IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
April 29, 2014 Session

UNITED PARCEL SERVICE, INC. ET AL. V. KENNETH CAMERON

Appeal from the Circuit Court for Hamilton County
No. 09C172 L. Marie Williams, Judge

No. E2013-02001-SC-R3-WC-MAILED-JULY 16, 2014 / FILED-AUGUST 15, 2014

The employee was injured in a motor vehicle accident while at work. He claimed permanent injury to his left elbow and left shoulder. The trial court found that his left elbow was permanently injured but that his left shoulder was not permanently injured. The employee has appealed, contending that the trial court erred by not finding that the left shoulder was permanently injured, by not awarding additional temporary disability benefits, and by failing to order surgery for his left shoulder. 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 of the trial court.

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

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which GARY R. WADE, C.J., and JON KERRY BLACKWOOD, SR. J., joined.

Hugh P. Garner, Chattanooga, Tennessee, for the appellant, Kenneth Cameron.

C. Scott Johnson, Chattanooga, Tennessee, for the appellees, United Parcel Services, Inc. and Liberty Mutual Fire Insurance Company.

OPINION

I. Factual and Procedural Background

Kenneth Cameron (the "Employee") worked for United Parcel Service (the "Employer") from 1980 until 2008. He was working as a package car driver on April 10,

2008, on his regular route in Kimball, Tennessee, when his vehicle was struck by a pickup truck in a head-on collision. He suffered immediate pain in his shoulder, neck, and arm.[1] He contacted his supervisor, who arranged for another truck and driver to come to the scene. He made two visits to Physicians' Care in Chattanooga where he was examined by Dr. Lloyd Rimer and Dr. Matthew Tinney. During his treatment at Physicians' Care, he received prescriptions for muscle relaxers and pain medication. The Employee then returned to Dr. Jerry Smith, a pain management specialist who was the authorized physician for his previous work injury in 2001 but was not an authorized physician for the 2008 injury. Following an examination, Dr. Smith placed temporary work restrictions on the Employee. Dr. Smith had seen the Employee prior to his work injury on March 25, 2008, for pain in his elbow, neck, and left upper back. Dr. Smith's impression was chronic cervical pain and left elbow medial epicondylitis. Beginning in December 2007 and continuing into 2008, the Employee was on light duty because of pain in the neck and elbow. Following the incident on April 10, 2008, and the brief initial treatment by Dr. Rimer, Dr. Tinney, and Dr. Smith, the Employer provided a list of physicians to treat the new injury.

The Employee chose from the list Dr. Robert Mastey, an orthopaedic surgeon. Dr. Mastey did not testify, but his medical records were stipulated as evidence by agreement of the parties. According to the medical records, the Employee was first seen by Dr. Mastey on May 5, 2008. Dr. Mastey ordered an EMG study, which was normal, and an MRI, which showed a "very small partial articular surface tear of the osseous attachment of the conjoined portion of the supraspinatus/infraspinatus tendon" in the left shoulder. Dr. Mastey provided conservative treatment which included physical therapy and medication until November 2008, when Dr. Mastey reported that the Employee said his shoulder was "doing great." Dr. Mastey returned the Employee to work and released work restrictions for the left shoulder and elbow. In a report dated November 14, 2008, Dr. Mastey found that the Employee had reached maximum medical improvement and assigned a permanent impairment rating of 1% to the body as a whole.

The Employee was dissatisfied with Dr. Mastey's opinions and denied that he told Dr. Mastey that his shoulder was "doing great." Thereafter he went to Dr. James Killeffer, a neurosurgeon, for additional treatment. He returned, however, to Dr. Mastey in May 2009. Dr. Mastey ordered an additional MRI and an arthrogram. In June 2009, Dr. Mastey recommended surgery for the Employee's elbow. The Employee determined that he did not

[1] The Employee had sustained a work-related injury to his neck and left shoulder area in 2001, for which he continued to receive occasional treatment at the time of this incident. Although the Employee initially reported neck symptoms from the 2008 incident, various doctors concluded that he had not sustained a new injury to his neck, and he did not pursue a claim for such an injury at trial.

wish to continue treatment with Dr. Mastey. The Employer then offered a new panel of physicians, and the Employee selected Dr. Peter Lund.

Dr. Lund, an orthopaedic surgeon, examined the Employee on a single occasion on September 1, 2009 for complaints of left shoulder pain and hand numbness. Dr. Lund also reviewed medical records and tests ordered by other physicians. Dr. Lund found diminished range of motion in the shoulder, but normal strength. He did not find any compromise of the rotator cuff in the MRI or arthrogram, but he thought the studies showed possible tendinosis, or thinning, of one of the tendons. He did not think surgery would help this condition, but recommended an evaluation by a shoulder specialist, Dr. John Dorizas, to address that question. He further opined that the Employee had a probable mild ulnar neuropathy at the elbow.

Dr. Dorizas, an orthopaedic surgeon, first examined the Employee on October 20, 2009. Dr. Dorizas found stiffness in the left shoulder and diagnosed a "frozen shoulder." He gave the Employee an injection in the shoulder, prescribed anti-inflammatory medication, and ordered physical therapy. The Employee was "convinced" that he had a rotator cuff tear that required surgical repair, but Dr. Dorizas advised him that was not the case. The injection did not give even temporary relief, which further suggested to Dr. Dorizas that there was no rotator cuff tear and that the Employee would not benefit from surgery. He recommended a manipulation of the shoulder under anaesthesia to "loosen up" the possible frozen shoulder. Dr. Dorizas performed the manipulation on January 19, 2010, and reported that he did not feel any adhesions breaking loose during the procedure, which was unusual. For that reason, he felt that the tightness in the shoulder was caused by chronic disuse.

After the manipulation procedure, the Employee reported to Dr. Dorizas that the pain in his shoulder had improved dramatically. Dr. Dorizas testified that the strength and range of motion of the shoulder also improved. He ordered additional physical therapy to further strengthen the shoulder. The physical therapist reported that the Employee was not cooperating and was magnifying symptoms. In March 2010, Dr. Dorizas advised the Employee that he would reach maximum medical improvement in about six weeks and recommended that he undergo a functional capacity evaluation and an independent medical evaluation ("IME") to determine if he had a permanent impairment. The Employee disagreed with these findings and recommendations and returned to Dr. Jerry Smith, who was not an authorized physician as to the April 10, 2008 incident. Dr. Jerry Smith referred him to Dr. Chad Smith.[2]

[2] In order to distinguish Dr. Chad Smith from Dr. Jerry Smith, we refer to these physicians by their first and last names in this portion of the opinion.

The Employee returned to Dr. Dorizas in April 2010 and stated that Dr. Chad Smith had recommended a rotator cuff repair surgery. Dr. Chad Smith was not an authorized physician; moreover, he did not testify and his records were not placed into evidence. Dr. Dorizas, however, testified that he called Dr. Chad Smith and found that there had been no recommendation for rotator cuff surgery. The Employee declined to participate in the functional capacity evaluation by Dr. Dorizas. Dr. Dorizas declared him to be at maximum medical improvement and opined that he required no further medical treatment for his shoulder. He stated that he did not think the Employee had any impairment concerning his shoulder, and he recommended an IME to determine if there was any impairment due to his other medical issues.

Dr. Jerry Smith, the pain management specialist who had been treating the Employee since his 2001 injury, testified that the Employee had chronic pain in the left shoulder blade. He stated that the Employee had new symptoms and a new injury in his shoulder after the April 2008 motor vehicle accident. He opined that an early MRI showed a rotator cuff tear. He opined that surgery was required to repair the rotator cuff. His opinion was based on the Employee's statement to him that Dr. Chad Smith had made such a recommendation. Unlike Dr. Dorizas, Dr. Jerry Smith did not speak to Dr. Chad Smith about the alleged recommendation. During cross-examination, he agreed that the Employee had reported left elbow symptoms to him ten days before the motor vehicle accident. He also stated that he would defer to the opinions of the orthopaedic surgeons involved as to the usefulness of shoulder surgery.

Dr. Blake Garside, an orthopaedic surgeon, saw the Employee on one occasion on September 14, 2011. While Dr. Garside was not an authorized physician, he was authorized to perform an IME as recommended by Dr. Dorizas. Dr. Garside's diagnoses included "[l]eft partial rotator cuff tear versus tendinopathy," "[a]cromioclavicular joint arthritis," and "[l]eft cubital tunnel syndrome." He stated that it was difficult to distinguish a partial tear from tendinopathy on an MRI. Dr. Garside noted that numerous physicians had concluded that the Employee's subjective complaints were far out of proportion to the objective findings or what would be expected based on diagnostic studies. He based his opinion in part on the pain complaints. He opined that the Employee had an impairment of 11% to the body as a whole based on diminished range of motion in his shoulder and left cubital tunnel syndrome. He agreed that the Employee's range of motion had decreased substantially since examinations by Dr. Mastey and Dr. Dorizas. He recommended that the Employee avoid overhead work and overhead lifting. On cross-examination, he agreed that non-use of the arm and shoulder could cause adhesive capsulitis to develop, resulting in lost range of motion. He suggested that a diagnostic arthroscopy might be useful. If such a procedure were done, impairment would be assigned under the diagnosis related estimate portion of the AMA Guides and would probably be in the range of 3% to the body as a whole.

The Employee sought workers' compensation benefits from the Employer in connection with the April 2008 work injury. The parties were unable to resolve their differences at a Benefit Review Conference held on January 27, 2009. The Employer filed this action in the Circuit Court for Hamilton County later the same day. The case proceeded to trial on August 1, 2013.

The Employee was fifty-one years old when the trial occurred. He was six feet three inches tall and weighed approximately 240 pounds. He had completed one and one-half years of college. He testified that he attended the functional capacity evaluation and IME recommended by Dr. Dorizas only when ordered by the trial court. He said that the statements in several doctors' medical records, particularly those of Dr. Dorizas, differed from what they had said to him in person. He stated that his elbow problem was getting worse and also that he thought he needed surgery on his shoulder and elbow.

The trial court took the case under advisement and issued its findings in a Memorandum Opinion. The trial court stated that "there are significant discrepancies between [the Employee's] testimony and that of the medical witnesses. Many of the Employee's factual recitals about his medical treatment and opinions of doctors are incorrect. His credibility is suspect." The trial court also made the following observation:

> [W]hen looking at the medical care and treatment as a whole it is apparent that when [the Employee] was actively involved in treatment and physical therapy, he would improve significantly until a physician told him he was about to reach maximum medical improvement or have an impairment rating. He then would institute a change of physicians to whom he would report multiple complaints and would have an increase of symptoms which it seems would be attributable to failure to perform home exercises and strengthening as required.

The trial court found that the Employee had sustained injuries to his left shoulder and left elbow as a result of his work injury. The trial court further found that he had sustained an 8% permanent partial disability to the arm as a result of the left elbow injury, but concluded that he had no permanent disability from the left shoulder injury. The trial court found that the Employee had the ability to return to work at regular duty. The court denied all claims for temporary disability benefits other than those already paid by the Employer. The court also determined that the Employee had been overpaid for temporary disability in the amount of $20,160, which it awarded as a credit against the permanent partial disability benefits owed by the Employer. The trial court denied the Employee's request to order shoulder surgery but held that the Employee could undergo further treatment by Dr. Mastey or Dr. Lund. The Employee has appealed, contending that the evidence preponderates

against the findings concerning his left shoulder and temporary disability. He also asserts that the trial court erred by failing to order surgery for the shoulder.

II. Analysis

The standard of review of issues 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 findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2013). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. 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. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

A. Permanent Partial Disability – Shoulder

The Employee argues that the evidence preponderates against the trial court's finding that he did not sustain permanent disability from his left shoulder injury. We begin our analysis by observing that the Employee was treated by no fewer than twelve physicians for the neck, shoulder, and elbow problems he alleged to be the result of the April 2008 motor vehicle accident. At the time of his accident in 2008 he was already receiving treatment for a prior neck injury in 2001. Although several specialists examined his neck, there was no evidence of a new injury.

The Employee's shoulder was examined and treated by Dr. Mastey, Dr. Lund, Dr. Dorizas, Dr. Chad Smith, Dr. Jerry Smith, and Dr. Garside. Dr. Mastey, Dr. Lund, and Dr. Dorizas all testified that the Employee did not have a torn rotator cuff, did not require surgery, and did not retain any permanent disability.

The Employee directly attacked the credibility of each of these doctors in his trial testimony. He contended that their medical records and testimony were inaccurate and contradicted their statements made to him during treatment. The trial court's examination of this conflicting evidence necessarily involved an assessment of the Employee's credibility. The trial court found that there were "significant discrepancies" between the Employee's testimony and that of the his physicians, and further found that "[m]any of the [his] factual recitations about his medical treatment and opinions of doctors are incorrect." Thus, the trial court described the Employee's credibility as "suspect." The trial court observed that the

Employee repeatedly requested "another doctor when the authorized treating physician opined he was at MMI and removed restrictions for the treated area." The trial court's conclusion that the left shoulder injury was not permanent reflects a finding that much of the Employee's testimony concerning medical treatment of his shoulder was not credible. We defer to that finding.

Dr. Jerry Smith and Dr. Garside testified that the Employee did, in fact, have a permanent impairment in his shoulder. Dr. Jerry Smith's opinion appeared to be based, in whole or in part, on statements verbally attributed by the Employee to Dr. Chad Smith that surgery was required to repair the rotary cuff of the shoulder. There is, however, no direct evidence of Dr. Chad Smith's opinion in this record. Moreover, Dr. Dorizas testified that he was personally acquainted with Dr. Chad Smith, that he called him to discuss the case, and that the two were in agreement as to the proper diagnosis and proposed course of treatment, which did not include surgery. The trial court found that "Dr. Jerry Smith makes the comment he thinks surgery is appropriate but the court finds there is not a credible basis for his opinions as the statements on which he admits to basing his opinion reflect a history which is not accurate." We find no error in this assessment of Dr. Jerry Smith's opinion by the trial court.

Upon careful examination, Dr. Garside's opinions concerning the Employee's shoulder are, for the most part, consistent with those of Dr. Mastey and Dr. Dorizas. Dr. Garside indicated that the defect shown on the MRIs and arthrogram might be a "partial tear" of a rotator cuff tendon or might be degenerative thinning. The procedure he proposed, an arthroscopy, was directed more at diagnosis than treatment. Dr. Garside did not contend that the tendon required any type of surgical repair. His assignment of impairment was based strictly on measurements of diminished range of motion in the left shoulder joint, which other doctors' explained was the result of disuse. Dr. Garside's measurements took place over a year after Dr. Dorizas had determined the Employee to be at maximum medical improvement in April 2010. At that time, the Employee had full range of motion and strength in his left shoulder. Dr. Mastey and Dr. Lund had made similar findings in the years prior to the treatment by Dr. Dorizas. Based on that evidence, we conclude that the trial court did not err by choosing to give greater weight to the opinions of the physicians who provided treatment in the years immediately following the accident and less weight to those who relied on inaccurate medical history provided by the Employee. We conclude, therefore, that the evidence does not preponderate against the trial court's determination that there was no permanent disability to the left shoulder.

B. Temporary Total Disability

The Employee contends that the trial court erred by failing to award temporary total disability benefits in addition to those paid voluntarily by the Employer. The Employee

asserts that "[i]n each case where [a] doctor said that [he] was at maximum medical improvement, [he] asked for and was given another doctor. The newly-appointed doctors reinstated him on temporary total disability and proceeded with their care and treatment." The Employee does not set out any specific evidence to support his assertion that more benefits for total temporary disability should be awarded, nor does he provide any citations to the record. See Tenn. R. App. P. 27(a)(6), (7); Sykes v. Chattanooga Hous. Auth., 343 S.W.3d 18, 24 n.1 (Tenn. 2011) (declining to review rulings where the appellants "provided no argument nor citation to authority disputing the[] rulings in their appellate brief").

On the other hand, the trial court specifically addressed the issue of additional temporary total disability in its memorandum opinion. It examined each of the three cases where there was a determination that the Employee had reached maximum medical improvement and found that there had been an overpayment of temporary total disability. The Employee had been paid $76,832 in temporary total and temporary partial benefits and $3472 as an advancement, for a total of $80,304. The court found he was overpaid by the sum of $20,160 for temporary total disability benefits based on periods when he had been declared to be at maximum medical improvement and had not yet had his temporary disability status reinstated by a subsequent physician. The record shows that the Employee was declared to be at maximum medical improvement as early as November 14, 2008. We find that the evidence in this record does not preponderate against the trial court's decision that temporary total benefits had been overpaid.

C. Surgery

Finally, the Employee contends that the trial court erred by failing to order surgery for his left shoulder. He offers no arguments in support of this contention. It is well established that "[t]he employer or the employer's agent shall furnish . . . such medical and surgical treatment . . . as ordered by the attending physician . . . made reasonably necessary by accident as defined in the chapter." Tenn. Code Ann. § 50-6-204(a)(1)(A) (Supp. 2013). As a precondition before any surgery can be ordered by a reviewing court, the surgery must have been ordered by the attending physician. Without a physician ordering same, a court is powerless to issue medical decrees. The trial court observed:

> The [E]mployee contends this court should order the requested shoulder surgery. The court finds its authority is to designate the authorized treating physicians who in this case are Drs. Lund and Mastey. In order to seek additional medical treatment the [E]mployee must return to one of these authorized treating physicians for additional treatment and recommendations. The court is not a physician authorized to order medical treatment.

As set out above, Dr. Mastey, Dr. Lund, and Dr. Dorizas all opined that the Employee would not benefit from rotator cuff surgery. The trial court accredited that testimony. We find that the evidence in this record does not preponderate against the trial court's decision not to order surgery.

III. Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Kenneth Cameron and his surety, for which execution may issue if necessary.

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E. RILEY ANDERSON, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
April 29, 2014 SESSION

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Circuit Court for Hamilton County
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No. E2013-02001-SC-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 appeals 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 of this appeal are taxed to Kenneth Cameron and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM