IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 25, 2011 Session

MICHAEL SCHWAMB v. BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC

Appeal from the Chancery Court for Coffee County
No. 09-425 Vanessa A. Jackson, Chancellor

No. M2010-01643-WC-R3-WC - Mailed - July 5, 2011
Filed - August 9, 2011

In this workers' compensation case, the employee had a compensable back injury in 2008. His doctor assigned 19% permanent anatomical impairment for the injury, based upon the Sixth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. He had previously settled a claim for a compensable back injury in 1996. That injury resulted in a 15% permanent impairment according to the Fourth Edition of the Guides, then in effect. Based upon those ratings, the treating physician for the 2008 injury apportioned 4% of the total 19% impairment to the more recent injury. An evaluating physician used the Sixth Edition to rate both injuries and opined that the impairment for the 2008 injury was 13% to the body as a whole. The trial court adopted the evaluating physician's rating and based its award of permanent disability benefits on it. The employer has appealed, arguing that the trial court erred by adopting the evaluating physician's rating.[1] We affirm the judgment.

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

Donald P. Harris, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C. J. and E. RILEY ANDERSON, SP. J., joined.

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[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.

B. Timothy Pirtle, McMinnville, Tennessee, for the appellant, Bridgestone Americas Tire Operations, LLC.

Susan K. Bradley, Murfreesboro, Tennessee, for the appellee, Michael Schwamb.

MEMORANDUM OPINION

Factual and Procedural Background

The employee, Michael Schwamb, was employed as an inspector by Bridgestone Americas Tire Operations, LLC ("Bridgestone"). He injured his neck on May 9, 2008, when a tire fell on his head. He promptly reported the injury and was eventually referred to Dr. George Lien, a neurosurgeon, for treatment. Compensability of the injury was not disputed. Dr. Lien ordered a cervical myelogram which revealed nerve root impingement at the C5-6 and C6-7 levels. To correct that problem, Dr. Lien performed a two-level surgical fusion on March 2, 2009. Mr. Schwamb reached maximum medical improvement on May 7, 2009, and Dr. Lien released him to return to work with no restrictions. Mr. Schwamb returned to his previous job at Bridgestone, and continued to hold that job at the time of trial. It was Dr. Lien's opinion that Mr. Schwamb had a permanent impairment of 19% to the body as a whole resulting from the injury and subsequent surgery. This impairment rating was based upon the Sixth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (Robert Rondinelli et al. eds., 2008) (hereinafter "Sixth Edition").

Mr. Schwamb had previously sustained a compensable injury to his neck in 1996. His treating physician for that injury was Dr. Vaughn Allen, a neurosurgeon. Dr. Allen had performed a cervical laminectomy at the C5-6 level to treat that injury. He had assigned 15% permanent anatomical impairment to the body as a whole, based upon the Fourth Edition of the AMA Guides ("Fourth Edition"), which was in effect at that time. Dr. Leon Ensalada, an occupational medicine specialist, performed an independent medical evaluation and also assigned a 15% impairment. Mr. Schwamb and Bridgestone reached a settlement of his workers' compensation claim arising from that injury. That agreement was approved by the General Sessions Court of Warren County on October 22, 1997. The order approving the settlement refers to Dr. Allen's impairment rating.

Regarding the 2008 injury, Dr. Lien testified that section 2.5c of the Sixth Edition directs an evaluating physician to apportion impairment between the current injury or condition and any prior injuries or preexisting conditions. In order to apportion impairment, the physician must first determine the current total impairment. He must then determine the baseline impairment from preexisting causes, and subtract that amount from the total impairment. The result is the impairment for the current injury or condition. Dr. Lien

conducted this apportionment by subtracting the impairment previously assigned by Dr. Allen in 1997 (15%) from his own 2009 impairment rating (19%). Based upon those calculations, Mr. Schwamb, in Dr. Lien's opinion, had sustained an impairment of 4% to the body as a whole from the 2008 injury.

During cross examination, Dr. Lien agreed that there were differences between the Fourth Edition and the Sixth Edition in the methods used to determine impairment. He declined to attempt to calculate Mr. Schwamb's 1996 impairment using the Sixth Edition. He agreed that section 2.5c permitted physicians to take such differences into account when apportioning impairment. He stated, however, that he did not think "that there's a substantial change in terms of how the ratings are determined" between the two editions.

Dr. David Gaw, an orthopedic surgeon, conducted a review of medical records at the request of Mr. Schwamb's attorney. Dr. Gaw testified by deposition that the methods for assigning impairment for cervical injuries in the Fourth Edition and Sixth Edition differed so greatly that the results were not comparable. For that reason, in his opinion, "the appropriate way to [apportion the impairment] would be to rate both injuries under the Fourth [Edition], both under the Sixth [Edition], and then basically let the legal system decide which to use. I think that's basically what [the Sixth Edition] says on page 26." He agreed with Dr. Lien's opinion that Mr. Schwamb's overall impairment in 2009 was 19%. He estimated that the impairment caused by Mr. Schwamb's 1996 injury, using the method set out in the Sixth Edition, was 6% to the body as a whole. Using those figures, he believed that Mr. Schwamb had sustained an impairment of 13% to the body as a whole due to the 2008 injury. He agreed with Dr. Allen's assignment of 15% impairment for the 1996 injury under the Fourth Edition. He did not attempt to calculate a rating for the 2008 injury according to the Fourth Edition, because the available medical records did not contain enough reliable information for him to do so.

The parties stipulated all issues except which impairment rating should be used. The trial court accredited Dr. Gaw's testimony that there had been a substantial change in the method used to assign impairment for spinal injuries between the Fourth and Sixth Editions. It found that his apportionment of impairment between the 1996 and 2008 injuries was appropriate and adopted his rating of 13%. It therefore awarded permanent partial disability benefits of one and one-half times that rating, 19.5% to the body as a whole. Bridgestone has appealed from that decision.

Standard of Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides that appellate

courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Bridgestone asserts "that the finding of permanent anatomical impairment of . . . 15% which formed the basis for the prior settlement which the approving court concluded was reasonable in the context of the original workers' compensation claim involving the neck constitutes *res judicata* regarding the rating on the 1996 claim," but does not cite any authority in support of that contention. In our view, *res judicata* is not applicable to the case before us. The issue presented here is one of interpretation of the AMA Guides, more specifically, the method for apportioning impairment between injuries widely separated in time.

In this case, Dr. Gaw agreed that the impairment ratings assigned by Drs. Allen and Ensalada in 1997 were correct under the Fourth Edition. His testimony centered on the apportionment of impairment among multiple causes pursuant to section 2.5c of the Sixth Edition. On its face, that section provides, in part:

> Apportionment requires a determination of percentage of impairment directly attributable to preexisting as compared with resulting conditions and directly contributing to the total impairment rating derived. . . . If different editions of the Guides have been used, the physician must assess their similarity. If the basis of the ratings is similar, a subtraction is appropriate. If the bases of the ratings differ markedly, the physician should evaluate the circumstances and determine whether conversion to the earlier or latest edition of the Guides for both ratings is possible.

Sixth Edition at pp. 25-26.

Dr. Gaw did assess the similarities between the methodologies of the Fourth Edition and Sixth Edition and concluded the differences made it appropriate in this case to rate both injuries under each edition. Dr. Lien, interpreting the same section, concluded that the differences between the two editions were small enough that a simple subtraction was appropriate. In short, this case presented the trial court with a choice about which expert testimony to credit where the experts were offering different interpretations of a medical treatise.[2]

Dr. Gaw and Dr. Lien disagreed concerning the application of section 2.5c of the Sixth Edition to the facts of this case. The Tennessee Supreme Court has held that it is within a trial court's discretion to choose which expert to accredit when there is a conflict of expert opinions. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). Nonetheless, where medical expert testimony is presented by deposition, as is the case here, the reviewing court may independently assess the medical proof to determine where the preponderance of the evidence lies. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 665 (Tenn. 2008). We have independently reviewed the two medical depositions introduced into evidence in this case and agree with the trial court's assessment of the evidence relating to impairment.

Dr. Gaw testified, and the trial judge noted in a well written opinion, that his practice consisted almost entirely of performing impairment evaluations and that he trained attorneys and other physicians in the use of the AMA Guides in connection with the Department of Labor and Workforce Development's Medical Impairment Registry Program. See Tenn. Code Ann. § 50-6-204(d)(6) (2008 & Supp. 2010). Dr. Lien testified that his practice was oriented more towards treatment than evaluation of impairment. His expertise in applying the AMA Guides was not further explored in his testimony, nor is it apparent from his curriculum vitae, attached to his deposition as an exhibit. Moreover, when asked whether the Fourth Edition contained an apportionment provision similar to the Sixth Edition, he testified, "To be honest with you, I really don't remember the Fourth Edition. That was quite a few years ago, but certainly I do recall that was the case in the Fifth Edition."

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[2]Bridgestone also contends that Dr. Gaw's opinion is not entitled to credence, based upon a 1999 Special Workers' Compensation Panel opinion, Anderson v. Alcoa Fukikara, Ltd., No. 01S019802CH00019, 1999 WL 32977 (Tenn. Workers' Comp. Panel Jan. 26, 1999). In that case, the Panel chose not to accredit Dr. Gaw's testimony because "the history given by the claimant to [him was] not supported by a preponderance of all the evidence." Id. at *1. Bridgestone argues that the facts of this case are analogous to Anderson in that Drs. Allen and Ensalada had more information about Mr. Schwamb's condition after his 1996 injury and surgery at the time they rated him than Dr. Gaw had when reviewing records concerning that injury and surgery twelve years later. In our view, this argument is not relevant to the dispute at hand.

Both doctors testified that under the Fourth Edition there were a number of methods for determining impairment of a spinal injury whereas under the Sixth Edition impairment is solely based upon the specific diagnosis. Dr. Lien testified, "I don't think I can speculate as to what was the appropriate impairment following Mr. Schwamb's first surgery." Dr. Gaw testified that under the Fourth Edition a 15 % impairment to the whole person would be the appropriate rating for a one-level surgical decompression. Under the Sixth Edition, the range of impairment for a one-level surgical decompression with resolved radiculopathy, as found by Dr. Ensalada, would be 4 to 8 % with 6 % being the default rating. Based upon this testimony, it seems to us that there was a significant difference between the Fourth Edition and the Sixth Edition for the impairment sustained by Mr. Schwamb as a result of the 1996 injury.

Dr. Lien was not asked about and gave no opinion concerning how Mr. Schwamb's 2008 injury would be rated under the Fourth Edition. Dr. Gaw testified that under the Fourth Edition a multi-level fusion would have been rated at 11 % plus loss of range of motion. The only recorded range of motion contained in the medical record was made by Mr. Schwamb's physical therapist. Because that range of motion was recorded as 30 % one week and 70 % a week later, Dr. Gaw did not consider it reliable and was unable to arrive at an opinion as to impairment under the Fourth Edition for the 2008 injury. He did testify that loss of range of motion in his experience added 6 to 10 % and the usual rating "would be anywhere from 18 (sic) to 20 %." Both Dr. Lien and Dr. Gaw testified that the range of impairment for a multi-level fusion with unresolved radiculopathy under the Sixth Edition would be 15 to 23 % and both agreed that 19 % was an appropriate impairment rating for the 2008 injury. While the result as to impairment may be similar for the 2008 injury between the Fourth Edition and the Sixth Edition, the bases of the two ratings are significantly different in view of the record before us.

In our view, the bases for determining an impairment rating under the Fourth Edition and the Sixth Edition of the AMA Guides differ significantly such that it was proper for Dr. Gaw to give his opinion as to apportionment for the 1996 and 2008 injuries based upon the Sixth Edition ratings for the two injuries. Tennessee Code Annotated section 50-6-207(3)(F) provides, in part, as follows:

> If an employee has previously sustained an injury compensable under this section for which a court of competent jurisdiction has awarded benefits based on percentage of disability to the body as a whole and suffers a subsequent injury not enumerated in this subdivision (3), the injured employee shall be paid compensation for the period of temporary total disability and only for the degree of permanent disability that results from the subsequent injury.

The trial court was required to base its determinations as to impairment on the Sixth Edition. Tenn. Code Ann. §§ 50-6-204(d)(3)(A) and (B). Accordingly, we do not find it error for the trial court to base its findings as to apportionment of the two injuries based upon a determination of impairment for both the 1996 and 2008 injuries under the Sixth Edition. In our view, the trial court's finding as to impairment was correct based upon the record in this case.

Conclusion

The judgment is affirmed. Costs are taxed to the appellant, Bridgestone Americas Tire Operations, LLC and its surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

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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 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, Bridgestone Americas Tire Operations, LLC and its surety, for which execution may issue if necessary.

PER CURIAM