

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

January 28, 2008 Session

BRIAN MACHUTA v. ROYAL & SUNALLIANCE INSURANCE

**Direct Appeal from the Chancery Court for Coffee County
No. 00-476 John W. Rollins, Judge**

**No. M2007-00588-WC-R3-WC - Mailed - March 19, 2008
Filed - April 22, 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 Employee sustained a compensable injury to his lower back in February 2000. He had surgery to repair the injury in July 2000 and returned to work in September of that year. In April 2001, he completed a temporary day shift assignment. Shortly thereafter, he moved to Florida. The timing and cause of the move are disputed. In July 2002, he consulted a doctor in Florida for low back pain. He had a second surgery in May 2003. The Employer admitted liability for the February 2000 injury and surgery, but denied that the second surgery was compensable. The trial court found that the Employee had a meaningful return to work after the initial injury, that the second surgery was not compensable and awarded 25% permanent partial disability to the body as a whole. The Employee has appealed, contending that the trial court erred in finding that the second surgery was not related to the initial injury. 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**

JERRY SCOTT, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Robert S. Peters, Winchester, Tennessee, for the appellant, Brian Machuta.

Frank C. Lynch, Winchester, Tennessee, for the appellee, Royal & Sunalliance Insurance.

OPINION

Factual and Procedural Background

Brian Machuta was an assembly line worker at Nissan's automobile manufacturing plant (Nissan). He injured his back at work on February 8, 2000. It is undisputed that the injury was compensable. Nissan provided medical care in accordance with the workers' compensation law, and Mr. Machuta continued to work. After a period of conservative treatment did not improve his condition, Mr. Machuta was referred to Dr. George Lien, a neurosurgeon. Dr. Lien determined that Mr. Machuta had a herniated disc at L5-S1 and recommended surgery, which was carried out on July 13, 2000. Dr. Lien released Mr. Machuta on September 26, 2000, assigned an impairment of 10% to the body as a whole, and assigned permanent restrictions based upon the results of a functional capacities evaluation ("FCE"). Those restrictions were: "[N]o lifting greater than 40 pounds, and no overhead lifting greater than 25 pounds [and] no bending at the waist greater than 30 degrees on a frequent basis."

Using an established internal procedure, Nissan identified available jobs in Mr. Machuta's work area that complied with those restrictions, and he returned to a permanent assignment on November 6, 2000. Two representatives of Nissan testified concerning the process used to accommodate Mr. Machuta's restrictions. A video recording of the jobs on which Mr. Machuta eventually worked was introduced into evidence. However, Mr. Machuta testified that he did not believe those jobs complied with his restrictions.

Mr. Machuta had been placed on the night shift. He preferred the day shift, and made that preference known to Sherry Gentry, who was section manager over his work area. On March 19, 2001, a temporary day shift opening arose, and Mr. Machuta transferred to that position. That assignment ended on April 30, 2001. Ms. Gentry testified that Mr. Machuta would have been returned to the night shift shortly thereafter. However, he did not return to work for Nissan.

Mr. Machuta had previously returned to Dr. Lien on January 3, 2001, with symptoms in his left leg. Dr. Lien prescribed physical therapy at that time. Dr. Lien testified that by February 7, 2001, those symptoms had resolved, and he released Mr. Machuta from his care. On May 2, 2001, two days after his day shift assignment

ended, Mr. Machuta returned to Dr. Lien again. He again reported radicular symptoms in his left leg. Dr. Lien took Mr. Machuta off work, prescribed medication and physical therapy, and ordered an MRI. Dr. Lien testified that the MRI revealed scar tissue and a very small recurrent disc herniation but no nerve root compression. Dr. Lien continued to order conservative treatment. A lumbar myelogram was ordered. It showed no evidence of nerve root compression. A second FCE was ordered in September 2001. Dr. Lien considered the results to be inconsistent with his observations of Mr. Machuta, so he ordered a third FCE, but it was never administered. In addition, Dr. Lien recommended an EMG study, which was conducted in January 2002. The result was normal.

Mr. Machuta moved to Florida, where he had grown up. He initially testified that his move occurred in September 2001. However, when shown court documents from his divorce proceeding, he conceded that his move may have occurred as early as May 2001. The reason for the move was disputed. Mr. Machuta testified that he was unable to return to work at Nissan because of his continuing back problems, and that he had severe financial problems as a result of being off work. Nissan introduced court documents from his divorce which contained a statement that Mr. Machuta had threatened to quit his job and move to Florida at some time prior to February 2001, while he was still working for Nissan. Mr. Machuta also testified on cross-examination that his ex-wife had filed assault charges against him at an unspecified time prior to April 2001. The record also demonstrates that Mr. Machuta received payments from Nissan's disability plan and an advance of permanent partial disability benefits. Nissan contends that this evidence suggests that Mr. Machuta moved to Florida as a result of his domestic problems, rather than financial pressures.

Mr. Machuta remarried in October 2001. In February 2002, he started a business in Florida, which he called "Brian Machuta's Painting and Home Repair." A business card or advertisement placed into evidence listed various services performed by his business, including interior and exterior painting, drywall, carpentry, fencing, professional moving, and numerous other services. Mr. Machuta testified that most of the physical labor was performed by his stepson. However, a private investigator hired by Nissan observed Mr. Machuta climbing ladders, carrying paint buckets and bending and stooping while operating a paint sprayer.

On July 18, 2002, Mr. Machuta consulted Dr. John Ortolani, a neurologist practicing in Florida. Mr. Machuta gave Dr. Ortolani a history of "increased

difficulty [over the past few months].” On a later visit, he told Dr. Ortolani that his symptoms lessened when he took time off from his work as a painter.¹ Dr. Ortolani performed an EMG which indicated an L5-S1 radiculopathy. He then ordered an MRI which showed a left disc herniation at that level. Dr. Ortolani referred Mr. Machuta to Dr. Gilbert Tweed, a neurosurgeon. Dr. Tweed first saw Mr. Machuta in January 2003. Dr. Tweed ordered a myelogram and a post-myelogram CT scan, which confirmed nerve root impingement at L5-S1. In cooperation with another surgeon, Dr. Tweed performed a laminectomy and fusion at the L5-S1 level in May 2003. Dr. Tweed continued to follow Mr. Machuta until October 2004. Mr. Machuta continued to have back and leg pain. He had not returned to work in any capacity as of the date of trial.

Dr. Tweed testified by deposition. He stated that: “[Y]ou could argue [the disc herniation which he operated on] would be an aggravation of a preexisting injury, but it certainly occurred after – very soon after the surgery was done to correct the first injury, so you have to say it’s definitely related to that – to the original injury.” On cross-examination, Dr. Tweed agreed that the work of a house painter could cause a recurrent disc herniation. He had seen the notes of Dr. Lien, but had not seen the results of the MRI and other diagnostic tests ordered, which had been ordered by Dr. Lien. Dr. Tweed did not testify concerning impairment or specific restrictions. He testified that Mr. Machuta would be able to work at “something very restrictive.”

After Dr. Tweed’s deposition, a second deposition of Dr. Lien was taken. Dr. Lien had reviewed the MRI and post-myelogram CT films ordered by Dr. Ortolani and Dr. Tweed in 2002 and 2003. He compared those tests to the myelogram and MRI studies, which he had ordered in 2001. He testified that the later tests showed findings that were not present on the earlier tests. On that basis, he opined that the 2003 surgery and the condition which precipitated it were not causally related to the original injury. Like Dr. Tweed, he testified that the activities of a house painter could cause a recurrent disc herniation. On cross-examination, he stated that Mr. Machuta had an impairment of 23% to the body as a whole after the second surgery.

Mr. Machuta was forty-two years old on the date of the trial. He was a high school graduate. He began working for Nissan in 1993. Prior to that time, he had

¹Dr. Ortolani did not testify. His notes were introduced as exhibits to the deposition of Dr. Tweed, a neurosurgeon, who subsequently performed surgery on Mr. Machuta..

worked for a courier service, and as a supervisor at a plant which manufactured fireplaces. John McKinney, a vocational evaluator, testified that Mr. Machuta scored in the average range (93) on an IQ test, was able to read at a high school level and to perform arithmetic at a seventh grade level.

The trial court found that the second surgery was not related to the work injury in February 2000; that Mr. Machuta had a 10% impairment to the body as a whole as a result of the work injury; and that he had made a meaningful return to work. Applying the 2.5 times impairment “cap,” the court awarded 25% permanent partial disability. Mr. Machuta has appealed, presenting two issues. First, he argues that the trial court erred by finding that the second surgery was unrelated to the February 2000 work injury. In addition, he contends that the trial court erred by finding that he had a meaningful return to work.

Standard of Review

Our standard of review of factual issues in a workers’ compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court’s factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). When expert medical testimony differs, it is within the trial judge’s discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). A reviewing 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. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court’s conclusions. Gray v. Cullom Mach., Tool & Die, Inc., 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

1. Cause of the 2003 Surgery

Mr. Machuta contends that the trial court erred by finding that he had sustained an anatomical impairment of 10% as a result of his work injury. That finding was based upon the court's conclusion that the disc herniation diagnosed in 2002, which necessitated the 2003 surgery and resulting increased impairment, was not related to the original injury. Mr. Machuta points to the testimony of Dr. Tweed, who treated the second injury, in support of this contention. Nissan relies upon the testimony of Dr. Lien. Based upon our review of the evidence, we agree with the trial court that Dr. Lien's testimony was more persuasive.

Dr. Tweed carefully explained his reasoning for finding a causal relationship between the initial injury and the second injury. He opined that the initial injury and surgery resulted in a weakened disc, and in the development of scar tissue, which ultimately caused the second disc herniation. However, his opinion was based in part upon the history given to him by Mr. Machuta that his symptoms recurred shortly after the first surgery and were continual thereafter. Those assumptions are not borne out by the records of Dr. Lien or Dr. Ortolani. Although Mr. Machuta clearly had symptoms in 2001, the records indicate that those occurrences were intermittent, rather than ongoing. In addition, Mr. Machuta sought no medical treatment of any sort between September 2001 and July 2002. Finally, Dr. Tweed had not seen the various post-surgical tests ordered by Dr. Lien in 2001.

Dr. Lien had the advantage of comparing the 2001 MRI and myelogram with the 2002 and 2003 MRI and CT myelogram. His testimony that Mr. Machuta's second disc herniation occurred after September 2001 is unrebutted. Further support for Dr. Lien's opinion is found in the results of the two EMG studies. The January 2002 study, ordered by Dr. Lien, was negative. The test performed later that year by Dr. Ortolani was positive.

Moreover, there is a logical alternative cause for the second injury. Mr. Machuta's work as a painter and handyman during the early months of 2002 was established through his testimony and the advertisement for his business. It was further documented through surveillance by a private detective. Both Dr. Lien and Dr. Tweed agreed that the activities required of a house painter could have caused the

second injury. The history that Mr. Machuta gave to Dr. Ortolani in the summer of 2002 is also consistent with such a course of events.

After weighing all of these factors, we conclude that the evidence in this case does not preponderate against the trial court's finding on this issue.

2. Meaningful Return to Work

The trial court did not explain its finding concerning this subject. Nissan provided Mr. Machuta employment within the restrictions outlined by Dr. Lien and Mr. Machuta worked from September 2000 through April 2001. He testified that he had difficulty in performing his job during that time, and that he was unable to return to work for Nissan after May 2001 as a result of ongoing symptoms from his injury. It is undisputed that Dr. Lien did in fact take him off work during the summer of 2001. However, by the time Dr. Lien released Mr. Machuta, he already had left Tennessee. In fact, there is ample evidence from Mr. Machuta's own testimony to sustain a finding that he moved to Florida almost immediately after his temporary day shift assignment ended on April 30, 2001.

Mr. Machuta's credibility is important in evaluating this issue. The trial court made no explicit finding concerning credibility. In that regard, we note that a "trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the trial court resolves conflicts in the testimony and decides the case." Rhodes, 154 S.W.3d at 46; see also Richards, 70 S.W.3d at 733-34. The trial court's decision in the present case implicitly rejected Mr. Machuta's testimony that he was unable to return to Nissan as a result of pain. There is substantial support in the record for the trial court's rejection of that testimony. There were discrepancies between Mr. Machuta's account at trial of his medical history after February 2000 and the medical records. There were also discrepancies between his description of his work activities in Florida and the information obtained from surveillance. Mr. Machuta's testimony on direct examination that he moved from Tennessee to Florida as a result of financial strains caused by being unable to work in the summer of 2001 was contradicted by his admission on cross-examination that he may have moved as early as May 2001 -- only a few days after the end of his day shift assignment on April 30, 2001. His testimony was further undermined by the statements contained in the court records in his divorce proceeding, and by the testimony of Ms. Gentry concerning his stated preference for a day shift assignment.

Based upon all of these factors, we cannot say that the evidence preponderates against the trial court's finding that Mr. Machuta had a meaningful return to work.

Conclusion

The judgment of the trial court is affirmed. Costs of this appeal are taxed to the appellant, Brian Machuta, and his surety, for which execution may issue if necessary.

JERRY SCOTT, SENIOR JUDGE

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JANUARY 28, 2008 SESSION

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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 appeals 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 the Appellant, Brian Machuta, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM