IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 27, 2010 Session

MICHAEL C. MASSEY v. NISSAN NORTH AMERICA, INC.

Appeal from the Chancery Court for Wilson County
No. 08001 C. K. Smith, Chancellor

No. M2010-00151-WC-R3-WC - Mailed - February 11, 2011
Filed - April 14, 2011

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. Employee alleged he sustained an injury to his back in the course and scope of his employment. After Employee had back surgery, he returned to work for five months, then resigned his employment and received a lump sum payment offered by Employer for the purpose of reducing its workforce. Employee claimed that he was unable to continue performing his job due to back pain. Employee filed suit against Employer seeking worker's compensation benefits. Employer denied that the claim was compensable and asserted that the employee had made a meaningful return to work. The trial court found that Employee had suffered a compensable injury and did not have a meaningful return to work. The trial court awarded Employee 35% permanent partial disability ("PPD") benefits. Employer has appealed. We affirm.

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

JERRI S. BRYANT, SP. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and JON KERRY BLACKWOOD, SR. J., joined.

Randolph A. Veazey and Janis O. Mize, Nashville, Tennessee, for the appellant, Nissan North America, Inc.

Brian Dunigan, Goodlettsville, Tennessee, for the appellee, Michael Massey.

MEMORANDUM OPINION

Factual and Procedural Background

Michael C. Massey ("Employee") began work for Defendant Nissan North America, Inc. ("Employer" or "Nissan") in 1992 as an auto technician. In early 2007, Employee took a position, described as a "material handler," that required him to drive a machine called a "tug" carrying automobile parts on a set of three or four carts that were hooked together. Each cart carried four baskets that weighed between 30 and 50 pounds each. Employee routinely worked as a material handler for a full eight- to nine-hour shift. This job required repetitive stooping, bending, twisting, lifting, and pulling. Employee alleged he first began suffering pain in his lower back about five months after he began the material handling job. He stated that his hip began hurting and described the pain as "like [he] was sitting on [his] wallet." The back pain came on gradually while he was doing the material handling job. Employee did not remember his back beginning to hurt as a result of any particular episode of lifting, bending, or twisting, and stated that there was no single traumatic event that started his pain.

Employee testified that he began suffering back pain "a couple weeks before" Employer's two-week shutdown which began in July. After Employee returned to work in mid-July of 2007, he reported the injury to his Employer, describing how he thought the material handling job caused his back problems. Because the pain remained consistent during the shutdown, Employee reported it when he returned to work. He had not been suffering back problems before he began the material handling job. He testified that he had "no doubt" that the material handling job was the cause of his injury. During the shutdown, Employee saw Dr. Douglas B. Freels, who had previously treated Employee for a broken leg, for his new pain. Dr. Freels advised Employee he had a ruptured disk. When Employee reported this to Employer, the Employer refused to provide treatment on the grounds that the injury was not work-related.

Dr. Tarak Elalayli, an orthopaedic surgeon, performed lower back surgery on Employee on January 3, 2008. The surgery provided immediate relief and Employee testified he was "at 100 percent" as of February or March 2008 following the surgery. Dr. Elalayli placed no restrictions on Employee when he released him on April 1, 2008, but assigned him a 10% permanent anatomical impairment to the body as a whole. Employee returned to work and was placed in a job that required him to handle a 20-pound engine harness for forty cars per hour on the assembly line. Employee testified that the job required him to "stay bent over under the car" and caused him difficulty. He further testified that Nissan sped up the line and added so many parts he was not able to keep up. During breaks his back would "lock up," and it would take an hour or so to loosen back up.

Employee had been previously injured in 2003 while working on his farm in a tree-cutting accident. He suffered a broken pelvis, a punctured lung, and three fractured ribs. He was hospitalized for six weeks and made a full recovery. Employee later broke his leg in a four-wheeler ATV accident, after which he worked a day and a half before seeking treatment. This accident occurred several years before he began working as a material handler. There was no medical evidence of any pre-existing impairment.

Employee had suffered a single work-related injury prior to the current injury when he pulled a back muscle five or six years earlier. Employer provided him with treatment for the injury.

Employee acknowledged at trial that when he broke his pelvis in the earlier 2003 accident, the doctor informed him that he also had some damage to the vertebrae in his lower back, which Employee described as "[f]lattened vertebrae." However, he returned to work at Employer following this accident with no restrictions.

In addition to his job with Employer, Employee also raised cattle and hay on his 280-acre farm. He cut, baled, and stored hay using a tractor to pick up the round bales, and at the time of the shutdown, he was also taking care of eighty head of cattle. Employee also rode a lawnmower and used a weed-eater on his farm. The pain he had noticed at work in his back and "wallet" remained constant. Employee stated that he was able to do the farm work because he could take a break when necessary, and because he did not do heavy or repetitive lifting on his farm.

Employee filed a workers' compensation action against Employer on January 2, 2008. Employer denied that the claim was compensable. In the summer of 2008, Employer offered a voluntary buyout package to its employees in order to reduce the size of its workforce. Because Employee was having difficulty performing his job and was not able to keep up with production, he decided to take the company buyout. He did not think he was able to perform general assembly jobs at Employer any longer because of his back. Employee accepted the buyout offer in August 2008. He received a lump sum payment of $80,000 and ended his employment in September 2008. At that time, Employee was performing his job with difficulty but had been "written up" several times because he could not keep up.

At trial, Jerry England, who was Employee's supervisor when Employee was performing the material handling job, testified that Employer tried to keep the weight of the baskets containing auto parts to no more than 35 pounds. The baskets of parts were loaded on carts with two shelves. The top shelf was about 4 feet high, and the bottom shelf was about 1½ feet high. On cross-examination, Mr. England estimated that Employee would have to reach down to the lower shelf, pick up parts, and transfer them

500 times a day. Mr. England verified that Employee told him of his pain and its origin. Employee thought it was being caused by sitting on his wallet as he rode on the tug and decided to remove his wallet for a period of time to see if that helped. Nothing else was said until July 16, 2007, when Employee told Mr. England that "he was in a lot of pain and he wanted to go to the medical department." Mr. England took him for medical treatment. Mr. England described Employee as a good employee who had been able to perform his work.

The trial court reviewed the deposition testimony of Dr. Elalayli and Dr. Joseph R. Trubia, an orthopaedic surgeon who performed an independent medical evaluation of Employee on June 10, 2008. Dr. Elalayli testified he first saw Employee on December 17, 2007, and that Employee provided a five-month history of lower back pain with pain radiating in the right leg. Employee related this pain to his work for Employer, but did not recall any specific single injury or traumatic event. Employee had been treated with three epidural steroid injections, each of which gave him about a day of relief. Overall, he felt his symptoms were worsening with time. Dr. Elalayli reviewed Employee's MRI of July 11, 2007, that revealed evidence of a large disk herniation at L5-S1 on the right, and recommended surgery. He explained that Employee's injury would typically be caused by some type of strain to the back that involved heavy lifting, bending, or twisting. Other causes could include some type of trauma like a fall or accident. Dr. Elalayli opined that "heavy lifting at work would be consistent with [Employee's] condition." He also explained that it was not uncommon "for patients not to recall a special event that resulted in onset of their pain."

Dr. Elalayli performed back surgery on Employee on January 3, 2008. Dr. Elalayli testified that Employee returned to him on January 23, 2008, reported feeling "dramatically better," and "had a negative exam." Dr. Elalayli recommended that Employee remain off work at that time. Employee returned on February 13, 2008, and was continuing to do well. Dr. Elalayli stated that because Employee "was concerned that it was a very demanding job, and that [Employer] would not take him back with restrictions," the doctor recommended physical therapy. On April 1, 2008, Dr. Elalayli found Employee had reached maximum medical improvement and allowed him to return to work "full duty." Dr. Elalayli assigned a 10% anatomical impairment to the whole body without restrictions. On cross-examination, Dr. Elalayli acknowledged that Employee initially told him that he did not know how he had hurt his back. The July 2007 MRI revealed a component of degenerative disk disease which Dr. Elalayli described as "typically an age-related change that is part of the natural process of aging." He also testified that "degenerative disk disease by itself doesn't result in herniation."

Dr. Elalayli last saw Employee on August 4, 2008, when Employee reported the onset of some pain in his right hip and buttock area. A new MRI revealed no disk herniation. Dr. Elalayli recommended a home exercise program. At that time, he felt that it was safe for Employee to continue work. He acknowledged that "simple bending" could cause a herniated disk but also testified on redirect that herniation usually involved some kind of traumatic event or heavy lifting.

Dr. Trubia testified that during his independent medical examination on June 10, 2008, Employee reported lower back pain but denied "any specific traumatic event." Employee thought the pain originated from his work at Employer where he "did a lot of repetitive lifting and bending." Employee did not inform Dr. Trubia about his previous tree-cutting and four-wheeler ATV accidents. Dr. Trubia opined that Employee's injury was work-related because his work involved a lot of repetitive stooping, lifting, and bending.

Dr. Trubia noted that his examination of Employee revealed that Employee's gait was normal. Employee's surgical scar from the lower back surgery was well-healed. Further physical examination and testing revealed a "normal neurologic exam . . . [for Employee's] low back." Dr. Trubia also reviewed Employee's medical records from Dr. Freels, Dr. Christopher Kaufman,[1] and Dr. Elalayli, all of which consistently indicated a work-related injury. Dr. Trubia also reviewed the July 11, 2007 MRI that showed a disk herniation causing the displacement of the right S1 nerve root, foraminal narrowing, and an L4-5 annular tear. Dr. Trubia assigned a 12% permanent whole person impairment based on DRE lumbar category III, Fifth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.

On cross-examination, Dr. Trubia acknowledged that he evaluated Employee at the request of Employee's lawyer and was unaware of the activities Employee engaged in at home. Dr. Trubia that found Employee had stiffness and decreased range of motion, which Dr. Trubia ascribed to muscle guarding and spasm in his lower back. He placed restrictions on Employee's work activities of lifting limited to 50 pounds with restrictions on bending and twisting.

The trial court ruled that Employee had sustained a compensable injury, that Employee had reached maximum medical improvement on April 1, 2008, and that he did not have a meaningful return to work. The trial court awarded Employee 35% permanent

[1] Dr. Trubia testified that Dr. Kaufman, an "orthopaedic surgeon who specializes in back problems and back surgery," saw Employee on August 29, 2007. Dr. Kaufman's notes stated that Employee "had a back injury at work, and he diagnosed that [Employee] had an L5-S1 disk herniation with an S1 nerve root displacement."

partial disability to the body as a whole. Employer has appealed, asserting that the trial court erred by holding that Employee suffered a compensable injury. In the alternative, Employer contends that the trial court erred by finding Employee did not have a meaningful return to work.

Standard of Review

The standard of appellate review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings of the trial court, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). The reviewing court must give considerable deference to the trial court's factual findings when the trial judge had the opportunity to observe the witness and make findings on credibility. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony 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

Causation

Employer argues that Employee failed to prove causation, pointing to the fact that Employee did not report his injury until returning to work after the plant's summer shutdown. During the shutdown, Employee worked on his farm and continued to have pain. After returning to work and seeing Dr. Freels, Employee reported the injury to the Employer. Employer contends that "the medical proof in this matter is merely speculative regarding causation of [Employee's] back condition."

Employee responds that a trial court in a workers' compensation action "must construe 'reasonable doubt' about the cause of an injury in favor of the employee." Medical testimony that an employee's job was a "possible" cause of the employee's injury is adequate where lay testimony also supports the inference that the injury was work-related. See Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Employee asserts that the medical proof in this case, together with his testimony, supports a finding that his material handling job required much repetitive bending, stooping, twisting, and lifting, and caused his injury. Employee points to the fact that both of the testifying orthopaedic surgeons opined that his injury was work-

related. Furthermore, the record contains no evidence that Employee's back problem occurred or worsened during the plant shutdown. Employee testified his back pain "stayed the same" during the shutdown. The trial court specifically found that Employee was "a very credible witness" and that he was "just very honest."

Having conducted an independent review of the record, we conclude that the evidence does not preponderate against the trial court's finding that Employee sustained a compensable injury. Employee testified without contradiction that his job with Employer required much repetitive stooping, bending, and lifting of heavy objects. The trial court accredited Employee's testimony that he was injured on the job as a result of his required job activities. Both Dr. Elalayli and Dr. Trubia related Employee's injury to his work activity and opined that it was the likely or possible cause of his injury. Employer presented no evidence that Employee's back injury occurred or worsened during the two-week July shutdown, and Employee specifically testified that it did not. The evidence does not preponderate against the trial court's finding that Employee's injury arose out of, and was sustained in the course of, his employment, and was thus compensable.

