

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 22, 2011 Session

KENNETH STEWART v. WESTFIELD INSURANCE COMPANY

**Appeal from the Chancery Court for Madison County
No. 66793 James F. Butler, Chancellor**

**No. W2011-00327-SC-WCM-WC - Mailed November 17, 2011
Filed February 16, 2012**

The appellant insurance company asserts on appeal that the employee failed to prove that his spinal infection was causally related to any work-place injury and that he also failed to provide the employer with timely notice of his injury. Based upon our review of the record, we conclude that the expert medical proof establishes causation and that the evidence supports the trial court's finding that the employee gave timely notice of his injury. We affirm the judgment of the trial court.¹

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

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and TONY CHILDRESS, SP. J. joined.

Randolph A. Veazey and Janis O. Mize, Nashville, Tennessee, for the appellant, Westfield Insurance Company.

Ricky L. Boren, Jackson, Tennessee, for the appellee, Kenneth Stewart.

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.

MEMORANDUM OPINION

Factual and Procedural Background

In January 2009, Kenneth Stewart (“Employee”) was fifty-four years old and had an eleventh-grade education. Since leaving high school, Employee has worked in various jobs involving manual labor, primarily factory work, carpentry, and maintenance work.

Employee began working as the maintenance man at the Chester Park Apartments in Jackson, Tennessee in 2005. The Chester Park Apartments (“Employer”) consist of seventy-two units, with thirty-six units upstairs and thirty-six units downstairs. As the sole maintenance man for the apartments, Employee was required to perform heavy lifting and other types of manual labor. His duties included hoisting trash bags into the garbage dumpster, repairing refrigerators, cleaning and painting vacant apartments, fixing holes in apartment walls, repairing leaks, cleaning appliances, pulling up and hauling carpet, and replacing wood flooring.

In order to repair appliances from an upstairs unit, Employee had to remove the appliance from the apartment and take it downstairs on a dolly. On or around January 15, 2009, Employee was moving a refrigerator downstairs and felt a sharp pain in his abdomen. Employee reported his injury to Ms. Angela Miller, the new apartment manager, and Ms. Miller informed him she would call her supervisor. However, Employee never heard back from Ms. Miller or her supervisor. Employee returned to work and completed his work day. The next day, however, Employee experienced “intense” pain in his stomach that extended “around [his] sides” Employee left work and went to the emergency room at Jackson-Madison County General Hospital. Employee was accompanied to the hospital emergency room by his wife, Mrs. Linda Stewart, who works at the hospital. Employee reported to the triage nurse that he had been hurt at work while lifting a refrigerator and complained of pain that started in his stomach and wrapped around to his back. The emergency room physician examined Employee and prescribed pain medication for him.

Employee returned to the emergency room on January 18, 2009, and February 3, 2009, complaining on both dates of abdominal pain. On February 9, 2009, Employee had a colonoscopy and an upper endoscopy to determine whether his complaints were due to abdominal problems. Based upon the results of those procedures, the physicians ruled out a gastrointestinal cause for his complaints.

On February 10, 2009, Employee consulted his family physician, Dr. Stephen Collier. Dr. Collier ordered an MRI which was performed on February 20, 2009. The MRI showed

spondylolisthesis of L5 over S1 and severe spinal stenosis at other areas in his spine. On February 27, 2009, Dr. Collier ordered a morphine injection to relieve Employee's pain.

On March 2, 2009, Employee continued to have severe pain and also developed partial paralysis below the waist. He was transported by ambulance from his residence to Jackson-Madison County General Hospital. The emergency service's records indicate that Employee told the emergency medical technicians he had submitted an injury complaint to his Employer on January 16 and that his injury was work-related. At the hospital, an MRI of the thoracic and lumbar spine showed severe osteomyelitic changes involving T8 through T10. Due to the severity of his condition, Employee was transferred via helicopter to Vanderbilt University Medical Center for emergency surgery. At the time of the transfer, Employee had partial paralysis in both legs.

At Vanderbilt, Employee was seen by Dr. Gregory Mencio, an orthopaedic surgeon, who diagnosed Employee as having an infection of the thoracic spine, spinal cord compression, and paraplegia. Employee told Dr. Mencio that he had been having back pain since January 16, 2009, and because of his back pain, he had been to the emergency room several times. Dr. Mencio performed surgery on March 4, 2009, during which he removed two vertebral bodies and surrounding tissue affected by the infection and placed a strut graft into the spine to provide support.

On March 24, 2009, Employee was transferred from Vanderbilt to a rehabilitation facility in Jackson. After he was medically stable, he was transferred back to Vanderbilt Hospital for follow-up surgery on April 23, 2009. This second procedure was a posterior spinal fusion with instrumentation to stabilize Employee's spine. Employee was last seen at Vanderbilt on July 1, 2009, and was told to return for a follow-up consultation in one year.

While the record does not contain Employee's last day of work for Employer, it appears that he continued to work until February 19, 2009.² Employee has been unable to return to any type of employment since his spinal surgeries. Employee takes pain medication twice a day and is frequently in pain. He has pain when he walks, bends over, or reaches for things, and he cannot stand for more than thirty-five to forty minutes.

On February 22, 2010, Employee filed his complaint in this workers' compensation action. At trial, Westfield Insurance Company, Employer's insurance carrier, asserted that Employee had not given timely notice of his claim and that his spinal infection and any

² The parties stipulated that in the event the trial court were to find the injury compensable, Employee would be entitled to temporary total disability benefits beginning on February 20, 2009; it can be inferred from that stipulation that his last day of work was February 19, 2009.

resulting disability were not the result of a work-related injury. The trial was held November 16, 2010.

Ms. Miller, the apartment manager, testified at trial that Employee had occasionally complained of back pain but that Employee did not inform her of any injury that occurred on January 15th or 16th. Ms. Miller stated that she would have immediately notified her boss and would have filled out an incident report if Employee had reported a work injury. Ms. Miller testified that she first learned of Employee's claim of a work injury when she received a letter from his attorney in early March 2009.

At trial, the deposition testimony of three physicians was admitted into evidence. In addition to Dr. Mencio, Employee's treating surgeon, two other physicians also testified. Dr. Apurva Dalal, who is board-certified in orthopaedic surgery and as an independent medical evaluator, testified on behalf of Employee. Dr. Horace Watson, a board-certified orthopaedic surgeon, testified on behalf of Employer's insurance carrier.

The trial court issued a seven-page detailed opinion that addressed both the notice and causation issues. The trial court credited Employee's testimony on the issue of notice and therefore found that Employee had given timely notice to Employer. The trial court noted that "[t]his is a close and difficult case," but found that Employee had proven a causal connection between his back injury and his employment. The trial court went on to find that Employee was permanently and totally disabled as a result of his injury. Accordingly, the trial court awarded Employee temporary total disability benefits,³ permanent total disability benefits, future medical expenses, and discretionary costs. The trial court also ordered Westfield Insurance to reimburse Employee's medical insurance carrier for the medical expenses paid on Employee's behalf for his treatment and surgeries.

Standard of Review

The standard of review for factual issues is de novo upon the record of the trial court accompanied by a presumption of correctness, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When the trial court has heard in-court testimony, considerable deference must be afforded to the trial court's findings of credibility and assessment of the weight to be given to that testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When the issues involve expert medical testimony contained in the record by deposition, the reviewing court may draw its own conclusions with regard to a determination of the weight and credibility of the deposition evidence. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law

³ The amount of temporary total disability benefits was stipulated to by the parties.

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

Westfield Insurance raises two issues in this appeal: (1) whether Employee “suffer[ed] a permanent work related injury, including a spinal infection, that arose out of and within the course and scope of his employment”; and (2) whether Employee failed to give timely notice of his alleged work injury. We will begin our analysis by first addressing the notice issue.

1. Notice

An employee who fails to notify his employer within thirty days of sustaining a work-related injury forfeits the right to workers’ compensation benefits unless the employer has actual notice of the injury or “unless reasonable excuse for failure to give the notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.” Tenn. Code Ann. § 50-6-201(a) (2008). The notice requirement in the workers’ compensation statutory scheme “exists so that an employer will have the opportunity to make a timely investigation of the facts while still readily accessible, and to enable the employer to provide timely and proper treatment for the injured employee.” *Jones v. Sterling Last Corp.*, 962 S.W.2d 469, 471 (Tenn. 1998).

Westfield Insurance contends that Employee did not give timely notice of his alleged injury on January 16, 2009. The evidence on this issue is conflicting. Employee testified that he told Employer’s apartment manager, Ms. Miller, of his injury immediately after it happened and that she told him she would notify her supervisor. On the other hand, Ms. Miller testified that she first learned of Employee’s claim of a work-related injury when she received a letter from Employee’s attorney in early March 2009. The trial court accredited Employee’s testimony and therefore found that he provided timely notice of the injury.

Based upon our review of the record, we conclude that the evidence does not preponderate against the trial court’s finding on the notice issue. The trial court accepted Employee’s testimony concerning notice, and we afford the trial court considerable deference when the trial court has weighed and accredited in-court testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). We therefore affirm the trial court’s finding that timely notice was provided to the employer.

2. Causation

We next turn to the issue of whether Employee's back condition was an injury that occurred during the course and was within the scope of his employment. In short, Westfield Insurance argues that Employee's spinal infection was not causally related to his employment.

Our Supreme Court has summarized the legal principles concerning causation as follows:

Generally speaking, a workers' compensation claimant must establish by expert medical evidence the causal relationship between the alleged injury and the claimant's employment activity, "[e]xcept in the most obvious, simple and routine cases." *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008) (quoting *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)). The claimant must establish causation by the preponderance of the expert medical testimony, as supplemented by the evidence of lay witnesses. *Id.* As we observed in *Cloyd*, the claimant is granted the benefit of all reasonable doubts regarding causation of his or her injury The trial court may properly award benefits based upon medical testimony that the employment "could or might have been the cause" of the employee's injury when there is also lay testimony supporting a reasonable inference of causation. *Fritts [v. Safety Nat'l Cas. Corp]*, 163 S.W.3d [673,] [] 678 [Tenn. 2004]. (citations omitted).

Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274-75 (Tenn. 2009).

The record contains the deposition testimony of Dr. Mencio, Employee's treating surgeon at Vanderbilt, Dr. Dalal, who performed an independent medical evaluation and testified on behalf of Employee, and Dr. Watson, who reviewed Employee's medical records and testified on behalf of Westfield Insurance. When all of the medical proof is presented by deposition, we must determine the weight to be given to the expert testimony and draw our own conclusions with regard to the issues of credibility. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997).

In his deposition, Dr. Mencio testified that suffering back strain while lifting an object does not typically cause a spinal infection by itself. He stated, however, that trauma can be

a “participating” or “contributing” factor in the development of infection. Additionally, Dr. Mencio testified that Employee’s medical history, which included diabetes, hypertension, and hepatitis, made Employee more vulnerable to an infection. Dr. Mencio testified that an injury in which blood collects in tissue “provides a breeding ground” for an infection to develop. In his deposition testimony, Dr. Mencio reaffirmed the following statement that he had made earlier in a letter to Employee’s attorney:

In regards to the etiology of this condition, although [Employee] did give a history of developed back pain – developing back pain, starting on January 16th, 2009, while at work, it is doubtful that any sort of traumatic on-the-job injury would have precipitated the development of vertebral osteomyelitis. More likely, this is the scenario that whatever happened at work aggravated an ongoing spinal infection.

Dr. Dalal testified that he evaluated Employee in November 2009. In addition to taking a history from Employee, Dr. Dalal reviewed Employee’s medical records, medical history, and performed a physical examination. Dr. Dalal testified that when a person who sustains a trauma bleeds in the area of that trauma, causing a hematoma, or a collection of blood. When that occurs, bacteria, which are always present in the body, can breed in that hematoma and can develop into an infection or abscess. Dr. Dalal stated that Employee’s back injury caused him to develop an infection in his thoracic spine because the injured tissue created a breeding ground in which the bacteria formed an abscess. On cross-examination, Dr. Dalal conceded that Employee’s various medical records contained no mention of a hematoma. Dr. Dalal explained that a hematoma of the spine would not be visible. Only an MRI around the time of the injury would have shown the existence of bruising around the spine, and no MRI was performed until approximately six weeks after the injury. Based upon his medical evaluation of Employee, Dr. Dalal assigned a medical impairment rating of 22% to Employee’s body as a whole.

Dr. Watson testified that he reviewed Employee's medical records on behalf of Employer and Westfield Insurance. Although he did not examine Employee, Dr. Watson expressed the opinion that Employee’s spinal infection was neither caused nor aggravated by his work-related activities. Dr. Watson testified that Employee’s medical records contained no indication of any spinal infection prior to March 2, 2009, the date the MRI was performed after Employee was taken by ambulance to the hospital. Dr. Watson conceded that staph bacteria could have been introduced into Employee’s body when he had a colonoscopy and upper endoscopy to rule out a gastrointestinal cause of his symptoms.

The findings of the trial judge on causation are as follows:

This is a close and difficult case. Depending on which doctor the Court finds is more persuasive, the Court could go either way on the outcome. The Court is mindful that employers take the employee as they find him and cannot escape liability when the employee, upon suffering a work related injury, incurs disability far greater than if he had not had a pre-existing condition. In this case, the Plaintiff clearly had a pre-existing condition in his body. While it had not manifested itself, it certainly was there. There is no evidence that the condition was caused by the work incident or injury. However, the circumstances all fit together. Plaintiff had been able to work without too much hindrance up to the time that he described the refrigerator lifting incident. There is no evidence that Plaintiff suffered a trauma or blow to his back. However, there is medical testimony to the effect that the infection can occur even without trauma. It is reasonable to assume that Plaintiff's injury or strain to his back occurred at work and this is in fact a hazard to which he was exposed while doing his work. Thus, this establishes a causal connection between the Plaintiff's injury and his work. Even if there is some question or doubt about that, this is exactly the type of doubt that should be resolved in favor of the employee. While there is [sic] conflicting opinions about whether or not the infection settled in the spine because of the alleged work injury, there is certainly medical testimony to the effect that it in fact did do that and this was the cause of the infection taking place in his spine which ultimately caused the extensive damage before it was discovered and dealt with.

In considering the foregoing, we are mindful of both our obligation to resolve all reasonable doubts as to causation in favor of the employee, *Phillips v. A&H Constr. Co.*, 134 S.W.3d 148, 150 (Tenn. 2004), and of the presumption of correctness which attaches to the trial court's findings, *Skinner v. CNA Ins. Co.*, 824 S.W.2d 164, 166 (Tenn. 1992). Taking these factors into consideration, we conclude that the testimony of Dr. Mencio and Dr. Dalal is sufficient to prove causation in this case. Dr. Dalal testified unequivocally that Employee's injury at work on January 15, 2009, led to a hematoma, which then served as a "breeding ground" for his spinal infection. Although Dr. Mencio's testimony was more equivocal as to causation, he testified that the work-related injury "more likely" aggravated an ongoing infection. In light of their testimony, and applying the principles quoted above from *Excel Polymers, LLC v. Broyles, supra*, we affirm the trial court's finding that

Employee's spinal infection was causally related to Employee's work-related injury on January 15, 2009.

Conclusion

In summary, we hold that the expert medical proof establishes that Employee's spinal infection was causally related to his work-related injury on January 15, 2009. We also hold that the evidence supports the trial court's finding that Employee gave timely notice of his injury to Employer. Accordingly, we affirm the judgment of the trial court.

The costs are taxed to Westfield Insurance Company and its surety, for which execution may issue if necessary.

SENIOR JUDGE WALTER C. KURTZ

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Westfield 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 Westfield Insurance Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

HOLDER, Janice M., J., Not Participating