IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 21, 2015 Session

DEAN LOGAN v. TRACIE McCORMICK, INC., ET AL.

Appeal from the Circuit Court for Rutherford County
No. 67727 J. Mark Rogers, Judge

No. M2015-00300-SC-R3-WC – Mailed November 17, 2015
Filed December 22, 2015

This case concerns injuries arising from two separate incidents. The employee, a truck driver, was involved in a motor vehicle accident on May 13, 2008. He alleged that he sustained injuries to his neck, mid-back, lower back, right shoulder and left knee as a result of that event. On July 12, 2012, he injured his left shoulder when he slipped while exiting his truck. His employer admitted the compensability of all of the injuries except the lower back, contending that the employee's lower back problems pre-existed the accident. The trial court ruled that the back injury was compensable and awarded 80.5% permanent partial disability benefits for the combined injuries. The employer has appealed, asserting that the preponderance of the evidence does not prove that the back injury was compensable. 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)(2) (2014) Appeal as of Right;
Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, delivered the opinion of the Court, in which JEFFREY S. BIVINS, J. and BEN CANTRELL, J., joined.

Nicholas S. Akins and A. Allen Grant, Nashville, Tennessee, for the appellants, Tracie McCormick, Inc., and Cherokee Insurance Company.

James S. Higgins and Carrie LeBrec, Nashville, Tennessee, for the appellee, Dean Logan.

OPINION

FACTUAL AND PROCEDURAL HISTORY

Dean Logan ("Employee") is a resident of Pittsburgh, Pennsylvania. He was employed by Tracie McCormick, Inc. ("Employer") as a tractor-trailer driver from 2007 until 2013. He transported mail between Pittsburgh and Columbus, Ohio. On May 13, 2008, Employee's truck left the highway and struck a tree when he swerved to avoid colliding with an automobile. He injured his neck, back, hand, left knee and right shoulder. He did not immediately seek medical treatment. Eventually, he came under the care of Dr. Bonier, who prescribed physical therapy and injections, as did Dr. Nour. These treatments provided some relief, but the pain would return. He began treatment under the care of Dr. Demeo and Dr. Altman in 2010. These physicians prescribed additional physical therapy, injections and medication. He continued to work during this time.

Employee's symptoms progressed over time. The frequency of injections increased from once every six months to once every six weeks. His doctors discussed neck surgery with him, but he preferred to avoid surgery. On July 12, 2012, he slipped while getting out of his truck. He grabbed the door of the vehicle as he fell, pulling his left arm. Employee immediately felt "serious" pain in his shoulder. He told Employer about it, and Dr. Demeo began to treat this injury. Therapy and injections did not alleviate his symptoms, and he eventually had surgery on the shoulder. He reached maximum medical improvement ("MMI") in July 2013. He was referred to Dr. Wang, a pain management specialist, who continued to be his treating physician at the time the trial took place in December 2014.

When Employee reached MMI, his physician assigned permanent restrictions. These included a lifting limit of ten pounds maximally and five pounds frequently. He was to avoid kneeling and crawling, as well as reaching with his left arm. He was permitted to stand or walk for three hours of an eight-hour workday. Employer was unable to accommodate those restrictions. Employee subsequently obtained work as a delivery driver for a food wholesaler, working fifty to fifty-five hours per week.

Employee testified that he had pain every day. He had pain in his neck that also caused head pain. Numbness ran down his arms into his hands. Pain in his lower back went down into his legs. As a result, it was necessary for him to pull his truck over frequently and walk around it. His left knee made it difficult for him to operate a clutch, although he was able to do so. He was earning $18.50 per hour in his present position, which was substantially less than his wage rate of $25.00 per hour for Employer. He took ibuprofen, flexeril and gabaprime each day. He also used vicodin approximately once per week. He was unable to golf or ride a bicycle with his son, activities he had enjoyed prior to his accident. His social life with friends decreased.

During cross-examination, he admitted that he had told the physicians who treated his work injuries that he had no prior lower back problems. He agreed that he had, in fact, seen his primary care physician for low back pain and leg pain on several occasions in the months prior to his 2008 accident. He also recalled that he had an MRI of his lower back a few weeks before the accident. These admissions were confirmed by medical records of Employee's primary care physician. However, Employee stated that the pain he experienced after the May 2008 accident was dramatically more severe that his earlier symptoms.

Dr. Anna Mathew, an internal and occupational medicine specialist, provided a C-32 medical report and testified by deposition. She was a member of the same medical group as Employee's treating physicians. The treating physicians were not qualified or certified to provide impairment ratings. Dr. Mathew was certified by the state of Pennsylvania to provide impairment ratings. She reviewed the records of the treating physicians and conducted a physical examination of Employee. The examination occurred in July 2013. In her deposition, she stated her diagnoses:

> On July 8, 2013, my diagnosis or impression of Mr. Logan was that he had chronic cervical pain with left – [interruption by court reporter] Paracentral disk herniation, paracentral disk herniation C6-7 with bilateral arm radicular pain. The second diagnosis was chronic lumbar sacral pain with degenerative joint disease of lumbar spine. Neural foraminal stenosis bilaterally L4 to S1 with bilateral leg radicular pain. The third diagnosis was chronic graphic pain. The fourth diagnosis was supraspinatus endonapathy(ph) subacromial subdeltoid bursitis with impingement off the right shoulder. The fifth diagnosis was chronic pain left shoulder -- left shoulder surgery for impingement. And the last diagnosis was medial meniscus left knee patella gosis.

Dr. Mathew opined that the May 2008 motor vehicle accident caused the injuries to the neck, lower back, right shoulder and left knee. In addition, she opined that the July 2012 incident caused the left shoulder injury. She testified that she was not aware that Employee did not seek treatment for his injuries for several weeks after the May 2008 accident. In that regard, she testified that it was difficult to state when symptoms arising from such an event would require medical attention. She had not reviewed Employee's discovery deposition. Dr. Mathew testified that Employee's cervical disk injury did not require surgery but did generate pain that required ongoing treatment. Based on the MRI reports, she could not state whether the herniation was acute or degenerative in nature. She had not reviewed the actual images of the MRI. Dr. Mathew also testified that she based her opinion concerning the low back injury on Employee's statement that his pain commenced after the May 2008 accident.

Dr. Mathew assigned the following impairments for Employee's injuries: 8% to the body as a whole for the cervical spine injury; 1% to the body as a whole for the thoracic spine; 9% to the body as a whole for lumbar stenosis; 2% to the body as a whole for the right shoulder; 3% to the body as a whole for the left shoulder; and 1% to the body as a whole for the left knee injury. These impairments combined for an overall impairment of 23% to the body as a whole. Dr. Mathew placed Employee's ability to work at the sedentary level.

The trial court issued its decision from the bench. After a careful and detailed review on the record of Dr. Mathew's testimony, Employee's discovery deposition and the records of Employee's primary care physician, the court found that the lower back injury was compensable. It found that Employee sustained a 70% permanent partial disability to the body as a whole from the May 2008 injury and a 10.5% disability from the July 2012 injury. Judgment was entered in accordance with those findings, and Employer has appealed the trial court's ruling as to the compensability of the lower back injury, attacking the trial court's finding that Employee was credible and maintaining that Dr. Mathew used inaccurate medical history to form her opinion.

STANDARD OF REVIEW

A trial court's findings of fact in a workers' compensation case are reviewed de novo, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(a)(2) (2014); *see also* Tenn. R. App. P. 13(d). "'This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions.'" *Williamson v. Baptist Hosp. of Cocke Cnty., Inc*., 361 S.W.3d 483, 487 (Tenn. 2012) (quoting *Galloway v. Memphis Drum Serv.*, 822

S.W.2d 584, 586 (Tenn. 1991)). When the trial court has seen and heard the witnesses, "considerable deference must be afforded in reviewing the trial court's findings of credibility and assessment of the weight to be given to that testimony." *Tryon v. Saturn Corp*., 254 S.W.3d 321, 327 (Tenn. 2008).

"When the issues involve expert medical testimony that is contained 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 the reviewing court may draw its own conclusions with regard to those issues." *Foreman v. Automatic Sys., Inc*., 272 S.W.3d 560, 571 (Tenn. 2008). In this regard, we may make our own assessment of the evidence to determine where the preponderance of the evidence lies. *Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 665 (Tenn. 2008); *Wilhelm v. Krogers*, 235 S.W.3d 122, 127 (Tenn. 2007). Further, "[o]n questions of law, our standard of review is de novo with no presumption of correctness." *Wilhelm*, 235 S.W.3d at 126.

ANALYSIS

Compensability of Lower Back Injury

The existence of a pre-existing condition is always a complicating factor in determining compensability. The Tennessee Supreme Court has stated that it is well-settled in Tennessee "that an employer takes an employee 'as is' and assumes the responsibility of having a pre-existing condition aggravated by a work-related injury which might not affect an otherwise healthy person." *Trosper v. Armstrong Wood Prods.*, 273 S.W.3d 598, 604 (Tenn. 2008) (citing *Hill v. Eagle Bend Mfg. Inc*., 942 S.W.2d 483, 488 (Tenn.1997). Consequently, "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*, 364 S.W.2d 936, 942–43 (1961)). An increase in pain alone is not compensable. *Id*., at 605 (citing *Barnett v. Milan Seating Sys*., 215 S.W.3d 828, 835 (Tenn.2007). There must be a corresponding permanent anatomical change. *Id*.

Employer's arguments are actually intertwined, so they will be discussed together. The gist of its argument is that Dr. Mathew's opinion on the subject was based on inaccurate information, *viz*., that Employee's lumbar stenosis became symptomatic after the May 2008 motor vehicle accident. Employer observes that Dr. Mathew did not review Employee's discovery deposition, nor did she have any of the medical records of his pre-accident treatment. Employer also maintains that Employee was not credible

regarding pre-accident back pain. For those reasons, Employer contends that the evidence was not sufficient to support a causation finding.

The circumstances of a medical expert's examination and the accuracy of the information available to her are useful factors in determining the weight to be attached to her testimony. *See Orman v. Williams Sonoma, Inc*., 803 S.W.2d 672, 676 (Tenn. 1991). In this case, it is obvious that the information used by Dr. Mathew was not complete. However, it is undisputed that the May 2008 accident occurred, and Employee was tossed about the cab of his vehicle during the event. Employer did not dispute that Employee sustained injuries to his neck, shoulder and knee as a result of that event. Employee conceded that he had experienced back pain in the weeks and months prior to the accident. However, he testified that his back problems increased dramatically after the accident and did not improve thereafter. The trial court heard Employee's trial testimony, including the cross-examination by Employer's attorney about his lower back pain, and reviewed his discovery deposition. It found him to be a credible witness concerning the effects of the accident.

> I don't think Mr. Logan lied. I think he is credible and honest . . . And I fully believe that the testimony of Mr. Logan should be given full credit. He wasn't trying to hide anything or mislead anyone, and I don't think it changed any of the diagnosis or opinions of Dr. Mathew in any way whatsoever.

Dr. Mathew's opinion was the only medical evidence addressing causation of the lower back injury, and that opinion was that the accident worsened Employee's degenerative condition. She was not questioned concerning the pre-accident medical records. Her lack of knowledge concerning the extent of Employee's earlier problems detracts from the weight of her testimony. Nevertheless, her opinion is the only evidence in the record on the subject of causation.

In view of these circumstances, we are unable to conclude that the evidence preponderates against the trial court's finding that Employee sustained an injury to his lower back as a result of the May 2008 accident.

Excessive Award

Although not stated expressly, Employer appears to contend that the award of 80.5% permanent partial disability is excessive. It points out that Employee continues to work as a truck driver, albeit for a different company, because Employer could not

accommodate the medical restrictions. Further, Employee testified that he regularly works fifty or more hours per week in his new job. His hourly wage is approximately 24% less than what he received from Employer.

Tennessee Code Annotated section 50-6-241(d) sets out a non-exclusive list of factors to be considered in determining the extent of permanent partial disability: "the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition." Also, "[t]he claimant's own assessment of her physical condition and resulting disabilities must also be evaluated." *Whirlpool Corp v. Nakhoneinh*, 69 S.W.3d 164, 170 (Tenn. 2002). In that context, we observe that the activity restrictions placed by Employee's physicians are extensive. His maximum lifting capacity is ten pounds. His frequent lifting capacity is five pounds. He is limited in his ability to kneel, crawl and sustain certain body positions. Employee testified that these limitations would prevent him from holding any of his previous jobs. No contrary evidence was presented. Employee also testified that he had varying levels of pain throughout his body at all times. He was unable to engage in activities he had previously enjoyed such as golf and cycling. He was forty-nine years old when the trial occurred. Although he was a high school graduate, he described himself as a poor student. This evidence was not disputed. In view of all these factors, we are unable to conclude that the evidence preponderates against the trial court's finding that Employee sustained a permanent partial disability of 80.5%.

CONCLUSION

The judgment is affirmed. Costs are taxed to Tracie McCormick Inc., Cherokee Insurance Company and their surety, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE

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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 the appellants, Tracie McCormick, Inc., and Cherokee Insurance Company, and its sureties, for which execution may issue if necessary.

PER CURIAM