IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 23, 2011 Session

STERLING EDWARD HUBBARD v. SHERMAN-DIXIE CONCRETE INDUSTRIES, INC. ET AL.

Appeal from Chancery Court for Hamilton County
No. 09-0025 W. Frank Brown, III, Chancellor

E2010-02219-WC-R3-WC MAILED JULY 26, 2011/FILED OCTOBER 18, 2011

Pursuant to Tennessee Supreme Court Rule 51 and Tennessee Code Annotated Section 50-6-225(e)(3), this appeal has been referred to the Special Workers' Compensation Panel. In this instance, an employee was injured when he tripped and fell over boxes while loading a truck. The employer, who contended that the injury was an aggravation of a pre-existing condition, requested two independent medical evaluations, the second of which the employee refused to attend. The trial court denied the employer's motion to compel the second evaluation and, ultimately, awarded workers' compensation benefits. In this appeal, the employer contends that the trial court erred by failing to compel a second evaluation, by awarding benefits to the employee, and by failing to apportion liability to the Second Injury Fund. We affirm the judgment.

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

GARY R. WADE, J., delivered the opinion of the court, in which JON KERRY BLACKWOOD, SR. J., and JERRI S. BRYANT, SP. J., joined.

Thomas O. Sippel and James F. Exum, III, Chattanooga, Tennessee, for the appellant, Sherman-Dixie Concrete Industries, Inc. and CNA Insurance Company.

Michael A. Wagner, Chattanooga, Tennessee, for the appellee, Sterling Edward Hubbard.

Robert E. Cooper, Jr., Attorney General and Reporter, and Alexander S. Rieger and Joshua Davis Baker, Assistant Attorneys General, for the appellee, Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

In 2004, Sterling Edward Hubbard (the "Employee") was employed by Sherman-Dixie Concrete Industries, Inc. (the "Employer") as a truck driver. As a part of his employment, the Employee was responsible for loading and unloading heavy concrete pipes.[1] He used several heavy-duty tools for loading, securing, and unloading the pipes. Over a two-year period, the Employee neither missed a day of work nor complained about the heavy lifting requirements of his job.

On September 11, 2006, the Employee arrived at work before daylight. While walking from the cab to the back of his truck, he tripped and fell over two boxes, landing on his knee and twisting his back. Although the Employee was taken to the hospital, treated, and released, he was unable to get out of bed the next morning. When he contacted his supervisor, he was directed to the Employer's insurance carrier. The Employee eventually returned to work. He underwent knee surgery on May 24, 2007.

The Employee received treatment for the injuries sustained in the fall by several physicians, including Dr. Thomas Brown, who treated the knee injury, Drs. David Lowry and Richard Pearce, who treated the lower back injury, Dr. Steven Musick, and Dr. Steven Sanders. Dr. Musick, an orthopaedic surgeon, first examined the Employee four months after the surgery and found numerous infirmities, including L3-4 spondylolisthesis, degenerative lumbar disc disease, and, significantly, hypermobility of L3-4 in Employee's lower back. After reviewing the x-rays taken earlier by Drs. Pearce and Lowry,[2] Dr. Musick first determined that the Employee had a 20% impairment rating to the body as a whole for the back injury and later concluded that the combination of his knee and back injuries resulted in a 23% impairment to the body as a whole.

In 2009, the Employee filed this suit for workers' compensation benefits, claiming permanent and total disability. Prior to trial, the Employer asked that the Employee submit to two independent medical evaluations, first with Dr. David Gaw, an orthopaedic surgeon, and second with Dr. Mckinley Lundy.[3] The Employee was examined by Dr. Gaw, but

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[1] The trial court's memorandum opinion describes the lightest concrete pipe as eighty-four pounds. The transcript of the Employee's testimony reflects that the smallest pipe was eight-hundred-forty pounds.

