IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 22, 2014 Session

JOHN MORAN v. UNITED PARCEL SERVICE, INC., ET AL.

Appeal from the Chancery Court for Cheatham County
No. 15669 Larry Wallace, Judge

No. M2014-00039-SC-R3-WC - Mailed November 20, 2014
FILED: December 26, 2014

An employee injured his left shoulder in 2005. He returned to work for his employer and settled his workers' compensation claim. In 2011, he had recurrent symptoms in the shoulder. Eventually, he made a claim for benefits, alleging that he had sustained a new injury. His employer contended that his symptoms were caused by the earlier injury and that he was entitled only to medical care under the previous settlement. The trial court found that the employee had sustained a new injury and awarded permanent partial and temporary total disability benefits. The employer has appealed. Pursuant to Tennessee Supreme Court Rule 51, 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. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right; Judgment of the Chancery Court Affirmed

PAUL G. SUMMERS SR. J., delivered the opinion of the Court, in which JEFFREY S. BIVINS, J., and BEN H. CANTRELL SR. J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellants, United Parcel Service, Inc. and Liberty Mutual Insurance Corporation.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee, for the appellee, John Moran.

OPINION

Factual and Procedural Background

John Moran ("Employee") was employed by United Parcel Service ("Employer") as a "feeder driver" on May 18, 2011. By letter of his counsel, dated November 21, 2011, to Employer's workers' compensation carrier, he claimed to have sustained an injury to his left shoulder on May 18, 2011. Employer agreed to provide medical treatment for the injury under the settlement of an earlier claim, but denied that a new injury had occurred. A Benefit Review Conference was held; the parties were unable to resolve their differences. Employee filed this workers' compensation action in the Chancery Court for Cheatham County on November 14, 2012. The case proceeded to trial on October 1, 2013.

Employee was forty-eight years old when the trial occurred. He was a high school graduate. At various times, he attended the University of Cincinnati, Tennessee Technological University and Georgia Tech. His major was mechanical engineering. He left Georgia Tech during his senior year because he had recently married and was "burned out" from attending school. He began working for Employer as a part-time "preloader" at its Atlanta facility in September 1990. His job consisted primarily of loading packages onto delivery trucks. Employee also worked as a part-time dock worker at Consolidated Freightways. After one and one-half years in Atlanta, he transferred to Tennessee. After several years, he was promoted to sorter, distributing packages onto conveyor belts within Employer's facility. He then became an "irregular" driver. In that job, he transported "incompatible" packages within the facility.

In approximately 1997, Employee became a temporary cover driver. That job consisted of covering package delivery routes when the regular driver was sick, on vacation or the like. He became a full-time package delivery driver in 2004. Then, in 2007, he became a "feeder" driver, driving tractor-trailers among various locations in Nashville or in nearby cities such as Louisville and Cincinnati.

Employee testified that he first injured his left shoulder in 2005 while working as a package delivery driver. His vehicle struck a culvert, causing the steering wheel to jerk violently. He sustained a torn rotator cuff. Dr. Blake Garside performed a surgical repair, and Employee was able to return to work without any restrictions or

limitations. In 2007, he injured his right shoulder while trying to pull down a box from a high shelf in his truck. This injury resulted in another surgery by Dr. Garside. As before, Employee was able to return to his previous job without difficulty.

In May 2011, Employee's left shoulder began to hurt while he was driving to Louisville, Kentucky. Employee testified at trial that this occurred on May 18, 2011. During cross-examination, he stated that he had determined the date by referring to notes he had kept at the time. However, he had not produced the notes during discovery and had been unable to locate them before trial. Employee stated that he had stopped at a truck stop near Franklin, Kentucky. When he started driving, he realized that his door was not completely shut. He opened and slammed it several times before it closed satisfactorily. Fifteen or twenty minutes later, he began experiencing a sharp pain in his left shoulder. The pain was so intense that he held his left arm in his lap for the rest of his work day. Nevertheless, he did not report the incident or his symptoms to anyone at Employer's facility at the end of the day. He agreed that at least two supervisors were present at the facility. Further, although his symptoms continued, he did not discuss the matter with anyone at Employer's facility when he reported for work the next morning.

Employee testified that the sharp pain he initially experienced evolved into an aching pain. He suspected his symptoms were due to arthritis caused by the 2005 injury. He began taking over-the-counter medicines and performing exercises from his earlier rehabilitation. These provided no relief, so he sought out his primary care physician, Dr. Steigelfest. He did not report the May 18 door-closing incident to Dr. Steigelfest. He stated that he did not do so because of his belief that his symptoms were caused by arthritis. Dr. Steigelfest recommended that Employee return to Dr. Garside, who had performed surgery on the Employee's shoulder after the 2005 injury. On August 2, 2011, Employee contacted Liberty Mutual, Employer's workers' compensation insurer, to arrange an appointment with Dr. Garside.

Dr. Garside testified by deposition. Employee gave him a history of three or four months of shoulder pain that began while Employee was driving his truck on the interstate. After examining Employee, Dr. Garside requested approval for an MRI of the shoulder. The study was taken on August 5, 2011. It showed a full-thickness tear of the left rotator cuff. Dr. Garside recommended surgery. He had been asked for his opinion concerning the causation of Employee's 2011 symptoms. In a September 30, 2011 letter, he stated:

> Based on his recent history, it is my opinion that his left rotator cuff tear and surgery is related to his employment at UPS. This likely represents a failure of his previous rotator cuff repair 4 years ago that has become larger with continued use and activities during the normal course of his employment. I did not have any history of intervening non-work-related accidents which have precipitated the need for surgery. I have reviewed my notes, my nurse's note, and patient's most recent medical history form from 08/08/2011, which did not describe any falls or other traumatic event.
>
> In summary, I feel his rotator cuff tear and symptoms are related to his previous work injury and from 2007.[1]

Based on this letter, Liberty Mutual approved the surgery under the open medical provision of the earlier workers' compensation settlement. The surgery was scheduled for November 28, 2011. On November 21, counsel for Employee sent and faxed the previously mentioned letter to Liberty Mutual, asserting that he had sustained a new injury on May 18 and requesting temporary and permanent disability benefits. The records of Liberty Mutual revealed that Employee had previously mentioned May 18 as the date of onset of his symptoms, but there had been no express or implied claim of a new injury before the November 21 letter.

Employee remained under Dr. Garside's care until March 5, 2012. Dr. Garside placed no permanent restrictions on Employee's activities, and Employee returned to his previous job Dr. Garside testified that, based on the Sixth Edition of the AMA guidelines, Employee retained a 4% impairment to the body as a whole. Employee testified that his shoulder felt "pretty good" after the surgery. He had good range of motion but felt that his left arm was "a little bit weaker" than his right arm. He experienced occasional numbness and tingling that interfered with his sleep. He had a fear of reinjury, especially when performing activities that required reaching, such as pulling down the rolling doors on trailers. He also reported that he had given up his hobby of bow hunting because he was unable to hold and pull the bow properly. He had worked without incident since being released by Dr. Garside.

[1] In his deposition testimony, Dr. Garside stated that the reference to 2007 was incorrect and that he intended to cite the 2005 injury. (Garside depo., p. 18)

At the conclusion of the proof, the trial court took the case under advisement. The trial court later issued written findings and conclusions. It held that Employee had sustained a new, compensable injury to his left shoulder; that he had provided appropriate notice of his injury; and that he had sustained a 4% impairment to the body as a whole due to the injury. It awarded permanent partial disability benefits of 6% to the body as a whole and temporary total disability benefits from the date of surgery until the date of maximum medical improvement. Employer has appealed, contending that the trial court erred by finding that Employee sustained a compensable injury; by finding that proper notice of the injury was given; and by basing its disability award on the 4% impairment discussed by Dr. Garside.

Analysis

in workers' compensation cases, the standard of review concerning 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 evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2013). Reviewing courts afford considerable deference to the trial court'sfindings of facts "[w]hen the trial court has seen and heard the witnesses." Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). "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). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Madden 277 S.W.3d at 898.

"New" or "Old" Injury

Employer's first contention is that the trial court erred by finding that Employee sustained a new, compensable injury in the course of his employment. It argues that the evidence preponderates in favor of a finding that Employee's left shoulder symptoms in 2011 were a direct result of the 2005 injury and, therefore, not a "new" injury for which permanent partial or temporary total disability benefits should be awarded. As set out above, Dr. Garside stated in his September 30, 2011 letter that he considered Employee's 2011 symptoms to be related to his 2005 injury. He elaborated on that opinion during his deposition testimony:

I felt that [the rotator cuff tear observed in 2011] likely represented a tear that -- That it had probably represented a smaller tear that had become larger with time. As I was able to glean from his subsequent operation performed on November 28, 2011, he had basically -- His repair had failed at a couple of the suture -- At the interface of the suture. And, the tendon to the sutures, where he had previously had the repair, were still intact and that area had completely healed. And, the tear that was present involved the remaining part of the previous repair.

* * * *

Q. Coming forward, it appears that -- Well, one other question on that. You were asked about whether this was new or whether it was old. And, I understood you to have said that it probably represented a small tear that had increased over time. And, the tears represented failure at one particularly located previously repaired area. But, not all of the repairs?
A. Correct.
Q. Some of the repairs held fast?
A. Yes.
Q. Good. Okay. And, that happens from time to time, even in the best of circumstances; does it not?
A. Depending on the size of the tear, the recurrent rate is 40 percent with a large tear.
Q. Okay. So, it's not uncommon for you to see a patient who years later might come back and have –
A. Correct.
Q. Even in the absence of a traumatic or traumatically acute event, have a recurrence?
A. Correct.

* * * *

Q. First, you mentioned the subscapular tendon tear. So, there was an additional pathology --
A. Well, he had -- It was torn a little further than the -- If you look at the 2005 note, you will see that he had the subscapularis tear then. He had some fraying then. This one, I think I described it as a 15 to 20 percent tear of the superior fibers of the subscapularis tendon.

Q. So, it was a larger tear than the prior --
A. It had extended over a small area, yes. It's not a fixable tear. You don't fix it, you just debride it.
Q. And, would you consider that an advancement over --
A. It had advanced from 2005.

Dr. Garside's testimony is the only medical evidence in the record. Dr. Garside's testimony lends itself to dual interpretations on the subject of whether Employee sustained a new, compensable injury or merely a statistically predictable failure of his earlier surgery. There is little doubt that some of the sutures from the prior procedure failed. Yet it is also apparent from Dr. Garside's testimony that, after that occurrence, the tear increased in size. He attributed that increase to "continued use and activities during the normal course of [Employee's] employment." Further, there had been some deterioration of the subscapularis tendon between 2005 and 2011. Issues regarding causation of an injury are questions of fact. Hall v. Am. Freight Sys., Inc., 687 S.W.2d 713, 713 (Tenn. 1985) Thus, the trial court's finding must be accorded a presumption of correctness and may be reversed only if the evidence preponderates against it. House v. YRC, Inc., No. M2011-01535-WC-R3-WC, 2012 WL 2367551, at *5 (Tenn. Workers' Comp. Panel June 22, 2012). In light of the equivocal nature of the medical proof and the fact that Dr. Garside's testimony was given great weight by the trial court due to his extensive history with the Employee as his patient, we are unable to conclude that the trial court's decision was erroneous.

Notice

Employer next contends that Employee failed to give timely notice of his injury as required by Tenn. Code Ann. § 50-6-201(a). Employee testified that his symptoms began with an onset of sharp pain on May 18, 2011. He described the pain as so severe that he was effectively unable to use his arm for the remainder of his workday. Nevertheless, he did not inform his Employer or its insurer of his symptoms until August 2, when he spoke to a representative of Liberty Mutual to arrange an appointment with Dr. Garside. He did not reference the May 18 date until a conversation with a representative of Liberty Mutual on August 29. Finally, he did not give any indication that he was claiming that he had suffered a new injury until his attorney's letter of November 21, 2011.

The trial court found that Employee's conversation with Liberty Mutual's representative on August 29 was sufficient to satisfy the notice requirement.

Employee had met with Dr. Garside concerning the results of his MRI scan three days earlier, on August 26. He testified, and there is no evidence to the contrary, that he believed that his left shoulder symptoms from arthritis were caused by his 2005 injury. The MRI revealed the existence of a rotator cuff tear and prompted Dr. Garside to recommend surgery. According to the testimony of Terry DeLucia, Senior Claims Consultant, Liberty Mutual had already received a copy of the MRI report at that time.

The notice requirement in the workers' compensation statutory scheme "exists so that the Employer will have the opportunity to make a timely investigation of the facts while still readily accessible, and to enable the employer to provide timely and proper treatment for the injured employee." Jones v. Sterling Last Corp. 962 S.W.2d 469, 471 (Tenn. 1998). An employee who fails to notify his employer within the thirty days after he has sustained a work-related injury forfeits the right to workers' compensation benefits unless the employer has actual notice of the injury or unless the employee's failure to notify the employer was reasonable. Tenn. Code Ann. § 50-6-201(a) (2008 & Supp. 2013). In this case, Employee's testimony that he considered arthritis to be the cause of his problems was accredited by the trial court and provides a reasonable explanation for his failure to provide notice at an earlier time. It is noteworthy that Employer, through its insurer, was aware of Employee's symptoms no later than August 2, 2011 and had agreed to provide medical care in accordance with the provisions of the 2005 injury settlement. There is no evidence that Employer's investigation of the facts was compromised in any way by delayed notice. Thus, we are unable to conclude that the evidence preponderates against the trial court's finding on this issue.

Impairment

Finally, Employer asserts that the trial court incorrectly based its award of permanent partial disability benefits on the 4% anatomical impairment to the body as a whole (6% to the left upper extremity) assigned by Dr. Garside at the time he released Employee in March 2012. That impairment was calculated using the Sixth Edition of the AMA Guides. Dr. Garside had assigned an impairment of four percent (4%) to the body as a whole (7% to the left upper extremity) due to the 2005 injury. That rating was calculated using the Fifth Edition of the AMA Guides, which were in effect at that time. Asked to explain the ratings, Dr. Garside testified:

Well, if you look back to the Fifth Edition, they didn't rate rotator cuff tears. There was no -- You can look all through you want and you'll not find a rotator cuff addressed in the Fifth Edition. So, typically, the treatment at that time when you figure out an impairment rating, you rated a patient based on he had subacromial decompression. So, it was very standard to provide an impairment for the subacromial decompression which was an anatomic change to the body, which represents half of the side of an AC joint resection arthroplasty, which was a ten percent (10%) impairment. So, half would be a five percent (5%) impairment. Commonly done in 2005.

If you -- Then, you also were asked during the Fifth Edition to rate a patient based on range of motion. When he was rated at that time, he had a two percent (2%) loss of range of motion. And, adding the two together for a rotator cuff tear would therefore be a seven percent (7%) upper extremity impairment.

Today in the Sixth Edition, they realized one of the failings was, it's basically a diagnosis based impairment rating. So, you take the primary diagnosis and you were placed into a regional impairment. And they have tables for which they provide impairments based on the diagnoses that are present.

So, it's totally changed. You can incorporate a patient's range of motion into that and it will affect a certain aspect of that; the physical exam findings. But, it also rates -- It rates the diagnosis. Then, it looks at the patient. It takes in the patient's functional history, meaning more of their subjective complaints. Physical exam being more of the objective findings. Then, clinical studies. And, you work within this impairment.

So, on Table 15-5 has anywhere from an impairment I believe that can go from three percent (3%) to seven percent (7%). He felt based on the pathology that was noted at the time of his surgery, he would have a six percent (6%) impairment because he had a full thickness rotator cuff tear. He also had a subscapularis tendon tear by clinical studies. Therefore, you have two or more things which boosts it and makes it plus one, which is why I did have that for what I treated him for in 2011.

Dr. Garside was specifically asked if Employee was "any more impaired now anatomically than he was after the 2005 surgery." He responded:

> It's a difficult thing. Because one didn't even take into account a rotator cuff tear. The current system does takes in the rotator cuff tear. The additional pathology that is present, different from the 2005 to 2011, is the thing that pushes it from five to six. And, that's a one percent difference because of the other subscapularis tendon tear.

Employer argues, with some justification, that the meaning of this testimony is that Employee sustained an increase of no more than 1% impairment as a result of the 2011 injury. However, we are unable to conclude that employer's interpretation is the only possible interpretation of Dr. Garside's remarks. In light of the different methodologies used, we find it is equally likely that the rating provided by the Sixth Edition, which specifically addresses a torn rotator cuff, is entirely separate from that provided by the Fifth Edition, which relied on anatomical changes caused by surgical procedures associated with a rotator cuff tear. Under these circumstances, we conclude that the evidence does not preponderate against the trial court's decision.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to United Parcel Service and Liberty Mutual Insurance Corporation and their surety, for which execution may issue if necessary.

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Paul G. Summers, Senior Judge