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

STEVE MCBROOM v. NISSAN NORTH AMERICA, INC., ET AL.

Chancery Court for Rutherford County
No. 09-0738WC

No. M2010-00940-WC-R3-WC - Filed - March 17, 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 appears 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 will be paid by Nissan North America, Inc. and Ace American Insurance Company, for which execution may issue if necessary.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 15, 2010 Session

STEVE MCBROOM v. NISSAN NORTH AMERICA, INC. ET AL.

Appeal from the Chancery Court for Rutherford County
No. 09-0738WC Robert E. Corlew, III, Chancellor

No. M2010-00940-WC-R3-WC - Mailed - February 14, 2011
Filed - March 17, 2011

The employee alleged that he sustained a lower back injury as a result of his job. His employer denied the claim based upon findings by its work site medical staff. An evaluating physician opined that the employee's job had caused an aggravation of a pre-existing degenerative disc disease. The trial court found that the employee had sustained a compensable injury and awarded benefits. The employer appealed, contending that the evidence preponderates against the trial court's finding. We affirm the judgment, but we decline the employee's request to find the appeal to be frivolous.[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 CORNELIA A. CLARK, C.J., and JON KERRY BLACKWOOD, SR.J., joined.

T. Franklin Gilley, III, Murfreesboro, Tennessee, for the appellants, Nissan North America, Inc. and Ace American Insurance Company.

Donald D. Zuccarello and Marshall A. McClarnon, Nashville, Tennessee, for the appellee, Steve McBroom.

MEMORANDUM OPINION

[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

Steve McBroom ("Employee") is an assembly line worker for Nissan North America, Inc. ("Employer"), an automobile manufacturer. He testified that he developed pain in his low back near the end of his night shift on the morning of June 3, 2008. The job he was working on at the time involved attaching four bolts to the drive shaft of a vehicle and attaching a filling tube to the gas tank. Because it was near the end of his shift, he did not report an injury to his supervisor at that time. His pain worsened during the next day, so he reported the matter when his next night shift began.

Employee was referred to Employer's onsite clinic, where he was examined by a nurse practitioner after reporting symptoms of back pain and lower extremity twinges and muscle spasms. The nurse advised him to continue taking Ibuprofen, and he was given Aleve and Dyspel and told to use moist heat. The nurse recommended light duty and his return to the clinic the following day. Also, he was provided and asked to select from a panel of physicians.

His symptoms continued, and the next day, June 4, 2008, he was referred to Dr. Christopher Thompson, a primary care physician. Dr. Thompson diagnosed Employee with low back pain associated with muscle strain. He opined that Employee's job could have aggravated his pre-existing degenerative condition and stated that Employee did not identify a specific precipitating event for the symptoms. Dr. Thompson provided conservative treatment, which included medication, use of a heating pad and stretching exercises.

On June 5, 2008, after this visit to Dr. Thompson, Employee reported back to the clinic at work where he was placed on light duty restrictions. He returned to the clinic again on June 9, 2008, after his low back symptoms had increased and he was unable to perform his job. He was advised to continue current medications and to follow up with Dr. Thompson. His work restrictions were continued.

Employee followed up with Dr. Thompson on June 9, 2008, and complained of increased pain and no relief from the medication. Dr. Thompson took an x-ray which showed non-acute "mild spondylitic changes" in the back. He changed Employee's medications, prescribed physical therapy, and restricted Employee from work until the next evaluation.[2] The next evaluation took place on June 13, 2008, and again Employee complained of increased pain and symptoms. Dr. Thompson ordered an MRI, performed on June 19, 2008, which showed a bulging disc at the L4-5 level. He provided restrictions that

[2] For purposes of temporary disability determination, the trial court found that Employee was absent from work from June 11, 2008, until maximum medical improvement on August 1, 2008.

Employee remain off work with only limited activity at home, including no lifting, limited standing and with a reclining position preferred. He recommended that Employee be referred to an orthopaedic spine specialist.[3]

This referral, however, did not occur. After Dr. Thompson's recommendation, Employer requested a review of Employee's job, which was performed on June 9, 2008, by Dean Beach, a physician's assistant employed at the onsite clinic. Mr. Beach observed that Employee's job consisted of installing four bolts per vehicle using a torque wrench which applied six to seven foot pounds of torque while bending at approximately a thirty-degree angle. The bolts were installed on seven to eight vehicles per hour. In his report, Mr. Beach opined that, based upon the small amount of torque and limited bending involved, it was not likely that Employee's work had caused his back injury. Mr. Beach did not observe or report on any of the other jobs that would have been part of Employee's job rotation.

Mr. Beach's report was reviewed by Dr. Mark Watkins, a trained but non-board certified occupational medicine physician who was the interim director of Employer's onsite medical clinic at the time of Employee's injury. Dr. Watkins testified by deposition. On June 13, 2008, at Employer's request, he performed an evaluation of Employee and found his overall symptoms to be "stable" despite Employee's complaint of continued back pain that had not improved by ongoing treatment. Dr. Watkins' evaluation showed limited lumbar range of motion and revealed a positive straight leg test, radicular symptoms and a painful gait. He recommended continued work restrictions, physical therapy and treatment from Dr. Thompson. He also testified that Employee did not identify any particular movement or event as the trigger for the sudden onset of pain on June 3, 2011. On cross-examination, Dr. Watkins conceded that his evaluation was for the purpose of determining causation but not treatment. Dr. Watkins further conceded that he did not independently observe or review Employee's job, but rather he concurred with Mr. Beach's prior report and assessment that the injury was not work-related and gave no opinion on impairment. This report was then sent to Dr. Thompson, who also agreed with its conclusions. Based upon these opinions, Employer denied the claim.

Employee then sought additional medical treatment from his primary care physician, Dr. James Elrod. Dr. Elrod provided additional conservative care and referred Employee to Dr. Mitul Patel, a spine specialist. Dr. Patel's diagnosis was "nonsurgical low back and left leg symptoms." After additional conservative treatment, Employee returned to work on August 11, 2008, with no permanent restrictions.

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[3] Dr. Thompson last saw Employee on June 24, 2008, and directed his return to work on July 7, 2008, after some strengthening and conditioning exercises.

Dr. Richard Fishbein, a board certified orthopaedic surgeon, performed an examination at the request of Employee's attorney on December 5, 2009, and testified by deposition. Dr. Fishbein also reviewed Employee's medical records and testified that Employee reported a history of "repetitively, in quotes, lifting, twisting and bending while working on a truck, on the chassis of the truck, and he began to feel some low back pain." Dr. Fishbein's examination revealed tenderness along the SI joint, painful range of motion, and a positive straight leg test on the left leg. He diagnosed lumbar disc bulging with radiculopathy and stated that while maximum medical improvement occurred on August 1, 2008, Employee would need ongoing care but not work restrictions. He opined that the Employee's injury was caused by the work for Employer and that Employee's job had aggravated pre-existing degenerative changes in his lumbar spine. He assigned 8% impairment to the body as a whole, based upon the appropriate edition of the AMA Guides.

Employee was thirty-three years old at the time of the trial on March 15, 2010. He was a high school graduate. After treatment for his low back symptoms, he returned to and continued to work for Employer in his previous job. He testified that he had not sought or received medical treatment since being released by Dr. Patel in August 2008. He reported intermittent episodes of pain and some daily life activity changes due to his symptoms.

The trial court issued its findings in the form of a five-page written memorandum. It found that the Employee had sustained his burden of proof on the issue of causation. Because there was no other opinion concerning impairment or permanency, it adopted Dr. Fishbein's assessment of 8% to the body as a whole. In light of the absence of restrictions and Employee's testimony concerning the effects of the injury, it awarded 10% permanent partial disability ("PPD") to the body as a whole, along with temporary disability and medical benefits.

Employer has appealed, contending that the trial court erred by finding that Employee sustained a compensable injury. Employee disagrees, and he contends that this appeal is frivolous and requests an award of damages pursuant to Tennessee Code Annotated sections 27-1-122 (2000) and 50-6-225(i).

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 to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Madden v. Holland Grp. of Tenn. Inc.*, 277 S.W.3d 896, 900 (Tenn.

2009). When the issues involve expert medical testimony which 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. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). 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

1. *Causation*

Employer contends that the evidence preponderates against the trial court's finding that Employee suffered a work-related injury. In support of its position, Employer relies upon Dr. Watkins' testimony that Employee's condition was unrelated to his employment. Employer further relies on the absence of any reference to Employee's job as a possible cause of his symptoms in the notes of Dr. Patel and Dr. Thompson, and it argues that there are a large number of potential causes or conditions that could result in Employee's condition.[4] Employer further argues that Employee's symptoms result from a pre-existing degenerative condition.

In response, Employee points out that it is undisputed that he had an onset of severe pain while at work. He relies on Dr. Fishbein's affirmative testimony on causation and Dr. Thompson's testimony during cross-examination that the job could have aggravated his pre-existing degenerative condition.[5] He also notes that Dr. Watkins' opinion was not based upon his own observations but rather those of Mr. Beach, a physician's assistant who did not testify.

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[4] Employer refers to the testimony of Dr. Thompson that mentions these causes to be sneezing, straining to use the toilet, and smoking. Employer further refers to the testimony of Employee's wife who stated that Employee has experienced back pain in the past after sleeping on a bad mattress.

[5] In its brief, Employee acknowledges that some degenerative changes were found in the diagnostic study. Employee cites *Brewster v. American Residential Services, Inc.*, No. M2004-00236-WC-R3-CV, 2005 WL 1025771 (Tenn. Workers' Comp. Panel Apr. 22, 2005) and argues that these changes are irrelevant because Employee, like *Brewster*, was asymptomatic prior to the June 3, 2008, work injury and "[a]n employer is responsible for workers compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, if employment causes an actual progression or aggravation of the prior disabling condition or disease which produces pain that is disabling . . . Where there has been no prior pain, however, pain is considered a disabling injury, compensable when occurring as a result of a work-related injury." (citations omitted).

"In order to be eligible for workers' compensation benefits, an employee must suffer an 'injury by accident arising out of and in the course of employment which causes either disablement or death . . . .'" *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001) (citing Tenn. Code Ann. § 50-6-102(12) (1999). An injury occurs "in the course of" employment if it takes place while the employee was performing a duty he or she was employed to perform. *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993). And an injury arises out of employment "when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Id.*; *see also Houser,* 36 S.W.3d at 71.

Thus, in order for Employee's injury to be compensable, it must have been "caused" by the incident at work on June 3, 2008. The burden and degree of proof required to prove such causation has been recently summarized by this Court:

> "Except in the most obvious, simple and routine cases," a claimant in a workers' compensation case must establish by expert medical evidence the causal relationship between the claimed injury and the employment activity, and that relationship must be established by a preponderance of the expert medical testimony, as supplemented by the lay evidence. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008). While absolute certainty with respect to causation is not required, *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005), the proof of the causal connection may not be speculative, conjectural, or uncertain, *Clark v. Nashville Mach. Elevator Co., Inc.*, 129 S.W.3d 42, 47 (Tenn. 2004); *Simpson v. H.D. Lee Co.*, 793 S.W.2d 929, 931 (Tenn. 1990); *Tindall v. Waring Park Ass'n.*, 725 S.W.2d 935, 937 (Tenn. 1987).

Griffin v. Walker Die Casting, Inc., No. M2009-01773-WC-R3-WC, 2010 WL 4513336, at *2 (Tenn. Workers' Comp. Panel Nov. 10, 2010).

Furthermore, any reasonable doubt 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).

> [Our courts have] consistently held that an award may properly be based upon medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact

the cause of the injury.

Reeser, 938 S.W.2d at 692; *see also Long v. Tri-Con Indus., Ltd,* 996 S.W.2d 173, 177 (Tenn. 1999); *GAF Bldg. Materials v. George*, 47 S.W.3d 430, 432-333 (Tenn. Workers' Comp. Panel 2001).

We believe the trial court properly weighed the conflicting testimony and concluded:

> We have carefully considered the evidence and the arguments of Counsel. We have begun our analysis by considering whether the Employee's injury is compensable. We have recognized that the evidence is undisputed that the Employee did sustain a lumbar strain which became symptomatic while the Employee was performing his duties for the Employer. We also have noted that, while the proof shows that the work the Employee was performing was not particularly strenuous, there is no other testimony of any other causative factor which was present. We have noted the vast body of case law which provides that we should liberally construe the evidence regarding causation in favor of a finding that the injury is compensable. Clearly, Dr. Fishbein is of the opinion that the injury is work-related. Dr. Thompson testified that it is possible that the injury is work-related. Dr. Watkins, who is not board certified and did not examine the Employee, but only relied upon the opinions and evaluations of a nurse-practitioner and a physician assistant, opined that the injury was not work-related. The lay testimony from the Employee supports the medical opinion that the injury was causally related to the workplace. Upon consideration of this evidence, we find that the injury is compensable.

In this case, the trial court was presented with conflicting expert testimony regarding causation: Dr. Fishbein testified affirmatively that Employee's job had aggravated his pre-existing degenerative condition; Dr. Thompson opined that his job could have aggravated that condition; and Dr. Watkins opined that there was no causal relationship. It is undisputed that the initial onset of Employee's symptoms occurred while he was working and that his job required at least some bending and physical exertion. Viewing these facts in particular and the record as a whole, we find that Employee suffered an injury by an accident arising out of and in the course of his employment. Further, we conclude that the evidence does not preponderate against the trial court's finding that Employee sustained a compensable aggravation of his pre-existing degenerative condition.

2. *Frivolous Appeal*

Employee contends that the appeal is frivolous and requests costs and damages pursuant to Tennessee Code Annotated sections 27-1-122 and 50-6-225 (i). Among other cases, Employee cites *Riley v. Aetna Casualty & Surety*, 729 S.W.2d 81, 84-85 (Tenn. 1987) and quotes from the case that "where questions of fact have been adversely determined below but are supported by material evidence in the record and no questions of law are presented, a frivolous appeal may be appropriately found." Interestingly, as Employer points out, the *Riley* appeal was determined not to be frivolous:

> Plaintiff has urged this Court to find that this is a frivolous appeal because the issues raised concern questions of fact that have been determined adversely to Defendants at trial, which are now conclusive on appeal because they are supported by material evidence, and thus the appeal had no reasonable chance of success. While this Court is repeatedly confronted with Worker's Compensation cases that border on frivolous appeals, we do not think that this case is so completely lacking in merit that the appeal is frivolous within the meaning of [Tennessee Code Annotated] § 27-1-122 [2000].

Id. at 84.

Likewise, we do not think that this appeal is so lacking in merit as to warrant a finding of being frivolous.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Nissan North America, Inc. and Ace American Insurance Company, for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE