

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

August 27, 2007 Session

**TREBION LINDSAY v. UNITED PARCEL SERVICE, INC. and LIBERTY
MUTUAL INSURANCE COMPANY**

**Direct Appeal from the Chancery Court for Davidson County
No. 04-3105-III Ellen Hobbs Lyle, Chancellor**

**No. M2006-00016-WC-R3-WC - Mailed - January 9, 2008
Filed - February 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 a hearing and a report of findings of fact and conclusions of law. Employee sought workers' compensation benefits for a June 2000 injury to his right shoulder and a November 2000 injury to both shoulders. He had surgery to repair a torn labrum of the right shoulder in November 2003. The trial court dismissed the November 2000 claim based upon the statute of limitations, and found that the labral tear was not caused by the June 2000 injury. Employee has appealed, contending that the evidence preponderates against the trial court's decision. We affirm the judgment.

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

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Trebion Lindsay, Nashville, Tennessee, appellant, pro se.

David T. Hooper, Brentwood, Tennessee, for the appellees, United Parcel Service, Inc., and Liberty Mutual Insurance Company.

MEMORANDUM OPINION

Factual and Procedural Background

Trebion Lindsay ("Employee") worked for United Parcel Service ("Employer") on either two or three occasions. His last period of employment began in 1999. He alleged that he suffered an injury to his right shoulder in June 2000, and a separate injury to both shoulders in November 2000. He left Employer in November 2000 to go to work for Sprint as a customer service specialist.

Employee testified that he informed his supervisor of the June 2000 injury. He was provided with a panel of physicians, and initially chose Baptist Centra Care. He was referred to the late Dr. John McInnis, an orthopaedic surgeon, who saw him on several occasions. In December 2000, Dr. McInnis released him. Employee sought a second opinion, and was referred to another orthopaedic surgeon, Dr. Gray Stahlman. Dr. Stahlman, in turn, referred him to Dr. J. Wills Oglesby, an orthopaedic surgeon who specialized in the treatment of shoulder problems.

Dr. Oglesby testified by deposition. He first saw Employee on February 5, 2001. He examined Employee and reviewed x-ray and MRI films that had previously been taken. Dr. Oglesby diagnosed tendinitis. He opined that, based upon his clinical examination, Employee did not have a labral tear at that time. Dr. Oglesby specifically noted that a small finding on the MRI was not, in his opinion, a labral tear. Dr. Oglesby recommended conservative treatment. He ordered a functional capacity evaluation (FCE). That evaluation took place in March 2001. It concluded that Employee was capable of performing work in the heavy category. Dr. Oglesby released Employee from his care at that time. He assigned 0% impairment and imposed no restrictions upon Employee.

Employee introduced a Form C-32 from Dr. John Kuhn, an orthopaedic surgeon at Vanderbilt. That report indicates that Employee had surgery for a right labrum tear on November 4, 2003. Dr. Kuhn assigned 5% impairment to the body as a whole. The portion of the form relating to causation is answered "Yes". Dr. Kuhn was not deposed.

Employee sought payment of temporary total disability benefits ("TTD") through the Department of Labor ("DOL"). On September 24, 2001, DOL ordered Employer to pay TTD for the period from December 11, 2000, through March 27, 2001. A copy of DOL's order was placed into evidence at trial. Employer sought to have the trial court order repayment from DOL pursuant to Tennessee Code Annotated Section 50-6-238(b).

At the date of trial, Employee was 36 years old. He was a high school graduate, and also had completed two years of college. He had served in the military. His prior jobs included cook and management trainee at several restaurants, driver for an auto parts store, working in the meat department of a grocery store, factory work, and selling automobiles. After leaving his job with Employer, he worked as a customer service representative for Sprint and T-Mobile, and also as an automobile salesman.

Although the record does not reflect it, counsel for the appellees stated in oral argument that

Employee timely filed a civil action concerning the June 2000 injury. That action was apparently nonsuited on a date after October 29, 2003. Employee then filed this action on October 29, 2004. The complaint in this action alleges injuries in both June and November 2000. Employer's answer asserted, among other things, that the November 2000 claim was barred by the applicable statute of limitations.

The trial court ruled from the bench, finding that the claim for the alleged November 2000 injury to both shoulders was barred by the statute of limitations. The court also found that Employee's claim concerning the June 2000 injury was not time-barred, but that he did not suffer a labrum tear as a result of that event. The trial court also denied Employer's application to order a refund of TTD benefits paid under the order from DOL. Judgment was entered accordingly. Employee has appealed, contending that the trial court erred in finding that the November 2000 injury claim was barred by the statute of limitations, and also by finding that the labrum tear was not caused by the June 2000 event.

Standard of Review

This Court reviews a trial court's findings of fact in a workers' compensation case *de novo* with a presumption of correctness, "unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and weight of testimony are involved, we must extend considerable deference to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W3d 164, 167 (Tenn. 2002). We extend no deference to the trial court's findings when reviewing documentary evidence such as depositions, however. Id. As to questions of law, our standard of review is *de novo* with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

Statute of Limitations

As noted above, this suit was filed on October 29, 2004. The complaint alleged injury dates of June and November 2000. Employer raised the statute of limitations defense as to the latter claim in its answer and trial brief. At trial, a short discussion of the issue occurred, but no evidence was presented.

This action is governed by Tennessee Code Annotated Section 50-6-203(a) (1999), which requires that an action for benefits under the workers' compensation law must be filed within one year of either the date of injury or the date of an employer's last voluntary payment for medical treatment. With respect to the alleged November 2000 injury, suit was not filed until almost four years after the date of injury. There is no basis in the record to reverse the trial court's conclusion that Employee's claim for the alleged November 2000 injury is barred by the statute of limitations.

Causation

Dr. Oglesby testified affirmatively that Employee did not have a torn labrum of the right shoulder in February 2001. His opinion was based upon his clinical examination of Employee. He agreed that there was an abnormality on an MRI of Employee's shoulder, but testified that he did not consider that finding to reflect an acute injury and explained his reasons for that conclusion.

Employee's medical proof consisted of a Form C-32 from Dr. Kuhn. That document states that Dr. Kuhn first examined Employee in October 2003. He found Employee "to have symptoms suspicious for right labral tear", and performed surgery shortly thereafter. Dr. Kuhn's medical records were not attached to the Form C-32 and his deposition was not taken. The Form C-32 itself contains only minimal information; it does not provide any explanation of Dr. Kuhn's opinion regarding causation. He first examined Employee two and one-half years after Dr. Oglesby had released him, and more than three years after the June 2000 injury. In light of those factors, the trial court explicitly placed greater weight on Dr. Oglesby's opinion.

When expert medical testimony conflicts, the trial judge has discretion to determine which to accept. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996). The Supreme Court has noted the limitations of medical proof introduced via Form C-32. Ferrell v. Cigna Prop. & Cas. Ins. Co., 33 S.W.3d 731, 734, 736 (Tenn. 2000). A previous Workers' Compensation Appeals Panel has also mentioned this issue. Salyers v. Jones Plastic & Engineering Co., LLC, No. W2004-02979-WC-R3-CV, 2005 WL 2412879, at *6 (Tenn. Workers' Comp. Panel Sept. 29, 2005) (noting that, "[w]here the Form C-32 is used and no deposition testimony is presented, the duty of the court is difficult where the language in the form is unclear").

Based upon these considerations, we conclude that the evidence does not preponderate against the trial court's finding that Employee's labral tear was not caused by a work-related injury in June 2000. We therefore affirm that finding.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, Trebion Lindsay, and his surety, for which execution may issue if necessary.

ALLEN W. WALLACE, 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 appeals 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, Trebion Lindsay, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM