

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

ROY T. McGAHA v. COCKE COUNTY HIGHWAY DEPARTMENT, ET AL

**Circuit Court for Cocke County
No. 31,302-II**

No. E2009-00881-SC-WCM-WC - Filed August 25, 2010

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Cocke County Highway Department et al, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 one-half to Cocke County Highway Department and one-half to the Second Injury Fund, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Lee, Sharon G., J., Not Participating

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

February 22, 2010 Session

ROY T. McGAHA v. COCKE COUNTY HIGHWAY DEPARTMENT ET AL.

**Appeal from the Circuit Court for Cocke County
No. 31,302-II Richard R. Vance, Judge**

No. E2009-00881-WC-R3-WC - Filed August 25, 2010

In this workers' compensation action, the employee, Roy McGaha, sustained a work-related back injury in June 2004, while employed by the Cocke County Highway Department. He was able to return to work, and his claim for benefits was settled within the one and one-half times impairment cap contained in Tennessee Code Annotated section 50-6-241(a). He alleged that he sustained a new compensable injury to his back in November 2007. The county denied the claim, asserting that Mr. McGaha did not sustain a new injury, but that his condition was the result of his earlier injury, and his remedy was, therefore, limited to reconsideration of his previous settlement. The trial court held that a new injury occurred in 2007 and that Mr. McGaha was permanently and totally disabled as a result of it. The court assigned 76% of the liability for the award to the county and 24% to the Second Injury Fund. The county has appealed, asserting that the trial court erred by finding that Mr. McGaha sustained a new injury and by finding that he was permanently and totally disabled. The Fund asserts, on appeal, that the trial court used an incorrect method to apportion liability.¹ We affirm the award of benefits. We conclude, however, that the trial court did not use the correct method of apportioning liability between the Fund and the county. That portion of the order is vacated, and the case is remanded for further proceedings with regard to that issue.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and SHARON BELL, SP. J., joined.

Stuart James and Todd Hasty, Chattanooga, Tennessee, for the appellant, Cocke County Highway Department.

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.

Ben W. Hooper, III, Newport, Tennessee, for the appellee, Roy T. McGaha.

Robert E. Cooper, Jr., Attorney General & Reporter; Michael E. Moore, Solicitor General; Joshua Davis Baker, Assistant Attorney General, for the appellee, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

Mr. McGaha worked on a road repair crew for Cocke County. In June 2004, he injured his lower back when he fell from the back of a truck. The injury was accepted as work-related by the county. Dr. Joel Ragland, a neurosurgeon, performed a discectomy at the L5-S1 level of the spine, on the left side. He assigned a permanent impairment of 11% to the body as a whole for the injury. At Mr. McGaha's request, he assigned no permanent restrictions. Mr. McGaha testified that he made the request because he feared that activity restrictions would cause him to lose his job. He was able to return to work, and his workers' compensation claim was settled for 24% permanent partial disability to the body as a whole.

Mr. McGaha testified that, after his return to work, he tried to avoid heavy lifting and often requested assistance from his co-workers. He was referred by Dr. Ragland to Dr. Michael Hood, a pain management specialist. He saw Dr. Hood intermittently during 2005 and 2006. His pain increased significantly in 2007. As a result, Dr. Hood was prescribing four 7.5 milligram hydrocodone tablets per day by September 2007.

The event at issue in this case occurred on November 5, 2007. Mr. McGaha felt a sharp pain in his lower back and right leg while lowering the tailgate of a truck. He reported the incident to his supervisor, but continued working for several hours before requesting medical care. He was transported to a clinic where he was seen and treated by Dr. A. J. Garbarino, who treated him for approximately one month. Dr. Garbarino ordered an MRI and referred him back to Dr. Ragland.

Dr. Ragland testified by deposition. He reviewed the MRI study and examined Mr. McGaha on December 21, 2007. His diagnoses at that time were a "small herniated nucleus pulposus, L5-S1, right," and "S1 radiculopathy." Dr. Ragland also noted the presence of scar tissue at L5-S1 on the right.² He recommended physical therapy and an epidural steroid injection. Thereafter, Cocke County's insurer requested that Dr. Ragland compare an MRI scan taken on June 22, 2007 with the December 2007 scan. He did so on January 21, 2008. His note of that date states: "I could not discern any appreciable difference in the amount of protrusion [of disc material] or nerve root location. I, therefore, would conclude from an MRI standpoint that there is no anatomic change

²Mr. McGaha had also injured his back in 1999. The injury required surgery at the L5-S1 level on the right side. The scar tissue in that area was the result of that procedure.

between these studies.” Later in the same note, however, Dr. Ragland stated: “[I]t is my opinion that he has aggravated a pre-existing condition. However, I do not see any anatomic changes.”

Based upon the lack of an anatomic change, Cocke County’s insurer terminated benefits, taking the position that no new injury had occurred.³ Mr. McGaha’s attorney then requested that Dr. Ragland “render an opinion concerning evidence of a new injury.” The doctor’s March 3, 2008, response noted that Mr. McGaha’s symptoms in 2004 had been on the left side, but his current symptoms were on the right. He also stated: “From reviewing the records, I do believe that [Mr. McGaha] has had a new injury occur in November of 2007 with the tailgate incident . . . I cannot confirm that there is an anatomic change on MRI but I do think a new injury occurred at that time.” Dr. Ragland said in his letter that he did not believe surgery was indicated and expressed the same opinion during his deposition.

Dr. William Kennedy conducted an independent medical examination at the request of Mr. McGaha’s attorney on April 1, 2008. He also testified by deposition. Dr. Kennedy held the opinion that Mr. McGaha had “suffered a sprain to the lumbar spine on November 5, 2007, and that sprain had permanently aggravated and advanced the pre-existing degenerative changes at L5 and had caused the wide S1 radiculopathy which was present by the time of [his] examination. . . .” He described the injury as a sprain of the spinal ligament at that level which caused permanent damage to the S1 nerve root. He stated that neither of these findings would be detectable by an MRI. Dr. Kennedy testified that, in his opinion, Mr. McGaha had sustained an anatomical impairment of 13% to the body as a whole due to the most recent injury. He arrived at that figure by using the range of motion method contained in the Fifth Edition of the AMA Guides, which resulted in a 23% impairment. He then subtracted the 11% assigned by Dr. Ragland for the 2004 surgery which, using the combined value chart of the Guides, resulted in the 13% figure. He recommended that Mr. McGaha avoid lifting more than ten pounds occasionally, or five pounds frequently, bending, stooping, ladder climbing, working over rough terrain, running, jumping, crawling, or working with his hands above the level of his chest. He also testified that the restrictions he would have placed upon Mr. McGaha after the 2004 surgery would have included a twenty-pound lifting limit, and slightly less strict limitations on movement and body position. Dr. Kennedy agreed with Dr. Ragsdale’s conclusion that there was no discernible difference between the June 2007 and December 2007 MRI films.

Dr. Norman Hankins, a vocational evaluator, testified on behalf of Mr. McGaha. His testing revealed that Mr. McGaha scored below average on the Slosson Intelligence Test. He found that Mr. McGaha was able to read at an eighth grade level and to perform arithmetic at a fourth grade level. Applying Dr. Kennedy’s restrictions, he opined that Mr. McGaha had an 88% vocational disability after the 2004 injury, and a 100% vocational disability after the 2007 injury.

Mr. McGaha was thirty-eight years old. He was a high school graduate. Prior to working for Cocke County, he had worked for a paving contractor, as a farrier, and in a restaurant. He had

³Cocke County had changed insurers between 2004 and 2007.

not worked since the date of his injury. He testified that he was unable to sit or stand for long periods of time. He had constant pain in his back and right leg. He had difficulty bending at the waist for activities such as tying his shoes. He no longer rode his “dirt bike” but continued to ride his Harley-Davidson motorcycle. He was limited in his ability to perform household chores and yard work, although he was able to use a riding lawnmower occasionally. He also testified that he had recovered completely from his 1999 injury and surgery and did not have any right leg symptoms from that time until his November 2007 injury.

The trial court found that Mr. McGaha had sustained a compensable injury in November 2007, and that he was permanently and totally disabled. It apportioned the award 76% to Cocke County and 24% to the Second Injury Fund. Cocke County has appealed from that judgment, contending that the trial court erred by finding that Mr. McGaha sustained a compensable injury, by finding that Mr. McGaha sustained permanent disability, by finding that he was permanently and totally disabled, and by entering a judgment before the conclusion of Mr. McGaha’s separate action for reconsideration of his previous workers’ compensation settlement. In addition, Cocke County and the Fund contend that the trial court erred in its method of apportioning the award between them.

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 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’ demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where 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. Perrin v. Gaylord Entm’t Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

Compensability

Cocke County argues that Mr. McGaha did not sustain a new injury in November 2007, but only an increase in symptoms. It bases this position upon Dr. Ragdale’s testimony that the pre- and post-injury MRI scans did not show any anatomical change. It also points to Mr. McGaha’s testimony and medical records which indicate that he already had a dramatic increase in his pain level in the months immediately preceding the November 2007 event. Cocke County relies upon

Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d 888, 891 (Tenn. 1991), and similar cases which hold that an injury which causes only an increase in symptoms is not compensable.

The trial court found:

Dr. Kennedy found that the radiculopathy of the right leg, the pain, the numbness extending as far as his toes was indeed an anatomic change, and the Court finds it was. He did not have that before this accident. He had it afterward. It was found by both doctors. That's an anatomic change. May not be a bone change, but it's certainly a change in his anatomy and condition. It's more than just pain. The numbness was found by both doctors. That resulted from the injury of November 5th, 2007. That injury irritated the S1 nerve root.

* * * *

After considering all of the evidence in light of the cases and authorities with respect to the injuries, the Court concludes that the evidence does preponderate in favor of the findings that the injury of November 5th, 2007, did cause an anatomic change. It also aggravated Mr. McGaha's previous back injury and further advanced his pain and symptomology from that of intermittent and constant and to include the additional radiculopathy of the right leg and that that injury is permanent.

In reviewing the trial court's findings, we note that absolute certainty with respect to causation in a workers' compensation case is not required, and our courts have recognized that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). Further, all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A. & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004); Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997).

Both Dr. Ragsdale and Dr. Kennedy were of the opinion that a new injury had occurred, but was the type of injury that cannot be detected with an MRI or similar test. All of the evidence indicates that Mr. McGaha had been essentially asymptomatic on the right side since having surgery for his 1999 injury. His symptoms after the 2004 injury involved his lower back and left leg only. After the November 2007 injury, his symptoms did not merely increase in intensity, but involved a different part of his body. In view of these considerations, we are unable to conclude that the evidence preponderates against the trial court's finding that Mr. McGaha sustained a new, compensable, injury in November 2007.

Permanency

Cocke County also contends that the evidence preponderates against the trial court's finding that Mr. McGaha sustained a permanent injury. It cites language from Foreman v. Automatic

Systems, Inc., 272 S.W.3d 560 (Tenn. 2008), similar to that in Cunningham, in support of its position. The argument is essentially a restatement of its argument on causation, that a mere increase in pain does not constitute a permanent injury. We note that both doctors believed that a new injury had occurred, that Dr. Kennedy assigned additional permanent impairment as a result of that injury, and that medically Mr. McGaha was unable to return to his job for the county after that injury occurred. Consistent with our conclusion concerning the county's arguments on the issue of causation, we find that the evidence does not preponderate against the trial court's ruling that Mr. McGaha's injury was permanent.

Permanent Total Disability

Cocke County and the Fund assert that the evidence preponderates against the trial court's finding that Mr. McGaha was permanently and totally disabled. They contend that Dr. Hankins' assessment is not reliable, because he also concluded that Mr. McGaha had an 88% disability after the 2004 injury, in spite of the fact that Dr. Ragsdale placed no permanent restrictions on him at the time. Dr. Hankins' testimony was based upon the restrictions which Dr. Kennedy assigned retroactively for the 2004 injury. He conceded on cross examination that Mr. McGaha would have no disability if he had no restrictions.

There is other evidence in the record to support the proposition that Mr. McGaha had a significant disability after the 2004 incident, including his un rebutted testimony that he self-limited his activities and frequently sought assistance from his co-workers after he returned to work. There is nothing in the record to rebut Mr. McGaha's testimony that the reason Dr. Ragsdale placed no restrictions upon him at that time was his explicit request to the doctor, which he made due to fear of losing his job. Also, Dr. Ragsdale assigned permanent impairment after the injury, and Cocke County was willing to settle the claim based upon 24% permanent partial disability. In light of this evidence, Dr. Hankins' testimony is not inherently unbelievable.

Permanent total disability occurs when an injured employee is totally incapacitated "from working at an occupation that brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B)(2005); See Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535-6 (Tenn. 2006). The unrefuted evidence in this case showed that Mr. McGaha had limited reading and math skills and was intellectually below average for his age group. His work experience was mostly unskilled, or semi-skilled at best. He had sustained three injuries and two surgeries to the same part of his back which caused significant limitations in his ability to perform certain bodily motions or lift more than a few pounds of weight. In consideration of these facts, and the entire record, we are unable to conclude that the evidence preponderates against the trial court's award of permanent total disability benefits.

Apportionment to Second Injury Fund

Cocke County contends that a larger portion of the award should have been assigned to the Fund. The Fund contends that it should not be liable for any portion of the award.

This injury occurred after July 1, 2006, and involves an award of permanent total disability. It is therefore governed by Tennessee Code Annotated section 50-6-208(a). That statute requires the trial court to “determine the extent of disability resulting from the subsequent injury without consideration of the prior injury. In other words, the trial court must find what disability would have resulted if a person with no preexisting disabilities, in the same position as the plaintiff, had suffered the second injury but not the first.” Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 (Tenn. 2001)(internal citation omitted). The employer is liable for that portion of the permanent total disability award, and the remainder is assigned to the Fund.

It appears that the trial court did not follow that procedure. Its sole statement on the subject was “[t]hat the award be assessed at 24 percent to Cocke County Highway Department and 76 percent to the Second Injury Fund.” It provided no explanation for that finding. The amount of liability assigned to the Fund directly corresponds to the amount of the prior settlement. We conclude that the trial court simply based its allocation on that settlement. In so doing, it failed to follow the procedure set out in section 50-6-208(a). We therefore vacate that portion of the judgment, and remand the case to the trial court for the entry of findings consistent with the statutory requirements.

We note the arguments of the county, based upon Dr. Hankins’ testimony, that the second injury caused only a small additional disability, and the argument of the Fund that Mr. McGaha was totally disabled solely as a result of the second injury. The evidence does not support either position. After the 2004 injury, Mr. McGaha was able to return to his previous job and perform it adequately, without formal restrictions, by self-limiting his activities, and with the assistance of his co-workers. It is reasonable to conclude that his disability at that point in time was not severe. On the other hand, the evidence is consistent with the conclusion that his inability to return to work after the second injury was a result of the combined effects of the two injuries, i.e., that the second injury did not, of itself, cause total disability. See Watt v. Lumbermens Mut. Cas. Ins. Co., 62 S.W.3d 123, 131-2 (Tenn. 2001). The Fund suggests in its brief that the trial court’s allocation of liability may, in fact, be consistent with the evidence concerning the effects of the second injury upon Mr. McGaha’s ability to work and conduct his other activities of daily living. Our decision today does not preclude such a finding on remand. We merely hold that the allocation of liability must be based upon the application of the method set forth in section 50-6-208(a) in view of the evidence presented.

Priority of Reconsideration Claim

Cocke County also contends that the trial court erred in hearing and deciding this claim before Mr. McGaha’s petition for reconsideration of his 2004 injury had been heard and decided.⁴ The reason for this assertion is that Cocke County was covered by one insurance carrier at the time of the 2004 injury and a second insurance carrier at the time of the 2007 injury. It argues that the earlier injury was the cause of the majority of Mr. McGaha’s disability and, therefore, the first insurance carrier should be responsible for the majority of the benefits awarded. This issue was brought to the attention of trial court through a motion to continue the trial date which was granted

⁴The Second Injury Fund did not raise this issue, either before the trial court or on this appeal.

by the trial court. The case was reset and tried, however, before the reconsideration case was resolved. The significance of the issue is that, in our view, the award of permanent total disability benefits in this case limits Mr. McGaha's ability to receive an additional award of benefits in his reconsideration case. See Turner v. Homecrest Corp., 226 S.W.3d 273, 279 (Tenn. 2007) ("Without rehabilitation, the employee's entitlement to any further vocational disability benefits ends upon the finding of permanent and total disability."). Thus, it may be that the first insurer has avoided some liability it otherwise would have had. Since we have held that Cocke County's liability in this case is limited by Tennessee Code Annotated section 50-6-208(a) to the disability sustained by Mr. McGaha in the second injury, Cocke County and its current insurer will not have been adversely affected by the trial court's rendering judgment in this case prior to disposing of the reconsideration case. Under these circumstances, we do not find that the trial court erred by hearing and deciding this claim first.⁵

Conclusion

The portion of the judgment allocating liability between Cocke County and the Second Injury Fund is vacated. It is affirmed in all other respects. The case is remanded to the trial court for further proceedings consistent with this opinion. Costs are taxed one-half to Cocke County and its surety, and one-half to the Second Injury Fund.

DONALD P. HARRIS, SENIOR JUDGE

⁵During oral argument, counsel for Mr. McGaha stated that the reconsideration action had been voluntarily dismissed.