IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
October 25, 2010 SESSION

WAUSAU INSURANCE COMPANY VS. ARCHIE W. RICHARDSON

Chancery Court for Loudon County
No. 11376

No. E2010-00356-WC-R3-WC - Filed February 16, 2011

JUDGMENT

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 appeals 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 of this appeal are taxed to Archie Richardson and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 25, 2010 Session

WAUSAU INSURANCE COMPANY v. ARCHIE W. RICHARDSON

Appeal from the Chancery Court for Loudon County
No. 11376 Frank V. Williams, III, Chancellor

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The employee alleged that he injured his back in the course of his employment. His employers denied the claim based upon failure to give timely notice of the injury. The employee saw two medical doctors and a chiropractor shortly after his injury. Their records contained no reference to a work injury; one stated that the injury had happened at home. The trial court found that the employee did not provide timely notice of his alleged injury and, alternatively, that he failed to sustain his burden of proof concerning causation. The employee has appealed from those findings. We affirm the judgment.[1]

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

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which GARY R. WADE, J., and JON KERRY BLACKWOOD, SR. J., joined.

Joseph R Ford, Loudon, Tennessee, and Whitney S. Bailey, Knoxville, Tennessee, for the appellant, Archie W. Richardson.

Mary Elizabeth Maddox and Robert H. Smith, Knoxville, Tennessee, for the appellee, Wausau Insurance Company.

MEMORANDUM OPINION

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[1] Pursuant 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.

Factual and Procedural Background

Archie Richardson ("Employee") was a joint employee of Hutch Manufacturing and TSI, a personnel staffing agency. He worked as a forklift mechanic. He was hired by Louis Nanni, Hutch's Plant Manager, in 2002 or 2003. Employee was permitted to make his own schedule. Thus, he often worked only four or five hours per day. Occasionally, he worked as many as eight hours; sometimes he worked fewer hours or did not come in at all. He alleged that he injured his lower back on April 4, 2007 while working at Hutch. He testified that, on that date, he and his immediate supervisor, Van Thompson,[2] were using a pry bar to move a part while installing a clutch on a forklift. He stated that the pry bar slipped, causing him to fall against the truck, which in turn caused immediate pain in his lower back. Employee testified that he continued to work for a period of time but had to leave work early because he was in pain. However, Employer's time records for April 4, 2007, showed that he left work at 2:45 p.m., which was consistent with his usual practice.

Employee testified that Mr. Thompson offered him a ride home but that he declined. He stated that he "barely made it home," because his back pain made it difficult to drive. Employee's fiancee, Diane Pierce, who lived with him, testified that Mr. Thompson and his wife visited Employee at home that evening to check on him. Employee initially testified that he did not work on the next day. However, Employer's time records showed that the next day and on several following days, he worked roughly the same number of hours that he had worked on the date of the alleged injury.

Employee consulted his primary care physician, Dr. Bipinchanra Patel, on April 13, 2007, for lower back pain. Dr. Patel testified by deposition. He stated that his record of that encounter did not contain any reference to a work injury. He provided conservative treatment for one week. He then ordered an MRI, and referred Employee to Dr. Richard Boyer, a neurosurgeon.

Before Employee saw Dr. Boyer, he consulted Dr. Jessica Smiley-Hedrick, a chiropractor. Dr. Smiley-Hedrick testified by deposition. She first saw Employee on April 24, 2007. His chief complaint was back and right leg pain. He reported that the condition began on April 11, 2007. An intake questionnaire completed by Employee and Ms. Pierce stated that his pain was not caused by a work injury or automobile accident. Dr. Smiley-Hedrick provided him with thirty-seven chiropractic treatments between April 24,

[2]Mr. Thompson passed away before the trial and gave no statement concerning Employee's alleged injury prior to his death.

2007 and August 3, 2007. She testified that Employee never advised her during that time that he had sustained an injury at work.

Employee first saw Dr. Boyer on May 14, 2007. At that time, Ms. Pierce completed an intake questionnaire, which Employee then signed. The form contained the questions "Is your illness the result of an accident? ___ yes ____no. If yes, what type of accident? ____ Automobile ____ Work ____ Other." Ms. Pierce placed a check mark next to "no" after the first question. The second question was not answered. Ms. Pierce testified at trial that she discussed this question and answer with Employee at the time. She stated that they chose to answer the question "no" because they thought answering "yes" would delay medical treatment. Dr. Boyer's note of his initial meeting with Employee contains the following history: "This is a 66 year old male who says his pain began on April 11, 2007. He got up in the night to go to the bathroom and had a pain shoot from his buttocks down to his foot."

Dr. Boyer testified that Employee brought with him the MRI scan ordered by Dr. Patel. The MRI showed a large herniated disc at the L2-3 level. Dr. Boyer recommended epidural steroid injections to treat the condition. Employee had two such injections, which ultimately did not provide relief. Dr. Boyer therefore recommended surgery to remove the disc herniation, which was performed on October 1, 2007. The procedure improved Employee's leg pain, but he continued to have pain in his lower back. Dr. Boyer placed him at maximum medical improvement on January 7, 2008. He assigned a permanent impairment of 10% to the body as a whole, and placed no permanent restrictions upon Employee's activities. On cross-examination, Dr. Boyer stated that an event such as the pry bar incident described by Employee could cause a disc herniation. On redirect, he testified that disc herniations often occur without any precipitating accident.

Nancy Owens, insurance administrator for TSI, testified that she had been unable to locate Employee's personnel file. She testified that computer records indicated that Employee had called TSI on July 19, 2007, to report that he had been unable to work due to a back injury. That notation did not refer to a work injury. She testified that her first knowledge that Employee was alleging that he had injured himself at work occurred when she received a call from him on October 4, 2007, three days after Dr. Boyer's surgery. At that time, she filed an Employer's first report of injury.

Vivian Russell testified that she was a secretary for Hutch Manufacturing. One of her responsibilities was to assist employees in completing reports of work injuries. She testified that before April 2007, she had assisted Employee in completing four such reports, all involving minor injuries. Employee had declined offers of medical care in each instance, so those reports had not been forwarded to either TSI or the workers' compensation insurer.

She testified about the procedure followed when an employee reported an injury to a supervisor. The supervisor was to either send or accompany the employee to her office, where a report was then completed. She testified that Van Thompson was aware of this procedure and had followed it. Neither Employee nor Thompson had reported an April 2007 work injury to her.

Louis Nanni testified that he was aware that Employee began missing work in April 2007. He said that Employee told him on either April 17, 2007 or May 2, 2007 that he was having back problems. Mr. Nanni said that Employee told him "he got up in the middle of the night to go to the bathroom and walking down the hall, and he fell to his knees." He confirmed that Mr. Thompson routinely followed company procedures concerning work injuries. He denied that Mr. Thompson had ever told him that Employee had injured his back.

Employee was sixty-nine years old when the trial occurred. He had attended school into the eleventh grade. He testified that he had been a heavy equipment mechanic all his life. He met Mr. Nanni while operating his own equipment repair business. He had later taken a job with a tractor company. He was laid off from that job, and Nanni then hired him to work for Hutch. He described the alleged injury of April 4, 2007. Employee said that Mr. Thompson told him at that time that he would "take care of the paperwork" concerning the injury. He had called TSI on July 17, 2007, and then again on October 4, 2007, "to tell them about me getting hurt there and . . . sign up for workmen's comp."

Employee testified that he has had "good days and bad days" since his back surgery. He had operated a business repairing lawn mowers prior to the injury and had continued that business after recovering from the surgery. He had not returned to work for Hutch, but had spoken to Mr. Nanni about doing so. However, Employee was not asked to return because of the company's economic condition. He did not think that he could perform any of the heavy equipment repair jobs he had previously held because of the heavy lifting required. On cross-examination, Employee confirmed that he had previously reported four minor work injuries to Ms. Russell, had signed reports concerning those injuries, and had declined offers of medical care. He had contracted meningitis and sustained a head injury in the year preceding the trial, and he had some problems with his memory as a result.

The trial court found that Mr. Thompson, and therefore Employer, did not have actual notice of the injury as alleged by Employee, and that evidence preponderated in favor of Employer on the issue of causation.

The notice statute at issue in this case states:

> Every injured employee or the injured employee's representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, and the employee shall not be entitled to physician's fees or to any compensation that may have accrued under this chapter, from the date of the accident to the giving of notice, unless it can be shown that the employer had actual knowledge of the accident. No compensation shall be payable under this chapter, unless the written notice is given the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give the notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.

Tenn. Code Ann. § 50-6-201(a) (2008).

