

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

February 25, 2013 Session

UNITED PARCEL SERVICE, INC. v. CINDY HANNAH

**Appeal from the Chancery Court for Rutherford County
No. 11CV-12 Robert E. Corlew, III, Chancellor**

**No. M2012-00884-WC-R3-WC - Mailed June 25, 2013
Filed August 14, 2013**

In this workers' compensation action, the employee sought permanent partial disability benefits for an injury to her hip and lower back. Her employer agreed that her hip injury was compensable, but denied that she had suffered a permanent disability. It also denied that her alleged back injury was compensable. The trial court found for the employee, and awarded permanent disability benefits for both injuries. Her employer has appealed, arguing that the medical evidence preponderates against the trial court's findings. 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 pursuant to 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

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and DONALD P. HARRIS, SP. J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellant, United Parcel Service, Inc.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee, for the appellee, Cindy Hannah.

OPINION

Factual and Procedural Background

Cindy Hannah (“Employee”) is employed by United Parcel Service (“Employer”) as a delivery driver. She was injured on Thursday, January 7, 2010 when she slipped and fell on a patch of “black ice” while making a delivery. She landed on her left hip and reported the incident to Wayne Scales, her supervisor. Mr. Scales assisted her in completing her route. The next day, she went to a walk-in clinic. She was told she had an “old injury,” and instructed to return on Monday. However, on Saturday, her hip became extremely painful and she was taken to a hospital by ambulance. Dr. James Rungee, the orthopaedic surgeon on call at the hospital, diagnosed her with a fracture of the femoral neck. Dr. Rungee was able to place the fracture in proper alignment non-surgically. He then placed three screws to hold the bone in place, using a minimally invasive method.

Initially, Dr. Rungee restricted her from placing any weight on the injured leg. In March 2010, he permitted her to put some weight on the leg and ordered physical therapy. X-rays taken throughout this period showed the fracture healing “perfectly.” In May, Dr. Rungee discontinued therapy and permitted her to lift five pounds. At that time, Employee’s primary complaint was lower back pain. Dr. Rungee ordered x-rays, which showed chronic narrowing of the L5-S1 disc space but no acute findings. He concluded that her back pain was unrelated to her hip problem. By June 16, Employee was able to walk five miles without difficulty. At that time, Dr. Rungee permitted her to return to work with a ten-pound lifting restriction until July 6, and to full duty thereafter. At the time of trial in February 2012,

Employee continued to work in the same position without accommodation.

Dr. Rungee testified that, according to Table 16-4 of the Sixth Edition of the AMA Guides, Employee had an impairment of 0% after recovery from her hip injury. He stated that although Employee's type of injury "has a notoriety for complications," she had no problems or significant objective findings at the time she reached maximum medical improvement. Employee returned to Dr. Rungee in October 2010 with a complaint of pain in her left leg. His examination of her hip was normal. He diagnosed "advance lumbosacral arthritis" as the probable source of her pain. He recommended an MRI, but apparently that did not occur. Employee called Dr. Rungee's office on one or more occasions thereafter to complain concerning her interactions with him and his office. He testified that Employee's physical therapy and use of a walker during her recovery could have caused her spinal arthritis to become symptomatic.

Dr. John Bacon conducted an independent medical evaluation on October 29, 2010. He was deposed on May 16, 2011 and October 10, 2011. Both depositions were placed in evidence by Employee. Dr. Bacon made two diagnoses: a displaced fracture of the left hip and a lumbar strain. It was his opinion that Employee's prognosis was

..good. I think that she will continue to have some discomfort and stiffness in her lower back with activities, and she'll have some ongoing discomfort of her hips. But I think that she could continue to be active. She's working at a regular job. I think she can continue to do that.

He did not suggest any activity restrictions. Using the same table from the AMA Guides (16-4) as Dr. Rungee, he placed Employee in Class 2 and assigned a 6% impairment to the body as a whole. His classification and rating were based in part on range of motion measurements he took, which showed that Employee had ten degrees of internal rotation of her left hip, compared to twenty-five degrees on the right, and thirty degrees of external rotation on the left, compared to forty-five degrees on the right. In addition, Dr. Bacon assigned a 2% permanent impairment to the body as a whole based on his back strain diagnosis. Thus, his opinion was that Employee retained an impairment of 8% to the body as a whole due to her injury.

Dr. Bacon testified that he was an orthopaedic surgeon. He had been board-certified until 2007, but was no longer certified. On cross-examination, he stated that his medical license had been placed on probation in July 2010, and he had been assessed a \$25,000 penalty by the Board of Medical Examiners for prescribing medication without proper documentation or examinations. At the time of his first deposition, he had opened a laser and skin care center. By the time of his second deposition, he had closed his office at Sumner Regional Medical Center and was no longer accepting new orthopaedic patients. He no longer had privileges at any hospital. He agreed that the procedures performed by Dr. Rungee were successful in causing Employee's hip fracture to heal. His finding that Employee had a Class 2 impairment according to Table 16-4 was based on his

characterization of her range of motion deficits as “moderate.” In that regard, Employee’s motion was normal in all planes except internal and external rotation. He agreed that, according to Table 16-24 of the Sixth Edition, ten degrees of internal rotation is classified as a “mild” deficit. Similarly, thirty degrees of external rotation is classified as a “mild” deficit. He explained that he chose to characterize these deficits as moderate because they were “right on the border” between mild and moderate, and within the range of error of the instrument he used to measure them. He also testified that he applied an upward modifier to the Class 2 impairment based upon “clinical studies.” It appears from Dr. Bacon’s testimony that the studies he relied upon were x-rays taken at or near the time of injury. During his second deposition, he testified that he could not recall if he reviewed the actual x-rays or relied upon radiologists’ reports. He agreed that the current printing of the Sixth Edition of the AMA Guides stated that only studies made at the time of maximum medical improvement should be used to modify an impairment rating. He testified that he disagreed with that provision of the Guides.

Employee testified that she was fifty years old. She graduated from high school in 1979, then attended Middle Tennessee State University for three years. She later returned to MTSU and received a bachelor’s degree in biology in 1997. She then attended a one-year certificate program at Volunteer State Community College, with the aim of becoming a physical therapy assistant (“PTA”). She completed the program, but did not pass the PTA

licensing examination. She attributed her failure to pass the exam to “brain fog” caused by hypothyroidism. Her work history included three years as a cashier at an outlet store and seven years as a bookkeeper/accounting clerk at a food wholesaler. She began working for Employer as a reloader for one year, became an “operations manager specialist” for seven years, then became a delivery driver in 2004 or 2005.

Employee testified that she continued to have pain in her back and hip. She described her pain as “a constant ache.” Her left hip was painful to sleep on. Prior to her injury, she enjoyed dancing. After the injury, she was unable to lift and plant her foot as she had done before, which interfered with dancing. Her delivery route for Employer had “about 150 stops a day,” and she was able to perform it without any accommodations. She had not missed any work due to her hip or back since her return in July 2010.

The trial court issued its findings from the bench. The Court expressed some reservations about Dr. Bacon’s credibility, but the Court was also skeptical of Dr. Rungee’s opinion that Employee had no permanent impairment, in light of the nature of her injury, the continuing presence of pins in her hip joint, and her own testimony concerning her continuing back and hip symptoms. The Court accepted Dr. Bacon’s impairment rating of 8% to the body as a whole. It was undisputed that Employee had a meaningful return to work and her award of disability benefits was therefore limited to one and one-half times the

impairment. The court therefore awarded 12% permanent partial disability. Judgment was entered in accordance with those findings. Employer has appealed, asserting that the trial court erred by adopting Dr. Bacon's impairment rating for Employee's hip injury and by finding that Employee sustained a compensable injury to her back.

Standard of Review

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . 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." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327, (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn.

2009). With respect to causation, this Court has also said “[A]bsolute medical certainty is not required to establish causation... The causal connection may be established by expert opinion combined with lay testimony.” *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992).

Analysis

Impairment for Hip Injury

Employer first contends that the trial court erred by adopting Dr. Bacon’s impairment rating as the basis for its award of benefits for Employee’s hip injury. In support of this contention, Employer points to Dr. Bacon’s lack of board certification, the fine and probation imposed upon him by the Board of Medical Examiners, his lack of hospital privileges and his decision to change the focus of his practice from orthopaedics to skin care. In addition, Employer asserts that Dr. Bacon’s opinion is undermined by his admitted disregard of the AMA Guides by classifying Employee’s range of motion impairments as “moderate,” rather than mild, and modifying the rating by use of x-rays taken at the time of the injury rather than at the time of maximum medical improvement.

The trial court recognized that Dr. Bacon’s credibility was limited:

Dr. Bacon. . . had some issues with the various boards. . . [A]s I was reading his deposition before we even got to the issue of the suspension and fine. . . I was somewhat incredulous of the testimony that he had been board certified and simply the board had not gotten around to re-certifying him with the passage of time. . . [T]hat was a concern to me.

However, the trial court also found Employee to be a credible witness on the subject of the effects of her injury. In that context, the court was unable to accredit Dr. Rungee's opinion that Employee had no permanent impairment:

I have real concern with a zero impairment rating when we have someone who's had . . . the horrible break at the crucial point in the bone that Ms. Hannah suffered. And it's hard for us to conceive of the concept that a person with pins and hardware in her leg would have zero impairment and would not have a permanent injury.

* * * *

Having said all of that, I will acknowledge the superior credentials, if you will, of Dr. Rungee, and certainly he is very respected. At the same time, I respectfully. . . can't accept a zero rating for an employee who has suffered the impairments that Ms. Hannah has -- or the pain.

* * * *

I think, given those circumstances, we should accept the 6-percent anatomical impairment rating that Dr. Bacon has provided. Even given. . . the questionable nature of his credentials. . .

The trial court was presented with a difficult decision. Employee sustained a significant injury and testified credibly that it had continuing effects on her activities of daily living. Her treating physician, a well-qualified specialist, concluded that she had no impairment according to the AMA Guides. Her evaluating physician, whose credibility was questionable on several counts, assigned an impairment rating that was ostensibly derived from the same Guides. Careful examination of Dr. Bacon's testimony supports a conclusion that his impairment rating was greater than that called for by the Guides. However, assuming

the existence of an impairment, Dr. Rungee's analysis did not provide a method to "discount" Dr. Bacon's opinion. The trial court in a workers' compensation case has the discretion to accept the opinion of one medical expert over another. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990). It appears that, based upon the nature of Ms. Hannah's injury and her testimony as to her current condition, the trial court found Dr. Bacon's testimony more reasonable than that of Dr. Rungee. Since it does not appear that evidence was presented from which the trial court could find a middle ground, it was left with the option of accepting one opinion or the other. We cannot find that the trial court abused its discretion by accepting the opinion of Dr. Bacon as being more reasonable considering the evidence in the case, thus we uphold the finding that Employee sustained a 6% impairment as a result of her hip injury.

Back Injury

Employer also asserts that the trial court erred by finding that Employee's January 7, 2010 accident caused an injury to her lower back. Pointing out that Dr. Rungee's records contain no reference to any back symptoms until May 5, 2010, almost four months after the accident, and that Dr. Rungee's examination, including x-rays, revealed only long-standing degenerative changes in Employee's lumbar spine, Employer argues that there is no causal connection between the accident and the employee's back problems. In addition, Dr. Rungee found no evidence of a soft tissue injury (Dr. Bacon's diagnosis) at any time. We note,

however, that Dr. Rungee candidly testified that he did not fully evaluate Employee's low back complaints and that her pre-existing degenerative condition could have been aggravated by either physical therapy prescribed for treatment of her hip injury or by her use of a walker and similar devices during the time it was necessary for her to avoid placing weight on her left leg. 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 v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997); *cf. GAF Bldg. Materials v. George*, 47 S.W.3d 430, 433 (Tenn. Workers' Comp. Panel 2001). The element of causation is satisfied where the "injury has a rational, causal connection to the work." *Braden v. Sears, Roebuck & Co.*, 833 S.W.2d 496, 498 (Tenn. 1992). Applying that standard here, we conclude that the evidence does not preponderate against the trial court's decision to award benefits for a lower back injury in this case.

Conclusion

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

BEN H. CANTRELL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

UNITED PARCEL SERVICE v. CINDY HANNAH

**Chancery Court for Rutherford County
No. 11CV12**

No. M2012-00884-SC-WCM-WC - Filed August 14, 2013

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by United Parcel Service, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 United Parcel Service, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

KOCH, William C., Jr., J., Not Participating