at the time of Employee's injury. Because the only change in the cited section is the numbering, we cite to the current version of the Tennessee Code.

is otherwise." As the Supreme Court has observed many times, reviewing courts 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 the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

At the outset, we observe that the trial court incorrectly stated the ultimate issue in this case to be "whether or not Mr. Green's arthritis in his right shoulder was primarily caused by his employment at Kellogg." Employee and Employer agreed with the court's assessment of the ultimate issue. Arthritis is an inflammation of the joints and develops over a period of time. It can be exacerbated by an injury, but not immediately caused by such. However, the issue of whether the November 14, 2014, incident caused a compensable aggravation of the underlying arthritic condition was not addressed at the trial by medical evidence as required by statute. Consequently, that issue is not before this panel.

In essence, this appeal presents a single issue, causation. Causation is a fact issue, and we review it according to the standard set out in Tennessee Code Annotated section 50-6-225(a). See Hall v. Am. Freight Sys., Inc., 687 S.W.2d 713, 713 (Tenn. 1985). In all but the most obvious cases, causation must be established by expert medical evidence. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). When a trial court is presented with conflicting medical testimony "'it is within the discretion of the trial judge to conclude that

the opinion of certain experts should be accepted over that of other experts and that [the accepted opinion] contains the more probable explanation.'" Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991) (quoting Hinson v. Wal–Mart Stores, Inc., 654 S.W.2d 675, 676–77 (Tenn. 1983)).

The statutory standard of proof regarding causation is:

> (14) "Injury" and "personal injury" mean an injury by accident, a mental injury, occupational disease including diseases of the heart, lung and hypertension, or cumulative trauma conditions including hearing loss, carpal tunnel syndrome or any other repetitive motion conditions, arising primarily out of and in the course and scope of employment, that causes death, disablement or the need for medical treatment of the employee; provided, that:
>
> (A) An injury is "accidental" only if the injury is caused by a specific incident, or set of incidents, arising primarily out of and in the course and scope of employment, and is identifiable by time and place of occurrence, and shall not include the aggravation of a preexisting disease, condition or ailment unless it can be shown to a reasonable degree of medical certainty that the aggravation arose primarily out of and in the course and scope of employment;
>
> (B) 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;
>
> (C) An injury causes death, disablement or 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;

(D) "Shown to 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;

(E) The 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[.]

Tenn. Code Ann. § 50-6-102(14).

In this case, there are four sources of medical evidence: the records of Dr. McCallum; the deposition of Dr. Robinson; the C-32 medical report of Dr. Chung; and the records of Dr. Weiss.

In his deposition, Dr. Robinson testified that the MRI showed severe arthritis in Employee's shoulder but no evidence of an acute injury. He implicitly considered arthritis to be a preexisting condition that arose gradually prior to November 2014. The severity of the arthritis led Dr. Robinson to conclude that Employee's work contributed less than 50% to his need for medical treatment. Employee had the opportunity to explore the bases of that opinion during cross-examination and to question the doctor about an aggravation, but he did not do so.

Pursuant to Tenn. Code Ann. § 50-6-102(14)(E), Dr. Robinson's opinion is entitled to a presumption of correctness. The burden was upon Employee to refute that opinion by a preponderance of the evidence.

Employee sought to refute Dr. Robinson's opinion with medical

records from Drs. McCallum, Weiss, and Chung. We find it unnecessary to analyze the relative qualifications of the three, other than to note that all were qualified to express expert opinions on the subject of causation.

On the causation issue, in his records, Dr. McCallum opined that the injury "seems to be work-related." Dr. McCallum did not offer further opinions through a deposition or in-court testimony.

At Employee's initial visit, Dr. Weiss noted that Employee stated he had a "long history" of shoulder pain, claiming, "it has been hurting through the years." After performing a right-shoulder replacement on September 14, 2015, Dr. Weiss opined that Employee's shoulder injuries were compatible with his work duties and "consistent with or at least exacerbated by his repetitive pushing, pulling and lifting the arm while at work."

Dr. Chung's opinions were presented by means of a C-32 medical report. In his report, Dr. Chung opined that Employee's employment contributed more than 50% in causing the injury.

The records of Drs. McCallum, Weiss, and Chung offer no foundation or explanation for each doctor's opinions or observations relating to causation. Dr. McCallum and Dr. Weiss's records do not address the statutory language in Tennessee Code Annotated section 50-6-102(14)(B), which requires Employees to show, by a preponderance of the evidence, that their employment contributed more than fifty percent (50%) in causing an injury, considering all causes. Thus, the records of Dr. McCallum and Dr. Weiss are not sufficient to rebut the presumption of correctness afforded to Dr. Robinson, the treating physician.

Dr. Chung's records included a preprinted form containing the statutory language in Tennessee Code Annotated section 50-6-

102(14)(B). The form was unsigned. Someone marked a box which stated the Employer contributed more than fifty percent (50%) in causing Employee's injury. However, we find that the statement in the unsigned and unexplained form, which was an addendum to the report, does not have the degree of trustworthiness or reliability necessary to rebut the presumption of correctness of the treating physician's opinion as to causation.

Conclusion

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

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WILLIAM B. ACREE, JR., SENIOR JUDGE

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

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From the Court of Workers' Compensation Claims
No. 2015-08-0568

No. W2017-00549-SC-R3-WC – Filed February 20, 2018

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 Appellant James Green, and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM