

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
September 24, 2007 Session

GARY CARTER v. MILAN SEATING SYSTEMS

**Direct Appeal from the Chancery Court for Gibson County
No. 17275 George R. Ellis, Chancellor**

No. W2007-00400-WC-R3-CV - Mailed January 15, 2008; Filed February 20, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The trial court found that the employee had sustained a permanent disability as a result of his work injury and awarded benefits for 80% permanent partial disability. The employer has appealed, contending that the trial court erred in finding that the employee's permanent disability was work-related and, in the alternative, that the award was excessive. The employee contends that the trial court should have found him to be permanently and totally disabled. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Affirmed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and D. J. ALISSANDRATOS, SP. J., joined.

P. Allen Phillips, Jackson, Tennessee, for the appellant, Milan Seating Systems.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Gary Carter.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Gary Carter worked as a "floater" in Milan Seating System's ("Milan") factory, which manufactured seats for automobiles. He began working for Milan in 1997. His prior work experience included construction work and other factory work. He was forty-eight years old at the

time of trial and had completed the ninth grade and a portion of the tenth. He testified that he had “some” ability to read and was able to fill out a job application without assistance.

The alleged injury occurred in August 2004. The trial court made detailed findings concerning the testimony of Mr. Carter concerning the injury that he sustained. The transcript of the trial proceedings contains none of that testimony.¹ According to the trial court, Mr. Carter testified that he was pulling a 125 pound die when he heard a “pop” in his back. The complaint alleges that the injury occurred on August 3, 2004. The only evidence in the record regarding the injury is contained in the medical records and in the testimony of the various doctors whose depositions were placed into evidence. In general, those histories report that Mr. Carter began having back pain in the summer of 2004. Some of the histories reference a single event, while others refer generally to heavy lifting. Mr. Carter testified that he had no lower back problems prior to August 2004. That testimony was not rebutted.

After Mr. Carter reported his injury, he selected Dr. Twilla from a panel of physicians provided by Milan. Dr. Twilla referred him to Dr. Claiborne Christian, an orthopaedic surgeon. Dr. Christian testified by deposition. He first examined Mr. Carter on August 12, 2004. Dr. Christian testified that Mr. Carter “told me that he didn’t remember doing anything in particular, whether it be at home or at work, but that he had been noticing some pain at work when he was lifting heavy dies.” Dr. Christian ordered an x-ray, which revealed the presence of a compression fracture of the L1 vertebra. Dr. Christian thought the fracture appeared to be an old fracture. He ordered an MRI and prescribed medication.

Mr. Carter returned to Dr. Christian two weeks later. The doctor reviewed the MRI, which confirmed the presence of a compression fracture of the L1 vertebra. According to Dr. Christian, Mr. Carter had lost 20% of the height of this vertebra. There was no evidence of nerve root impingement. The radiologist could not determine the age of the compression fracture. Dr. Christian referred Mr. Carter to Dr. John Brophy, a neurosurgeon, for further evaluation. Dr. Christian also testified that Mr. Carter had a permanent impairment of 8% to the body as a whole as a result of the compression fracture. Dr. Christian testified that Mr. Carter did not have symptoms of spinal stenosis at the time of his evaluation and that he did not consider him to be a surgical candidate. Regarding the compression fracture, he testified, “there is no way in my opinion that it could have occurred two weeks prior to my seeing [Mr. Carter].” He based this opinion on two factors: (1) his recollection that the x-ray showed some healing had occurred which would take longer than two weeks; and (2) lifting a heavy objects is not an activity, which normally would cause this type of injury in a man of Mr. Carter’s age. On cross-examination, he stated that it was possible that a previously asymptomatic compression fracture could become symptomatic and be anatomically changed as a result of lifting heavy objects.

¹It is fairly obvious that the trial transcript does not accurately reflect Mr. Carter’s testimony. The transcript includes, in Mr. Carter’s testimony, statements that appear to have been made by a physician.

Dr. Brophy examined Mr. Carter on September 22, 2004. He also testified by deposition. His diagnosis was myofascial pain associated with lumbar spondylosis. He ordered physical therapy, prescribed medication, and placed Mr. Carter on light duty. He had reviewed the radiologist's report concerning the MRI scan ordered by Dr. Christian but wanted to review the actual film himself. After reviewing the MRI in October, Dr. Brophy noted a "compression deformity" that may have been the result of a fracture. Like Dr. Christian, he did not consider the deformity to be the result of a recent injury. To further evaluate that question, he ordered a bone scan. With this procedure, nuclear material is injected into the vein and the body is scanned. The nuclear material "lights up" areas of increased activity frequently associated with fractures.

In November 2004, Dr. Brophy saw Mr. Carter for the final time. He reviewed the results of the bone scan and concluded that the compression deformity was not the result of a recent fracture. Mr. Carter reported no improvement from physical therapy. Dr. Brophy prescribed two additional weeks of light duty after which Mr. Carter was released to return to work at full duty.

Dr. Joseph Boals conducted an independent medical evaluation on December 13, 2004. His opinions were introduced via a C-32, Standard Form Medical Report for Industrial Injuries. Dr. Boals assigned a permanent impairment of 8% to the body as a whole based upon a diagnosis of "Residuals from injury to back aggravating pre-existing arthritis with ongoing symptomatology." His report noted that the September 2004 MRI and an x-ray of an unspecified date showed an "old L1 compression fracture."

Mr. Carter continued to work throughout this period. He also continued to have low back pain. As a result, he went to Dr. Glen Barnett, a neurosurgeon, through his health insurance plan. He saw Dr. Barnett on January 20, 2005. Dr. Barnett reviewed an x-ray and the MRI that had been previously taken. He concluded Mr. Carter had a compression fracture with stenosis or tight narrowing around the spinal cord at the T12-L1 level. Based upon a review of these diagnostic tests, his examination, and Mr. Carter's statements that he had no previous lower back problems, Dr. Barnett concluded that Mr. Carter "hurt his back with the lifting that he did" in the summer of 2004 and "apparently did have a compression fracture at that time that caused some spinal narrowing or stenosis." Dr. Barnett referred Mr. Carter to Dr. John Campbell, also a neurosurgeon, for possible surgery.

Dr. Campbell testified by deposition. He initially saw Mr. Carter on January 25, 2005. At that time, Mr. Carter reported that he was having weakness in his legs, numbness in his thighs and scrotal area, and pain in his middle to low back. Dr. Campbell considered these symptoms to be highly significant because they indicated he was getting compression in the bottom part of his spinal cord. Dr. Campbell reviewed the same MRI which had previously been reviewed by Drs. Christian, Brophy, and Barnett. He, like Dr. Barnett, concluded that Mr. Carter had "sustained some degree of compression fracture when he was doing this lifting" in the summer of 2004. The compression fracture caused stenosis of the spine at the T12-L1 level. Dr. Campbell testified such injuries require aggressive treatment in order to decompress the spinal cord and that he had recommended surgery. Mr. Carter agreed with this recommendation.

The surgery was performed on February 15, 2005. It consisted of the removal of the bony covering of the spine in order to widen the canal, connecting the T12 and L1 vertebrae using screws and rods, and completing the fusion of these vertebrae with bone grafting. Mr. Carter recovered from the procedure, and was released by Dr. Campbell in September 2005. At that time, Mr. Carter was still having some symptoms, back pain, and numbness in the legs. Dr. Campbell testified that Mr. Carter would be limited to sedentary work as a result of his injury and surgery. He did not assess Mr. Carter's permanent impairment because he thought such an assessment should be done by someone whose specialty included measuring ranges of motion.

Prior to releasing him, Dr. Campbell referred Mr. Carter to Dr. Samuel Chung, a physical medicine and rehabilitation specialist. Dr. Chung provided pain management treatment, but Mr. Carter did not like the effects of the pain medication prescribed and discontinued using it. Dr. Chung later performed an independent medical evaluation at the request of Mr. Carter's attorney. Dr. Chung assigned a 23% permanent impairment to the body as a whole as a result of the surgery and recommended that Mr. Carter "avoid prolonged walking, standing, stooping and squatting, and bending, and excessive flexion, extension, or rotation of the back."

As of the date of trial, Mr. Carter had not worked, or applied for work, since January 2005. He lived in his sister's home. She confirmed that Mr. Carter had no problems with his back prior to August 2004 and described his limitations since he had undergone surgery.

The trial court found that Mr. Carter had sustained a permanent injury as a result of the August 2004 incident and awarded 80% permanent partial disability to the body as a whole. On appeal, both parties contend that the trial court erred. Milan contends that the evidence preponderates against the trial court's finding that Mr. Carter sustained a work-related injury resulting in permanent impairment. In the alternative, Milan argues that the award of 80% permanent partial disability is excessive. Mr. Carter contends that the trial court erred by failing to find him to be permanently and totally disabled.

II. STANDARD OF REVIEW

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness's demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When weighing conflicting medical testimony, "it is within the discretion of the trial judge to determine which testimony to accept." Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004). "However, where the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge." Id. (quoting Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997)).

III. ANALYSIS

A. Causation

Milan contends that the evidence preponderates against the trial court's finding that Mr. Carter sustained a work-related permanent injury. To support its position, Milan relies primarily upon the testimony of Drs. Christian and Brophy that the compression fracture was not caused by the August 2004 incident. Both doctors testified that the act of lifting a heavy object could not mechanically cause a compression fracture in a healthy spine, and it was not determined that Mr. Carter had a condition such as osteoporosis or a metabolic bone disorder which would make his spine susceptible to such an injury. Milan further relies upon the bone scan ordered by Dr. Brophy, which did not show an active healing process frequently associated with a recent fracture. In Milan's view, the testimony of these two doctors is more persuasive on this issue because they examined Mr. Carter much closer in time to the event than either Dr. Campbell or Dr. Chung. Milan also points out that Dr. Boals describes the fracture as "old" in his C-32.

Mr. Carter's position is supported by his uncontradicted testimony that he had no back problems prior to the injury at issue; that he reported the injury on the date it occurred; and that he consistently had symptoms of low back pain and leg pain thereafter. He relies on the opinions of Drs. Barnett and Campbell that, based upon the medical history given by him and their examinations, Mr. Carter sustained an injury to his back while working in the summer of 2004 that resulted in the compression of his spinal cord. Further, Dr. Campbell, who performed the surgery, testified that he was able to "feel the bone kind of bulging somewhat backwards into the [spinal] canal" during surgery.

In a workers' compensation case, the causal relationship between the employment and the injury must be proven by a preponderance of the expert medical testimony as supplemented by the lay evidence. The proof of the causal connection may not be speculative, conjectural, or uncertain. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004); Tindall v. Waring Park Ass'n., 725 S.W.2d 935, 937 (Tenn. 1987). Absolute certainty with respect to causation is not required, however, and the Court must recognize that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004).

In this case, the uncontradicted evidence is that Mr. Carter had no back problems before August 2004, but that he had continuous problems thereafter. Drs. Barnett and Campbell were of the opinion that Mr. Carter injured his back while working in the summer of 2004, causing the compression fracture in his L1 vertebra to compress his spinal cord. Although Drs. Christian and Brophy disagree, we cannot determine that the evidence preponderates against the trial court's finding. We therefore affirm the judgment with respect to the issue of causation.

B. Extent of Disability

Milan contends that the award of 80% permanent partial disability is excessive. Mr. Carter contends that the trial court should have awarded permanent total disability benefits.

In support of its position, Milan notes that Mr. Carter continued to work, sometimes at full duty, from August 2004 until January 2005. In addition, Milan relies upon the testimony of Dr. Campbell that Mr. Carter is capable of sedentary work. Milan implies that the surgery performed by Dr. Campbell, which caused a substantial increase in impairment, was not necessary according to the testimony of Dr. Brophy.

Mr. Carter asserts that he is totally disabled because of his limited education and history of unskilled, heavy work combined with the restrictions placed upon him by Drs. Campbell and Chung. His sister testified that he was a “slow learner.” Mr. Carter, however, did not present any records or expert testimony concerning his ability to read, write or perform arithmetic, or any evidence concerning the types of employment available in the area where he lived.

The evidence cited by Mr. Carter provides strong support for a finding of a very substantial disability. His education is limited, as is his work history. The restrictions placed upon him by Dr. Campbell greatly limit his employment options. On the other hand, permanent total disability occurs when an injured employee is totally incapacitated “from working at an occupation that brings the employee an income.” Tenn. Code Ann. § 50-6-207(4)(B)(2005). There is no medical testimony that Mr. Carter is incapable of work. There is only vague evidence concerning his intellectual function, and no evidence concerning the labor market. Considering all of those factors, there is simply no basis for determining the evidence preponderates against the trial court’s ruling on this issue.

IV. CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to Milan Seating Systems and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
September 24, 2007 Session

GARY CARTER v. MILAN SEATING SYSTEMS

**Direct Appeal from the Chancery Court for Gibson County
No. 17275 George R. Ellis, Chancellor**

No. W2007-00400-WC-R3-CV - Filed February 20, 2008

JUDGMENT ORDER

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 on appeal are taxed to the Appellant, Milan Seating Systems and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM