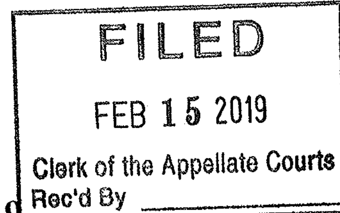
IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 24, 2018 Session

DONALD R. LOVELESS v. CITY OF NEW JOHNSONVILLE, ET AL.

Appeal from the Chancery Court for Humphreys County
No. 2016-CV-73 Larry J. Wallace, Judge



No. M2018-00523-SC-R3-WC – Mailed January 15, 2019
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Donald R. Loveless ("Employee") alleged he sustained a compensable injury on February 9, 2014, when he fell in the course and scope of his employment with the City of New Johnsonville ("Employer"). Following trial, the trial court awarded permanent partial disability benefits. Employer appeals, contending Employee did not sustain a compensable injury. 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 reverse the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Chancery Court Reversed

DON R. ASH, SR.J. delivered the opinion of the court, in which JEFFREY S. BIVINS, C.J. and ROSS H. HICKS, J. joined.

Robert O. Binkley and Jennifer Vallor Ivy, Jackson, Tennessee, for the appellant City of New Johnsonville.

Charles L. Hicks, Camden, Tennessee, for the appellee Donald R. Loveless.

OPINION

Factual and Procedural Background

Employee, age 52 at the time of trial, began working as a water treatment plant operator for the City of New Johnsonville in February 2011. On February 9, 2014, Employee was walking down steps at the water treatment plant when he slipped and fell. Employee testified he did not have any problems with his back or legs prior to the February 2014 fall. Employee testified he had pain in his lower back, right leg, and right foot after the fall.

Employee sought medical treatment following the fall with Dr. Jackson, a general practitioner who had previously treated Employee. Dr. Jackson gave Employee a steroid shot and took him off work for one week. Dr. Jackson also prescribed hydrocodone, muscle relaxers, and prednisone. Employee saw Dr. Jackson again between one to two weeks later, and Dr. Jackson referred Employee to physical therapy. Employee remained off of work for approximately one month. As of the date of trial, Employee continues to see Dr. Jackson periodically to help with pain management.

Separately from his visits with Dr. Jackson, Employer provided Employee with a panel of physicians, and Employee selected Dr. John D. Brophy. Dr. Brophy examined Employee on March 26, 2014, and ordered an MRI. The MRI showed mild spondylosis, which is arthritis of the spine, with no evidence of a herniated disc or nerve root compression. At his deposition, Dr. Brophy testified mild spondylosis is a normal chronic finding for Employee's age. The MRI did not show any indication of spondylolisthesis, which Dr. Brophy testified is a subluxation of the bones, one over the other. Dr. Brophy saw Employee again on April 2, 2014, and released him at full duty without restrictions as of April 16, 2014. Dr. Brophy saw Employee a final time on December 17, 2014, for evaluation of recurrent back and leg pain, during which Employee said his back and leg had been aggravated after twisting a valve at the water treatment plant. Dr. Brophy had recommended a home exercise program, but testified Employee refused to do the exercises, although Employee separately testified he was unable to do the exercises due to discomfort. Dr. Brophy concluded Employee suffered a soft tissue injury as a result of the February 2014 fall and there were no anatomical changes, and thus no impairment rating was indicated.

Employee subsequently saw Dr. Lowell F. Stonecipher on May 19, 2015. Dr. Stonecipher reviewed an x-ray of the lumbar spine, and testified at his deposition "[e]verything about his x-ray was okay," and for a person of Employee's age "his x-rays looked pretty good." Dr. Stonecipher ordered a nerve conduction test, which was done on May 22, 2015, and which was normal. Dr. Stonecipher also agreed the previous MRI did not show any abnormality. Dr. Stonecipher saw Employee for the second and last time on May 26, 2015. Dr. Stonecipher concluded Employee did not have any permanent

anatomical impairment as a result of the February 2014 fall. Dr. Stonecipher said while Employee has spondylosis, which "just means a little bit of early arthritis," Employee does not have spondylolisthesis.

Employee was referred by his attorney to Dr. Richard E. Fishbein for an independent medical examination. Dr. Fishbein performed an examination on December 15, 2015, and reviewed Employee's medical records. Dr. Fishbein diagnosed Employee with "degenerative lumbar spondylolisthesis with symptoms, with radiculopathy" assigning a 9% impairment rating to the body as a whole, pursuant to the AMA Guide, page 572, Table 17-4, Class 1. Given Employee's lack of symptoms prior to the fall, Dr. Fishbein concluded the assigned impairment is directly and causally related to the February 2014 fall. He further opined the fall aggravated and exacerbated the anatomic degeneration of Employee's back. However, on cross-examination at his deposition, Dr. Fishbein agreed spondylolisthesis is diagnosed radiographically, while Employee's x-rays and MRIs did not show spondylolisthesis, only spondylosis.

Employee testified he continues to experience pain in his lower back and legs, as well as numbness in his right foot. Employee also testified he has difficulty standing, sitting, and walking for extended periods of time, and does not take part in activities he previously participated in, such as yard work, hunting, and fishing. However, Employee is not under any work restrictions from any doctor. Employee continues to work at the water treatment plant, working the same hours as he did before the fall, and his wages have increased as a result of cost-of-living adjustments. He performs the same duties as he did previously, although he testified he has difficulty with some of the physical work such as lifting large bags of chemicals. Employee also began driving a garbage truck for the City one day a week after the February 2014 fall, which he continued doing until 2016. He testified he stopped driving the garbage truck because the City hired someone else, but said he could have continued working at the water treatment plant and driving the garbage truck, although it caused him pain in his lower back and leg. Employee also maintains an active commercial driver's license, and passed physicals with Dr. Jackson to maintain Employee's license in July 2016 and June 2017. Since being released from Dr. Stonecipher in May 2015, Employee has not asked Employer to see a doctor for his lower back pain related to the February 2014 fall. Employee testified he has taken vacation and sick days as a result of his back pain, but has not told Employer he needed to take time off work due to his alleged injury.

At the conclusion of trial, the trial court did not issue a ruling. Instead, the trial court instructed each side to file proposed findings of fact and conclusions of law. The trial court then signed a "Statement of Law and Proposed Findings," which adopted

Employee's "Proposed Findings" except it reduced Employee's proposed permanent anatomical impairment rating from 9% to 5%, concluding Employee had a permanent partial disability of 7.5% to the body as a whole. The trial court then signed an "Order," attaching the previously entered findings, and restating them in the order.[1]

Standard of Review

The standard of review of 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 the evidence is otherwise. Tenn. Code Ann. § 50–6–225(e)(2). When credibility and weight to be given testimony are involved, considerable deference is given the trial court's decision when the trial judge had the opportunity to observe the witness's demeanor and hear in-court testimony. *Tryon v. Saturn Corp.,* 254 S.W.3d 321, 327 (Tenn. 2008). A reviewing court may, however, draw its own conclusions about the weight and credibility to be given expert testimony when the medical proof is by deposition, as it is here. *Glisson v. Mohon Int'l, Inc./Campbell Ray,* 185 S.W.3d 348, 353 (Tenn. 2006); *Krick v. City of Lawrenceburg,* 945 S.W.2d 709, 712 (Tenn. 1997). 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).

Analysis

On appeal, Employer contends the trial court erred in awarding permanent disability benefits because Employee failed to establish he was entitled to such benefits. Employer further argues Employee failed to establish a valid impairment rating or suffered any loss of vocational opportunities or earnings. Finally, Employer argues the trial court erred in awarding Employee discretionary costs.

Compensable Injury

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[1] Although the Employee appears to complain in the statement of the case section of his brief about the form of the proposed findings and order signed by the trial court, he never raised this issue as an issue on appeal or even further referenced this issue anywhere in his brief. Accordingly, we deem any potential issue to be waived. We, however, take this opportunity to remind the trial courts of requirements in this area set forth by our Supreme Court in *Smith v. UHS Lakeside, Inc.*, 439 S.W.3d 303 (Tenn. 2014).

Tennessee Code Annotated section 50-6-102(12) (Supp. 2013) provides the terms "Injury" and "personal injury":

> (A) Mean an injury by accident, arising out of and in the course of employment, that causes either disablement or death of the employee;
>
> . . .
>
> (C) Do not include: (i) A disease in any form, except when the disease arises out of and in the course and scope of employment; or (ii) Cumulative trauma conditions, hearing loss, carpal tunnel syndrome, or any other repetitive motion conditions unless such conditions arose primarily out of and in the course and scope of employment[.]

An employee "does not suffer a compensable injury where the work activity aggravates a preexisting condition merely by increasing the pain." *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 607 (Tenn. 2008). However, "if the work injury advances the severity of the preexisting condition, or if, as a result of the preexisting condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable." *Id.* at 607. "'Except in the most obvious, simple and routine cases,' a claimant must establish by expert medical evidence the causal relationship between the claimed injury and the employment activity." *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008) (quoting *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)).

Here, the two authorized treating physicians, Dr. Brophy and Dr. Stonecipher, unequivocally testified Employee's February 2014 fall caused no permanent anatomical impairment. Both physicians testified Employee did not have spondylolisthesis, which is distinct from Employee's mild arthritis, referred to as spondylosis. These opinions are presumed to be correct, unless rebutted by a preponderance of the evidence. Tenn. Code Ann. § 50-6-102(12)(A)(ii) (Supp. 2013). The only contrary medical evidence was Dr. Fishbein's opinion Employee had spondylolisthesis. However, Dr. Fishbein conceded spondylolisthesis is diagnosed radiographically and further conceded Employee's x-rays and MRIs did not show spondylolisthesis. Moreover, while the evidence indicates Employee continued to experience pain after the February 2014 fall, such pain alone does not establish a compensable injury.

After a detailed review of the record evidence, we hold Employee failed to overcome by a preponderance of the evidence the statutory presumption in favor of the opinion of the authorized treating physicians that Employee suffered no permanent anatomical impairment as a result of the February 2014 fall. Thus, we hold Employee

did not suffer a compensable injury, and we reverse the trial court's awards of permanent partial disability benefits and discretionary costs. Any additional issues raised by Employer related to the establishment of a valid impairment rating and whether Employee suffered any loss of vocational opportunities or earnings are pretermitted.

Conclusion

For the foregoing reasons, the judgment of the trial court is reversed. Costs of this appeal are assessed to Mr. Loveless, for which execution may issue if necessary.

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DON R. ASH, SENIOR JUDGE