IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 23, 2012 Session

KIEWIT-ACT, A JOINT VENTURE v. CHRIS JONES
and
CHRISTOPHER BRYON JONES v. KIEWIT-ACT, A JOINT VENTURE
and ZURICH AMERICAN INSURANCE COMPANY

Appeal from the Circuit Court for DeKalb County
No. 2010-CV-41 Amy V. Hollars, Judge

No. M2011-01202-WC-R3-WC - Mailed April 9, 2012
Filed May 10, 2012

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. The employee has appealed the trial court's denial of benefits for injuries to his right shoulder purportedly caused by a fall at work. The trial court denied the claim based on a finding that the employee's testimony was not credible and that he failed to establish that his injury arose out of and in the course of his employment. The employee has also challenged the trial court's award of $3,245.25 in discretionary costs to the employer. We affirm the trial court's judgment.

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

JUDGE J. S. "STEVE" DANIEL, SP.J., delivered the opinion of the Court, in which JUSTICE WILLIAM C. KOCH., JR., J. and WALTER C. KURTZ, SR. J., joined.

Aubrey T. Givens, Nashville, Tennessee, for the appellant, Christopher Bryon Jones.

Mary Dee Allen, Cookeville, Tennessee, for the appellees, Kiewit-Act, A Joint Venture, and Zurich American Insurance Company.

MEMORANDUM OPINION

Factual and Procedural Background

The employee, Christopher Bryon Jones, worked as a heavy equipment operator for the employer, Kiewit-Act, A Joint Venture, from June 2008 to February 24, 2009, when he was laid off due to a lack of work. The employee was 37 years old at the time of trial, had not completed the eleventh grade, and did not have a GED. His employment history included working as a heavy equipment operator, driving dump trucks, bulldozers, scrapers, and other large machines, as well as performing general labor at construction sites and laying pipe for underground utilities.

Mr. Jones had several injuries previous to the right shoulder injury which is the subject of this appeal. In 1983, he was run over by a riding lawnmower which nearly severed his left foot. In 1999, he was in a car accident which injured his back. In 2003, he received medical treatment for pain in his right shoulder for what he described as a pulled muscle. In 2005, he was in a four-wheeler accident which injured his left shoulder.

In June 2008, Mr. Jones was hired by Kiewit-Act to work as a heavy equipment operator at a construction project at Center Hill Dam in Smithville, Tennessee. Mr. Jones testified that he was working the night shift on February 21, 2009, when he slipped on some ice and fell. He stated that he was walking on an incline when he lost his footing and fell face first, hitting the ground first with his right shoulder and then with his left wrist. At another point in his testimony, he stated that he fell face first but did not fall to his right. According to the employee, he then slid down the hill approximately 10 feet, at which point a co-worker, Keith Scholl, helped him get off the ground. On the day of the incident Mr. Jones told Mr. Scholl that he was "all right" and completed his shift. When clocking out later in the day, Mr. Jones initialed a box on his time card indicating that he had not been injured during his shift. He continued to work without incident until he was laid off on February 24, 2009.

Following the loss of his job, Mr. Jones, on March 12, 2009, sought medical treatment for pain in his right shoulder at a clinic where he was seen by Dr. Ernest Jones. Dr. Jones did not testify, but an office note from that visit reveals that the employee "was needing to establish a family provider," and he reported having a torn rotator cuff, along with several other long-standing problems such as depression, anxiety, erectile dysfunction, a rash on his face, and swelling in his left foot. The office note further indicates that Mr. Jones had surgery on his left foot stemming from the lawnmower accident and continues to have problems with that foot. Neither Dr. Jones's note from March 12, 2009, nor a later note apparently from the same clinic dated April 10, 2009, mentions a fall at work on February 21, 2009, or at any other time.

Mr. Jones was referred to Dr. Wills Oglesby, an orthopedic surgeon, who began treating him in June 2009. Mr. Jones informed Dr. Oglesby that he had fallen on his right shoulder at work and immediately experienced pain in that shoulder. The employee did not tell Dr. Oglesby about any prior shoulder problems, including pain in his right shoulder dating back to 2003 or a previously suspected rotator cuff problem.[1] Dr. Oglesby ordered an MRI which revealed rotator cuff impingement, an AC joint injury, and a cartilage tear in the employee's right shoulder. On December 14, 2009, Dr. Oglesby operated on the employee's shoulder and ordered physical therapy to assist in the healing process. The employee, however, failed to keep most of his appointments.

Attempts at treating the employee post-surgery were not productive. Dr. Oglesby testified that his efforts to examine Mr. Jones were undermined by "inconsistency of effort," and he concluded that Mr. Jones "behavior was not clinically consistent with a gentleman who was trying hard to help himself recover from this." Although Mr. Jones repeatedly reported having pain in his shoulder and asked for pain medicine, an MRI and EMG study revealed nothing abnormal, and Dr. Oglesby could find nothing objective to support his complaints of pain. Dr. Oglesby testified that during the EMG test Mr. Jones "had very atypical unusual pain behavior." Mr. Jones also underwent a Functional Capacity Evaluation, but "unreliable effort" and "significant objectively measured inconsistencies" corroborated Dr. Oglesby's clinical impression that the employee did not have a physical problem in his right shoulder following surgery. Indeed, Dr. Oglesby was adamant that he could not find anything objective to support the employee's continuing complaints of pain.

In February 2010, Dr. Oglesby released Mr. Jones with no work restrictions. He testified the employee had been "noncompliant with post-op management" and that his "demonstrated failure to perform reliably on the FCE and all of my objective testing had shown no problems." Observing that Mr. Jones had "issues with reliability" and "issues with pain behavior" and "did very little that I asked him to do," Dr. Oglesby stated that Mr. Jones was one of the most noncompliant patients he had had in 27 years of performing surgery. When asked whether he had directed the employee to forego physical therapy as the employee claimed, Dr. Oglesby stated "no." Dr. Oglesby did, however, state that the problems he found in Mr. Jones shoulder during surgery were compatible with a fall, and he gave the employee an impairment rating of 2% to the body as a whole.

An evaluating physician, Dr. Richard Fishbein, also an orthopedic surgeon, examined the employee in April 2010 at the request of his lawyer. Mr. Jones told Dr. Fishbein about the fall at work and reported constant pain in his right shoulder, limited range of motion, and

[1]The employee's medical records reveal that in 2003 he was treated for on-going pain in his right shoulder which was characterized as "rotator cuff disease" by the health care provider who treated him at the time.

numbness in his forearm. Based upon his examination of the employee and a review of some of his medical records, including a post-surgery MRI, Dr. Fishbein believed Mr. Jones suffered from "residual tendonitis or impingement to his shoulder." Dr. Fishbein opined that the employee's fall at work caused his shoulder injury and that he sustained an impairment of 6% to the whole body. Dr. Fishbein acknowledged, however, that his opinion regarding causation could be different if Mr. Jones gave him an inaccurate history. He also acknowledged not having reviewed all the employee's medical records, including all of Dr. Oglesby's notes, and stated that the employee failed to inform him of any prior shoulder problems. Dr. Fishbein, who did not review any of the employee's physical therapy records and was unaware of his limited participation in physical therapy, agreed that refusing to participate in post-operative physical therapy could result in decreased range of motion – which is what Dr. Fishbein found when he examined the employee.

At trial, Mr. Jones testified that his arm "worked fine" before his fall at work, but continuing pain in his shoulder now makes it difficult for him to sleep, play sports with his son, or get dressed by himself. He testified to having limited range of motion and diminished arm strength, and stated that his arm stays numb from his wrist to his elbow. He also stated that although he worked two jobs operating heavy equipment since his surgery, he was unable to satisfactorily operate the machines due to the problems with his arm.

Mr. Jones testified that Kiewit-Act took safety seriously, and that although he knew he was required to report all injuries no matter how slight, he initialed "no" to a question on his time card asking whether he had been injured during his shift. Mr. Jones admitted that in April 2009 his wife sent an e-mail to the employer on his behalf stating he "instantly became aware of constant pain" upon falling. In addition, he testified that he told the clinic where he initially sought treatment on March 12, 2009, about the fall, yet there was no mention of it in the office notes.

Mr. Jones admitted to not disclosing chronic back pain from the 1999 car accident during a physical examination when he was hired as a miner shortly before being hired by the employer in this case. He also acknowledged that despite a long history of depression, anxiety, and scarring on his left foot stemming from the lawnmower accident, those conditions were likewise not reflected on the physical examination report. Mr. Jones admitted that he was taking medication for depression and anxiety at that time. Further, he admitted to misrepresenting his physical condition on the medical questionnaire he completed for the employer in this case, checking "no" to having a previous back injury, despite receiving a settlement for that injury, and checking "no" in response to a question asking whether he had a condition constituting an impairment of any body part, despite having his foot nearly severed in the lawnmower accident. He also misrepresented that he was not taking prescription medication.

The employee acknowledged that he went once or twice to physical therapy following his surgery, even though it was ordered by Dr. Oglesby three times a week for four weeks. His stated reason for doing so was that Dr. Oglesby directed him to stop going, a charge Dr. Oglesby denied. He also testified that the FCE report indicating he declined to perform certain tasks during the test was simply wrong. Further, Mr. Jones admitted that despite testifying in his deposition that he got laid off from a previous construction job, he actually walked off the job and quit. He also admitted to misrepresenting his education on his application for the employer in this case, to filing bankruptcy three times, and to five burglary convictions, including aggravated burglary. In addition, he had criminal convictions for simple possession of marijuana, and for filing a false report with an insurance company for misrepresenting the theft of a boat motor. Finally, he admitted to not having paid child support in two years to support a daughter.[2]

Mr. Jones's wife, Evealyn Jones, testified that on February 21, 2009, the employee told her he had fallen at work and that his shoulder "was a little achy." The following day, he told her that "he was still just a little bit sore . . . it wasn't anything of a concern at that moment." However, she acknowledged sending Kiewit-Act an e-mail at Mr. Jones' request stating he was in constant pain, even though he told her he was experiencing only intermittent achiness. She also testified that Mr. Jones shoulder was "perfectly fine" prior to the fall. She stated that the injury prevents him from performing daily chores, doing yard work, and makes it difficult for him to get dressed by himself.

Keith Scholl, the co-worker who saw the employee fall, testified the two men were walking down a hill spreading salt when the employee's feet slipped out from underneath him and he fell on his left side. He testified that the employee did not fall face first as he claimed, and that he did not have to help him up as Mr. Jones claimed. At another point in his testimony, Mr. Scholl stated that the employee fell backward, not forward. He also denied, contrary to Mr. Jones's testimony, that Mr. Jones slid down the hill after he fell. According to Mr. Scholl, he asked Mr. Jones whether he was okay, and he responded that he was fine.[3]

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[2] Although the employee's suit alleged injuries to his left foot and wrist, he testified that those injuries had resolved themselves. Consequently, he was not seeking benefits for either of those injuries.

[3] Other witnesses, namely Scott Drobney and Matthew Giles, both management level employees, testified primarily as to the issue of notice, which is not an issue on appeal. Therefore, their testimony will not be summarized in this opinion. We note, however, that Mr. Giles, a safety manager for the employer, testified that the company's investigation revealed that the employee fell, but that he did not suffer an injury.

After hearing the evidence, the trial court found that the employee failed to prove by a preponderance of the evidence that his shoulder injury arose out of and in the course of his employment. The trial court also found that the employee was not credible, stating

> [T]he issue here is -- I cannot escape it, is the credibility of the employee. And this Court always hopes and expects to find an employee who is -- who is truthful and accurately articulates what has happened to him or her.
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> But in this case there is a pervasive pattern of untruth. And it grieves the Court to say that, because without the credibility of the employee, even the most skilled advocacy, even the most hard fought trial, cannot be successful. And in the final analysis, I cannot find that Mr. Jones'[s] testimony was sufficient to establish that he suffered an injury to his right shoulder on this evening.
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> The testimony of Mr. Keith Scholl indicated that Mr. Jones fell on his left side and in a different direction on the hill. The testimony also -- but there were surrounding circumstances that were, that were spun out in Mr. Jones'[s] testimony about sliding, about losing his helmet and having to be helped up. There were just too many things like this in this case for the Court to overlook.
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> The Court could not credit Mr. Jones'[s] testimony when he said that Dr. Oglesby was the one who told him to stop his physical therapy. That's implausible to this Court. The Court cannot credit Mr. Jones'[s] testimony that someone at the Carthage Medical -- or the family practice center, the medical center there in Carthage, told him that he had had a rotator cuff tear and that's why that appeared in that note. That too seems implausible.
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> When this Court initially reviewed the testimony of Dr. Oglesby and the FCE report, the Court kept in mind that maybe there was an echo chamber effect of one doctor hearing something and passing it on. But there is just too much here for the Court to believe that that occurred in this case.

> The evaluator for the FCE found that Mr. Jones did not give full effort . . . and therefore that his results were unreliable.
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> [I]t was clear to the Court that Dr. Oglesby reacted because he felt he was being challenged when the employee's veracity and effort at helping in his own recovery were the real problem.
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> The Court notes Mr. Jones did not tell either Dr. Oglesby or Dr. Fishbein about the 2001 right shoulder injury which, according to Mr. Jones'[s] testimony, was resolved. But nonetheless, that was a factor that should have been disclosed to them.
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> The Court was willing to believe at the outset that Mr. Jones'[s] conduct as reflected in his past criminal history may have been something that was entirely behind him, that his credibility would be judged on the facts in this case and what he said in this case and to the doctors who treated him. And still, the Court, even trying to set that aside, still the Court found this pervasive pattern of untruth. And therefore the Court will award no recovery in this case.

As a result of these findings and the dismissal of the claim, the trial court granted the employer, Kiewit-Act, discretionary costs in the amount of $3,245.25.

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 the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and the weight to be given testimony are involved, considerable deference is given the trial court's decision when the trial judge had the opportunity to observe the witness's demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). A reviewing court may, however, draw its own conclusions about the weight and credibility to be given expert testimony when the medical proof is by deposition, as it was in this case. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *see also Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

A. Compensability of shoulder injury

The law is settled that, except in obvious cases, a workers' compensation claimant must establish by expert medical evidence the causal relationship between the alleged injury and the claimant's employment activity. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008). Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain. *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004). Thus, a court may properly award benefits based upon medical testimony that the employment could or might have been the cause of the employee's injury when there is also lay testimony supporting an inference of causation. *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). Any reasonable doubt as to the causation of an injury is resolved in favor of the employee. *Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004).

In this case, Mr. Jones contends that the trial court's denial of benefits should be reversed because the evidence established that he fell at work on February 21, 2009, and that the fall injured his shoulder. He asserts that his testimony describes in detail how he fell, that the fall was witnessed by a co-worker, Mr. Scholl, and that both Doctor Oglesby and Dr. Fishbein testified that his injuries were caused by the fall.

Kiewit-Act takes the position that the trial court properly found the employee was not credible because his testimony was riddled with inconsistencies and falsehoods. It is pointed out by Kiewit-Act that Mr. Jones's own account of what happened was internally inconsistent, as well as inconsistent with the testimony of Mr. Scholl. Further, the employer argues that the employee misrepresented his prior medical history, criminal history, financial history, work history, and education. The employer also notes that in addition to multiple criminal convictions for burglary and possession of marijuana, the employee was convicted of insurance fraud for falsely claiming that his property had been stolen. It is the position of the employer that all of these misrepresentations and criminal records can be considered by the court as to the veracity of Mr. Jones.

As indicated, the trial judge was not persuaded that Mr. Jones suffered an injury to his right shoulder on February 21, 2009. The trial judge expressly found that the employee was not credible – even ignoring his extensive criminal history – and observed more than once that his testimony reflected a "pervasive pattern of untruth."

Considering the record as a whole, we cannot conclude that the evidence preponderates against the trial court's decision to deny benefits. As noted above, when the

trial court has seen and heard the lay witnesses, as the trial court did in this case, considerable deference must be afforded the trial court's findings. *See, e.g.*, *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008).

B. Award of discretionary costs

Mr. Jones challenges the trial court's award of $3,245.25 in discretionary costs to the employer. Mr. Jones argument on this issue consists of one sentence – "the trial court erred in awarding the employer discretionary costs." As the Tennessee Supreme Court has observed, "[i]t is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived." *Sneed v. Bd. of Prof'l Responsibility*, 301 S.W.3d 603, 615 (Tenn. 2010). Here, the employee makes no argument in support of his claim of error, and we are not inclined to speculate as to how or in what manner the trial court may have erred in awarding discretionary costs to the employer. This issue is waived.

Even if the issue of discretionary costs had been properly addressed, it would have no merit. Tenn. R. Civ. P. 54.04 authorizes an award of costs to the prevailing party and, on appeal, the party challenging the award has the burden of showing that the trial court abused its discretion in making such an award. *See Perdue v. Green Branch Mining Co.*, 837 S.W.2d 56, 60 (Tenn. 1992); *Carpenter v. Klepper*, 205 S.W.3d 474, 490 (Tenn. Ct. App. 2006). A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical result, or resolves the matter on a clearly erroneous assessment of the evidence. *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010). We can discern no basis, and none has been suggested to us, to conclude that the trial court in this case abused its discretion in awarding costs to the employer.

Conclusion

For the foregoing reasons, we conclude that the record supports the trial court's decision to deny benefits to Mr. Jones. In addition, we conclude that the issue regarding discretionary costs is waived and, in any event, has no merit. Accordingly, the trial court's judgment dismissing the case and awarding of discretionary cost is affirmed. The costs of this appeal are taxed to the employee, Christopher Bryon Jones, and his surety, for which execution may issue if necessary.

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J.S. "STEVE" DANIEL, SP.J.

IN THE SUPREME COURT OF TENNESSEE
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No. M2011-01202-WC-R3-WC - Filed May 10, 2012

JUDGMENT

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 Memorandum 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 Memorandum 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 will be paid by employee, Christopher Bryon Jones, and his surety, for which execution may issue if necessary.

PER CURIAM