

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 26, 2009 Session

JAMES R. SHIRLEY v. BI-LO, LLC

**Direct Appeal from the Chancery Court for Hamilton County
No. 07-0886 Howell Peoples, Chancellor**

Filed October 14, 2009

No. E2008-02452-WC-R3-WC - Mailed August 7, 2009

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee suffered a compensable injury to his lower back, which resulted in two surgical procedures and a 12% anatomical impairment. Subsequently, his treating physician recommended an additional surgical procedure. Employer declined to pay for the procedure, contending that intervening events caused the need for surgery. The trial court awarded Employee 18% permanent partial disability to the body as a whole. The trial court also found that the additional procedure was related to the original work injury, and ordered Employer to pay for it. On appeal, Employer contends that the evidence preponderates against the trial court's ruling. We disagree, and affirm the judgment.

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

E. RILEY ANDERSON, SP. J., delivered the opinion of the court, in which GARY R. WADE, J., and DONALD P. HARRIS, SR. J., joined.

Jennifer W. Arnold, Chattanooga, Tennessee, for the appellant, Bi-Lo, LLC.

Rodney H. Bennett, Rossville, Georgia, for the appellee, James R. Shipley.

MEMORANDUM OPINION

Factual and Procedural Background

James Shirley ("Employee") injured his lower back while unloading a truck in October

2005. The compensability of the injury was not disputed by his employer, Bi-Lo, LLC (“Employer”). As a result of the injury, Dr. Jay Jolley, an orthopaedic surgeon, performed two surgeries on Employee’s lower back. Dr. Jolley released him to return to work with restrictions in November 2006. Employer attempted to accommodate the restrictions, but in February 2007, Employee left his job. Employee testified that Employer had required him to work outside of his restrictions, but the trial court found otherwise. Employee’s recovery was thereby limited by the one and one-half times impairment cap, and Employee has not appealed that ruling.

In March and April of 2007, Employee was arrested for domestic violence and for threatening a policeman. The charges included allegations that he head-butted his wife. He pled guilty, and served about 90 days in the county jail. While in jail, he was assaulted by another inmate, receiving injuries to his face.

In November 2007, after being released from jail, Employee returned to Dr. Jolley. An MRI taken at that time showed a recurrent herniated disk at L5-S1, the same level that the earlier surgeries had addressed. At that time, Dr. Jolley recommended a more extensive surgical procedure, a fusion of the L4, L5 and S1 vertebrae. Employer declined to pay for the procedure, pointing to the various incidents which had led to Employee’s arrest and incarceration as potential causes of the worsening of his condition.

Dr. Jolley testified by deposition. The proposed fusion procedure was the primary subject of that deposition. He testified that Employee reached maximum medical improvement from the original surgical procedures in November 2006. He opined that Employee retained an anatomical impairment of 12% to the body as a whole due to his injury and surgeries. He assigned lifting and carrying restrictions of no more than 35 pounds occasionally and 25 pounds frequently. Those restrictions were based upon a Functional Capacities Evaluation which he ordered. Dr. Jolley had only limited and secondhand knowledge of the altercations in which Employee was involved before and during his incarceration. He stated that some of those events could have caused a worsening of his underlying condition, but he was furnished little detail about the location, symptoms and effect of any bodily trauma.

Dr. Jolley also testified that the November 2007 MRI showed a fractured vertebra at the L1 level which was not present in previous studies. He stated that Employee’s condition had worsened since November 2006, which was the reason that he recommended the additional surgery. He further stated that Employee’s current condition, and need for surgery, were not “solely” related to the work injury. He described the cause of Employee’s condition as “multifactorial.” On cross-examination, Dr. Jolley testified that Employee’s symptoms in November 2007 were similar to his symptoms in March 2007 and November 2006. He also stated that the need for the proposed surgery was a progression of the condition for which he had previously been treating Employee. He agreed that incident reports concerning the jail assault on Employee stated that there was no trauma to the lumbar spine. Finally, on redirect, he stated that it would be speculative to state “the cause of the progression of [Employee’s] condition as to whether or not it’s work related.”

Dr. Jolley had referred Employee to Dr. Steven Musick, a pain management specialist, in

January 2007. Dr. Musick testified by deposition. He testified that Employee's condition worsened after March 2007. He agreed that a physical altercation, such as the jail assault, could potentially aggravate Employee's underlying condition. He also agreed that it was possible that the need for additional surgery was caused by non-work-related events. On cross-examination, he was asked if Employee's problems were "basically a progression from his work injury and the two surgeries he had previously." He responded:

He's still having problems on the left side and that's where his initial surgery was. I don't know what the altercations and involvement in prison have to do with making it worse or not. I don't know that anybody can state that fully, but he does continue to have problems in his back and his left lower extremity compared to his right that could be a progression of his original injury.

Employee denied that he had head-butted his ex-wife, and denied the allegations of harassing a policeman, although he admitted that he had pled guilty to those charges. He admitted that he had been punched in the face while in jail, but denied that this had aggravated his lower back in any way.

The trial court awarded 18% permanent partial disability to the body as a whole. It found that the proposed third surgery was related to the work injury, and ordered Employer to provide that care. Subsequently, Employee was discharged from Dr. Musick's pain management program as a result of failing a drug test. Employer then filed a motion to alter or amend the judgment, seeking to be relieved of its obligation to provide medical care to Employee. The trial court granted the motion in part, ordering that Employer was no longer required to provide pain management care to Employee. The motion was denied with respect to the proposed lumbar fusion surgery.

Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the court on appeal must extend considerable deference to the trial court's factual findings. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). "In reviewing documentary evidence such as depositions, however, we extend no deference to the trial court's findings." Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006). Conclusions of law are subject to de novo review without any presumption of correctness. Rhodes, 154 S.W.3d at 46; Perrin, 120 S.W.3d at 826.

Analysis

Employer contends that the evidence preponderates against the trial court's finding that the lumbar fusion procedure recommended by Dr. Jolley was related to the original work injury. It argues that the jail assault upon Employee and/or his alleged assaults against his ex-wife constitute intervening causes which shield it from additional liability for medical care. In support of its position, Employer cites the recent decision in Anderson v. Westfield Group, 259 S.W.3d 690 (Tenn. 2008), which held that the worsening of a work-related injury is not compensable if it is produced by the employee's own intervening negligent conduct.

In Anderson, the employee sustained an injury which caused a loss of sensation in his fingers. He subsequently placed his hand upon a hot stove. Because of his limited sense of touch, he suffered a significant burn injury to the hand. Later, he tripped over a log while walking, which caused additional injury to the burned areas of his hand. Id. at 694. The Supreme Court held that the employee was negligent in each instance, and then considered whether such negligence alone was sufficient to constitute an intervening cause which relieved the employer of liability for additional medical treatment, or if only intentional conduct by an injured employee could break the chain of causation back to the original injury. Id. at 698-99. The Supreme Court ruled that the employee's negligence alone could be an intervening cause preventing compensation for the worsening of the work-related injury. Id. at 700.

One important difference between Anderson and this case is that there was no doubt that Mr. Anderson's conduct had caused significant worsening of his work injury. In contrast, the evidence in this case shows only that Employee was involved in several incidents which had the potential to worsen the condition of his back and create the need for the proposed surgery. Drs. Jolley and Musick each stated that an event such as an episode of domestic violence or an assault by other inmates could hypothetically cause a worsening of Employee's condition. However, the questions posed by Employer on the subject during the depositions of the doctors were very broad. The descriptions of the events used in those questions contained few details, such as how many blows were struck, where those blows may have landed on Employee's body, and if or when an increase in symptoms would be expected to occur after such an event. Neither doctor said those events actually worsened Employee's back injury nor even that it was probable that they did so. No contemporaneous evidence was introduced to show that Employee's back was harmed or that he had any change of symptoms after the events occurred.

Further, a fair reading of the testimony of both doctors is that the condition of Employee's back would, or could, have worsened as a natural consequence of the original injury. As Dr. Musick pointed out, the symptoms which Employee reported in late 2007 were entirely consistent with an ongoing deterioration of the original injury. This is completely unlike Mr. Anderson's situation, where the employee's negligence directly and undoubtedly caused his need for additional medical treatment. We conclude that the evidence does not preponderate against the trial court's finding that there was no clear testimony that the Employee's assault upon his spouse and his subsequent altercation while in custody affected his work injury.

Conclusion

The judgment is affirmed. Costs are taxed to the appellant, Bi-Lo, LLC and its surety,

for which execution may issue if necessary.

E. RILEY ANDERSON, SPECIAL JUSTICE