IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 24, 2014 Session

RANDY CARTER v. CITY OF CARTHAGE, TENNESSEE AND TENNESSEE SECOND INJURY FUND

Appeal from the Chancery Court for Smith County
No. 7607 Charles K. Smith, Chancellor

No. M2014-00852-SC-R3-WC - Mailed February 10, 2015
Filed June 16, 2015

Employee alleged that he sustained an injury to his lower back while lifting a heavy grate in the course of his work. Employer provided medical care, but denied that he had sustained a permanent injury. The trial court awarded permanent disability benefits. The employer has appealed, contending that the evidence preponderates against the trial court's findings concerning causation, permanency, and impairment. 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 and dismiss.

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

PAUL G. SUMMERS, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and DON R. ASH, SR.J., joined

Richard Lane Moore, Cookeville, Tennessee, for the appellant, City of Carthage, Tennessee.

Michael Fisher, Nashville, Tennessee, for the appellee, Randy Carter.

OPINION

Factual and Procedural Background

Randy Carter ("Employee") alleged that he sustained an injury to his lower back while lifting a large grate on May 21, 2007, in the course of his employment with the City of Carthage ("Employer"). The parties attended a Benefit Review Conference on September 30, 2009, but were unable to resolve their differences. Employee filed this civil action on October 2, 2009. On October 4, 2012, the trial court held a hearing on the limited issue of whether Employee was an independent contractor for purposes of the workers' compensation law. The court found that he was not, and that finding has not been challenged on appeal. A hearing on the issues of causation and permanency was held on February 5 and 6, 2014. The court issued its findings and conclusions from the bench. Judgment was entered in accordance with those findings, and this appeal followed.

Employee was sixty-three years old when the trial occurred. He was a high school graduate and had one year of training at a "trade school." He began working for Employer in 2001 as a painter and general laborer. He had previously worked as a police officer for Employer and for the town of Alexandria; as a security officer at a construction company; as a deputy sheriff for Smith County; as a draftsman for an engineering firm; and as a truck driver. He also owned his own painting business for several years.

At trial, Employee testified that he had an episode of "discomfort" in his lower back in May and June of 2006. He received chiropractic treatment for this discomfort. The records of Shea Chiropractic Clinic were placed into evidence by stipulation of the parties. Those records state that, at the time of his initial consultation on May 4, 2006, Employee was in pain 100% of the time and was able to perform only 50% of his regular work activities. Over the course of the next six weeks, Employee had seventeen appointments. His treatment consisted of chiropractic manipulation, ultrasound, and electronic stimulation. The note of his final visit, on June 16, states that Employee reported that he was "a little better" in his lower back and posterior thigh. Employee testified that he had completely recovered from that episode before the incident at issue occurred on May 21, 2007.

On that date, Employee and his supervisor, Charles Massey, moved a large grate from one area to another in a city building so that Employee could paint it. Various witnesses gave different descriptions of the size of the grate; the consensus was that it weighed two hundred pounds or more. Employee testified that he felt pain in his back and legs immediately after lifting the grate. He stated that he told Mr. Massey that he had injured his back and then reported the incident to Debbie Spivey, the City Clerk. Ms. Spivey was the official responsible for workers' compensation claims.

Employee was given a list of medical providers and selected Todd Lewis, a physician's assistant, for his initial evaluation. An MRI (magnetic resonance imaging) test was performed on June 11, 2007. Employer then denied the claim. A Request for Assistance was filed with the Department of Labor and Workforce Development. The Department ultimately ruled in favor of Employee. He was referred to Dr. Leonardo Cruz, a neurosurgeon, on February 8, 2008. Dr. Cruz did not testify, but his records were placed into the record by stipulation. He diagnosed degenerative disc disease and recommended a course of physical therapy. Dr. Cruz then ordered a CT/myelogram, which revealed degenerative changes throughout the lumbar spine. At that time, Dr. Cruz recommended a multi-level spinal fusion.

Employee was then referred to Dr. Jack Kruse, a neurosurgeon, for a second opinion concerning the proposed surgery. He first saw Dr. Kruse on March 25, 2008. Dr. Kruse's diagnosis at that time was "severe, end stage degenerative disc disease from L-1 all the way to S-1." He recommended that Employee cease smoking, then undergo a series of epidural steroid injections. He also suggested that an "x-stop" surgical procedure would be a better alternative than a multi-level laminectomy and fusion. Dr. Kruse described the x-stop procedure as a method to open up the space between two vertebrae "without doing anything massively invasive to the spine." The x-stop is "a distraction device that holds the disc space open." Employee returned to Dr. Kruse in October 2008. He had stopped smoking and had epidural steroid injections with no significant improvement in his symptoms. He desired to go through with the x-stop procedure.

The surgery was performed on January 7, 2009. When Employee saw Dr. Kruse on January 22, he reported "great improvement" until he fell from a commode. He noted an increase in symptoms in his right foot after that incident. Employee continued to have some pain in his right leg and lower back, but improved to the point that Dr. Kruse released him with no permanent restrictions on April 16, 2009.

Employee began receiving pain management treatment from Dr. Jeffrey Hazlewood, a physical medicine and rehabilitation specialist, in July 2008. At his initial appointment with Dr. Hazlewood Employee denied having any back problems prior to May 2007 and Dr. Hazlewood diagnosed a soft tissue injury superimposed upon pre-existing degenerative disc disease and he recommended medication, work restrictions, physical therapy, and a TENS (a transcutaneous electrical nerve stimulator, which sends stimulating pulses across the skin and along nerve strands) unit. Dr. Hazlewood noted that Employee reported that he was "80% better" shortly after the January 2009 x-stop surgery. However, by April, Employee was "back to square one." Dr. Hazlewood performed an EMG (or electromyography), which revealed that Employee's symptoms in his legs and feet were due to polyneuropathy and unrelated to his spinal condition. He further determined that no work restrictions were needed to protect Employee from additional injury. When he last saw Employee in November 2009, his condition was about the same

as it had been since the beginning. Employee had a normal neurological exam and described his pain level as six on a scale of ten.

Dr. Toney Hudson, an internal medicine specialist, examined Employee on November 17, 2009. The purpose of the examination was to determine if Employee was able to meet the medical requirements of the U. S. Department of Transportation ("DOT") to drive a commercial vehicle. Employee had been offered a job by the Upper Cumberland Human Resource Agency to transport disabled patients to and from medical appointments. At the time of the exam, Employee stated that he had no chronic back pain, no current spinal injury or disease, and was able to work without limitations. He disclosed the January 2009 surgery and his pain management treatment to Dr. Hudson. Dr. Hudson testified that Employee had normal range of motion in his back and a normal neurological examination. Dr. Hudson was not willing to approve Employee to drive commercially because of the pain medications[1] Dr. Hazlewood had prescribed for him. The records of both doctors showed that Dr. Hazlewood stopped prescribing these medications at Employee's request.

Dr. Hudson's examination influenced the opinions of Dr. Kruse and Dr. Hazlewood concerning Employee's credibility and impairment. Both doctors considered it unlikely that a person with Employee's level of degenerative disc disease could function with no pain or difficulty. However, based on Dr. Hudson's report, both doctors gave Employee a 0% impairment rating, using the Fifth Edition of the AMA Guidelines, which was in effect at the time of Employee's injury. Dr. Hazlewood also expressed concern about Employee's failure to disclose the back symptoms and chiropractic treatment he had received prior to the work injury.

Dr. Richard Fishbein, an orthopedic surgeon, performed an independent medical examination for Employee on June 14, 2011, over four years after the alleged injury date. In addition to taking a history from Employee, he reviewed the records of Dr. Cruz, Dr. Kruse, and Dr. Hazelwood. He later received the records of Shea Chiropractic Clinic. Dr. Fishbein opined that May 21, 2007 incident caused the need for the surgery performed by Dr. Kruse and later medical treatment. He testified that he understood the procedure performed by Dr. Kruse was a two-level fusion of the lumbar spine. He opined that Employee retained a 13% anatomical impairment to the body as a whole from the injury and surgery. He suggested that Employee avoid lifting weight in excess of twenty pounds and alternate sitting and standing.

[1] Dr. Hazlewood prescribed Employee, Ultram, a narcotic type pain medication, and Baclofin, a muscle relaxer.

During cross-examination, Dr. Fishbein stated that he had never performed a spinal fusion or an x-stop procedure. He did not know what an x-stop device was or what it looked like. He had not reviewed the DOT examination performed by Dr. Hudson, but stated that he usually disregarded such reports because patients often made misstatements in order to obtain employment. Dr. Fishbein also testified that he had received approximately $784,000 from Employee's attorney in the five years preceding his deposition in this case.

David Bowman, mayor of the City of Carthage from 1990 to 2010, testified that he had known Employee since the 1980's when he hired Employee to work as a painter in his painting business. Mayor Bowman testified that Employee had complained to him about back pain on at least two prior occasions, first while Employee was working for him in the painting business, and later, while Employee was working for Employer as a general laborer. Mayor Bowman described in detail the second conversation, which occurred a few months before May 2007. Employee told him at that time that he was having a lot of back pain. Mayor Bowman recommended Dr. Timothy Schoettle, who had treated Mayor Bowman's wife for several years, to Employee. Employee returned to Mayor Bowman at a later time and reported that he had seen Dr. Schoettle, but could not afford further treatment. He also reported that Dr. Schoettle had agreed to let him make payments toward the cost of treatment. Employee testified that he did not remember having this conversation, but would not deny that it had occurred.

