IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 28, 2013 Session

RANDALL S. ROGERS v. THYSSENKRUPP WAUPACA, INC. ET AL.

Appeal from the Chancery Court for McMinn County
No. 24660 Jerri S. Bryant, Chancellor

No. E2012-00904-WC-R3-WC-Mailed-March 13, 2013/Filed-April 15, 2013

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 report of findings of fact and conclusion of law. The Employee alleged that he sustained a gradual injury to his back in 2007 as a result of his work as a maintenance technician. His employer denied that a compensable injury had occurred and denied that employee had provided timely notice. The trial court found the Employee had sustained a compensable injury and that timely notice had been given. The trial court also found that the Employee had been terminated for cause and limited the award to one and one-half times the anatomical impairment. The Employer has appealed, asserting that the evidence preponderates against the trial court's finding on compensability. We reverse the judgment of the trial court.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J. and PAUL SUMMERS, SR. J., joined.

Catheryne L. Grant, Nashville, Tennessee, for the appellants, ThyssenKrupp Waupaca, Inc. and Sentry Insurance Company.

Bert Bates, Cleveland, Tennessee, for the appellee, Randall S. Rogers.

OPINION

Factual and Procedural Background

Randall Rogers ("Employee") was employed by ThyssenKrupp Waupaca, Inc. ("Employer") from 2001 until May 2009. Initially, his job duties were to install pipe. In 2002, he strained his back while pulling pipe with a rope. This injury did not require medical treatment. After several years, Employee was transferred to the maintenance department. In 2006, Employee slipped and fell causing another episode of back pain. Employee did not seek medical treatment for the 2006 incident.

In August 2007, Employee injured his back while he and other employees were moving a large machine called an auto-grinder. Employee testified that as he was pulling the machine, his back went out and he slipped. After he got up, he felt pain in his back and then leaned on the back of a fork truck. Employee further testified that he immediately told his supervisors, Jim Lick and Al Radke.[1] He was instructed to report to the plant nurse, Lorraine Powers. Ms. Powers was not available at that time, so Employee returned to work. The Employee testified that he spoke to Ms. Powers a couple of days after the incident.

Employee had been a regular patient of Dr. Charles Cox for many years. He had a regularly scheduled appointment with Dr. Cox in September. Consequently, Employee did not seek medical assistance from the Employer but chose to see his regular physician Dr. Cox on September 4, 2007. At the appointment, Employee reported right hip and leg pain. After ordering an MRI, Dr. Cox referred Employee to Dr. Kimbro Maguire, an orthopedist, for evaluation of a herniated disc at L4-5. Dr. Maguire recommended surgery, but Employee opted for a conservative treatment of epidural steroid injections. These injections were arranged by Dr. Cox. The Employee continued to experience pain so Dr. Cox increased the dosage of pain medication he was already prescribing for Employee and changed his appointment schedule from every three months to once-a-month. Dr. Cox placed no restrictions or limitations on Employee's work duties.

Employee continued to work at his same job until May 3, 2009. On that date, he injured his chest while moving a piece of plywood. He reported the incident and continued to work for several hours. His pain worsened, and he was taken to a nearby emergency room for treatment. After he was discharged, he returned to work where a drug screen was administered. The test was positive for cocaine. The Employer's policy on positive drug

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[1] Mr. Lick testified that he had been Employee's supervisor at one time. However, he moved to a different department in 2006. He denied any knowledge of the auto-grinder incident. Mr. Radke did not testify.

screens required that the Employee be driven home and remain off work until the urine sample was sent to an outside laboratory for analysis. The sample was confirmed for cocaine and Employee was terminated on May 6, 2009. Employee filed a Request for Assistance with the Department of Labor and Workforce Development. Employer received notice from the department on June 8, 2009. The department denied Employee's request on June 26, 2009. Employee filed this civil action and on January 12, 2010, the trial court entered an order directing Employer to provide Employee with a panel of physicians for treatment. Employee was referred to Dr. Jay Jolley, an orthopaedic surgeon.

Employee testified that in 2007 his duties in the maintenance department were taking care of the HVAC units, the roof and working on the fork trucks. He also testified that he was required to move casts for the assembly of brake drums. He operated cranes and fork trucks. He testified that it was difficult on his back to pick up the metal casts and made his back hurt. He further testified that his job duties were getting to the point that he was going to quit because of his back difficulties had he not been terminated. On cross examination, however, he admitted that he would have returned to work if he had been allowed after the drug screen and admitted that working with the casts was an exception to his job duties. He admitted that he had a number of jobs that did not require physical activity including reading dials, water and chemical checks, fixing toilets and changing air filters.

Jim Lick testified that he was Employee's supervisor in the maintenance department until 2006. Mr. Lick testified that Employee's work duties were to take care of vehicle maintenance, the compressor, and water and backup systems. The heaviest object he would be called upon to lift weighed fifty to sixty pounds. Mr. Lick estimated that Employee spent 10% of his daily duties lifting objects.

Lorraine Powers, the Employer's nurse, testified she did not recall Employee ever reporting a back injury to her. She first became aware of his alleged back injury in June 2009, when she received correspondence from the Department of Labor.

Medical Evidence

Dr. Charles Cox, Employee's primary care physician, was deposed on October 28, 2009 and a second time on October 19, 2011. Dr. Cox explained that Employee had been his patient since 1991. Initially, Dr. Cox testified that he treated Employee for hypertension and anxiety. Dr. Cox testified on direct examination that Employee complained of low back pain in November 2007 but that he did not relate the pain to any specific event. In his second deposition, Dr. Cox testified that Employee's back condition came to his attention at an office visit on September 4, 2007. At that visit, Employee complained of pain to the right hip and leg and burning in the bottom of the right foot. Dr. Cox ordered a MRI which

revealed a degenerative spine with spondylosis, arthritis, disc bulging and a protrusion or rupture at L4-5. As a result of the MRI, Dr. Cox referred Employee to Dr. Kimbro Maguire, an orthopedist. Dr. Maguire recommended epidural steroid injections directly into the back. Dr. Cox testified that he has continued to see Employee since the referral to Dr. Maguire. Dr. Cox testified that Employee's back condition has "fairly stabilized" and his condition has "waxed and waned." Employee continues to be treated with a combination of narcotic pain medications.

Dr. Cox opined that Employee's injury was a gradual injury. He stated that he based his opinion "on what he told me he did at his job, that it aggravated" Employee's low back condition. Dr. Cox testified on cross examination that he began prescribing narcotic pain medication, including Lortab, Percocet and Endocet to Employee in 2000. He further stated that Employee had "complained of low back pain prior to 2007." Employee's diagnosis and pain medication has remained the same since the 2007 visit. Dr. Cox's medical records reveal numerous recommendations concerning Employee's obesity and Dr. Cox agreed that his obesity contributed to his back pain. Dr. Cox never took Employee off work or placed any limitation on his activities.

Dr. Jay Jolley was deposed on September 26, 2011 and October 3, 2011. Dr. Jolley testified that he first examined Employee on May 5, 2010. Dr. Jolley testified that 30% of his practice was related to workers' compensation. Employee reported that his low back pain symptoms began when "he was pulling an auto-grinder on a skid around the shop floor and felt a sharp pain in his back." Employee did not provide a specific date of injury, but told Dr. Jolley that the situation "had been going on a year and a half."[2] Dr. Jolley's examination of Employee was "pretty unremarkable." His diagnosis was "L4-L5, degenerative disc disease, right lower extremity radiculopathy, and L4-5 stenosis." Employee received an MRI on June 21, 2010. The study revealed degenerative changes and evidence of a disc herniation at the L4-5 level on the right side. On June 23, 2010, Dr. Jolley saw the Employee and recommended surgery to repair the herniated disc. Dr. Jolley believed surgery would decrease Employee's leg pain, but not his back pain. Dr. Jolley recognized that because of Employee's obesity, surgery presented more risks. One month after the June visit, Dr. Jolley had the opportunity to review the voluminous medical records of the Employee, including the records of Dr. Cox. Based upon those records and his own examinations, he opined that Employee's need for surgery to repair the herniated disc was not related to the auto-grinder incident. Dr. Jolley explained that the medical records of Dr. Cox revealed "a fairly extensive pre-injury back condition, which similarly approached the complaints he [Employee] came to me with." Dr. Jolley compared the MRI of September 2007 and the

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[2]In light of that history, Dr. Jolley believed that the auto-grinder incident took place in early 2009. Subsequent questions and answers in both depositions refer to 2007 and 2009 interchangeably.

MRI he ordered in 2010 and found that they did not differ in terms of degenerative disc changes. Dr. Jolley based his opinion that the injury was not work related based upon the extensive amount of history of Employee's back problems and complaints and his pretty significant degenerative disc disease. Furthermore, Dr. Jolley did not believe that there was a specific inciting event for Employee's symptoms. The need for surgery, Dr. Jolley explained, was rooted in Employee's degenerative disc disease. Employee's problem was stenosis where he had changes from the disc which led to changes in the joints which cause constriction around the nerves. Dr. Jolley opined that Employee's weight and genetics were the primary component of his degenerative disc disease and that there was "no good medical basis" to support a conclusion that progression of degenerative disc disease was work related.

In his second deposition, Dr. Jolley restated his opinion that the injury was not work related. He testified that it was clear that the Employee had a "chronic amount of back pain" and degeneration which was "likely obesity related and degeneration related." He considered it a 'no-brainer' that Employee's condition was caused by normal wear and tear and not work related. He stated that the "current thinking" in the medical profession was that degenerative disc disease was primarily genetic.

The trial court took the case under advisement and issued its ruling at a subsequent hearing. The trial court found that Employee had sustained a gradual injury and awarded 7.5% permanent partial disability to the body as a whole. Employer has appealed from that judgment, contending that the trial court erred by finding that a gradual injury occurred.

Standard of Review

We are statutorily required to review the trial court's factual findings "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc., 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

Analysis

Gradual Injury

A gradual injury occurs "when a condition has developed gradually over a period of time resulting in a definite work-connected unexpected, fortuitous injury." Central Motor Express, Inc. v. Burney, 377 S.W.2d 947, 949 (1964)(citing Brown Shoe Co. v. Reed, 350 S.W.2d 65, 69 (Tenn. 1961)).

Dr. Cox first diagnosed Employee with lumbago (lower back pain) in May 2006. At that time, Employee was already being treated with narcotic pain medication for joint pain. After the auto-grinder incident, Employee reported to Dr. Cox that he was experiencing pain going into his right hip and leg. The MRI that Dr. Cox ordered revealed a disc herniation at L4-5. Employee did not report to either Dr. Cox or Dr. Maguire that he had injured his back at work. After his visit to Dr. Maguire, Employee received epidural injections which did not ease the back complaints. Thereafter, Dr. Cox continued to treat Employee with a regimen of pain medication and that regimen has continued. The Employee was able to continue his work without any restrictions or limitations until his termination in May 2009. Dr. Cox opined that Employee had suffered a "gradual injury which worsened over time." Dr. Cox testified that his opinion was "based on what he [Employee] told me he did at his job, that it aggravated." However, Dr. Cox's knowledge of Employee's work duties were limited at best. Dr. Cox had visited the Employer's facility, but according to Nurse Powers, his visit was limited to the production plant and not the maintenance department. Dr. Cox's medical records do not contain a notation of a description of Employee's work activities. Dr. Cox described that he understood Employee's work activities to consist of lifting and carrying parts and moving parts from one place in the factory to another. However, Mr. Lick testified that Employee's job consisted of many tasks and that lifting comprised only 10% of his job duties. In addition, Dr. Cox testified that Employee's back pain "waxes and waned" but was fairly stabilized or perhaps marginally worse since November 2007. Additionally, Dr. Cox did not review the MRI ordered in 2010 by Dr. Jolley. This MRI was consistent with the 2007 MRI and revealed no anatomical changes. Finally, Dr. Cox admitted that Employee's obesity was a contributing factor of his back condition.

The employee has the burden of proving every element of his case by a preponderance of the evidence. Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992). With regard to causation, a plaintiff carries his burden when the proof determines that the "injury has a rational, causal connection to the work." Braden v. Sears, Roebuck & Co., 833 S.W.2d 496, 498 (Tenn. 1992). An employer is required to pay workers' compensation benefits if an employee's work activities cause an actual progression of a pre-existing condition. Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 615 (Tenn. 2008)(citing White

v. Werthan Indus., 824 S.W.2d 158, 160-61 (Tenn. 1992)). A gradually occurring injury is one that typically commences at some unknown point and then gradually progresses in severity until it causes disability. Rankin v. Everybody Oil Co., No. E2010-00587-WC-R3-WC, 2011 WL 826184 (Tenn. Worker's Comp. Panel Mar. 9, 2011) (citing Aerospace Testing Alliance v. Anderson, No. M2007-00959-WC-R3-WC, 2008 WL 2199785 at *6 (Tenn. Worker's Comp. Panel May 23, 2008).

We find that the weight of the evidence does not support a gradual injury. Having examined the record closely, we conclude that the evidence preponderates against the findings of the trial court and we reverse.

Conclusion

The judgment of the trial court is reversed and the complaint is dismissed. Costs are taxed to Randall Rogers and his surety, for which execution shall issue.

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JON KERRY BLACKWOOD, SENIOR JUDGE

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McMinn County Chancery Court
No. 24660

No. E2012-00904-WC-R3-WC

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 Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to Randall Rogers and his surety, for which execution shall issue.

PER CURIAM