

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 26, 2010 Session

RUBY E. AUSTIN v. GENLYTE THOMAS GROUP, LLC ET AL.

Appeal from the Circuit Court for White County
No. CC1938T Amy Hollars, Judge

No. M2009-01601-WC-R3-WC - Mailed - June 10, 2010
Filed - July 12, 2010

Employee alleged that she sustained a compensable injury to her back. Employer referred her to a physician who opined that her condition was not work-related, and her claim was thereafter denied. After trial, the court found that Employee's condition was compensable and awarded 65% permanent partial disability to the body as a whole and temporary total disability benefits. Employer has appealed, contending that the evidence preponderates against the trial court's finding that a compensable injury occurred, or alternatively in ordering payment of temporary total disability benefits. We modify the award of temporary total disability benefits but otherwise affirm the judgment.¹

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Modified

WALTER C. KURTZ, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Frederick R. Baker and Margaret L. Noland, Cookeville, Tennessee, for the appellants, Genlyte Thomas Group, LLC and Travelers Indemnity Company.

D. Russell Thomas and Herbert M. Schaltegger, Murfreesboro, Tennessee, for the appellee,

¹ Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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.

Ruby Austin.

MEMORANDUM OPINION

Factual and Procedural Background

Ruby E. Austin (“Employee”) worked for Genlyte Thomas Group, LLC (“Employer”) from 1977 until 2008. For approximately the last twenty years of her tenure, she was a forklift driver. She testified that the vehicle was configured so that it was necessary for her to step up approximately eighteen to twenty inches to get into the driving seat. She further testified that it had hard rubber tires which became uneven over time as a result of driving over cracks and holes in Employer’s concrete floor, and the condition of the tires caused the vehicle to have a rough, bouncing ride. At times it was necessary to drive the forklift over steel dock plates that were apparently not stationary. From time to time, a plate would get so far out of position that her forklift would suddenly stop upon contact with it. Employee also testified that she sometimes had to transport tall stacks of material which blocked her forward vision. On these occasions, safety regulations required her to operate the forklift in reverse, which required her to twist her body in order to see where she was going.

Employee testified that her “back started hurting” on March 22, 2007, when she was climbing into her forklift. She reported her injury to her supervisor. Initially, she was referred to Dr. Chad Griffin, a primary care doctor. Dr. Griffin provided conservative treatment and ordered an MRI of her lower back. He then referred her to Dr. Joseph Jestus, a neurosurgeon. Dr. Jestus testified by deposition. His diagnosis was spinal stenosis, and he recommended surgery to correct that condition. He opined, however, that the stenosis was not caused or aggravated by Employee’s work, and Employer thereafter denied the claim. On cross-examination, Dr. Jestus revealed a limited knowledge of Employee’s work activities.

Employee then sought treatment from Dr. Jason Hubbard, also a neurosurgeon. On August 20, 2007, Dr. Hubbard performed a surgical fusion of the L3, L4, L5 and S1 vertebrae. Employee’s symptoms improved as a result of the procedure. He released her to return to work with restrictions.² Employee attempted to return to work, but Employer was ultimately unable to accommodate her limitations. She was already receiving social security retirement benefits at the time her injury occurred. She continued to receive those benefits and did not attempt to return to work thereafter.

Dr. Richard Fishbein, an orthopaedic surgeon, conducted an examination at the

² Dr. Hubbard did not testify.

request of Employee's attorney. He opined that "based on [Employee's] explanation, working on a tow motor for [Employer] caused her -- or aggravated her situation." He assigned 20% permanent anatomical impairment. He also opined that she was unable to return to work as a forklift driver. Dr. Fishbein compared an MRI scan from 2001 to one taken in 2007, and he testified that the later scan showed numerous changes in the spine. On cross-examination, he, like Dr. Jestus, evidenced limited knowledge of Employee's work activities.

Employee was sixty-eight years old at the time of the trial. She had attended school through the eleventh grade. She had enrolled in a GED preparation course at one time but did not complete it due to an illness. Prior to working for Employer she had worked as a sewing machine operator and in an "administrative-type" position in which she answered phones, handled money and made reports. She had also been a Mary Kay cosmetics representative. In 2001, she had been treated for lower back pain by orthopaedic surgeon Dr. Douglas Arms and had since continued to receive occasional chiropractic treatment. She testified that since her injury she was unable to care for her lawn and garden, and she had difficulty with some household tasks such as mopping and vacuuming.

The trial court issued its findings from the bench. It found that Employee sustained a compensable aggravation of her pre-existing degenerative condition on March 22, 2007 and a 65% permanent partial disability ("PPD") to the body as a whole. The trial court also awarded temporary total disability ("TTD") benefits from April 26, 2007 to January 12, 2008. Employer has appealed, contending that the trial court erred by finding that Employee sustained a compensable injury and also by awarding TTD benefits.

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)(2008). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Madden v. Holland Group of Tenn., Inc.*, 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. Causation

The trial court explained its decision on this issue as follows:

[T]he Court is persuaded by the deposition testimony of Dr. Fishbein. While as counsel for the defendant notes, Dr. Jestus is certainly a well-respected neurosurgeon in the Upper Cumberland and elsewhere, the Court is persuaded, in part, by the fact that Dr. Fishbein did have both MRIs to compare, both the MRI from Ms. Austin's treatment in 2001 in McMinnville with Dr. Arms and the subsequent MRI dating from, I believe, April of 2007. And as the Court reads Dr. Fishbein's deposition, Dr. Fishbein does connect those marked changes that he noted in that MRI with Ms. Austin's work -- the trauma, sustained type of trauma that she suffered at work in her job as a forklift operator. And he also connects that with the history that she gave of twisting funny on the date that she reported her injury on March 22, 2007.

While all the doctors in this case agreed that the spinal stenosis and [spondylolisthesis] are degenerative conditions and that those conditions preexisted[,] the Court is persuaded by Dr. Fishbein's testimony that Ms. Austin did suffer an aggravation of her condition as a result of her work activity and as a result of, specifically, the twisting incident, getting onto the forklift on March 22, 2007.

Employer contends that the trial court erred in giving greater weight to Dr. Fishbein's opinion than to that of Dr. Jestus. In support of that argument, it notes that Dr. Jestus is a neurosurgeon whose practice includes back surgery, while Dr. Fishbein is an orthopaedic surgeon who does not perform back surgery. Employer further points out that Employee gave Dr. Jestus a history of one month of gradually increasing back pain, which differs from the history which she gave to Dr. Fishbein and also differs from her trial testimony. Employer also notes that, although Dr. Hubbard did not testify, the record contains a letter which he wrote to counsel for Employee expressing an opinion consistent with that of Dr. Jestus.

In addition to the reasons given by the trial court for its decision, Employee argues that Dr. Fishbein's opinion is entitled to greater weight because he had a better understanding of her job than Dr. Jestus did. This assertion is questionable, as both doctors exhibited

limited knowledge of the details of Employee's job. Employee further argues that the trial court's decision is consistent with the standard of resolving all reasonable doubts on the causation issue in favor of employees. *See Phillips v. A&H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004). We note that, in addition to the factors mentioned by Employee, Dr. Jestus, like Dr. Fishbein, examined Employee on a single occasion and cannot be considered to be a "treating physician" in the broad meaning of that term.

Our independent review of the record in this case, including the depositions of Drs. Jestus and Fishbein, leads us to the conclusion that the evidence does not preponderate against the trial court's decision that Employee sustained a compensable injury. Each doctor examined Employee on a single occasion. Each had, at best, minimal knowledge concerning the tasks required of her in her job. Both agreed that she had a significant pre-existing condition. One thought it probable that her work had advanced that condition; one did not. Given the above, we agree with the findings of the trial judge and find them supported by the evidence.

2. *Temporary Total Disability*

Employer makes two arguments concerning the TTD award. First, Employer simply restates its premise that no compensable injury occurred and that no TTD is therefore recoverable. Second, Employer contends that there was no medical proof offered at trial to support the award.

Dr. Fishbein's report of February 2008 states that Employee had reached maximum medical improvement at some point before he examined her but does not fix a specific date for that event. He did not testify concerning the period of temporary disability. Dr. Jestus's records, which are attached as exhibits to his deposition, state that he took her off work for one month beginning April 26, 2007. An exhibit which summarizes the hours worked by Employee from January 2007 through March 2008 shows that she actually returned to work during the week ending June 9, 2007 and worked during that week and part of the next. Dr. Hubbard performed surgery on August 20, 2007. Employee testified that he released her to return to work, with restrictions, on November 28, 2007. The summary of hours indicates that she actually returned to work on approximately January 19, 2008, worked the next five weeks, and then stopped working altogether at the end of February 2008.

Employee cites *Simpson v. Satterfield*, 564 S.W.2d 953, 956 (Tenn. 1978), for the proposition that expert medical proof is not required to establish duration of TTD. *See also Hatmaker v. Allied Indus. Equip., Inc.*, No. E2005-02519-WC-R3-CV, 2006 WL 2855083, at *3 (Tenn. Workers' Comp. Panel Oct. 9, 2006). The facts in *Simpson* were considerably clearer than those in this case. Mr. Simpson was kicked in the stomach by a bull, taken

directly to the hospital, and had several surgeries. *Simpson*, 564 S.W.2d at 954. While we accept the premise that expert medical testimony is not an absolute prerequisite to an award of TTD, we remain mindful that any such award must be consistent with the medical evidence in the record. In this case, the evidence was that Employee was temporarily disabled from April 26, 2007 to May 26, 2007, and from August 20, 2007 to November 28, 2007. The evidence in this record preponderates against any award of TTD benefits outside of those periods.

Conclusion

The case is remanded for entry of a modified judgment awarding TTD benefits to Employee from April 26 to May 26, 2007, and from August 20 to November 28, 2007. The judgment is affirmed in all other respects. Costs are taxed to Genlyte Thomas Group, LLC and Travelers Indemnity Company, and their sureties, for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE

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

RUBY E. AUSTIN v. GENLYTE THOMAS GROUP, LLC, ET AL.

**Circuit Court for White County
No. CC1938T**

No. M2009-01601-WC-R3-WC - Filed - July 12, 2010

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 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 Genlyte Thomas Group, LLC and Travelers Indemnity Company, and their sureties, for which execution may issue if necessary.

PER CURIAM