For the first time on appeal, Employer asserts that Employee's farm should be considered the equivalent of another employer under the "last injurious injury rule." Employer argues that Employee suffered his last injury during the shutdown while working on his farm, thereby relieving Employer of liability. Because Employer did not raise this issue at the trial level, it is waived. Powell v. Cmty. Health Sys., Inc., 312 S.W.3d 496, 511 (Tenn. 2010) ("It is axiomatic that parties will not be permitted to raise issues on appeal that they did not first raise in the trial court"); Black v. Blount, 938 S.W.2d 394, 403 (Tenn. 1996) ("Under Tennessee law, issues raised for the first time on appeal are waived").

Meaningful Return to Work

Employer also argues that Employee's award must be capped at 1.5 times his impairment rating because Mr. Massey made a meaningful return to work and voluntarily chose to retire early in order to benefit from Nissan's buyout program. Pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A), an employee injured after July 1, 2004, is not entitled to receive a permanent partial disability award greater than one and one-half times the employee's medical impairment rating if the employee has had a "meaningful return to work." See Tryon v. Saturn Corp., 254 S.W.3d 321, 328 (Tenn. 2008). However, when the injured employee is found not to have had a meaningful return to work, this cap is increased to six times the medical impairment rating pursuant to Tennessee Code Annotated section 50-6-241(d)(2)(A). Id. (citing Lay v. Scott Cnty. Sheriff's Dep't, 109 S.W.3d 293, 297-98 (Tenn. 2003); Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 630 (Tenn. 1999)).

Employer asserts that although Employee complained that his return to work caused him to suffer pain and stiffness, the medical proof established that Employee was able to return to his job. Dr. Elalayli stated that he placed Employee in physical therapy because Employee wanted to go back to work without restrictions. Based upon those considerations, Employer argues that the trial court should have adopted Dr. Elalayli's impairment rating of 10% and calculated an award capped by the 1.5 multiplier.

Employee asserts that he was forced to resign due to his injury. He contends the evidence shows his retirement was reasonably related to his injury and therefore he did not have a meaningful return to work. In support of his position, Employee relies upon his own testimony that he took the buyout because he was not able to keep up with the faster work required by his new work position. Employee did not believe that he was able to perform any jobs in general assembly for Nissan. He continued to suffer pain in August 2008 when he returned to the doctor, who determined that his condition required continuing treatment. Employee was disciplined several times by the Employer for failure to perform. The trial court made a specific credibility finding in favor of Employee on this issue. Employer did not present any contradictory evidence.

In Tryon, our Supreme Court observed that resolution of the question of whether a particular employee has had a meaningful return to work requires a fact-intensive inquiry to determine "the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work." 254 S.W.3d at 328 (emphasis added). In this case, the injured Employee returned to work for several months before ending his employment. Both the Employee and his supervisor's testimony established that Employee's job required repetitive bending and lifting of moderate amounts of weight. At the time Employee accepted Employer's buyout offer and retired, he was under the lifting, bending, and twisting work restrictions suggested by Dr. Trubia based on his June 10, 2008 examination. Employee had sustained a lower back injury that was significant enough to require surgery. The trial court accredited his testimony concerning the symptoms caused by performing his job. Employee returned to Dr. Elalayli and reported those symptoms prior to accepting the buyout offer. He continued to complain of pain and was disciplined for not keeping up with the work. Employer offered no other testimony on this issue. Although these facts present a close case, we conclude that the evidence does not preponderate against the trial court's fact-dependent conclusion that Employee did not have a meaningful return to work, and that Employee's decision not to continue working was reasonable under the circumstances presented, including his ongoing pain, medical restrictions, and demonstrated inability to keep up the physically difficult work at the required pace.

Conclusion

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

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JERRI S. BRYANT, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

MICHAEL C. MASSEY v. NISSAN NORTH AMERICA, INC.

Chancery Court for Wilson County
No. 08001

No. M2010-00151-SC-WCM-WC - Filed - April 14, 2011

ORDER

This case is before the Court upon the motion for review filed on behalf of Nissan North America, Inc. pursuant to Tenn. Code Ann. § 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 against Nissan North America, Inc., and its surety, for which execution may issue, if necessary.

PER CURIAM

SHARON G. LEE, J., not participating.