Employee has appealed, asserting that the trial court erred by finding that Employer did not have actual notice of his alleged work injury or, in the alternative, by failing to find that his failure to give notice was excusable. He also contends that the trial court erred by finding that he did not sustain a compensable injury.

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. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

(1) *Actual notice*.

Employee contends that the evidence preponderates against the trial court's finding

that Employer did not have actual notice of the alleged injury. Specifically, he points to the testimony of Louis Nanni that he "came to be aware of Employee's injury" in April 2007 or May 2007. Employee also relies upon his own testimony that the injury occurred in the presence of his supervisor Mr. Thompson.

Mr. Nanni testified that he was aware that Employee was missing work in April 2007 and May 2007 due to back problems. However, he specifically denied that Employee said he was injured at work. To the contrary, Mr. Nanni testified that Employee told him the same thing that he told Dr. Boyer -- that he had a sudden onset of pain at his home while walking from his bedroom to the bathroom in the middle of the night.

The trial court found that the testimony of Mr. Nanni and Ms. Russell about Mr. Thompson's practice concerning work injuries, the absence of any mention of a work injury in the records of Dr. Patel, Dr. Smiley-Hedrick, or Dr. Boyer, and Employee's several previous properly-reported injuries outweighed Employee's testimony that Mr. Thompson and Mr. Nanni were aware of his alleged work injury at or near the time it occurred. While he could not say the Mr. Richardson was "dishonest," the trial judge characterized him as "a person whose memory was perhaps not very good." The trial judge also stated that "Mr. Richardson has contradicted himself on numerous occasions to the very people that needed to know most of what the cause of his problems [was], and those were the two physicians and the chiropractor who were treating him." Based upon our review of the record, we conclude that the trial court's finding concerning actual notice was amply supported by the evidence presented.[3]

(2) *Reasonable excuse for failure to give notice*.

Employee makes the alternative argument that his failure to give notice of his alleged injury should be excused pursuant to Tenn. Code Ann. § 50-6-201(a). He contends that he did not act sooner to give formal notice because he was relying on Mr. Thompson to complete the necessary paperwork. Much as his first argument, this one is premised upon the assumption that Mr. Thompson was aware that the alleged injury occurred at work. The trial court found otherwise. Employee provides no further excuse for not contacting Employer concerning the alleged injury after a reasonable time had passed since Mr. Thompson's alleged statement. Moreover, this argument does not take into account the statements which he and Ms. Pierce made to his healthcare providers that his injury was not

[3] It has been stated many times that trial judges' credibility determinations carry great weight on appeal. *See, e.g.*, *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 271 (Tenn. 2009); *Clarendon v. Baptist Mem'l Hosp.*, 796 S.W.2d 685, 689 (Tenn. 1990) (stating that considerable deference is still owed to the trial judge's findings which depend on the credibility of witnesses).

work-related. We find that the evidence does not preponderate against the trial court's conclusion on this subject.

(3) *Causation*.

Finally, Employee contends that the trial court erred by finding that he failed to meet his burden on the issue of causation.[4] In his brief, he states: "[T]he trial court did not articulate any basis for the failure to find causation." He does not elaborate on the point. The trial court stated: "[Employee] has contradicted himself on numerous occasions to the very people that needed to know most what the cause of his problems [was], and those were the two physicians and the chiropractor who were treating him." The trial court found unconvincing the Employee's explanation of those statements, a vague assertion that revealing his alleged work injury would have made it more difficult to obtain medical care. This finding was supported by the testimony of the doctors concerning established arrangements in their offices for handling workers' compensation matters.

We agree with the trial court's analysis. Dr. Patel, Dr. Smiley-Hedrick and Dr. Boyer are disinterested witnesses. Their records, generated near the date of the alleged injury, were based upon information provided by Employee or Ms. Pierce. The records do not merely omit any mention of a work injury, but they contain a history of injury clearly unrelated to Employee's job. That history is entirely consistent with Employee's statement to Mr. Nanni made during the same time period. Viewing the record as a whole, we therefore conclude that the evidence preponderates in favor of the trial court's finding on the issue of causation.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Archie Richardson and his surety, for which execution may issue if necessary.

_____
WALTER C. KURTZ, SENIOR JUDGE

[4] We could pretermit this issue, as the case is resolved on the failure to give notice. However, since the trial court chose to address the issue and Employee designated causation as an issue, we have addressed the issue.