IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT MEMPHIS
March 25, 2015 Session

ROBERT MORROW v. MR. BULT'S, INC., ET AL.

Appeal from the Circuit Court for Benton County
No. 12CV42 Charles C. McGinley, Judge

No. W2014-00546-SC-WCM-WC – Mailed August 19, 2015;
Filed November 30, 2015

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. In this case, it is undisputed that Employee sustained an injury arising out of and in the scope of his employment; the issue on appeal, however, is whether Employee carried his burden of proving that his work-related injury caused a permanent disability. The trial court found that Employee failed to carry his burden of proving any permanent disability resulting from the injury. Based on our review of the evidence, we agree with the trial court's finding, and we therefore affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (2014) Appeal as of Right;
Judgment of the Circuit Court Affirmed.

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which HOLLY M. KIRBY, JUSTICE and MARTHA B. BRASFIELD, CHANCELLOR, joined.

Terry J. Leonard, Camden, Tennessee, for the appellant, Robert Morrow.

David T. Hooper, Brentwood, Tennessee, for the appellees, Mr. Bult's, Inc., and Dallas National Insurance Company.

MEMORANDUM OPINION

Factual and Procedural Background

The plaintiff, Robert Morrow ("Employee"), testified that he was 34 years old at the time of trial and that he had graduated from high school. Since graduating from high school, Employee worked in a number of "general labor" jobs, including custodial work. At some point, he received a commercial driver's license and then got a job driving a concrete mixer.

The defendant, Mr. Bult's, Inc. ("MBI" or "Employer"), works under contract with Waste Management, Inc., hauling waste from municipal areas to a landfill owned by Waste Management. Employee began working for Employer on January 16, 2008. His first job with Employer was to clean up MBI's shop, but he later took the position of "tarp boy." Employee's "tarping station" was located at Waste Management's landfill. Employee's duties as a tarp boy were to work with each truck's driver to unfasten bungee ties that held down the tarp covering the truck's open-top trailer, to roll the tarp from the back to the front of the trailer, and then to secure the tarp so that the waste could be dumped out the rear of the trailer. Once the tarp was rolled up and secured, the truck driver would back the trailer into a large hydraulic "tipper," which then tipped the trailer to dump the waste onto the ground of the landfill. As a tarp boy, Employee also was responsible for cleaning up around the tippers and for picking up any trash around the tarping station.

On May 4, 2010, a truck had pulled into Employee's tarping station (which was comprised of scaffolding on both sides of the trailer), and Employee had climbed approximately thirteen feet from the ground in order to remove the bungee straps and roll back the tarp on the trailer. As he attempted to release a bungee strap that had become entangled, Employee fell head-first from the scaffolding. As he fell, his upper back and neck area struck a cross-member of the scaffolding, and then he landed on his chest on the gravel covered ground below. Employee initially was transported to the emergency room at Camden General Hospital in Camden, Tennessee, and then was airlifted to a hospital in Jackson, Tennessee. Employee testified that the fall hurt his head, neck, shoulders, and the upper part of his back, and that he had difficulty breathing after the fall. His specific injuries included a laceration of his liver and a superficial laceration or scrape at the hairline on his forehead. The liver laceration, however, healed quickly, and the laceration or scrape on his forehead did not require any sutures. Employee testified on cross-examination that he did not have any bruises to his head or face, and he also stated that he did not lose consciousness when he fell.

After being released from the hospital in Jackson, Employee saw Dr. Jason Hollingsworth and He also periodically sought treatment for migraine headaches at the emergency room at Camden General Hospital. Employee testified that he did not have any migraine headaches prior to his fall on May 4, 2014.

Dr. Hollingsworth referred Employee to Dr. Michael Schlosser, a board-certified neurosurgeon. Dr. Schlosser testified that he first saw Employee on July 22, 2010, at which time Employee was complaining of ongoing neck pain, headaches, and bilateral shoulder pain. Dr. Schlosser performed a physical examination and noted that Employee had "full strength in his upper extremities, that he had good range of motion, symmetric reflexes, basically an unremarkable neurologic exam." Because Employee's complaint of neck and shoulder pain could have been consistent with a cervical spine injury, Dr. Schlosser ordered a cervical MRI scan. Dr. Schlosser also noted in his assessment "that I bring up the possibility of post-concussive syndrome," which he testified can cause persistent headaches after a head injury.

Employee returned to see Dr. Schlosser on August 12, 2010, after having his MRI scan. Dr. Schlosser testified that the scan was "a relatively normal appearing cervical spine MRI; no evidence of acute injury[.]" Dr. Schlosser testified that, based on the results of the MRI scan, he did not recommend any surgical treatment. Dr. Schlosser prescribed Employee a pain medication and a muscle relaxer and also referred him for physical therapy. Dr. Schlosser said in his testimony that did not see Employee again after the August 12 visit.

A benefit review conference held on July 9, 2012 resulted in an impasse. Employee then filed a complaint on July 11, 2012, in the Benton County Circuit Court, seeking workers' compensation benefits.

The case was tried before the Circuit Court on January 10, 2014. Employee testified at trial, and Arthur Jelson, a safety manager for Employer, also testified. Dr. Schlosser's deposition testimony was admitted into evidence, and a C-32 Form ("Standard Form Medical Report for Industrial Injuries") submitted by Dr. Richard Fishbein—who conducted an independent medical evaluation of Employee—also was admitted into evidence. Employee also introduced into evidence his medical records from Camden General Hospital, showing that he was treated at the emergency room for migraine headaches on approximately twenty-five different occasions from May 29, 2010 through December 15, 2013. At the conclusion of the trial, the trial judge orally announced the court's ruling; in summary, the court found Dr. Schlosser's deposition testimony more persuasive than the C-32 Form submitted by Dr. Fishbein. Expressly relying on Dr. Schlosser's testimony, the trial court found that Employee failed to carry

his burden of proving that he sustained any permanent impairment as a result of his work-related injury.

Standard of Review

In Tennessee workers' compensation cases, this Court reviews the trial court's findings of fact de novo, accompanied by a presumption of correctness of the finding, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2014); *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." *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991) (citing *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 675 (Tenn. 1991)). On questions of law, our standard of review is de novo with no presumption of correctness. *Wilhelm*, 235 S.W.3d at 126. The extent of vocational disability is a question of fact to be decided by the trial judge. *Johnson v. Lojac Materials*, 100 S.W.3d 201, 202 (Tenn. 2001). 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. *See Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991).

Analysis

In his brief, Employee states a single issue presented for review, which we restate here: whether the trial court erred in finding that Employee failed to carry his burden of proving he sustained a permanent impairment resulting from his work-related injury on May 4, 2010. In summary, Employee contends that the trial court erred by giving more weight to Dr. Schlosser's deposition testimony than to Dr. Fishbein's report, which was appended to his C-32 Form. Employee argues that Dr. Schlosser was merely a "consulting physician" and that Dr. Schlosser testified in his deposition that he did not treat headaches (other than those caused by a lesion inside the head). In short, Employee asserts that the trial court should have accepted Dr. Fishbein's report over Dr. Schlosser's testimony.

Generally speaking, "[w]hen the medical testimony differs, the trial judge must obviously choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." *Orman*, 803 S.W.2d at 676.

Dr. Fishbein's report states that he performed an independent medical evaluation of Employee on February 7, 2012, which was approximately twenty-one months after Employee's fall. In his report, Dr. Fishbein briefly summarized Employee's medical

history and then set out a list summarizing Employee's relevant medical treatment since the date of his injury. Dr. Fishbein's report then stated that he examined Employee and that his "[e]xamination of the spine revealed tenderness to palpation over the cervical musculature" and that "[t]here was no additional evidence of neurological, motor, and/or sensory deficit." In his "Comments and Conclusions," Dr. Fishbein stated, in pertinent part:

> According to the *American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition*, Mr. Morrow will retain 3% permanent impairment to the body as a whole based on his cervical strain, Class I (Table 17-2, page 564). The following net adjustment formula was used to determine the grade: (3-1) + (1-1) = 2. The clinical studies modifier was not used because it was used to determine the class. He will retain 4% permanent impairment to the body as a whole based on his migraines (Table 13-18, page 342). These combine for a total of 7% WP. Based on the treatment received to date, he has reached his maximum medical improvement. There is a direct causal relationship between his work injury and his head and neck conditions. Mr. Morrow is unable to work at this time due to his frequent severe headaches and emotional condition. He needs to be evaluated for his headaches and get those under control. Mr. Morrow will require continued symptom-relieving measures such as physician care, diagnostics, injections, analgesics and occupational/physical therapy into the indefinite future.

Notably, the foregoing quotation is the *entirety* of Dr. Fishbein's opinions concerning both the extent of Employee's permanent impairment and whether his ongoing medical problems were causally related to his fall on May 4, 2010.

Unlike the C-32 Form's relatively superficial statement of Dr. Fishbein's medical opinions, Dr. Schlosser's deposition testimony was quite detailed. When asked about any permanent impairment arising from an injury to Employee's cervical spine, Dr. Schlosser testified, "I don't see anything in his cervical spine that would give him impairment." Similarly, Dr. Schlosser stated that, at the time he last saw Employee (on August 12, 2010), he did not see anything in Employee's cervical spine that would give him an impairment.

Dr. Schlosser declined to offer any opinion concerning whether Employee sustained any permanent impairment as a result of headaches, because he does not treat

headaches as part of his routine practice. He did testify, however, as to the differences between "post-concussive" and migraine headaches; as Dr. Schlosser stated, "[p]ost-concussive headaches tend to occur daily, or sometimes all day, which would be different than other types of headaches like migraine headaches which are intermittent, you know, will occur once a week or twice a week." Similarly, when asked if he was aware of any study suggesting that physical impact is a cause for migraine headaches, Dr. Schlosser replied, "[n]o[,] I think trauma causes its own headache type which is different than migraines." Dr. Schlosser acknowledged that Employee's medical records from the date of his fall indicated that Employee sustained a minor laceration or scrape to his forehead, but Dr. Schlosser went on to testify as follows:

> So when I put his whole picture together, it sounds to me like someone who did not suffer a lot of direct trauma to the head but instead had a whiplash-type acceleration-deceleration injury to the neck. That can cause headaches as a feature; a lot of people with whiplash complain of headaches also. But I don't think that what we're dealing with here is a severe head injury which has led to a long-term problem from that. That would not be consistent with what I see here.

Dr. Schlosser went on to describe headaches which are caused by a whiplash-type injury, stating that such headaches "present much more like a tension-type headache, a stress headache because it's related to the musculature in the neck more than it is the head itself." He then was asked if a headache from a whiplash-type injury is different from a migraine headache, and he replied, "[i]t is."

As noted above, the record includes the deposition testimony of Dr. Schlosser and the C-32 Form submitted by Dr. Fishbein. Where the issues on appeal involve expert medical testimony that is contained in the record by deposition or other documentary evidence, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions or other documentary evidence, and the reviewing court may draw its own conclusions with regard to those issues. *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004); *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992).

In announcing the court's ruling, the trial judge stated from the bench:

> I've got conflicting medical proof. I've got the C-32 that's filed by Dr. Fishbein, and then I've got the deposition of Dr. Michael J. Schlosser, which to my knowledge, first time I've

probably had him, and in all candor, he is very, very qualified and persuasive, undergraduate degree in chemical engineering from MIT and graduate of Yale Medical school, board certified. Very, very impressive witness. In addition to that, he was actually a treating physician, hands-on experience with the Plaintiff in this particular case. If you read his deposition, he repeatedly says there's nothing in the cervical spine that would give him any type of impairment, and he is super qualified. So there's absolutely no question that the cervical injury does not lend itself to an anatomical disability, nor a vocational disability.

Dr. Fishbein did rate him as 3 percent based upon a cervical strain, and then the other question in this case, I've never had a case involving headaches. I've never had it. There is a portion of the guides, it's on 342, Table 18, I don't have it in front of me, and non-migrainous headaches are absolutely not rateable. Dr. Fishbein checks the thing that he's got migraines that are causally related.

But if you take the deposition of Dr. Schlosser and you read it closely, particularly starting about Page 22 or 23, he just says that these headaches are not migraine. He says he's not aware of any study that would suggest physical impact is a cause for migraine headaches. He says, "I think trauma causes its own headache, a type which is different than migraines." He goes on and states that you can have concussive headaches and they resolve, so forth and so on. But if you read the deposition as a whole, he is firmly of the medical opinion that if this gentleman does suffer migraine headaches or some type of headaches, whatever they are, that they are not – either not rateable under the guides or that they are a result of something other than the job-related injury. I find that his testimony is more persuasive than that of the one-time evaluating physician Dr. Fishbein, and as a result, the Court finds that the Plaintiff has failed to establish beyond – or by preponderance of the evidence that he has received any anatomical disability as a result of a very, very bad accident out there that occurred on May the 4th.

Based on our own review of Dr. Schlosser's deposition and Dr. Fishbein's report, we agree with the trial court's conclusion that Dr. Schlosser's testimony is more persuasive than Dr. Fishbein's report.

As the trial judge observed in his oral ruling, Dr. Schlosser is a "[v]ery, very impressive witness. In addition to that, he was actually a treating physician, hands-on experience with the Plaintiff in this particular case."

Dr. Fishbein saw Employee on only one occasion, and that was approximately twenty-one months after Employee's fall. Moreover, the C-32 Form submitted by Dr. Fishbein provides no information about his professional qualifications, and we therefore are unable to make any assessment of those qualifications. *See* Tenn. Code Ann. § 50-6-235(c)(1) (2014) (providing, in pertinent part, that "[a]ny written medical report sought to be introduced into evidence shall include within the body of the report or as an attachment a statement of qualifications of the person making the report").

Based on our review of the evidence, and for the reasons stated above, we find that the evidence does not preponderate against the trial court's finding that Employee failed to carry his burden of proof as to any permanent impairment resulting from his work-related injuries sustained on May 4, 2010.

Conclusion

The judgment is affirmed. The costs are taxed to Robert Morrow and his surety, for which execution may issue if necessary.

BEN H. CANTRELL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

ROBERT MORROW v. MBI AND/OR MR. BULT'S INC.

Circuit Court for Benton County
No. 12CV42

No. W2014-00546-SC-WCM-WC – Filed November 30, 2015

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Robert Morrow pursuant to Tennessee Code Annotated section 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 to Robert Morrow, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Kirby, Holly, J., not participating