IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 27, 2008 Session

SHANE DEAN CROSS v. PEMBERTON TRUCK LINES, INC., ET AL.

Direct Appeal from the Circuit Court for Cumberland County
No. CV004374 John Maddux, Judge
Filed October 27, 2008

E2007-02232-WC-R3-WC Mailed August 12, 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 hearing and reporting to the Supreme Court of findings of fact and conclusions of law. On appeal, Employer contends that the trial court erred in finding that Employee's expert and lay testimony established that his injuries arose out of and in the scope of his employment. Because the evidence does not preponderate against the findings, we affirm the trial court's judgment.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which GARY R. WADE, J., and WALTER C. KURTZ, SR. J., joined.

Robert M. Asbury, Knoxville, Tennessee, for appellants, Pemberton Truck Lines, Inc. and Cherokee Insurance Company.

James P. Smith, Jr., Crossville, Tennessee, for appellee, Shane Dean Cross.

MEMORANDUM OPINION

Factual Background

Shane Dean Cross was forty-three years old and divorced at the time of trial. He attended high school through the tenth grade but subsequently earned his GED. In September 2000, Mr. Cross received his commercial driver's license and has been employed as a truck driver since that time. Prior to 2000, Mr. Cross worked in construction and landscaping.

In January 2003, Mr. Cross began working for Pemberton Truck Lines ("Pemberton"). At

Pemberton, Mr. Cross worked as an over-the-road truck driver. Mr. Cross alleged that while in Texas on May 13, 2004, he sustained an injury to his cervical spine while attempting to pull a pin in order to adjust the weight distribution in a trailer. Mr. Cross described the incident by testifying:

> I picked up a load and I had to go to the truck stop to scale it out. The rear tandems on the trailer had too much weight on them, which required pulling the pin and allowing the tandem to slide to adjust the weight.
>
> I tried pulling it with my right hand to no avail. I went to pulling it with my left hand, using my right arm and right leg for leverage. And after jerking on it hard several times, I felt something pop in my neck and immediately had severe pain in my neck, left shoulder, and arm.

Mr. Cross testified that it was company policy to notify the supervisor if an injury occurred while "on the road." He testified that he called Pemberton several times, via cell phone, following his injury and finally spoke with David Pemberton about his injury. Mr. Cross explained that David Pemberton was not his supervisor. Instead, Mr. Cross explained that when he was unable to get in touch with his supervisor he would talk to Mr. Pemberton, the dispatcher.[1]

Pemberton disputed that Mr. Cross notified it of his alleged injury on May 13. Pemberton's safety director, Preston Cunningham, testified that if notice had been given, an accident report would have been generated and there was no record of such a report being created at that time. Further, Pemberton introduced a cell phone billing record, which showed that Mr. Cross made nine calls to Pemberton's on May 13, but the longest of those calls was two minutes. Mr. Cunningham testified that two minutes was not a sufficient amount of time to obtain the information necessary to complete an accident report.

Following his alleged May 13 injury, Mr. Cross continued to work until his truck needed servicing on June 2, 2004.[2] On June 2, Mr. Cross took his truck to Pemberton's terminal in Knoxville for service. At this time, Mr. Cross spoke with Mr. Pemberton. Although disputed, Mr. Cross testified that following this discussion, Mr. Pemberton sent Mr. Cross "across the road" to talk to Mr. Cunningham. While it is undisputed that a conversation occurred between Mr. Cunningham and Mr. Cross, the contents of the conversation are disputed. Mr. Cross testified that he described the May 13 incident to Mr. Cunningham and requested medical care. Mr. Cunningham testified that Mr. Cross mentioned that his neck and shoulder were bothering him but did not mention a specific precipitating incident. Following this conversation, however, Mr. Cunningham made an appointment for Mr. Cross to see Dr. Dave Rutledge. Dr. Rutledge regularly treated workers'

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[1] When questioned, Mr. Cross agreed that "the dispatcher is whoever you answered to as an immediate supervisor authority."

[2] Although unclear, we have gleaned from the record that Mr. Cross continued to drive his trucking routes without physically reporting into work from May 13, 2005, until June 2, 2005. This appears to be customary in his job as an over-the-road truck driver.

compensation claimants for Pemberton.

Dr. Rutledge did not testify at trial. His records, however, were introduced into evidence as exhibits to the deposition of Dr. Robert Davis. Dr. Rutlege's office note of June 2, 2004, contains the reference "Date Injured: 05/13/04." It further states, that Mr. Cross "is here for evaluation of trouble that started after he had pulled a pin to release his trailer." Additionally, Dr. Rutledge's note states "Initially [Mr. Cross] felt like [he had] pulled a muscle in [his] neck. However, the next day, he had numbness and tingling in the left shoulder blade area, which has now progressed down his arm into his fourth and fifth digits." Dr. Rutledge examined Mr. Cross and ordered C-spine x-rays. The latter showed degenerative changes at the C5-C6 level of the spine "with narrowing of the disk space at these levels." His diagnosis was "neck pain with radicular symptoms." He prescribed prednisone and a muscle relaxer and recommended that Mr. Cross engage in local driving only until the following Monday. Dr. Rutledge attributed Mr. Cross's symptoms to his "underlying apparent disease" and suggested follow-up with his primary care physician.

Following his visit with Dr. Rutledge, Mr. Cross returned to the Pemberton terminal. Mr. Cross testified that upon his return to the terminal, he provided Mr. Cunningham with a form that had been completed by Dr. Rutledge. Mr. Cunningham denied receiving the form at that time, but conceded that Pemberton was provided with a copy of Dr. Rutledge's note within a few days of the appointment. Upon receiving Dr. Rutledge's note and reviewing Dr. Rutledge's recommendations, Pemberton informed Mr. Cross that it did not have a local driving option available. Given his options, Mr. Cross decided to "go back out on the road."

Following his visit with Dr. Rutledge, Mr. Cross testified that his symptoms improved for a short time but then worsened. Per Dr. Rutledge's orders, Mr. Cross consulted his primary care physician, Dr. Francisco Marasigan, on July 9, 2004. Dr. Marasigan testified by deposition. Dr. Marasigan testified that while taking a medical history during the July 9 appointment, Mr. Cross informed him that "6 [weeks] ago while at work, [he] hyper-extended his left arm and shoulder." Dr. Marasigan's initial diagnosis was a cervical strain. As a result of this diagnosis, Dr. Marasigan prescribed additional steroid and pain medication.

Near the end of July, Mr. Cross left Pemberton to work for "Skyline," another trucking company. Mr. Cross testified that he left Pemberton "due to the fact that they had better working conditions and maintained their equipment better. And I wasn't going to have to do a lot of the loading and unloading, if at all."[3] On his Skyline application, Mr. Cross did not indicate that he had any physical limitations. However, during the application process and throughout all of July and August, Mr. Cross continued to be treated by Dr. Marasigan for his neck and arm pain.

[3]Mr. Cross testified that one of his responsibilities at Pemberton was to load the trailers as needed, including loading "cabinets, furniture, couches, and chairs." Mr. Cunningham, however, testified that drivers are not required to unload trucks and no penalty was applied for deciding not to unload. Instead, Mr. Cunningham testified that truck drivers received extra compensation for unloading trucks.

On September 13, 2004, Dr. Marasigan ordered an MRI scan, which revealed a disc protrusion at the C5-C6 level on the left side. Based on these findings and his evaluation and treatment of Mr. Cross, Dr. Marasigan opined that the May 13, 2004 incident worsened Mr. Cross's pre-existing degenerative condition by causing nerve root impingement. Following the MRI, Dr. Marasigan referred Mr. Cross to Dr. Robert Davis, a neurosurgeon, for additional evaluation and treatment.

Dr. Davis also testified by deposition. He first examined Mr. Cross on November 29, 2004. At that time, Mr. Cross complained of neck and upper extremity pain, numbness, and tingling. Dr. Davis testified that Mr. Cross did not describe a precipitating incident during this initial appointment.[4] Dr. Davis recommended additional conservative treatment. Employee returned on December 27, 2004. With his symptoms not improving, Dr. Davis recommended surgery. On January 6, 2005, Dr. Davis performed a fusion at the C5-C6 level. Following his recovery, Mr. Cross returned to work at Skyline in April 2005 without any work restrictions. Mr. Cross testified, however, that even after his surgery he continued to have pain and was only able to continue working with the assistance of pain medications.

Later that same year, Mr. Cross suffered symptoms of carpal tunnel syndrome. This diagnosis was confirmed by EMG studies. Dr. Davis performed surgical releases on both hands in November and December 2005. Following the surgical releases, Mr. Cross again returned to work at Skyline.

Based upon a hypothetical question, Dr. Davis testified that Mr. Cross's description of the May 13, 2004 incident was "compatible" with the cervical spine injury. He also opined that the carpal tunnel syndrome was related to the cervical injury, stating: "There is a double-crush theory that is proposed in regard to that. The bottom line is if you irritate the nerves up in the neck, it lowers the threshold and then [you] develop symptoms in other areas as the nerves travel down an extremity." Dr. Davis assigned a permanent anatomical impairment of 28% to the body as a whole due to the neck injury. He assigned no impairment for carpal tunnel syndrome. He placed no formal restrictions upon Employee's activities, but stated that "[d]riving aggravates neck problems" and that driving a truck "would aggravate or potentially aggravate cervical and/or carpal tunnel syndrome."

Prior to his alleged work injury, in February 2004, Mr. Cross received treatment from a chiropractor for neck and shoulder pain. He had not disclosed this fact to either Dr. Marasigan or Dr. Davis. Each doctor was cross-examined concerning this subject. Dr. Davis stated that the history would be significant if Mr. Cross had exhibited radicular symptoms at that time. Dr. Marasigan's testimony was similar to that of Dr. Davis. At trial, Employee testified that he had only neck pain in February, was not having pain in his left arm and hand, and his neck pain had completely resolved after three or four chiropractic treatments.

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[4] At an appointment on April 4, 2006, however, Mr. Cross informed Dr. Davis that he had injured his neck at work on May 5, 2004.

The trial court hearing was held on May 16, 2007. After reviewing the medical depositions and listening to the in-court testimony, the trial court found that Mr. Cross had sustained a compensable injury and had complied with the notice statute. Specifically, the trial court stated:

> The Court further finds that, based on all of the evidence, including testimony in open Court, [Mr. Cross] gave proper notice to his employer of the injury within the time required by the Workers' Compensation Act. The Court finds that [Mr. Cross] did, in fact, sustain an injury to his cervical spine on May 13, 2004, while working for Pemberton within the course and scope of his employment which resulted in the need for significant medical treatment.

The trial court awarded temporary total disability benefits and a 56% permanent partial disability award. Pemberton timely appealed, arguing that the trial court erred: (1) in finding that Mr. Cross's injuries arose out of and in the course and scope of his employment; and (2) in determining that the medical expert testimony established the existence of a work-related injury.[5]

Standard of Review

We review factual issues in a workers' compensation case 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. See Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825-26 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the panel on appeal must extend considerable deference to the trial court's factual findings. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). This Panel, however, may draw its own conclusions about the weight and credibility to be given to expert medical testimony when it is presented by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Analysis

On direct appeal to this Panel, Pemberton argues that Mr. Cross failed to prove, through both the lay and expert testimony, that his injury was work-related. For a claim to be compensable, the injury which causes the employee's disability must arise out of and in the course of the employment. Tenn. Code Ann. § 50-6-103(a) (2005); McCurry v. Container Corp. of Am., 982 S.W.2d 841, 843 (Tenn. 1998). An injury occurring while an employee is furthering his or her employer's business satisfies the "in the course of" requirement. Braden v. Sears, Roebuck & Co., 833 S.W.2d 496, 498 (Tenn. 1992). An injury arises out of the employment when, upon consideration of all the

[5]Pemberton is not disputing the trial court's findings with regard to the medical impairment rating or the permanent partial disability award.

circumstances, a causal connection exists between the conditions under which the work is required to be performed and the resulting injury. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993); see also Braden, 833 S.W.2d at 498 (recognizing that the element of causation is satisfied where the injury "has a rational, causal connection to the work"). Except in the most obvious cases, causation must be established through expert medical testimony. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). The Supreme Court has

> 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). Absolute certainty with respect to causation is not required, and the Panel 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). Additionally, 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); Reeser, 938 S.W.2d at 692.

In support of its argument that the lay testimony does not support the trial court's finding, Pemberton takes issue with several comments made by Mr. Cross. First, Pemberton argues that, based upon the testimony of Mr. Cunningham, Mr. Cross failed to describe a specific injury to Pemberton on either May 13 or June 2, 2004. Second, Pemberton notes that Mr. Cross did not initially describe a specific event to Dr. Davis, and that when he finally gave a specific event, he gave a date of May 5 rather than May 13. Third, Pemberton argues that the February 2004 chiropractic treatment shows that Mr. Cross's symptoms existed before the alleged May 13, 2004, event occurred.

After reviewing the record, we cannot agree with Pemberton's argument that the trial court erred. The trial court's conclusions are supported by the June 2, 2004, note of Dr. Rutledge, which includes Mr. Cross's description of the pin-pulling incident and subsequent symptoms. The court's opinion is further supported by the account of the injury which Mr. Cross gave to his personal physician a month later. In addition, there is Mr. Cross's own testimony describing the incident and his explanatory testimony concerning the chiropractic treatment. When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the panel on appeal must extend considerable deference to the trial court's factual findings unless the evidence preponderates against those findings. Houser, 36 S.W.3d at 71. For these reasons, we find that the evidence supports the trial court's findings that Mr. Cross's injury arose out of and in the course of his employment.

Pemberton also argues that the medical testimony was not sufficient to support the trial court's findings because of the differences in Mr. Cross's descriptions of his injury to Drs. Rutledge, Marasigan and Davis and Mr. Cross's failure to advise them of the earlier chiropractic

treatment. Dr. Davis testified that Mr. Cross's description of the May 13, 2004, incident was "compatible" with the cervical spine injury. Similarly, Dr. Marasigan opined that the May 13, 2004, incident worsened Mr. Cross's pre-existing degenerative condition. And when crossed-examined about Mr. Cross's earlier chiropractic treatment, neither changed his opinion. Moreover, Pemberton presented no contrary medical evidence to refute the testimony of Drs. Marasigan and Davis. Accordingly, we find that the evidence does not preponderate against the trial court's findings.

Conclusion

For these reasons, we affirm the decision of the trial court. Costs of this appeal are taxed to Pemberton Trucking Lines, Inc. and Cherokee Insurance Company, and their sureties, for which execution may issue if necessary.

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JON KERRY BLACKWOOD, Senior Judge

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No. E2007-02232-SC-WCM-WC

ORDER

This case is before the Court upon the motion for review filed by Pemberton Truck Lines, Inc. and Cherokee Insurance Company 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 Pemberton Trucking Lines, Inc. and Cherokee Insurance Company, and their sureties, for which execution may issue if necessary.

PER CURIAM

WADE, J., NOT PARTICIPATING