IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 17, 2010 Session

BRENDA M. McGHEE v. HOLLAND GROUP OF TENNESSEE, INC.

Appeal from the Circuit Court for Greene County
No. 08CV105KTL Kindall T. Lawson, Judge

No. E2009-01676-WC-R3-WC - Filed August 18, 2010

The Employee filed a workers' compensation claim against her Employer for back pain resulting from the aggravation and advancement of her degenerative disc disease, which she claimed had occurred from her injury while working on a brake line assembly. The trial court found that the Employee had not carried her burden of proof, and the Employee appealed. Because the evidence does not preponderate against the findings of fact made by the trial court, the Special Workers' Compensation Appeals Panel, sitting in accordance with Tennessee Code Annotated section 50-6-225(e)(3) and Tennessee Supreme Court Rule 51, affirms the judgment.

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

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

Robert Payne Cave, Jr. and Jonathan Sevier Cave, Greeneville, Tennessee, for the appellant, Brenda M. McGhee.

Jonathan E. Roberts and Jeffrey M. Ward, Greeneville, Tennessee, for the appellee, Holland Group of Tennessee, Inc.

MEMORANDUM OPINION

Facts and Procedural History

Brenda M. McGhee (the "Employee"), who was 29 years old at the time of trial, was employed in Greeneville by the Holland Group of Tennessee, Inc. (the "Employer"), a temporary staffing company. She had been assigned to work at TI Automotive in Greene

County for some six months when, on Saturday, August 5, 2006, she "felt a pull in [her] right shoulder blade" while reaching overhead for a plastic bag of hoses on the brake line assembly. She immediately reported the injury to her supervisor, but was able to finish her shift and, afterward, attend a "ladies' night out" at a local restaurant. Because she experienced increased pain later that night and throughout the next day, the Employee remained at her residence but chose not to go to a hospital for treatment. Two days following the injury, she again reported her condition to a representative of her Employer, who advised her to seek emergency room treatment at Takoma Hospital in Greeneville.

Dr. Gregory Vines diagnosed the Employee with a chest wall strain, put her on light duty restrictions for one week, and asked her to return for a check-up. Meanwhile, the Employee selected a Dr. Ashley[1] from a panel of physicians offered to her by the Employer. Dr. Ashley treated the Employee from August 14 to December 21, 2006, at which point she was transferred to Dr. Brantley Burns, a surgeon who works primarily out of Tennessee Orthopaedic Clinics in Knoxville. After performing a three-phase bone scan, Dr. Burns decided that the Employee was not a candidate for surgery and referred her to an associate, Dr. Elmer Pinzon. Dr. Pinzon, a board certified specialist in physical medicine, rehabilitation, and pain medicine, provided conservative treatment until August 21, 2007, at which time he determined that the Employee had reached maximum medical improvement.

On February 9, 2007, Dr. Pinzon reviewed the three-phase bone scan performed by Dr. Burns, as well as x-rays of the Employee's chest. When he found nothing abnormal, Dr. Pinzon arranged for a magnetic resonance imaging ("MRI") scan of the thoracic and lumbar segments of the Employee's back. That test, performed on February 21, 2007, indicated a "very mild disc protrusion at T6-7 on the right" and a "moderate foraminal narrowing and mild protrusion at L4-5." Dr. Pinzon's diagnosis was that the Employee had some "underlying degenerat[iv]e . . . musculoskeletal myofascial-related symptoms." According to Dr. Pinzon, there was no indication of an acute strain, such as the Employee's work injury, that could have caused the degenerative disc disease symptoms. When Dr. Pinzon released the Employee from treatment, he informed her that "she may have flare-ups in the future, but this seems to be more musculoskeletal since she had responded to conservative management." He did not recommend surgery and released her with no restrictions, concluding that she had no permanent impairment as a result of her work accident based upon the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Pinzon instructed the Employee to return for treatment only upon an as-needed basis.

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[1] The record is unclear as to Dr. Ashley's identity. The Employee's testimony does not include the doctor's first name. The deposition testimony of Dr. Elmer Pinzon does not mention Dr. Ashley but does refer to the Employee having been treated by a "Dr. Donald Aspley."

During the course of her treatment, the Employee worked in a light duty capacity at the Employer's Greeneville office in a position specifically created for her. After her release by Dr. Pinzon, however, the Employer had no work available. There is some dispute in the testimony about the extent of the Employer's efforts to find her a job after her release, as well as the Employee's efforts to stay in contact with the Employer. Nevertheless, the Employee remained unemployed until July of 2008, when, after passing a physical, she was hired by a different temporary staffing agency and assigned to work in the housekeeping department of Takoma Hospital.

On October 30, 2007, Dr. William Kennedy, an orthopaedic surgeon, conducted an independent medical evaluation ("IME") of the Employee at the request of her attorney. Dr. Kennedy diagnosed the Employee with a sprain of the thoracic spine and assigned an 8% permanent impairment under the AMA Guides. He recommended permanent restrictions against

> repeated bending, stooping or squatting; working over rough terrain or in rough vehicles; excessive ladder climbing or stair climbing; or working with her hands raised above the level of her shoulders. She should be able to control her posture with respect to sitting or standing. She should not be exposed to vibrations. Lifting and carrying, pushing and pulling should not exceed 20 pounds occasionally or 10 pounds frequently assuming a level lift and a level push or pull.

He stated that the Employee suffered from age-related degenerative changes to the T5, T6, T7 and T10 areas of her back, but found that the work-related incident on August 5, 2006 "permanently aggravated and advanced the preexisting underlying degenerative disc disease of the thoracic spine." In reaching his conclusion, Dr. Kennedy wrote that he was "[a]ssuming the foregoing history [provided to him by the Employee] to be reasonably accurate and thorough."

The Employee testified that her physical limitations as a result of the injury required her to seek help from her husband with the laundry, vacuuming, and other housework. She stated that she no longer worked in her yard and was limited to driving or riding in the car no more than one hour at a time. The Employee acknowledged, however, that she was fully capable of performing her job responsibilities at Takoma Hospital. In her discovery deposition, the Employee stated that a quarter of a pain pill put her "under the table." At trial, she admitted that she had received numerous prescriptions for such medications during the course of treatment for her injury. She explained that she did not take the medication, but nevertheless continued to have the prescriptions filled because she thought she had to do so "in order to keep the [workers' compensation] insurance paying for it." During her

deposition, she testified that she had not hired an attorney until after she had been put back on full duty by Dr. Pinzon; at trial, however, she acknowledged that she had contacted and retained counsel prior to returning to full duty. The Employee conceded that she had not sought or received medical treatment since Dr. Pinzon released her eighteen months earlier.

The Employee's mother, Lisa Lane, corroborated the Employee's claims of pain and discomfort, asserting that the Employee had trouble with stairs and mowing the yard and claiming that the Employee was no longer able to enjoy the amusement rides at Dollywood because the vibrations and movements caused pain. Ms. Lane also contended that the Employee could no longer play ball with her children or ride in a car for more than forty-five minutes to an hour. Michelle Southerland, a former co-employee who was also receiving workers' compensation benefits, testified that when they worked together, the Employee had trouble sitting in her office chair for long periods of time and seemed to be in discomfort.

At the conclusion of the trial, the trial court held that the Employee had failed to sustain her burden of proof and awarded no permanent disability benefits. The court made the following observations:

> Well, of course, I have to decide, and it is not easy sometimes. But this is a case, as I see it, which is obviously not one where there are broken bones or things of that kind, and from what I can glean from the evidence that I have before me, it's primarily subjective. The doctors, based on their history that they're given by the plaintiff and by I assume their examination, say that there's a mild muscle strain . . . .
>
> I have no reason to believe [Dr. Pinzon] did anything except call it like it is.
>
> I guess the same would apply for Dr. Kennedy except for the fact that he is retained by the plaintiff for the purpose of this evaluation, and the Court just has to consider that fact.
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> That becomes I think important in a case that's such a difficult case to call. . . . So what I've got is a subjective case. I have to look at the doctors and see how I resolve their different opinions. I have to consider the fact that the plaintiff has the burden of proof [and] if it's equally balanced, then the plaintiff does not carry their burden. I have to consider credibility, and in a case like this, it becomes a more important factor because basically the case is based on that. The doctor's evaluation and the Court's evaluation has to be determined on that.

> So I find in this case the plaintiff has not carried the burden. I find for the defendant.

Thereafter, the Employee filed a Motion to Amend the Findings of Fact, claiming that the trial judge had not given proper weight to Dr. Kennedy's opinions as required under the law. The motion was denied, and the Employee appealed.

Standard of Review

In workers' compensation cases, review of a trial court's findings of fact is de novo, accompanied by a presumption of correctness, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). "This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Group, 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). When the trial court has seen and heard in-court testimony, we give considerable deference to its factual findings as to credibility and any assessment as to the weight to be given to that testimony. Trosper v. Armstrong Wood Prods., 273 S.W.3d 598, 604 (Tenn. 2008). "The same deference need not be afforded findings based upon documentary evidence, such as depositions." Id. Our standard of review on questions of law is de novo with no presumption of correctness. Wilhelm, 235 S.W.3d at 126 (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)). "Although workers' compensation law must be construed liberally in favor of an injured employee, it is the employee's burden to prove causation by a preponderance of the evidence." Crew, 259 S.W.3d at 664. Nevertheless, expert testimony must be considered in conjunction with the testimony of the employee as a lay witness. Trosper, 273 S.W.3d at 604; Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991).

Analysis

The Employee contends that the trial judge erred by characterizing the evidence in support of her claim as "primarily subjective." In particular, she asserts that the trial court should have given greater weight to objective findings in the testimony of Dr. Kennedy. In response, the Employer asserts that the evidence failed to establish a causal connection between the Employee's work injury and an advancement or aggravation of her pre-existing degenerative disc disease. The Employer points out that the treating physician found no impairment, that Dr. Kennedy, as a "hired expert," relied on the veracity of the Employee's complaints, and that the trial court found that the Employee was not a credible witness. The Employer further argues that even if the Employee had presented credible testimony, she failed to prove that the condition in her back was causally related to her work accident.

The plaintiff in a workers' compensation case has the burden of proving every element

of his or her claim, including causation, by a preponderance of the evidence. Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). "Except in the most obvious, simple and routine cases," a claimant must establish by expert medical evidence the causal relationship between the claimed injury and the employment activity. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). That relationship must be established by the preponderance of the expert medical testimony, as supplemented by the lay evidence. Thomas, 812 S.W.2d at 283.

Dr. Pinzon and Dr. Kennedy both stated that the Employee suffered from age-related degenerative changes to the T5, T6, T7 and T10 areas of her back. The doctors disagreed, however, as to whether the work incident on August 5, 2006, permanently aggravated or advanced the pre-existing underlying degenerative disc disease of the thoracic spine. Both doctors diagnosed the Employee's work-related injury as a muscle sprain, and Dr. Kennedy's basis for giving an impairment rating of eight percent was that the sprain "permanently aggravated and advanced the preexisting underlying degenerative disc disease." The trial court found that the Employee had not carried her burden of proof based upon the fact that the treating physician, Dr. Pinzon, found no impairment or evidence in the three-phase bone scan, x-rays, or MRI that linked the Employee's discomfort to the work injury.

The issue here is not whether the Employee's work incident caused the degenerative disc disease, because the medical evidence demonstrates that it did not. Rather, the dispositive question is whether the Employee's work incident caused an advancement or aggravation of the pre-existing degenerative disc disease. Although the medical evidence is conflicting, which is not unusual in litigation of this nature, we cannot say that the trial court erred by accrediting the testimony of Dr. Pinzon. In assessing the evidence, the court observed that Dr. Pinzon, as the treating physician, "ha[d] no reason to . . . d[o] anything except call it like it is." While stating that "the same would apply for Dr. Kennedy," the trial court also considered the fact that Dr. Kennedy had been retained by the Employee to reassess the treating physician's evaluation. The trial court's decision to accredit the testimony of the treating physician over that of the independent medical examiner is consistent with Carter v. First Source Furniture Group, 92 S.W.3d 367, 373 (Tenn. 2002) (assigning greater weight to the opinion of the treating physician, who had released a worker with no restrictions after a month of physical therapy, than to that of the independent medical examiner, who recommended an award of disability benefits). See also Orman, 803 S.W.2d at 677 ("It seems reasonable that the physicians having greater contact . . . would have the advantage and opportunity to provide a more in-depth opinion, if not a more accurate one.").

The Employee asserts that the trial court erred by describing the evidence as "primarily subjective," because Dr. Kennedy's finding of a muscle spasm is an objective finding. While it referred to the claim as "subjective," there is no indication that the trial

court applied an incorrect legal standard. To the contrary, after weighing the medical opinions of the two doctors, in conjunction with the lay testimony, the trial court simply concluded that "the plaintiff has not carried the burden [of proof]." Moreover, the court took note of the fact that Dr. Kennedy, in preparing his impairment rating, had to rely heavily upon the history that the Employee provided him to determine "the impact of [the Employee's] symptoms on her activities of daily living." The trial court specifically stated, "I have to consider credibility, and in a case like this, it becomes a more important factor because basically the case is based on that." By holding that the Employee failed to carry her burden, the trial court implicitly found her to lack credibility. There is evidence in the record supporting the unfavorable credibility assessment by the trial judge. For example, the Employee passed a physical examination in order to be employed as a housekeeper at a local hospital and performed some chores at work that she claimed to be unable to do at home. That the Employee continued to have her prescriptions filled for workers' compensation insurance purposes, despite her expressed aversion to the pain medications, also did not serve to enhance the quality of her testimony.

Conclusion

The evidence does not preponderate against the trial court's conclusion that the Employee did not establish a causal relationship between the work accident and an advancement or aggravation of the pre-existing condition in her back. The judgment of the trial court is, therefore, affirmed.

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GARY R. WADE, JUSTICE