

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

November 25, 2013 Session

ASSOCIATED WHOLESALE GROCERS v. LAWRENCE F. LING

**Appeal from the Chancery Court for Davidson County
No. 12-931-III Ellen Hobbs Lyle, Chancellor**

**No. M2013-01317-WC-R3-WC - Mailed February 26, 2014
FILED APRIL 1, 2014**

In this workers' compensation action, the employee alleged that he sustained a compensable aggravation of his pre-existing spinal condition. The trial court ruled that he failed to satisfy his burden of proof and dismissed the complaint. The employee has appealed. The 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 in accordance with Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

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

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

David L. Cooper, Nashville, Tennessee, for the appellant, Lawrence F. Ling.

Kitty Boyte and Catherine C. Dugan, Nashville, Tennessee, for the appellee, Associated Wholesale Grocers.

OPINION

Factual and Procedural Background

Lawrence Ling contends that he suffered a compensable injury as a result of his work as a forklift driver for Associated Wholesale Grocers ("Associated"). Mr. Ling, through his attorney, gave notice of his workers' compensation claim to Associated by letter dated August 8, 2011. The parties were unable to resolve their differences at a June 27, 2012

benefit review conference, and on the same day, Associated filed this action in the Chancery Court for Davidson County.

Mr. Ling worked for Associated and its corporate predecessors from January 1978 until December 2011. His history of back problems began in 1996 or 1997. He did not suffer a specific injury, but did develop pain and stiffness in his lower back. Mr. Ling came under the care of Dr. Thomas O'Brien, an orthopedic surgeon, who operated on his back in July 1998. Mr. Ling was off work for approximately two months, but was ultimately able to return to his previous job without restrictions. Mr. Ling did not seek workers' compensation benefits at that time, and he continued to work for Associated as a forklift operator.

In 2007, Mr. Ling again began to experience stiffness and pain in his lower back and legs. He went to his primary care physician, Dr. Larry Pharris, who ordered an MRI. Before the MRI could be evaluated, Mr. Ling's "back went out," and he was referred to Dr. Paul Parsons, an orthopedic surgeon, for further evaluation. Dr. Parsons referred Mr. Ling to Dr. John Klekamp, an orthopedic surgeon specializing in treatment of the spine. Mr. Ling was off work for a period of time and received three steroid injections. He was able to return to his previous job without restrictions in February 2008.

Around the time that Mr. Ling returned to work, Associated began to change the type of forklift truck used in its facility. Previously, Associated had used Crown "sit-down" forklifts, which were operated from a sitting position. Beginning in 2008, those vehicles were gradually replaced with Raymond "stand-up" forklifts, which were operated from a standing position and were capable of raising loads to a higher level. According to Mr. Ling, the physical demands of operating the Raymond forklifts were different from those that had been required to operate the Crown forklifts. In addition to requiring the operator to stand, the Raymond forklifts were steered with a knob, rather than a steering wheel, and the accelerator was a toggle stick. It was often necessary to drive the Raymond forklifts backward, requiring the operator to turn his head frequently, and the Raymond forklifts' higher lifting capacity required the operator to look upward more often. Mr. Ling also testified that while he was working for Associated, the Raymond forklifts had a flaw that frequently caused their tires to fall apart, resulting in a rougher ride for the operator. This problem was confirmed by Associated's Maintenance Manager Brad March.

In April 2011, Mr. Ling's lower back "began to tighten up" and became painful. He also experienced tightening and pain in his neck. He sought treatment at a walk-in medical clinic, used ice and heat packs, and "stay[ed] in the bed on the weekends." On the weekend of May 21, 2011, his back "tightened up to the point [that he] couldn't get out of bed." Mr. Ling returned to the walk-in clinic, where he received an injection or other medication. Mr.

Ling also returned to Dr. Parsons, who examined him and again referred him to Dr. Klekamp. Dr. Klekamp ordered steroid injections and physical therapy, and he referred Mr. Ling to Dr. Son Le, a pain management specialist. Dr. Le also ordered steroid injections in Mr. Ling's neck and additional physical therapy. Mr. Ling reported limited improvement from these treatments, but still considered himself unable to work. Mr. Ling did not return to work after May 20, 2011. Associated terminated Mr. Ling's employment on December 28, 2011. During that period, Mr. Ling applied for social security disability benefits and subsequently received those benefits.

The attorney who handled Mr. Ling's social security disability claim advised Mr. Ling that his condition could be work-related. Mr. Ling then contacted another attorney, who provided written notice of Mr. Ling's work-related claim to Associated on August 8, 2011. Mr. Ling did not provide notice to Associated of a potential work-related injury prior to August 8, 2011. He also did not inform his supervisor or anyone else that he had suffered a work-related injury, he did not complain that operating the Raymond forklift was causing him pain, and he did not inform his doctors that he believed his work activities were causing his symptoms. After Mr. Ling stopped working in May 2011, he applied for and received short-term disability benefits through a plan offered by Associated. On his application for those benefits, Mr. Ling stated that his back condition was not related to his employment.

Dr. Robert Landsberg, an orthopedic surgeon, testified by deposition that he examined Mr. Ling on January 18, 2012. Dr. Landsberg reviewed the medical records relevant to Mr. Ling's claim, including MRIs of Mr. Ling's lower back taken in 2007 and 2011, and a 2011 MRI of Mr. Ling's neck. Dr. Landsberg diagnosed Mr. Ling with degenerative disc disease of the cervical and lumbar spine and spinal stenosis of the lumbar spine. Dr. Landsberg was of the opinion that Mr. Ling's work for Associated aggravated and advanced his symptoms and caused the MRI findings. He believed that Mr. Ling retained a 3% impairment to his body as a whole for the cervical spine problem and an 8% impairment to his body as a whole for the lumbar problem due to his work activities for Associated. Dr. Landsberg recommended that Mr. Ling alternate between standing, sitting and walking every thirty minutes. Dr. Landsberg also recommended that Mr. Ling lift no more than a maximum of thirty pounds at any time, and occasionally up to fifteen or twenty pounds.

During cross-examination, Dr. Landsberg acknowledged that in April 2011, Mr. Ling had reported a history of several years of back and neck stiffness. Dr. Landsberg stated that degenerative disc disease is a permanent condition and that the spine continues to age as the patient does. He agreed that the changes he perceived when comparing Mr. Ling's 2007 and 2011 MRIs could have been caused by normal wear and tear.

Dr. Klekamp, an orthopedic surgeon specializing in the treatment of spinal problems, also testified by deposition. He first saw Mr. Ling on January 22, 2008, and last saw him on July, 15 2011. In 2008, Mr. Ling complained of neck and back pain but did not indicate that those problems were related to his work. Dr. Klekamp ordered that Mr. Ling complete a series of epidural steroid injections. Mr. Ling improved after this treatment and returned to work without restrictions. Dr. Klekamp's diagnosis at that time was degenerative disc disease. He testified that about 10% of patients treated for this problem experience a recurrence of symptoms and that the natural course of the disease is for the spine to continue to degenerate and to extend to additional levels of the spine. Dr. Klekamp testified that he tells his patients the condition is "just like getting grey hair and wrinkles. It happens to everybody."

Mr. Ling returned to Dr. Klekamp in 2011 with complaints of back and neck pain. He found nothing significant in his physical examination of Mr. Ling and noted that Mr. Ling did not appear to be uncomfortable or in pain. He recommended a course of anti-inflammatory medication, injections and physical therapy. He also placed a temporary ten-pound lifting restriction on Mr. Ling. Dr. Klekamp later ordered MRIs of the cervical and lumbar spine which revealed no evidence of an acute injury. Dr. Klekamp considered the 2007 and 2011 studies to be essentially the same, although some findings on the lumbar MRI appeared to show improvement from the 2007 study. According to Dr. Klekamp, this reflected a possible problem with the quality of the studies. In his opinion, any advancement of Mr. Ling's condition was caused by "activities of life" and was not related to Mr. Ling's work activities.

During cross-examination, Dr. Klekamp testified that he did not understand that Mr. Ling's job as a forklift operator constituted "heavy manual labor." He did not know how long Mr. Ling had worked for Associated. He testified that he considered the origin of Mr. Ling's spinal degeneration to be primarily genetic. Dr. Klekamp said that frequently looking upward or other physical activity could temporarily aggravate Mr. Ling's symptoms, but could not permanently advance his underlying medical condition over a period of time.

The trial court took the case under advisement and issued a written memorandum of its findings. It found that Mr. Ling did not sustain a compensable injury. In reaching that conclusion, the court accredited the testimony of Dr. Klekamp and noted Dr. Landsberg's admission that Mr. Ling's symptoms could have been caused by normal wear and tear of the spine. The trial court also noted the discrepancy between Mr. Ling's position at trial and his failure to advise Associated of any potential work injury or complaints while he was still employed. Judgment was entered in accordance with those findings, and Mr. Ling filed a timely notice of appeal.

Analysis

By statute, we are required to review the trial court's factual findings "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2). This standard has been interpreted to require the reviewing court "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although we do not do so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

Mr. Ling contends that the evidence preponderates against the trial court's finding that he did not sustain a compensable injury. He argues that Dr. Landsberg's testimony that his work activity advanced his pre-existing arthritic condition, supported by his own testimony concerning the physical requirements of operating a stand-up forklift, is entitled to greater weight than the testimony of Dr. Klekamp. He points specifically to Dr. Klekamp's response to a question on cross-examination indicating that he did not think repetitive, heavy work can cause a "back injury" as a reason to disregard his opinions.

We find that, when viewed in context, Dr. Klekamp's statement was merely an extension of his view that Mr. Ling's degenerative condition was genetic. In other instances, Dr. Klekamp testified that the condition he had observed in Mr. Ling and his findings from Mr. Ling's MRIs and other studies reflected that Mr. Ling's condition was "by the vast majority, genetic," and that knowing the type of work Mr. Ling did would be important in only a "very small percentage" of cases. More significantly, we note that there are several reasons supporting the trial court's decision to accredit Dr. Klekamp's testimony over that of Dr. Landsberg. Dr. Klekamp is a spine specialist; Dr. Landsberg is not. Dr. Klekamp evaluated and treated Mr. Ling several times over the course of several years. Dr. Landsberg saw him on a single occasion. Dr. Landsberg based his opinions on what he was told by Mr. Ling about his working conditions, which the trial court found detracted from the weight of

his testimony.¹ Dr. Landsberg conceded that the MRI findings he observed could have been caused by normal wear and tear.

A trial court generally has “the discretion to accept the opinion of one medical expert over another medical expert” when there is a conflict of expert opinions. Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). See also Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers’ Comp. Panel 1996) (“When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept.”). Based on the applicable standard of review, we are unable to conclude that the evidence preponderates against the trial court’s decision.

Conclusion

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

DONALD P. HARRIS, SPECIAL JUDGE

¹ As stated above, we accord considerable deference to the trial court’s assessment of the credibility of witnesses it heard at trial.

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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 Lawrence F. Ling and his surety, for which execution may issue if necessary.

PER CURIAM