

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 23, 2009 Session

**JOE TURNER v. BRIDGESTONE/FIRESTONE NORTH AMERICAN
TIRE, LLC, ET AL.**

**Appeal from the Circuit Court for Rutherford County
No. 52495 Robert E. Corlew, Judge**

**No. M2009-00554-WC-R3-WC - Mailed - January 28, 2010
Filed - March 2, 2010**

Employee sustained a compensable injury to his lower back. He alleged that he also sustained a mental injury as a result of chronic pain. His employer contended that the chronic pain and any mental conditions arising from it were the result of several previous injuries and surgeries. The trial court awarded benefits for the mental injury. The employer contends that the trial court erred by doing so. We disagree and affirm the judgment.¹

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

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

Kitty Boyte and Marcia McShane Watson, Nashville, Tennessee, for the appellants, Bridgestone/Firestone North American Tire, LLC d/b/a Bridgestone Americas Holding, Inc., and Old Republic Insurance Company.

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

¹ Pursuant to Tennessee Code Annotated section 50-6-225(e)(3), 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.

OPINION

Facts and Procedural History

In this action, Joe Turner (“Employee”) alleged that he sustained a lower back injury in January 2005 as a result of his work for Bridgestone/Firestone (“Employer”), a tire manufacturer. He further alleged that he sustained mental injuries, specifically depression and panic attacks, as a result of the back injury.

Prior to January 2005, Employee sustained several lower back injuries, and he received two workers’ compensation settlements. He had four back surgeries, including a fusion from L4 to S1 in December 2000. He was able to return to his job as a fork lift operator for Employer.

Employee alleged that in January 2005 he sustained a new injury as a result of jostling and bouncing from driving a fork lift. Employer denied that a new injury had occurred, contending that his symptoms were the result of his previous injuries and surgeries.

A hearing was held in November 2006 on the subject of compensability. Subsequently, the trial court issued a detailed written memorandum opinion containing his findings and ruling. The trial court ruled that Employee had sustained a new injury and ordered Employer to provide medical care accordingly.²

In addition to his physical injury, Employee contended that his chronic pain, which existed prior to January 2005, worsened and, in turn, caused him to have panic attacks and depression. He testified at trial that shortly after the January 2005 injury he began to have panic attacks that were serious enough to require medical treatment.³

Employee described his post-January 2005 injury panic attacks: “[Y]our stomach knots up real bad, and you start shaking and getting a tingling feeling like all over and shaking real bad. I have had them bad enough where it draws up my muscles.” On at least one occasion, he also had chest pain, for which he sought treatment at an emergency room. He had a more difficult time describing the symptoms of his depression and explained,

² Employee had a fifth surgery, at the L3-L4 level, in December 2006. Employee was able to return to work after this procedure. The trial court ultimately awarded 3% permanent partial disability (“PPD”) to the body as a whole due to the additional lower back injury and surgery. That ruling is not contested on appeal.

³ Employee testified that although he had briefly experienced similar symptoms in the 1980s before he came to work for Employer, these symptoms subsided until 2005.

“Well, I get bummed out sometimes, but I don’t know. I don’t understand depression.” His wife, who also testified at trial, said, “When he comes home, he is dragging in the door and hardly says hello and usually gets something to eat and goes to bed . . . [h]e is very hard to live with . . . [u]nless . . . he takes his medicine, myself and friends can attest to the fact that he cannot even hardly be lived with.”

The medicine referred to by Employee’s wife is Zoloft. This medication was prescribed for Employee by his primary care physician. According to Dr. William Bernet, a psychiatrist who evaluated Employee at the request of his attorney, this is a medication that is used for treating both depression and anxiety.

Dr. Bernet testified by deposition that his evaluation consisted of an interview of Employee, a review of his medical records, and the administration of psychological tests by a colleague. Based upon these sources of information, Dr. Bernet opined that Employee had anxiety and chronic depression caused by chronic pain from his five back injuries and surgeries. He did think, however, that the mental health problems worsened after the January 2005 injury. He described Employee’s level of impairment as mild to moderate. The Fifth Edition of the AMA Guides does not provide numerical percentages for psychiatric impairments; thus, when asked to estimate a percentage impairment, Dr. Bernet suggested 20% to 25% to the whole person. On cross-examination, Dr. Bernet conceded that the Guides provided a method for rating chronic pain by adding up to 3% to other anatomical ratings, but he considered that to be an entirely separate subject. Dr. Bernet also agreed that Employee had chronic pain prior to his January 2005 injury. He did not place restrictions upon Employee’s activities, stating that Employee engaged in minimal pain behaviors and that the effect of Employee’s mental conditions upon most of his activities of daily living was mild.

The trial court issued a written decision, held that Employee had sustained a compensable mental injury, and awarded 15% PPD to the body as a whole for that condition. Employer appealed, contending that the trial court erred by awarding permanent partial disability benefits for Employee’s alleged mental injury.

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). *See Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009). When credibility and weight to be given testimony are involved, considerable deference is given 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, 898 (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).

Analysis

Employer raises one issue on appeal: whether the trial court erred in finding that Employee carried his burden of proving he sustained a compensable mental injury under the Tennessee Worker's Compensation Act.

Employer states its position as follows:

In this case, [Employee's] anxiety and depression contributed to his chronic pain syndrome, and his years of back problems contributed to his pre-existing anxiety and depression. Therefore, his mental condition was not the proximate result of the January 2005 injury. Instead, his long history of back problems and his pre-existing psychiatric issues caused his chronic pain and depression to become an impairment.

Employer is correct that in order to be compensable, Employee's mental injury⁴ must have been caused by a work-related physical injury. This Court recently stated:

The Tennessee Supreme Court has long recognized two factual situations in which employees may recover workers' compensation benefits for mental disorders. First, recovery has been allowed for a mental injury by accident or occupational disease, standing alone, if the mental disorder is "caused by an identifiable stress, work-related event that produces a sudden mental stimulus such as fright, shock, or excessive unexpected anxiety." *Ivey v. Trans Global*

⁴ For workers' compensation purposes, a mental injury is defined as:

[A] loss of mental facilities or a mental or behavioral disorder where the proximate cause is a compensable physical injury resulting in a permanent disability, or an identifiable work-related event resulting in a sudden or unusual mental stimulus. A mental injury shall not include a psychological or psychiatric response due to the loss of employment or employment opportunities[.]

Tenn. Code Ann. § 50-6-102 (15) (2008 & Supp. 2009).

Gas & Oil, 2 S.W.3d 441, 447 (Tenn. 1999); *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 488 (Tenn. 1997); *Batson v. Cigna Prop. & Cas. Cos.*, 874 S.W.2d 566, 570 (Tenn. 1994). Second, compensation for psychological disorders has been allowed when an employee sustains a compensable work-related injury by accident and thereafter experiences a mental disorder which is caused by the original compensable work-related injury. *Batson*, 874 S.W.2d at 570.

Bressler v. H & H Specialty Coatings, Inc., No. W2007-02902-WC-R3-WC, 2009 WL 605085, at * 4 (Tenn. Workers' Comp. Panel Mar. 9, 2009).

Employer is not, however, correct about the unrelated cause of Employee's disorder here. The record does show that Employee suffered from some chronic pain prior to January 2005, but there is testimony from Dr. Manuel Weiss and Dr. Michael Moran, neurosurgeons who treated Employee, that his pain symptoms increased as result of the physical injury after January 2005.

The burden of proving each element of his cause of action rests upon the employee in every worker's compensation case. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992). 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 v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). The element of causation is satisfied where the "injury has a rational, causal connection to the work." *Braden v. Sears, Roebuck & Co.*, 833 S.W.2d 496, 498 (Tenn. 1992).

In determining that the mental injury existed and was caused by the work-related physical injury of January 2005, the trial court relied upon Dr. Bernet's testimony:

Dr. Bernet listed three psychiatric problems which he asserts are related to the Employee's work injuries. The first was pain, primarily from his back due to the most recent back surgery and the four previous surgeries, including being "preoccupied with the pain." He also listed anxiety as a psychiatric problem. He discussed panic attacks and the fact that the Employee had suffered from these problems years before but they "went away, and then they had come back . . ." The panic attacks were treated with xanax and later zoloft. He suggested that the third psychiatric problem from which the Employee suffers is chronic depression. Symptoms of this problem were "being moody and irritable and, as [the Employee] put, bummed out."

(Footnotes omitted.) Thus, as the trial court’s opinion further states, “the evidence shows that the Employee did, in fact, sustain a further anatomical impairment as a result of the new injury, which the court found at the last hearing,” and “the evidence shows that the Employee did sustain a further injury due to the mental, psychiatric or psychological issues.”⁵

As Employee points out, he presented the only proof of psychiatric or emotional disability, and Dr. Bernet was the only psychiatrist to testify. Although Dr. Bernet’s testimony does not indicate absolute certainty on his part, he stated and restated his opinion that Employee’s mental condition changed for the worse as result of the January 2005 work injury. Absolute certainty with respect to causation is not required, and the courts have recognized that expert opinions in this area often contain an element of uncertainty and speculation. *Fritts v. Safety Nat’l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). This case falls within that analytical framework. Dr. Bernet’s opinion, which is supported by the lay testimony of Employee and his wife, is sufficient to support a finding of causation, and there is no contradictory psychiatric evidence in the record.⁶

We therefore conclude that the evidence does not preponderate against the trial court’s finding that Employee sustained a mental injury as a result of the January 2005 work-related injury to his lower back.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellants, Bridgestone/Firestone North American Tire, LLC and Old Republic Insurance Company, and their sureties, for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE

⁵ Although the record contains evidence that Employee had at least one extended episode of anxiety problems prior to January 2005, that episode was in the remote past. Also, there is no evidence of a medical diagnosis or medical treatment for depression prior to 2005.

⁶ It is clear from the trial court’s order that it carefully considered any qualification in Dr. Bernet’s testimony relating the mental injury to the most recent physical injury. It took a measured approach to the mental injury, finding it compensable but settling on an impairment rating, 15%, which was less than the 20-25% suggested by Dr. Bernet. It also declined to increase that impairment rating by the 1.5 multiplier as it did the back injury. *See* Tenn. Code Ann. § 50-6-241(d)(1)(A) (2008 & Supp. 2009).

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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 are taxed to the appellants, Bridgestone/Firestone North American Tire, LLC and Old Republic Insurance Company, and their sureties, for which execution may issue if necessary.

PER CURIAM