IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 18, 2017 Session

JAMIE JORDAN v. CITY OF MURFREESBORO

Appeal from the Circuit Court for Rutherford County
No. 68478 Howard W. Wilson, Chancellor

No. M2016-02446-SC-R3-WC – Mailed November 22, 2017
Filed December 28, 2017

Jamie Jordan ("Employee") is employed by the City of Murfreesboro ("Employer") as a trash collector. He allegedly sustained a low back injury on May 22, 2012, when lifting a wet sofa into a refuse truck. Employer denied his claim for workers' compensation benefits claiming, both, he failed to provide timely notice of his injury and his symptoms were caused by a preexisting condition. The trial court held Employee sustained a compensable injury and awarded 6%[1] permanent partial disability benefits. Employer appeals. 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.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Circuit Court Affirmed

[1] The Court applied a 1.5x multiplier to the 4% impairment rating.

DON R. ASH, SR.J. delivered the opinion of the court, in which JEFFREY S. BIVINS, C.J. and ROBERT E. LEE DAVIES, SR.J., joined.

Richard W. Rucker, Murfreesboro, Tennessee, for the appellant, City of Murfreesboro

D. Russell Thomas, Murfreesboro, Tennessee, for the appellee, Jamie Jordan

OPINION

Factual and Procedural Background

Jamie Lee Jordan ("Employee") began working for the City of Murfreesboro ("Employer") on July 10, 2000, as a trash collector servicing both residential and commercial customers. His duties included dumping trash cans, operating a "knuckle boom" truck, and loading large items into a "bulk item truck."

In September, October, and November 2011, Employee visited his primary care physician, Dr. Pardue, complaining of back pain. Dr. Pardue prescribed Naprosyn, an anti-inflammatory medication, and Lortab, a narcotic painkiller. Employee again visited Dr. Pardue in March, April, and on May 16, 2012, reporting back pain. Dr. Pardue added a high dose of Percocet and ordered an MRI which was performed on May 29.

The alleged injury at issue occurred on May 22, 2012. Employee and a co-worker attempted to lift a heavy, wet sleeper sofa into the garbage truck when Employee claims he "felt a pop in his back[.]"

According to Employee, he verbally reported the injury to his supervisor, Tim Reed, who told him "to bring it back to [his] attention" "if it gets worse[.]"

Thereafter, Employee suffered three additional injuries: bruising on November 23, 2012; back pain from maneuvering a snapped limb on February 14, 2013; and a "popped" back from catching a falling gate on March 7, 2013. Employee promptly notified Employer, who reported the injuries to the Department of Labor and Workforce Development.

On March 21, 2013, an Employer's First Report of Work Injury or Illness was also prepared regarding the May 22, 2012 injury. Thereafter, Employer provided physician panels. Employee was seen by Dr. Carl Hampf, a neurosurgeon, Dr. Juris Shibayama, a spine specialist, and Dr. Martin Glynn, a primary care physician. The physicians prescribed medications and ordered physical therapy and a second MRI, but Employee's condition did not improve.

On August 20, 2014, Employee filed a Complaint for workers' compensation benefits. Employer denied Employee's entitlement to such benefits, claiming his low back pain did not result from an injury in the course and scope of his employment. Further, as an affirmative defense, Employer claimed Employee failed to provide the requisite statutory notice.

Following a trial, the trial court ruled in favor of Employee. It held Employee had provided actual notice to Employer on the date of injury and Employee had sustained a compensable injury with a permanent impairment of 4% to the body as a whole, subject to a 1.5x multiplier, with recovery "capped" by Tennessee Code Annotated section 50-6-241(d)(1)(A) (2014) (applicable to injuries occurring prior to July 1,

2014). Employer appeals.

Analysis

In workers' compensation cases, issues of fact are reviewed de novo upon the record with a presumption of correctness unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225 (e)(2) (2008 and Supp. 2012) (now codified as Tenn. Code Ann. § 50-6-225(a)(2)). When the trial court had the opportunity to observe and hear witness testimony first-hand, its rulings regarding credibility and weight to be given to testimony are afforded considerable deference. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008) (citing Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002)). When the issues involve expert medical testimony 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 a reviewing court may draw its own conclusions regarding those issues. Id. (citing Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006)). 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) (citing Goodman v. HBD Indus., Inc., 208 S.W.3d 373, 376 (Tenn. 2006); Layman v. Vanguard Contractors, Inc., 183 S.W.3d 310, 314 (Tenn. 2006)).

Notice

Employer first contends Employee failed to provide timely written notice of his injury, as required by Tennessee Code Annotated section 50-6-201, which on the date of Employee's injury, stated in pertinent part:

(b) In those cases where the injuries occur as the result of

> gradual or cumulative events or trauma, then the injured employee or the injured employee's representative shall provide notice of the injury to the employer within thirty (30) days after the employee:
>
> (1) Knows or reasonably should know that the employee has suffered a work-related injury that has resulted in permanent physical impairment; or
>
> (2) Is rendered unable to continue to perform the employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

Tenn. Code Ann. § 50-6-201 (2008). However, written notice is only required in the absence of *actual* notice within the statutory period. Tenn. Code Ann. § 50-6-201(a) ("Every injured employee . . . shall . . . give . . . to the employer who has no actual notice, written notice of the injury[.]").

At trial, Employee testified he reported the May 22, 2012 injury to his supervisor, Mr. Reed, on the date of injury. He told Mr. Reed he "picked up a sleeper sofa, and [he] popped [his] back and [he] was hurting." Mr. Reed advised him, "if it gets worse," "to bring it back to the [Employer's] attention[.]" Similarly, Mr. Reed testified, on or about May 22, Employee told him "his back was hurt." He instructed Employee to report the injury to Debbie who would complete an on-the-job injury report. Employee did not contact Debbie, however, because he had no paid leave and could not afford to forego a paycheck.

The trial court found the "[u]ncontroverted testimony presented at

trial indicates that Mr. Jordan reported his work injury to his supervisor, Tim Reed[.]" We agree. Our Supreme Court has held "if an employee's superior is given notice of the accident and injury, this constitutes notice to the employer." Gluck Bros. v. Breeden, 215 Tenn. 587, 597, 387 S.W.2d 825, 830 (1965); see also Cleveland-Tennessee Enamel Co. v. Eaton, 517 S.W.2d 10, 12 (Tenn. 1974). Accordingly, we conclude the trial court correctly determined Employer possessed actual notice of Employee's injury within the statutory period.

Compensability

Employer next contends the evidence preponderates against the trial court's finding of a compensable injury. Employer points out Employee was the only witness to the injury and he failed to report the injury to Dr. Pardue during his June 6, 2012 appointment. Employer implies Employee fabricated the injury to gain pain medication and/or workers' compensation benefits.

Under Tennessee's workers' compensation law, employers shall compensate employees "for personal injury or death by accident arising out of and in the course of employment." Tenn. Code Ann. § 50-6-103(a) (2008 & Supp. 2013). An employee seeking to recover workers' compensation benefits bears the burden of proof. Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008) (citing Tenn. Code Ann. 50-6-102(12) (2008)). "An injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." Id. (citing Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005)). Expert medical evidence is required "[e]xcept in the most obvious cases." Id. (citing Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 354 (Tenn. 2006)). Proof of the causal connection may

not be speculative, conjectural, or uncertain. Clark v. Nashville Mach. Elevator Co., Inc., 129 S.W.3d 42, 47 (Tenn. 2004); Simpson v. H.D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990); Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). Absolute certainty with respect to causation is not required, however, and "'reasonable doubt must be resolved in favor of the employee.'"[2] Trosper, 273 S.W.3d at 604 (quoting Glisson, 185 S.W.3d at 354). "'[B]enefits may be properly awarded to an employee who presents medical evidence showing . . . the employment could or might have been the cause of his or her injury when lay testimony reasonably suggests causation.'" Id. (quoting Glisson, 185 S.W.3d at 354). "The causal connection may be established by expert opinion combined with lay testimony." White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992) (citation omitted).

"[A]n employer takes an employee 'as is' and assumes the responsibility for any work-related injury which might not affect an otherwise healthy person, but which aggravates a preexisting injury." Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008). (citation omitted). Accordingly, "an employer is 'liable for disability resulting from injuries sustained by an employee arising out of and in the course of his employment even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case.'" Id. (quoting Baxter v. Smith, 211 Tenn. 347, 364 S.W.2d 936, 942-43 (1962)).

At trial, Employee acknowledged suffering from, and receiving medical treatment for, lower back pain in the months before May 22,

[2]Because the injury and death in this matter occurred prior to July 1, 2014, we are required to construe the workers' compensation law liberally in favor of an injured employee. Tenn. Code Ann. § 50-6-116 (2008 & Supp. 2013) (applicable to injuries occurring prior to July 1, 2014); Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (citing Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991)).

2012. He described the pain as fluctuating and "manageable" prior to May 22. However, since May 22, his back pain has progressively worsened and his back is "really a lot weaker than it used to be." Employee testified he took the initiative to acquire Suboxone and, at trial, had not taken any narcotic pain medication in over eighteen months. He explained he did not report the injury to Dr. Pardue because he did not want a cortisone short or more narcotics and, moreover, because the appointment was "probably" designed to discuss his heart medication or bipolar disorder.

Employee's mother, Robin Brewer, with whom Employee resided in May 2012, testified at trial. She recalled him "barely walking" when he returned home from work on May 22, 2012. Despite having his own bedroom, Employee remained in a recliner where Ms. Brewer brought to him food, ice and a heating pad. He reported to her low back pain and "had trouble getting up and down." Ms. Brewer acknowledged a "definite . . . difference" in Employee after May 22, 2012.

Two physicians testified by deposition at trial: Dr. Richard Fishbein, a board-certified orthopaedic surgeon who performed an independent medical examination in December 2013; and Dr. Martin Glynn, who examined Employee on February 14 and 18, 2013.

Dr. Fishbein performed a comprehensive physical examination of Employee and reviewed his medical records, including MRI reports and doctors' notes. During his physical exam, he noted Employee could not complete a range of motion test "because it was too painful." He diagnosed "a herniated disc at two places pressing on a nerve going down his leg causing radiculopathy[—specifically,] a lumbar disc, Class 1, page 570, Table 17-4." Citing the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition, Dr.

Fishbein stated Employee will retain a 9% permanent impairment to the body as a whole. However, he deducted 5% for Employee's preexisting problems, and thus, assigned a 4% impairment to the May 22, 2012 injury. He stated the May 22, 2012 injury and other aggravating events—injuries in November 2012, February 2013 and March 2013—occurred in the course and scope of Employee's employment and indicated his opinions were rendered to a reasonable degree of medical certainty.

Dr. Glynn, "board eligible" in radiology, currently practices as a primary care physician. He first examined Employee on February 14, 2013 and reviewed Employee's medical records. He diagnosed Employee with an acute or chronic lumbar sprain and prescribed a steroid. He testified Employee requested "to be taken off work for two weeks on the basis that in . . . two weeks will give time for his workers' comp to kick in and pay for his problems." Dr. Glynn declined the request. Employee returned to Dr. Glynn on February 18, 2013, and described his pain level as eight out of ten. However, Dr. Glynn believed Employee's "movements and his behavior in the examining room didn't correspond with somebody who is in severe pain as he said he was in." Therefore, Dr. Glynn initiated a video camera to record Employee exiting the premises. He allegedly observed Employee walk to, and enter, his automobile without difficulty, indicating to Dr. Glynn "he was a man that was in very little pain." He described Employee's behavior as consistent with "drug-seeking behavior[.]"

Dr. Glynn testified at length regarding the medical records of Drs. Pardue, Hampf, and Shibayama. Employee reported back pain to Dr. Pardue on October 12, 2011; March 28, 2012; April 11, 2012; and May 16, 2012. An MRI was performed on May 29, 2012 which depicted a "mild constant disc bulge and small an[n]ular tears[.]" According to Dr.

Pardue's notes, as testified to by Dr. Glynn, Employee reported back pain to Dr. Pardue on June 6, 2012, but did not specifically reference the May 22, 2012 injury. Dr. Pardue noted, on November 28, 2012, there existed no evidence of aberrant drug use.

Employee was referred to Dr. Hampf on February 11, 2013. According to Dr. Hampf's notes, as testified to by Dr. Glynn, Employee "reported his difficulties began in May of 2012 when he awoke with severe pain. . . . His pain has persisted to date and notes pain across his back into his hips, into his thighs, and occasionally into his shins." Dr. Glynn noted Employee reported no injury to Dr. Hampf.

Employee visited Dr. Shibayama on May 9, 2013, with chief complaints of "low back, bilateral hip and leg pain with numbness and tingling." He reported the problem began in May 2012. According to Dr. Shibayama's notes, as testified to by Dr. Glynn, Dr. Shibayama indicated "there was a lot of pain medication [Employee] did not tell him about." Dr. Shibayama ordered a second MRI which, according to Dr. Glynn's own reading, showed "a little" but "not significant" progression of the bulging. Dr. Shibayama similarly found "[n]o significant integral change" from the previous May 29, 2012 MRI. Employee visited Dr. Shibayama again on May 16, 2013. He rated his pain as nine out of ten, but Dr. Shibayama noted he could "sit[] comfortably in a chair" and "mov[e] his lower extremities regularly." Dr. Glynn found Employee's pain rating inconsistent with Dr. Shibayama's observations.

At trial, Employee recounted an office visit with Dr. Glynn. He stated Dr. Glynn "threw [him] out of his office and cussed [sic] [him] out in front of everybody and told [him] that [his] back was not hurt, that [he] do[es] not have the walk or the . . . swagger of a person who has a

hurt back, to get the hell out of his office and don't come back because [he is] a fake."

"When there is conflicting medical testimony, the trial judge must choose which view to accredit." Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 644 (Tenn. 2008). Relevant factors include "'the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts.'" Id. (citation omitted).

> Here, the trial court discounted Dr. Glynn's testimony as follows:
> [Dr. Glynn] testified that [Employee's] back pain could be attributed to a sprain and further indicated his suspicion of [Employee's] reported injury. The testimony indicates that Dr. Glynn made video surveillance footage of the Plaintiff and believed that his movements and mannerisms were that of an individual with no injury or pain. The Court finds the testimony of Dr. Glynn to be unappealing. Not only does he fail to account for the simple fact that [Employee] was on pain relievers at the time of his visit, the surveillance video submitted into evidence [] shows absolutely nothing of any significance to the Court, much less indicate that [Employee's] reported work injury was a farce. Although Dr. Glynn reviewed [Employee's] records and gave him a cursory examination during his course of seeking treatment, Dr. Glynn is not a specialist, and his credentials falls far short of those of Dr. Fishbein, and further finds his surveillance footage means of patient evaluation to be less than scientific and much less than convincing.[3]

[3] The surveillance video is not included in the record before this Court because "it "could not be located in the trial court clerk's office."

In contrast, the Court found "highly credible [the] lay testimony of [Employee] and his mother" which "corroborate[d] the findings of Dr. Fishbein" and the objective medical proof.

We agree with the trial court's decision to accredit the testimony of orthopaedic surgeon Dr. Fishbein. His diagnosis is consistent with the available medical records, the MRI findings and Employee's reported history. He understood Employee's preexisting problems and expressly considered such in arriving at his impairment rating. In contrast, Dr. Glynn is a primary care physician. Although he examined Employee, his testimony largely consisted of reading, and occasionally commenting on, the records of other physicians. Additionally, he failed to provide a clear opinion regarding the relationship between the May 22, 2012 incident and Employee's subsequent medical history.

In sum, we find the testimonies of Employee, Ms. Brewer, and Dr. Fishbein, and his supporting documentation, demonstrate the May 22, 2012 workplace injury advanced the severity of Employee's preexisting condition. Accordingly, we affirm the trial court's conclusion Employee suffered a compensable injury.

Impairment

Finally, Employer contends the trial court in awarding Employee 4% permanent partial disability. Ostensibly, Employer seeks a 3% impairment rating, citing Dr. Fishbein's deposition testimony in which he stated, "In other words, I just really gave [Employee] a strain. I just took the AMA Guides that give up to 3 percent for a strain, I gave him 4 percent."

Tennessee Code Annotated section 50-6-204(d)(5) provides in part:

> When a dispute as to the degree of medical impairment exists, either party may request an independent medical examiner from the commissioner's registry. . . . The written opinion as to the permanent impairment rating given by the independent medical examiner pursuant to this subdivision (d)(5) shall be presumed to be the accurate impairment rating; provided, however, that this presumption may be rebutted by clear and convincing evidence to the contrary."

In his written Independent Medical Evaluation, Dr. Fishbein stated in pertinent part:

> According to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition, [Employee] will retain 9% permanent impairment to the body as a whole based on his lumbar disc, Class 1 (Table 17-4, page 570). The following net adjustment formula was used to determine the grade: (2-1) + (2-1) = 2. The clinical studies modifier was not used because it was used to determine the class. I feel 5% should be subtracted for his preexisting problems leaving a total of 4% WP. This impairment is assigned to his May 22, 2012 injury. The subsequent injuries were aggravations of this injury.

Employer has failed to rebut Dr. Fishbein's impairment rating by clear and convincing evidence.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the City of Murfreesboro and its surety, for which execution may issue if necessary.

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DON R. ASH, SENIOR JUDGE