During cross-examination, Mayor Bowman agreed that he had written a letter of reference for Employee in August 2006. He testified that Employee was a good worker and had not received any warnings or other discipline while working for Employer. He stated that he did not know if Employee had actually seen Dr. Schoettle. He recalled that Employee had mentioned a spinal fusion in the second conversation.

Joyce Rash was the city recorder for Employer from 1986 until February 2007. She testified that, shortly before she retired, Employee came to her office and complained about his back hurting badly. She said he was very emotional during the conversation and told her that he had seen a doctor that Mayor Bowman had recommended. She also recalled that he specifically mentioned Dr. Schoettle and the possibility of a payment plan. She thought the conversation took place between October and December 2006. Ms. Rash said that Employee had been complaining about back problems off and on for about a year before that. He told her that he had hurt his back several years earlier while painting. She testified that Employee asked her if he could file a workers' compensation claim. She told him he could not because he was considered a contractor and also because he had not injured himself while working for Employer.

Employee was asked about this conversation during his cross-examination. His testimony was similar to that he gave about the conversations with Mayor Bowman. He

stated that he did not recall the conversation, but did not deny making the statements attributed to him by Ms. Rash.

Charlie Massey was Employer's public works director. He testified that he and Employee set up a weight room in an unused area of a city building and lifted weights there together. He testified that Employee did not perform squat lifts. The reason Employee gave for this was that he hurt his back doing that exercise thirty years earlier. Mr. Massey also stated that he was present on May 21, 2007, when the grate was lifted. He agreed that the grate weighed about two hundred pounds. However, he denied that Employee said anything about injuring his back at that time.

Employee testified that he told Dr. Hudson he had no limitations or back pain, but those statements were not true. He made the statements "[b]ecause I needed a job." He got the job driving for Upper Cumberland Human Resources Agency and worked there for about six months. He subsequently got a job as a custodian for the Smith County Board of Education and still held that job when the trial occurred. He denied seeing Dr. Schoettle or any other neurosurgeon prior to May 2007. He also denied that any doctor had recommended back surgery to him before that time. He testified that he still had back pain and leg pain all day, every day. He continued to lift weights for a time, but had given up that hobby. He had ceased to be involved in the Carthage Volunteer Fire Department and Rescue Squad because he was no longer able to operate the heavy tools.

During cross-examination, he admitted that he had testified during his discovery deposition that he had no back problems prior to May 2007. He stated that he did not intentionally lie, but had no explanation for his false testimony. He recalled asking Mayor Bowman for the name of the doctor his wife was seeing for her back problems. He agreed that he had testified in his discovery deposition that he did not have any limitations as of November 2009. He agreed that he had not seen any doctors or taken any medication for back problems since that time. He also agreed that in 1993 he had settled a claim for a 1991 L4 disc injury, as set out in interrogatory responses. During redirect examination, he stated that the 1991 injury was not to his back but to his shoulder.

The trial court issued its findings and conclusions from the bench. It observed that Employee's "overall credibility is questionable" in light of conflicting statements made to various doctors, to his co-workers, in his interrogatory responses, in his discovery deposition, and his trial testimony. However, considering the evidence as a whole, the court found that Employee sustained a compensable injury on May 21, 2007, and it appeared to adopt Dr. Fishbein's impairment rating of 13% to the body as a whole, and awarded 50% permanent partial disability. Judgment was entered in accordance with those findings. Employer has appealed, asserting that the evidence preponderates against the trial court's findings that Employee sustained a compensable injury, that he sustained a 13% impairment, and that Employee is entitled to permanent partial disability benefits.

Analysis

Appellate Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise." As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007).

When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Causation

At issue in this case is whether Employee sustained a compensable back injury under Tennessee workers' compensation law on May 21, 2007. Employer contends that Employee's back problems result from non-work related activities and conditions; whereas, Employee asserts that the May 21, 2007 lifting accident caused an aggravation of a pre-existing condition.

Although workers' compensation laws must be construed liberally in favor of an injured employee, "it is the employee's burden to prove causation by a preponderance of the evidence." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (citing Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991)). In order to prove causation, a plaintiff in a workers' compensation case must establish "the causal relationship between the alleged injury and the claimant's employment activity." Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274-75 (Tenn. 2009). Proof of causation, in all but the most obvious cases, requires expert medical proof. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008). Where expert medical testimony is presented by deposition at trial, an appellate court may independently assess where the preponderance of the evidence lies. Thomas, 812 S.W.2d at 283.

Workers' compensation claimants must establish medical causation through reliable medical testimony. See, e.g., Reedy v. City of McMinnville, No. 01S01-9204-CH-00051, 1992 WL 398349, at *5-6 (Tenn. Dec. 28, 1992) (rejecting expert medical opinion based upon factually inaccurate medical history); Jones v. CVS Pharmacy, Inc., No. E2013-02451-SC-R3-WC, 2014 WL 6490204, at *4 (Tenn. Workers Comp. Panel Nov. 20, 2014) (same); Phillips v. Consolidation Coal Co., No. 03S01-9807-CH-0069, 2000 WL 85911, at *3 (Tenn. Workers Comp. Panel Jan. 25, 2000) (same) In the instant case, the trial court found that Employee's "overall credibility is questionable," and that Employee provided conflicting accounts of his medical history, but the trial court nevertheless, awarded Employee workers' compensation benefits based on a causal connection between the May 2007 lifting incident and Employee's degenerative disc disease. Having reviewed the record in this case, we conclude that the evidence preponderates against the trial court's findings.

At trial, Employee admitted that he had significant discomfort in his back in May and June of 2006 which prompted him to seek chiropractic treatment at Shea Chiropractic. Employee indicated on his initial intake form at Shea Chiropractic that he was in pain 100% of the time and could only perform 50% of his regular work activities. He also admitted that the pain was so severe that it caused him to "walk around crooked with a limp" because of pain radiating down to his legs from his back.

Mayor Bowman testified that Employee had complained of back problems to him on several occasions. Mayor Bowman specifically recalled an instance around December 2006, where he referred Employee to his wife's physician, who advised Employee he needed surgery, but Employee stated that he was unable to pay for the surgical procedure. Ms. Rash, the City Recorder, testified to a similar conversation, where Employee told her that he had hurt his back years ago working as a painter, was then having severe back pain, and needed surgery but could not afford it because he did not have insurance. Ms. Rash further testified that Employee asked if he could file a workers' compensation claim and became upset when she told him that he did not qualify for workers' compensation benefits. Employee testified that while he did not remember having these conversations with either Mayor Bowman and Ms. Rash, he could not dispute that the conversations actually occurred. He further admitted to providing an untruthful answer in his deposition when Employer's attorney asked whether he had ever injured his back before May 2007. Finally, Charlie Massey, Employer's Public Works Director, testified that he regularly lifted weights with Employee, and that Employee refused to do squat lifts because he had previously injured his back thirty years earlier doing squat lifts.

Despite a documented history of back problems, Employee told the doctors who evaluated him that he had not had any back problems before the May 2007 lifting incident. Dr. Kruse, Employee's treating surgeon, diagnosed Employee with degenerative disc disease and opined that the degenerative disc disease predated the May 2007 lifting injury

by five to ten years. Though he testified that the May 2007 lifting incident may have exacerbated this condition, on cross-examination, he further testified that his opinions regarding causation were based upon the medical history that Employee had provided and that knowing about Employee's history of back problems would have changed his opinion. Likewise, Dr. Hazlewood, who treated Employee for pain management from July 2008 to May 2009, testified that Employee did not report any prior history of back pain, despite being directly questioned about his prior medical history. Dr. Hazlewood also indicated that knowing about Employee's history of back problems would have affected his opinion regarding the cause of Employee's injury.

Finally, Dr. Fishbein, who was hired by Employee to perform an Independent Medical Examination, testified that Employee related only occasional back strains prior to the May 2007 lifting incident. Moreover, though Dr. Fishbein testified that the May 2007 incident caused Employee's injury, he admitted that his conclusion was based upon the history provided by Employee.

Consequently, the medical testimony regarding causation depended almost entirely upon the inaccurate and misleading medical history Employee provided and as a result, has little, if any, probative value. A de novo review of the depositions of Drs. Kruse, Hazlewood, and Fishbein indicates that Employee suffered from degenerative disc disease, which predated by many years the May 2007 lifting incident and that there is no credible expert medical testimony that the May 2007 incident caused Employee's injury. Aside from Employee's own testimony, which the trial court found to be of questionable veracity, the lay testimony also indicates that Employee's back problems predated the 2007 lifting incident. Accordingly, we conclude that Employee has failed to carry his burden of proof of establishing that the alleged work incident in May 2007 aggravated and/or exacerbated his underlying degenerative disc disease. As a result, we need not address Employer's other issues.

Conclusion

The judgment of the trial court is reversed, and the case is dismissed. Costs are taxed to the Randy Carter, for which execution may issue if necessary.

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PAUL G. SUMMERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

RANDY CARTER v. CITY OF CARTHAGE, TENNESSEE ET AL.

Chancery Court for Smith County
No. 7607

No. M2014-00852-SC-WCM-WC - Filed June 16, 2015

Judgment Order

This case is before the Court upon the motion for review filed by Randy Carter pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Randy Carter, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating