

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 23, 2010 Session

**WILLIAM DAVID MORGAN v. GOODYEAR TIRE & RUBBER
COMPANY ET AL.**

**Appeal from the Chancery Court for Obion County
No. 27,469 W. Michael Maloan, Chancellor**

No. W2009-02604-WC-R3-WC - Mailed February 9, 2011; Filed March 11, 2011

In this workers' compensation appeal, the employee alleged a work-related incident aggravated a pre-existing back condition and that he required surgery as a result of the injury. His employer denied the claim, contending that the surgery was for treatment of a pre-existing condition and that the work related incident did not advance the pre-existing condition. The trial court found for the employee and awarded 20% permanent partial disability benefits. The employer appealed.¹ We affirm the judgment.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and TONY A. CHILDRESS, SP. J., joined.

W. Lewis Jenkins, Jr., Dyersburg, Tennessee, for the appellants, Goodyear Tire & Rubber Company and Liberty Mutual Insurance Company.

Jeffrey A. Garrety and Michael J. Cash, Jackson, Tennessee, for the appellee, William David Morgan.

¹Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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.

MEMORANDUM OPINION

Factual and Procedural Background

On May 14, 2008, William David Morgan filed a complaint seeking workers' compensation benefits for alleged injuries to his lumbar spine. The complaint sought benefits from Goodyear Tire & Rubber Company ("Goodyear"), his employer, and Liberty Mutual Insurance Company, his employer's workers' compensation carrier. In his complaint, Mr. Morgan contended that he sustained a compensable back injury on or about April 23, 2007. His complaint alleges that the injury occurred at work while pushing a loaded trailer. A trial was held before the chancery court on April 7, 2009. The medical evidence at trial consisted of the testimony of three physicians who testified by deposition.

Five months prior to the date of the alleged injury, on November 21, 2006, Mr. Morgan consulted Dr. Michael Brueggeman, a neurologist, concerning pain in his lower back and right thigh. Dr. Brueggeman testified that Mr. Morgan had consulted another doctor in the Dr. Brueggeman's group in 1998 for lower back pain. Mr. Morgan told Dr. Brueggeman that he had been having trouble with his right thigh during the previous "several years." He told Dr. Brueggeman that his pain was "moderately bad," "about five days a week." The results of Dr. Brueggeman's physical examination were generally normal, although Mr. Morgan had diminished reflexes and he had difficulty performing a right heel-toe walk. Dr. Brueggeman prescribed medication and ordered magnetic resonance imaging (MRI) and electromyography (EMG) testing. The EMG was within normal limits, but the MRI showed a small disc herniation at the L5-S1 level on the right side. Based on his findings and Mr. Morgan's symptoms, Dr. Brueggeman did not believe that Mr. Morgan's back condition warranted surgery, but Dr. Brueggeman offered the option of a surgical consultation, which Mr. Morgan declined. Dr. Brueggeman discussed various non-surgical options with him, prescribed pain medication, and released Mr. Morgan from his care on December 27, 2006.

Mr. Morgan continued to work at his regular job for Goodyear. On April 28, 2007, he reported to the on-site medical facility with a complaint of lower back pain radiating into his right leg "after pushing a load of liner into #9 tuber." The clinic report stated that Mr. Morgan experienced lower back pain and pain in his leg in August 2005. He was referred to a primary care physician, who provided conservative treatment. Mr. Morgan was ultimately referred to Dr. LaVerne Lovell, a neurosurgeon.

Dr. Lovell first saw Mr. Morgan on June 19, 2007. Mr. Morgan gave a history of "back pain and lower extremity pain which started last year." The doctor's note states that Mr. Morgan "evidently declared a work injury in April, 2007." At the time of the examination, Mr. Morgan had a limp and displayed difficulty rising from a sitting position

due to right thigh pain. Dr. Lovell reviewed the December 2006 MRI ordered by Dr. Brueggeman and interpreted it to show a right L4-5 disc herniation. Because Mr. Morgan previously had an unsuccessful course of conservative treatment, Dr. Lovell recommended a microdiscectomy at the L4-5 level, which was performed on October 8, 2007. The surgery was successful, and Mr. Morgan had a substantial, though not total, decrease in his back and leg pain. In January 2008, after a period of recovery and physical therapy, Dr. Lovell released Mr. Morgan to return to work without restrictions. When Dr. Lovell next saw Mr. Morgan in April 2008, Mr. Morgan complained of intermittent severe right leg pain. Dr. Lovell ordered a new MRI, which showed a very small recurrent disc herniation at the level of the surgery. He recommended against additional surgery unless Mr. Morgan's symptoms increased substantially.

Dr. Lovell testified that he did not order an additional MRI prior to the October 2007 surgery. He further testified that the condition of Mr. Morgan's spine, as he observed it during surgery, was consistent with the MRI ordered by Dr. Brueggeman in December 2006, but that he did not have the medical records and reports from Dr. Brueggeman's office. Dr. Lovell was unwilling to state whether or not the April 2007 event had advanced Mr. Morgan's pre-existing condition or caused an anatomical change. He also declined to state an opinion concerning anatomical impairment. In response to a hypothetical question during cross examination, Dr. Lovell stated that the event, as described, could have caused an advancement of Mr. Morgan's pre-existing condition.

Dr. Apurva Dalal, a board certified orthopaedic surgeon, conducted an independent medical evaluation on March 3, 2008, at the request of Mr. Morgan's attorney. Dr. Dalal reviewed pertinent medical records and examined Mr. Morgan. Based upon that information, Dr. Dalal testified that the April 2007 event had caused an anatomical change in Mr. Morgan's spine and that surgery would not have been necessary if that event had not occurred. It was Dr. Dalal's opinion that Mr. Morgan retained a 13% permanent anatomical impairment to the body as a whole due to the injury and surgery.

Mr. Morgan was fifty-seven years old at the time of the trial. He had attended school through the tenth grade and later obtained a General Educational Development diploma. He began working for Goodyear in 1994, returned to work after the surgery involved in this action, and continued to work for Goodyear at the time of the trial. Prior to 1994, he served in the Navy and the National Guard. He also had worked for a grain company in an unspecified job, on a clean-up crew for a food processing company, on a job loading and unloading fertilizer from trucks, and for a soft-drink company. He testified that he would have been able to perform his previous jobs after his surgery, although he would have had difficulty with some of the heavier tasks involved.

Mr. Morgan also testified that he had injured his back in 1998 while working for Goodyear. He had received some medical treatment and had some ongoing symptoms thereafter, but he had no permanent restrictions and had been able to perform all tasks required of him. After the April 2007 event, his pain doubled and he developed a limp. After the surgery, he was able to return to normal activities, although he still had occasional symptoms. He did not require any medication on a regular basis.

The trial court found that Mr. Morgan had sustained a compensable aggravation of his pre-existing condition. It awarded 15% permanent partial disability to the body as a whole. Goodyear appealed, contending that the trial court erred by finding that Mr. Morgan suffered a compensable aggravation of his pre-existing lower back condition.

Standard of Review

The standard of review for findings of fact is “de novo upon the record of the trial court, accompanied by a presumption of the 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 the trial court when the trial judge had the opportunity to observe the witness's demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). 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. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). 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); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

Goodyear argues that Mr. Morgan had a pre-existing lumbar condition and that the work incident on April 28, 2007, increased his pain but did not advance the condition. Goodyear therefore contends that the incident did not result in a compensable injury. It cites Foreman v. Automatic Systems, Inc., 272 S.W.3d 560 (Tenn. 2008), as being analogous to the case before us. In that case, the employee had a pre-existing back condition of long standing. Id. at 563-66. She consulted an orthopaedic surgeon, who advised her that her treatment alternatives were either surgery or continuing to use medication for pain and muscle stiffness. Id. at 565. Shortly thereafter, she experienced an increase in pain as a

result of an incident at work. Id. The trial court denied benefits, and the Supreme Court affirmed, noting that the surgeon, who examined her both before and after the alleged work injury, testified that he was unable to detect an anatomical change based upon MRIs taken before and after the work incident. Id. at 575-75. Goodyear argues Dr. Lovell's testimony that his observations during surgery were consistent with the pre-injury MRI scan demonstrates that the work incident merely caused an aggravation of Mr. Morgan's symptoms and is therefore not compensable. Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d 888, 890 (Tenn. 1991).

Mr. Morgan compares the evidence in this case to that in Trosper v. Armstrong Wood Products, Inc., 273 S.W.3d 598 (Tenn. 2008). In that case, the employee contended that a particular job he performed for his employer had advanced pre-existing osteoarthritis in his hands. Id. at 603. There was conflicting medical evidence on the issue. Id. at 601-03. The trial court found for the employee, and the Supreme Court affirmed, adopting the following standard: "[I]f the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable." Id. at 607.

Similar to the Foreman case, Mr. Morgan sought and received medical treatment for significant low back problems a short time before his April 2007 work injury. However, Dr. Brueggeman, who treated him in November and December 2006, did not believe from his findings that Mr. Morgan's symptoms warranted surgery at that time. While he offered Mr. Morgan a surgical consultation, Dr. Brueggeman noted that it was unlikely the consulting physician would recommend surgery. Further, Mr. Morgan did not return to Dr. Brueggeman's care after the April 2007 injury. The facts are distinguishable from Foreman, in which the employee's physician offered a surgery option prior to the work event, continued to treat her for a time after the work event, and testified that the event had merely caused "a temporary exacerbation of her symptoms." Foreman, 272 S.W.3d at 565-66. Because of those significant differences in the evidence, Foreman does not dictate the outcome of this case.

In the present case, Dr. Lovell would not give an opinion as to whether the April 2007 incident caused an anatomical change or advanced Mr. Morgan's back condition, but stated that the incident could have done so. He did not, however, have Dr. Brueggeman's medical records and reports to compare with his own findings. Dr. Dalal, to the contrary, testified that in his opinion the injury sustained by Mr. Morgan on April 28, 2007, did cause anatomical change. He based his opinion on Dr. Brueggeman's examination of Mr. Morgan in 2006, during which the EMG nerve conduction velocity study of the right leg was within normal limits and the physical examination of Mr. Morgan indicated no significant radiculopathy. Mr. Morgan had good range of motion in his back, good strength in his lower

extremity and was able to flex up to ninety degrees. Dr. Dalal testified there was no mention by Dr. Brueggeman of a positive straight leg raising test and further noted that being able to flex or bend over to 90 degrees “indicates that he didn’t have a significantly positive radiculopathy.”²

Based on a review of Dr. Lovell’s medical records, Dr. Dalal observed that following the April 2007 injury, Mr. Morgan presented with “pain radiating down his leg . . . affecting his walking ability and . . . an antalgic gait which signifies that there is a severe pain and radiculopathy now present, which he did not have prior to this work related injury.” In Dr. Dalal’s opinion, the “disc became enlarged and completely herniated out pressing on this nerve root badly enough that it needed to have surgery” as a result of the April 28, 2007 injury. In our view, the evidence presented to the trial court reasonably allowed the conclusion that the April 2007 injury did not cause a mere “temporary exacerbation” of a long-standing condition but caused an actual advancement of that condition requiring surgical treatment. We therefore find 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 the appellants, Goodyear Tire & Rubber Company and Liberty Mutual Insurance Company, and their surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

²Dr. Dalal testified the fact Mr. Morgan was able to flex to 90 degrees was equivalent to a negative straight leg raising test.

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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, Goodyear Tire & Rubber Company and Liberty Mutual Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM