

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

October 22, 2007 Session

SHORE TRUCKING CO., INC. v. B. J. FRASHIER

**Direct Appeal from the Circuit Court for Rhea County
No. 23980 Thomas Graham, Judge**

Filed March 26, 2008

E2007-00626-WC-R3-WC- Mailed 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 § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee alleged that he sustained a permanent injury to his lower back as a result of a fall. Employer took the position that Employee did not sustain a permanent injury. At trial, an evaluating physician testified that Employee had a 7% permanent impairment to the body as a whole; two physicians who examined Employee shortly after the accident testified that he had no impairment. The trial court awarded benefits for 33% permanent partial disability to the body as a whole. Employer has appealed, asserting that the trial court erred in finding that Employee had sustained a permanent injury. We conclude that the evidence does not preponderate against the decision of the trial court and affirm the judgment.

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

BEN W. HOOPER, II, SP. J., delivered the opinion of the court, in which GARY R. WADE, J. and TELFORD E. FORGETY, SP. J., joined.

Clancy J. Covert, Chattanooga, Tennessee, for the appellant, Shore Trucking Co., Inc.

J. Shannon Garrison, Dayton, Tennessee, for the appellee, B. J. Frashier

MEMORANDUM OPINION

Factual and Procedural Background

B. J. Frashier (“Employee”) worked as a truck driver for Shore Trucking Company (“Employer”). On December 28, 2004, he fell to the ground while attempting to climb into the cab of his truck. He gave somewhat conflicting testimony as to the location and circumstances of the event. However, he consistently described slipping from an icy step, falling to the ground, and landing on his back. Thereafter, he went to his home. He told his wife, who testified at trial, what had happened. She called Employer, and arrangements were made for him to see a doctor on that date.

Employee was examined by a physician at Workforce Corporate Health Services (“Workforce”), who prescribed medication and rest. He returned to the same clinic about a week later. Physical therapy was prescribed. Employee completed only one session of therapy. Employer contends that Employee refused to return for additional prescribed therapy. However, the record does not demonstrate that additional appointments were scheduled. Employee returned to Workforce on one more occasion, approximately a week after the second appointment. At that time, a head x-ray and lumbar MRI were ordered. Employee was then referred to an orthopaedic surgeon, Dr. John Osborn.¹

Dr. Osborn testified by deposition. He examined Employee on February 4, 2005. He also reviewed Employee’s MRI study. He concluded that Employee had myofascial pain syndrome, which was described as muscle pain. Dr. Osborn found positive signs of symptom exaggeration. He concluded that Employee was not a surgical candidate and had no permanent impairment. It is apparent from Dr. Osborn’s clinical note and from Employee’s trial testimony that some conflict arose during the appointment. Dr. Osborn suggested that Employee seek a different treating physician.

Suit was filed by Employer shortly thereafter. On April 4, 2005, Employee filed the above-mentioned motion for medical and temporary disability benefits. From the transcript of the hearing on that motion, it appears that Employee had requested that Employer provide a physician for a second opinion, in accordance with Tennessee Code Annotated section 50-6-204(a)(4)(D). An appointment had previously been made for Employee to be seen by Dr. Stanley Kupiszewski, an orthopaedic surgeon, on March 18, 2005. However, Employee did not attend the appointment. Each side blames the other for that event. Dr. Kupiszewski reviewed the medical records and studies and issued a report which was introduced into evidence. He concluded from the information available to him that Employee had not sustained a significant injury, and that further treatment was not necessary.

As a result of the April 4, 2005 hearing, Employee was referred to Dr. Timothy Strait, a neurosurgeon. Dr. Strait examined Employee on May 31, 2005. He testified by deposition. Dr.

¹In his brief on appeal, Employee asserts that he was not provided with a panel of physicians from which to select a treating doctor, as required by Tennessee Code Annotated section 50-6-204(a)(4)(A)(2004), and that Dr. Osborn was selected solely by Employer. However, the record contains a transcript of a hearing on a motion by Employee for medical and temporary benefits. During that hearing, counsel for Employee stated that a panel had been provided.

Strait opined that Employee had sustained a lumbar strain. He found that Employee's symptoms "far outstrip[ped] either his clinical examination or MRI study." He found that Employee had reached maximum medical improvement. He released Employee to return to work without restrictions. He assigned no permanent impairment.

Dr. William Donaldson, an orthopaedic surgeon, conducted an independent medical evaluation of Employee at the request of his attorney on September 11, 2006. Dr. Donaldson prepared a C-32, which was submitted by Employee in accordance with Tennessee Code Annotated section 50-6-235(c). Employer conducted a cross-examination deposition as permitted by that section. Dr. Donaldson opined that Employee had sustained a "tiny central bulge and annular tear" of the L5-S1 disk as a result of the December 2004 injury. He assigned 7% permanent impairment to the body as a whole. He ordered a Functional Capacity Evaluation, which found that Employee was capable of work in the "medium" category. On cross-examination, Dr. Donaldson testified that he had detected "wedging" of Employee's L5-S1 disk on an x-ray. He stated that this could have been a result of the degenerative process. He also stated that disk dessication shown on both of the MRI's was "largely developmental."

On the date of trial, Employee was forty-five years old. He had attended school into the eighth grade and had no additional formal education. He testified that he was able to read and write "ordinary words . . . but if it gets too long or complicated, I sort of lose . . . how to pronounce it and stuff" He had taken a recorded video test, rather than a written test, to obtain his commercial truck driver's license. He had been a truck driver for ten years. Prior to that, his employment history consisted of factory and farm work. He had not returned to work in any capacity since December 2004. He testified that he had sought medical care from a local emergency room on one or more occasions prior to trial.

The trial court awarded 33% permanent partial disability to the body as a whole. Employer has appealed, asserting that the trial court erred by finding that Employee sustained a permanent partial disability as a result of his work injury.

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. 2007). 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' demeanor and to hear in-court testimony. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Employer contends that the evidence preponderates against the trial court's finding that Employee sustained a permanent disability. It asserts that the weight of the medical evidence showed that Employee had only age-related degenerative changes in his back. In support of this assertion, Employer points to the testimony of Drs. Osborn and Strait, the report of Dr. Kupiszewski, and statements made by Dr. Donaldson in response to cross-examination. Relying on the factors for evaluation of conflicting medical testimony set out in Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991)², Employer contends that the opinions of Drs. Osborn and Strait are entitled to greater weight because they examined Employee much closer in time to the accident than Dr. Donaldson; that Osborn and Strait reviewed the actual MRI film, while Donaldson did not; and that Osborn and Strait currently performed spinal surgery while Donaldson no longer did so.

Employer also contends that all of the physicians who examined Employee reported some degree of symptom magnification. Dr. Osborn testified that Employee had positive Waddell signs. He described these as "five tests to determine whether a patient is exaggerating their symptoms. So they are tests which should not reproduce pain, they should produce symmetrical findings." Dr. Strait testified that he could not find any objective basis to "validate" Employee's symptoms. Employer also notes that the functional capacity evaluation ordered by Dr. Donaldson noted some inconsistencies in Employee's performance. However, that report ultimately concluded that Employee had given a "conditionally reliable effort."

In response, Employee notes that the uncontradicted evidence showed that he had no back problems prior to December 2004; that all doctors agreed that the MRI films showed disc bulges at several levels; that Dr. Osborn did not review the records from Workforce Corporate Health; and that neither Osborn nor Strait recalled the amount of time spent with Employee.

Employee also implies that Osborn and Strait may have been influenced by a case manager, Karmen Knight. Both doctors denied that Knight had any effect on their opinions, and there is no evidence in the record to support that claim.

In a workers' compensation case, the causal relationship between the employment and the injury must be proven by the 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); Simpson v. H.D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990); 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

²"When 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." 803 S.W.2d at 676.

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).

Employee's testimony concerning the precise circumstances of the event of December 28, 2004 was not entirely consistent. However, he was consistent in describing a fall from an icy step while climbing into his truck, and landing flat on his back as a result. The event was promptly reported to Employer, and he received medical treatment on the day of the injury. There is no evidence that the event did not occur in the manner described by Employee. He had symptoms of low back pain after the fall. There is no evidence in the record that he had back problems of any sort before that date. There is no reason to doubt that Employee fell from his truck and landed on his back. It is at least plausible that such an event could cause an injury to his back.

The medical evidence as to whether or not Employee sustained a permanent injury as a result of the fall is mixed. Dr. Osborn found that there was not a permanent injury. However, he saw Employee on only one occasion, during which a disagreement arose between the two men. Dr. Kupiszewski reached the same conclusion, but his opinion was based solely upon a review of records. Dr. Strait also opined that there was no permanent impairment. However, like Dr. Osborn and Dr. Donaldson, he based his opinion on a single examination. The only doctor who found a permanent injury was Dr. Donaldson. He no longer performed spinal surgery, but that is not a prerequisite for assessing impairment. His examination occurred a significant period of time after the injury. This can be viewed as a positive, in that he saw Employee much nearer the time of trial than the other doctors. It can also be viewed as a negative, in that his observations were remote in time from the injury.

In our view, the trial court could have reasonably ruled either way on the issue of permanent impairment based upon the evidence placed before it. Based upon our review of the entire record, we are unable to conclude that the evidence preponderates against the finding of the trial court. We therefore affirm the judgment.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, Shore Trucking Company, Inc., and its surety, for which execution may issue if necessary.

BEN W. HOOPER, II, SPECIAL JUDGE

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AT KNOXVILLE, TENNESSEE

SHORE TRUCKING CO., INC. V. B. J. FRASHIER
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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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Shore Trucking Company, Inc., and its surety, for which execution may issue if necessary.