[2] Drs. Lowry and Pearce were the initial treating physicians for the Employee's lower back injury. On November 8, 2006, after an initial examination of the Employee and a review of x-rays taken that day, Dr. Lowry found the same hypermobility at L3-4 as Dr. Musick later reported. Dr. Pearce referred the Employee to Dr. Musick for pain management.

[3] The record refers to Dr. Lundy only as "not an orthopedic surgeon."

declined an examination by Dr. Lundy. Afterward, the trial court denied the Employer's motion to compel the Employee to undergo the second independent evaluation.

At trial, the Employee, who was fifty-two years old at the time, testified that he was a high school graduate whose prior work record was almost exclusively as a truck driver. He stated that when he applied for employment in 2004, he disclosed to the Employer prior job-related injuries to his knee and back. In 1995,[4] while working as a truck driver in Texas, the Employee fell while lifting a 400-pound television, injuring his knee and middle back. Later, in 2003, he suffered a neck injury when a trailer decoupled from his truck and smashed into the cab; he received an 8% permanent medical impairment rating and settled his claim for benefits founded upon a 35% vocational disability.

The Employee admitted to having pain in his mid-back and neck as a result of the 1995 and 2003 injuries. Some eight months prior to the injury at issue, the Employee made an appointment with Dr. Jay Jolley for continuing pain from the 2003 injury, complaining specifically of pain in his neck. The clinic's intake form, which the Employee signed but did not fill out, reflects that he had general pain in his back. As to the lower back, tests performed by Dr. Jolley showed normal pain responses, no obvious spinal deformities, no gait abnormalities, and no muscle tenderness. The Employee further admitted that he sought treatment from a chiropractor and received injections in his back, but he denied having any injury to the lower portion of his back before his fall in 2006. He testified that the strenuous labor involved in his work for Employer occasionally caused him neck pain associated with the 2003 injury and "normal" aches and pains in his lower back, but had never interfered with his ability to perform his work duties.

Two vocational experts, Michael Galloway and Mark Boatner, testified that because narcotic treatment was required to control the pain associated with the 2006 injuries, the Employee would be unable to work as a truck driver in the future. Each expert also testified that based upon Dr. Musick's findings, it would be unlikely that Employee could perform even sedentary work. According to these experts, the severity of the pain and Employee's level of education combined to establish a 100% vocational disability.

Cynthia Dilse, who testified for the Employer by deposition, had responsibility for interviewing applicants and hiring for the Employer. Ms. Dilse indicated that the Employee had informed her when he was hired that his prior injuries, including the neck injury sustained in 2003, had resolved and that he was capable of performing the tasks the job required. She also testified that prior to the 2006 injury, he was able to do everything that was asked of him.

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[4] Although there is no dispute that the Employee suffered this prior injury, the record contains references to the injury as occurring in 1993 or 1995.

Dr. Gaw testified by Form C-32. After examining the Employee and reviewing some of the x-rays, he noted injuries to the knee and back, including L3-4 spondylolisthesis and degenerative lumbar disc disease, and assigned an impairment rating of 8% to the body as a whole for the back injury and 12% to the body as a whole when combined with the knee injury. Dr. Gaw reported that the "accident of 9-11-06 did not cause [the Employee's] back condition," although, his answer to whether "the injury more probably than not [arose] out of the claimant's employment" was equivocal. He reported that the fall may have aggravated a preexisting condition, but noted that he did not see any evidence of an advancement of the Employee's lower back condition based upon the imaging studies he had at his disposal. Dr. Gaw did not have access to the x-rays ordered by Drs. Pearce and Lowry.

The trial court accredited the Employee's testimony regarding his prior back pain, observing that there was a distinction between normal lower back pain associated with his job and a lower back injury. After specifically accrediting Dr. Musick's findings because of the lengthy period of his treatment of the Employee and taking into account that Dr. Gaw had seen the Employee only one time, the trial court found that the Employee had suffered total permanent disability from the 2006 fall without regard to any prior injuries.

Standard of Review

In workers' compensation cases, the standard of review of a trial court's findings of fact is de novo on the record of the trial court accompanied by a presumption of correctness of these findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When the issues involve credibility determinations and the weight afforded to testimony, considerable deference should be given to the trial court, as it has seen and heard the witnesses. Wilhelm v. Krogers, 235 S.W.3d 122, 126-27 (Tenn. 2007). When the issue involves expert medical testimony by deposition within the record, the reviewing court may draw its own conclusions as to the testimony's weight and credibility. See Crew v. First Source Furniture Grp., 259 S.W.3d 656, 665 (Tenn. 2008). "A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness." Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 642 (Tenn. 2008). "Although workers' compensation law must be construed liberally in favor of an injured employee, it is the employee's burden to prove causation by a preponderance of the evidence." Crew, 259 S.W.3d at 664. Expert testimony must be considered in conjunction with the testimony of the employee as a lay witness. Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008); Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991).

Analysis

1. Denial of the Motion to Compel

The Employer first argues that the trial court abused its discretion by denying the motion to compel the Employee to undergo a second independent medical evaluation, relying on the holding in Myers v. Vanderbilt University, No. M2008-02009-WC-R3-WC, 2010 WL

1854141 (Tenn. Workers' Comp. Panel May 11, 2010). In Myers, a nurse had developed a latex allergy while working for Vanderbilt Hospital. Id. at *1-2. Her allergy was so severe that even airborne powder from latex gloves would cause her to have a reaction. Id. at *3. With the cooperation of her employer, she was examined by three separate physicians in an attempt to remedy the condition. Id. at *5. After the nurse claimed workers' compensation benefits, she initially agreed to submit to an independent medical evaluation. Id. at *4. When she chose to withdraw her consent, her employer filed a motion to compel, which the trial court denied. Id. at *3. On appeal, the Panel vacated and remanded, holding that the trial court had abused its discretion. Id. at *8. The Panel explained that a cooperative and willing employer who had acquiesced to its employee's choice of physicians should not be denied an evaluation of the employee by a physician of its choosing, so long as the request was reasonable under the circumstances. Id. at *5.

Trial courts have discretionary authority to determine whether the request for an examination is reasonable, due to the many and varied situations in which it can arise. Tibbals Flooring Co. v. Marcum, 404 S.W.2d 498, 500 (Tenn. 1966). The denial of an employer's motion to compel, therefore, is reviewed under an abuse of discretion standard. Overstreet v. TRW Commercial Steering Div., 256 S.W.3d 626, 639 (Tenn. 2008) (citing Tibbals, 404 S.W.2d at 500). "The abuse of discretion standard contemplates that before reversal the record must show that a judge 'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" State v. Ferrell, 277 S.W.3d 372, 378 (Tenn. 2009) (quoting State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999)).

The right of an employer to have an employee submit to an independent medical evaluation is governed by Tennessee Code Annotated section 50-6-204(d)(1) (2008 & Supp. 2010), which provides as follows:

> The injured employee must submit to examination by the employer's physician at all reasonable times if requested to do so by the employer, but the employee shall have the right to have the employee's own physician present at the examination, in which case the employee shall be liable to the employee's physician for that physician's services.

Our Supreme Court has recently observed that a plain reading of section 50-6-204(d)(1) "gives the employer a right to compel the employee to undergo an independent medical evaluation, so long as the request is 'reasonable.'" Overstreet, 256 S.W.3d at 636. In Overstreet, the Court quoted with approval language appearing in Trent v. American Service Co., 206 S.W.2d 301, 303 (Tenn. 1947):

> The purpose of the provision . . . whereby the injured employee must comply "with any reasonable request for an examination" "at all reasonable times" is obviously for the purpose, among others, of furnishing to the employer a fair means of ascertaining if and when the employee has entirely recovered from the injury for which the employer is paying compensation or of ascertaining whether the ailments from which the employee suffers at some period subsequent to the injury is due to that injury or some other cause not connected with his or her employment.

Overstreet, 256 S.W.3d at 636-37.

In our view, Myers is distinguishable on the facts and does not control under the circumstances before us. Here, as in Myers, the Employee had chosen several initial treating physicians. Unlike Myers, however, the Employee agreed to an independent medical evaluation by a physician of the Employer's choosing. Dr. Gaw, the physician who administered the examination, served as a witness, providing a report favorable to the Employer. The trial court listed specific reasons for denying the request for a second examination: first, because the Employee had already seen several physicians whose medical records were available to the Employer, it was unlikely that any new information would develop from the additional examination; and, second, the independent medical evaluation with Dr. Lundy could not be scheduled until May 24, 2010, only a few weeks before the trial date. Because these qualified as plausible grounds for the denial of the motion, we cannot hold that the trial court abused its discretionary authority.

2. Aggravation of Prior Injury and Second Injury Fund

The Employer next argues that the trial court erred by concluding that the injury was not an aggravation of a preexisting injury, and, further, that if the injury did preexist, the Second Injury Fund (the "Fund") would have some responsibility for the benefits awarded. See Tenn. Code Ann. § 50-6-208 (2008). Both the Employee and the Fund claim that because the Employee was rendered permanently and totally disabled as a result of the 2006 injury without regard to his previous injuries, the trial court correctly assigned liability only to the Employer.

A. Preexisting Condition

The Employer contends that the trial court erroneously found that the Employee was an "honest man" and inappropriately relied on Dr. Musick's report when it concluded that the Employee's past lower back pain was not indicative of a prior injury. In support of its arguments, the Employer cites the intake form for Dr. Jolley, the Employee's testimony in a prior deposition where he described pain in three places in his back, and Dr. Gaw's opinion that the pain was an aggravation of a preexisting injury.

In Trosper, the Supreme Court reiterated the applicable legal standard in Tennessee regarding compensability of injuries related to preexisting conditions, stating

> that the employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable.

273 S.W.3d at 607.

The trial court found that the Employee had specifically acknowledged that his upper and mid back injuries stemmed from the 2003 incident, but had denied any lower back injury prior to the fall at work on September 11, 2006. The Employee's testimony was consistent with the examination performed by Dr. Jolley, which the trial court deemed "essentially negative" as to whether there was a preexisting injury to the lower back. Further, the trial court found that the Employee's characterization of his previous lower back pain was "normal pain" associated with heavy labor, as opposed to pain associated with a prior "injury."

It is clear from the trial court's memorandum opinion that the hypermobility x-rays were central to its finding that the Employee's injury was not merely an aggravation of a preexisting injury, but a new, compensable injury. Dr. Musick and Dr. Gaw both found that the Employee suffered from L3-4 spondylolisthesis and degenerative lumbar disc disease; however, their opinions diverged on the finding of hypermobility of L3-4. Dr. Gaw reported that he found nothing in the records he reviewed to support Dr. Musick's impairment rating. That testimony is not inconsistent with Dr. Musick's, as Dr. Gaw did not have access to the x-rays reviewed by Dr. Musick, which indicated hypermobility. In contrast, Dr. Musick's report is consistent with Dr. Jolley's examination and his finding that the Employee showed normal pain response in the lower back. Finally, Ms. Dilse confirmed that the Employee never had any difficulty performing his duties prior to the 2006 injury. In short, the evidence does not preponderate against the trial court's finding that the Employee's lower back injury was a subsequent, compensable injury.

B. Second Injury Fund

A related question is whether the trial court erred by failing to apportion partial liability to the Fund. Tennessee Code Annotated section 50-6-208 governs the Fund[5] and

[5] The Second Injury Fund is designed to encourage the employment of workers who have prior injuries or disabilities. Reagan v. Am. Policyholders' Ins. Co., 842 S.W.2d 249, 250 (Tenn. 1992). The

provides that injuries that occur on or after July 1, 2006, are to be adjudged according to section 50-6-208(a). See Tenn. Code Ann. § 50-6-208(b)(1)(D). Under the terms of the statute, the trial court must determine the level of disability from the second injury without consideration of the first. Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 (Tenn. 2001);[6] see also Perry v. Sentry Ins. Co., 938 S.W.2d 404, 407 (Tenn. 1996). Tennessee Code Annotated section 50-6-208(a)(1) provides for benefits from the employer "only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered."[7] See also Bomely v. Mid-Am. Corp., 970 S.W.2d 929, 934 (Tenn. 1998) (observing that under subsection (a), "the employer pays only for the disability that results from the subsequent injury that rendered the employee permanently and totally disabled, without consideration of any prior injuries"); accord Perry, 938 S.W.2d at 407-08. "Subsection (a) . . . also requires the employer to have had actual knowledge of the employee's prior permanent physical disability prior to the subsequent injury." Bomely, 970 S.W.2d at 934 n.7 (citing Burris v. Cross Mountain Coal Co., 798 S.W.2d 746, 748 (Tenn. 1990)).

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purpose is "to encourage the hiring of the disabled by guaranteeing that employers will not be held liable for the effects of pre-existing conditions in cases of permanent total disability." Hollingsworth v. S & W Pallet Co., 74 S.W.3d 347, 355 (Tenn. 2002).

[6] In Allen, our Supreme Court observed that "the trial court could find that the second injury was so devastating that it would have caused a 100 percent permanent total disability even if the employee had never suffered the first injury, in which case 100 percent disability can be found for the second injury even though a 70 percent award has already been made to the same employee." 36 S.W.3d at 77 n.4.

[7] Before considering the liability of the Fund, section 50-6-208(a) requires the following threshold conditions be met:

> (1) the injured employee must have previously sustained a permanent physical disability from any cause or origin, Tenn. Code Ann. § 50-6-208(a)(1);
>
> (2) the injured employee must have become permanently and totally disabled through a subsequent work-related injury, Tenn. Code Ann. § 50-6-208(a)(1);
>
> (3) the injured employee's employer must have had actual knowledge of the employee's preexisting permanent disability before the subsequent work-related injury, either when the employee was hired or when the employee was retained in employment after the employer acquired actual knowledge of the employee's preexisting permanent disability, Tenn. Code Ann. § 50-6-208(a)(2); and
>
> (4) the injured employee must work for an employer who has "properly insured" its workers' compensation liability or has qualified to operate as a self-insurer, Tenn. Code Ann. § 50-6-208(a)(2).

Seiber v. Reeves Logging, 284 S.W.3d 294, 300 (Tenn. 2009).

It is undisputed that the Employee had suffered a previous permanent physical disability of which Employer was aware; therefore, the trial court needed only to focus on whether the Employee became permanently and totally disabled from a subsequent injury and the extent of disability that stemmed from that injury. The record shows that both vocational experts agreed that based upon Dr. Musick's assessment of a 23% impairment to the body as whole, the Employee was permanently and totally disabled as a result of the second injury, absent any consideration of the prior injury or injuries. We have found no basis to reverse the trial court's reliance on Dr. Musick's disability assessment. Under these circumstances, the Employer is fully responsible for the award of benefits.

Conclusion

The trial court did not abuse its discretionary authority by denying the Employer's request for a second independent medical evaluation. Further, the evidence does not preponderate against the trial court's determination that the Employee suffered permanent and total disability as a result of the 2006 injury and that the Employer is fully responsible for the award of benefits. Costs of this appeal are assessed against the Employer, Sherman-Dixie Concrete Industries, Inc., for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STERLING EDWARD HUBBARD v. SHERMAN DIXIE CONCRETE INDUSTRIES, INC., ET AL

Chancery Court for Hamilton County
No. 090025

No. E2010-02219-SC-WCM-WC-FILED-OCTOBER 18, 2011

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Sherman Dixie Concrete Industries, Inc., et al, 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 is not well-taken and is 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 Sherman Dixie Concrete Industries, Inc., et al, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

WADE, Gary R., J., Not Participating