IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 27, 2012 Session

SCOTT D. STRAIN v. MR. BULT'S, INC. ET AL.

Appeal from the Chancery Court for Obion County
No. 28230 W. Michael Maloan, Chancellor

No. W2012-00232-WC-R3-WC - Mailed October 30, 2012; Filed November 29, 2012

An employee alleged that he sustained an injury to his back. His employer denied the claim. The trial court found the injury to be compensable and awarded the employee 30% permanent partial disability benefits. The employer has appealed contending that the evidence preponderates against the trial court's finding that the injury is compensable. On appeal, the employee asserts that the award of benefits was inadequate. After review of the record, we affirm the trial court's judgment.

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

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE HOLDER, J., and DONALD E. PARISH, SP. J., joined.

Ashley Yarnell Baskette, Memphis, Tennessee, for the appellants, Mr. Bult's, Inc. and Zurich American Insurance Company.

Jay E. DeGroot, Jackson, Tennessee, for the appellee, Scott Strain.

MEMORANDUM OPINION

Factual and Procedural Background

Scott Strain was employed as a truck driver by Mr. Bult's Inc. ("MBI"), a waste hauling company. Mr. Strain's job consisted of picking up trailers containing waste and transporting those trailers to a landfill in Union City, Tennessee, for unloading. On December 24, 2008, Mr. Strain's truck became stuck while he was in the process of emptying

his trailer at the Union City landfill. He summoned a bulldozer operator, who provided him with a metal cable to attach to the trailer. Attaching the cable required Mr. Strain to bend over and reach a hook on the underside of the trailer. Mr. Strain felt a "pop" in his back while bending, which was followed by numbness and pain in his legs, spine, and waist area. This incident did not prevent Mr. Strain from finishing his workday.

Mr. Strain filed a complaint for workers' compensation benefits in the Chancery Court for Obion County on September 16, 2009. At trial, Mr. Strain testified that he informed Debra Rust, MBI's terminal manager and his direct supervisor, of his injury. Although Mr. Strain initially implied that he told Ms. Rust about the incident on December 24, 2008, he later testified that he spoke to her on December 26, 2008. Mr. Strain testified that Ms. Rust informed him that MBI did not have workers' compensation insurance. Mr. Strain also testified that on December 24, 2008, he "said something about [the incident]" over the radios that were used by drivers and landfill personnel. Mr. Strain continued to work for several days after December 24, 2008. His symptoms did not interfere with his activities until January 3 or 4, 2009, when he began to experience "[e]xcruciating pain" in his back, hips, and legs. On January 4, 2009, Mr. Strain sought treatment at a local emergency room for his symptoms.

Dr. Bruce Brown testified by deposition. Dr. Brown was Mr. Strain's primary care physician since 2002. Mr. Strain saw Dr. Brown on January 5, 2009. Dr. Brown's office note of that date indicated that Mr. Strain reported to him that he had been experiencing back pain for two months. Dr. Brown testified that he recalled Mr. Strain mentioning his back "popping" while unloading a truck, although this information is not contained in the January 5, 2009, note. Mr. Strain did not complain to Dr. Brown of any problem with his back during his previous August 2008 office visit, and Dr. Brown's office note from that date contained no mention of back problems.

Dr. Brown referred Mr. Strain to Dr. Joseph Neimat, a neurosurgeon at Vanderbilt University Medical Center. After examining Mr. Strain and reviewing MRI scans and other diagnostic tests, Dr. Neimat concluded that Mr. Strain had a modest "grade 1 spondylolesthesis at L5-S1" and "fractures in the facet joints or in the pars at L5." Dr. Neimat recommended a fusion of the L5 and S1 vertebrae to stabilize the joint and performed the procedure on February 15, 2010. Dr. Neimat testified that Mr. Strain had a good result from the surgery and that he was "very pleased" with its outcome. Dr. Neimat released Mr. Strain from his care on June 8, 2010. Dr. Neimat did not recall what, if any, permanent restrictions he placed on Mr. Strain's activities, and Dr. Neimat did not express an opinion concerning the extent of impairment resulting from the fracture and surgery. He testified that Mr. Strain's injury was consistent with the type of activity Mr. Strain described as occurring

on December 24, 2008. Dr. Neimat also agreed that other activities, such as moving furniture or picking up a child, could have caused Mr. Strain's injury.

Dr. Apurva Dalal, an orthopaedic surgeon, examined Mr. Strain at the request of Mr. Strain's attorney. Dr. Dalal, who testified by deposition, stated that Mr. Strain had a slippage of the vertebrae, known as spondylolisthesis, at the L5-S1 level prior to December 24, 2008. Dr. Dalal opined that the incident that occurred on December 24, 2008, caused the pars to fracture, which caused the slippage to worsen. There was no indication of pars fractures in Mr. Strain's medical records prior to December 2008. As a result of Mr. Strain's condition, Dr. Dalal stated that Mr. Strain should avoid lifting anything over ten pounds and should avoid bending, stooping, prolonged standing, or climbing, and that he should not ride in a truck for more than one hour. Dr. Dalal opined that Mr. Strain would not be able to be gainfully employed in the future and assigned a 14% permanent anatomical impairment to the body as a whole due to the December 2008 injury and subsequent surgery. Like Dr. Neimat, Dr. Dalal testified that this injury was consistent with the type of activity Mr. Strain described as occurring on December 24, 2008. Dr. Dalal also agreed, however, that other activities, such as bending or lifting children and furniture, could have caused Mr. Strain's injury.

Debra Rust testified at trial. Although Ms. Rust was MBI's terminal manager at the time of Mr. Strain's alleged injury, she was no longer working for MBI at the time of the trial. Ms. Rust testified that on November 20, 2008, Mr. Strain called to tell her he was unable to work that day because he had injured his back playing with his children. Mr. Strain returned to work one or two days later and told Ms. Rust that he was still in pain. Ms. Rust denied that Mr. Strain spoke directly to her concerning an injury on December 24, 2008. She testified that on January 3, 2009, however, Mr. Strain's wife informed her that Mr. Strain had injured himself at work, which was the first time she was made aware of the injury Mr. Strain claimed to have sustained. Ms. Rust told Mrs. Strain that it would be necessary for Mr. Strain to report the injury directly to Ms. Rust before a workers' compensation claim would be initiated. Ms. Rust denied telling Mr. Strain that MBI did not have workers' compensation insurance and testified that MBI did have insurance on December 24, 2008. After talking to Mrs. Strain, Ms. Rust contacted David Bragg, the manager of the landfill where the alleged injury occurred. Mr. Bragg reportedly knew nothing about the incident.

On January 8, 2009, Mr. Strain provided a written statement to Ms. Rust in which he described the injury. Insurance claims submitted by Mr. Strain to Ms. Rust set forth a description of Mr. Strain's injury consistent with his trial testimony.

Dennis Scott Workman, an employee of MBI, testified that around Thanksgiving 2008, Mr. Strain told Mr. Workman that he had hurt his back while moving furniture. Mr.

Workman stated that he could tell Mr. Strain was in pain because he was "walking funny and stuff." Mr. Workman testified that he experienced multiple on-the-job injuries while working for MBI, which were reported to Ms. Rust and were accepted and handled without any difficulty.

David Bragg, the manager of the landfill where Mr. Strain's alleged injury occurred, testified that prior to December 24, 2008, Mr. Strain came into the landfill office walking slowly and "very gingerly." According to Mr. Bragg, Mr. Strain told him that his condition was the result of an old injury. Mr. Bragg also remembered a casual conversation over the radios used at the landfill during which Mr. Strain mentioned that his back was hurting. Mr. Bragg testified that during the conversation, Mr. Strain stated that he did not know the cause of his back pain but that he had been in pain for some time. At one point during his testimony, Mr. Bragg stated that this conversation occurred on December 24, 2008. During another point in his testimony, however, Mr. Bragg stated that the conversation may have occurred prior to December 24, 2008.

James Richard Thomas operated a trash compactor at the landfill in December 2008. Mr. Thomas testified that approximately two weeks before Christmas 2008, he noticed that Mr. Strain was "in severe pain." According to Mr. Thomas, Mr. Strain told him at that time that he had hurt his back a long time ago at another job. Mr. Thomas also stated that Mr. Strain later told him that he thought the pain might have been caused by kidney stones. Mr. Thomas was not working on December 24, 2008, and had no knowledge of what occurred on that date.

Mr. Strain did not return to work for MBI after being released by Dr. Neimat. Instead, Mr. Strain testified that he had plans to look for work as a preacher. Mr. Strain was less active than he had been prior to the injury and was no longer able to mow his yard due to back pain. He did not believe that he was able to drive a truck for extended periods of time. Although he had moved into a new residence in September 2008, he denied telling Mr. Workman that he had injured his back while moving. Mr. Strain agreed that it was possible that he did not inform emergency room personnel on January 4, 2009, that he had injured himself at work.

Mr. Strain was forty-two years old at the time of the trial. He had attended school through the eleventh grade, and his primary work experience was in the trucking industry as both an over-the-road and local driver. He sustained an injury to his back in 2002 while working for another employer, which resulted in two surgical procedures. Mr. Strain testified that he had only occasional problems with his back after 2002 until December 24, 2008, when this injury occurred.

The trial court announced its findings from the bench. The trial court noted that Mr. Strain made different statements to several people concerning the onset of his pain but concluded that Mr. Strain had proven by a preponderance of the evidence that he injured himself at work on December 24, 2008. The trial court awarded Mr. Strain 30% permanent partial disability benefits to the body has a whole. Judgment was entered in accordance with the court's ruling. MBI has appealed, contending that the trial court erred by finding a compensable injury. In addition, Mr. Strain argues that the award of permanent partial disability benefits is inadequate.

This appeal has been referred to a Special Workers' Compensation Panel for a hearing and a report of findings of fact and conclusions of law. See Tenn. Sup. Ct. R. 51, § 1. The standard of review of findings of fact in a workers' compensation case is "de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witness's demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). A trial court's conclusions of law are reviewed de novo with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Claim Compensability

Tennessee Code Annotated section 50-6-103(a) (2005) permits an employee to recover for injuries that occur by accident and arise out of and in the course of employment. The phrase "in the course of" refers to the time, place, and circumstances of the injury and "arising out of" refers to the injury's cause or origin. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997). An accidental injury arises out of and is in the course of employment if the injury has a rational connection to the employment and occurs while the employee is engaged in the work he is employed to perform. Guess v. Sharp Mfg. Co. of Am., 114 S.W.3d 480, 484 (Tenn. 2003). The employee bears the burden of proving every element in a workers' compensation case by a preponderance of the evidence. Talley v. Va. Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989).

In most cases, causation of a work-related injury must be established by expert medical testimony. Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). The relationship between the injury and employment must be established by the preponderance of the expert medical testimony, as supplemented by the lay evidence. 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 . . . .'" Cloyd, 274 S.W.3d at 643 (quoting Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004)). However, all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004).

MBI asserts that the evidence preponderates against the trial court's finding that Mr. Strain sustained a compensable injury in the course of his employment. MBI asserts that Mr. Strain had "significant back injuries before December 24, 2008." Building on that premise, MBI points to Ms. Rust's testimony that in November 2008, Mr. Strain was absent from work due to back pain caused by an injury he sustained while playing with his children. MBI also points to testimony from Messrs. Workman, Bragg, and Thomas that Mr. Strain complained of significant back pain in the weeks prior to December 24, 2008.

Notwithstanding the testimony on which MBI relies, Dr. Neimat and Dr. Dalal both testified that the pars fractures disclosed by x-rays and MRIs were consistent with an incident such as the one described by Mr. Strain. Although Mr. Strain may have had back pain in the weeks prior to December 24, 2008, there is no evidence that he sought or received medical treatment for his pain. Dr. Brown also testified that during his January 5, 2009 visit, Mr. Strain mentioned that his back popped while unloading a truck. Ms. Rust testified that Mr. Strain's wife described a work injury during a conversation with her on January 3, 2009. In addition, the documents created or completed by Mr. Strain shortly thereafter, including his written notice to MBI, all included a consistent description of the injury.

The trial court had the opportunity to observe the witnesses as they testified. Although the trial court's decision makes no specific finding concerning credibility, the resolution of the issue of compensability necessarily required the trial court to accredit Mr. Strain's testimony. See Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002) (a trial court's finding on credibility may be implied from the manner in which the trial court decided the case). The trial court's implicit finding that Mr. Strain's testimony was credible is entitled to considerable deference from this court. Madden, 277 S.W.3d at 900.

After our review of the record, we conclude that the evidence does not preponderate against the trial court's finding that Mr. Strain suffered a compensable injury.

Vocational Disability

Mr. Strain argues that the evidence preponderates against the trial court's award of 30% permanent partial disability and asks this Panel to increase that award. BMI contends that the award was adequate.

The extent of an injured worker's permanent disability is a question of fact. Lang v. Nissan N. Am., Inc., 170 S.W.3d 564, 569 (Tenn. 2005) (citing Jaske v. Murray Ohio Mfg. Co., 750 S.W.2d 150, 151 (Tenn. 1988). In making a determination of vocational disability, the trial court considers all pertinent factors, including lay and expert testimony, an employee's age, education, skills and training, local job opportunities, and the employee's capacity to work at types of employment available in the employee's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1) (2008); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986).

A trial court may not disregard an employee's assessment of his own physical condition and resulting disabilities. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975). A trial court is not bound to accept physicians' opinions regarding the extent of an employee's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983). Instead, trial courts "consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability." Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998) (citing Hinson, 654 S.W.2d at 677).

Based on the medical proof presented, the trial court found that Mr. Strain was entitled to 30% permanent partial disability. Dr. Neimat testified that Mr. Strain had benefitted from his February 15, 2010, surgical procedure but did not testify as to Mr. Strain's impairment rating. Dr. Dalal's testified concerning Mr. Strain's suggested activity limitations and provided an impairment rating of 14% to the body as a whole. The trial court heard testimony from Mr. Strain concerning the effects of his injury, his unsuccessful efforts to find employment, his age, education, and job training.

Under the appropriate circumstances, a trial court's award of workers' compensation benefits may be reversed or modified. Howell v. Nissan N. Am., Inc., 346 S.W.3d 467, 474 (Tenn. 2011) (citing Tryon v. Saturn Corp., 254 S.W.3d 321, 335 (Tenn. 2008). It is not this court's role, however, "to simply substitute its judgment for that of the trial court in accessing an employee's vocational disability." Howell, 346 S.W.3d at 474 (citing Tryon, 254 S.W.3d at 335). After reviewing the record, we are unable to conclude that the evidence preponderates against the trial court's award of 30% permanent partial disability.

Conclusion

The judgment of the trial court is affirmed. Costs are assessed against MBI and Zurich American Insurance Company, and their surety, for which execution may issue if necessary.

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TONY A. CHILDRESS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

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Chancery Court for Obion County
No. 28230

No. W2012-00232-WC-R3-WC - Filed November 29, 2012

JUDGMENT ORDER

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 on appeal are taxed to the Appellants, Mr. Bult's, Inc. and Zurich American Insurance Company, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM