IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 23, 2012 Session

JOE SISSOM v. BRIDGESTONE/FIRESTONE, INC.

Appeal from the Chancery Court for Warren County
No. 6873

No. M2011-00363-WC-R3-WC - Mailed March 15, 2012
Filed June 20, 2012

The employee alleged that he injured his right shoulder while working for the employer. The trial court found that the employee's thoracic outlet syndrome stemmed from a congenital abnormality and not a work-related injury. The employee has appealed. We affirm the judgment of the trial court.[1]

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

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and J.S. DANIEL, SP.J., joined.

Gerald L. Ewell, Jr., Tullahoma, Tennessee, for the appellant, Joe Sissom

Timothy Pirtle, McMinnville, Tennessee, for the appellee, Bridgestone/Firestone, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

This case involves a 1998 injury which was not resolved by the trial court until 2011.

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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.

While not relevant to the ultimate disposition of this case, this Court is concerned about the extreme delay in having an April 1998 injury, for which a complaint was filed in March 1999, not go to trial until January 2011. At oral argument, the lawyers attempted to explain the delay with a murky explanation regarding waiting for a full recovery by the employee, deposition scheduling, and out-of-state medical providers - none of which could possibly explain a 13-year delay. The employee's own lawyer seemed unconcerned about this extraordinary delay.

The trial court is reminded of the legislative edict, "The trial of all [workers' compensation] cases . . . shall be expedited by: [g]iving the cases priority over all cases on the trial . . . docket." Tenn. Code Ann. § 50-6-225(f) (2008). *See Building Materials Corp. v. Britt*, 211 S.W.3d 706, 714 (Tenn. 2007).

Citing the requirements of the previous Tennessee Code Annotated section 50-6-225(f) (1999) in 2005, the Supreme Court condemned as "inexcusable" a trial court's delay in not addressing a workers' compensation claim until six years after the injury occurred and four years after the complaint was filed. *Mahoney v. NationsBank of Tennessee*, 158 S.W.3d 340, 343 n.2 (Tenn. 2005), *overruled on other grounds by Building Materials Corp. v. Britt*, 211 S.W.3d 706 (Tenn. 2007). We find the delay in this case to be obviously even more inexcusable. In fact, it is hard to find the right adjective to describe a 13-year delay.

The reasons why this statute was ignored, why docket control procedures were not in place, and how such an oversight could have taken place are not addressed in the record. This Court would expect that, in the future, the trial court and the Clerk & Master will see that cases are not allowed to languish and that the above mandate of the legislature is followed.[2]

This Court will now turn to the facts of this case. Joe Sissom ("Employee"), age 44 at the time of trial, began working for Bridgestone/Firestone, Inc. ("Employer") as a tire builder in April of 1995. The work included pulling and pushing carts, handling large material, lifting up to 100 pounds, and using tire building machines. Employee testified that in early April of 1998,[3] he was "reaching overhead" at work when his "right shoulder blade

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[2] Courts have recognized the valid public concern with excessive delays in the civil justice system. Not only have these delay problems been addressed by the American Bar Association, but trial judges have been charged with controlling the pace of litigation through the use of supervision and docket management which will ensure efficient disposition of civil cases. *See, e.g,, Hyman v. Arden-Mayfair, Inc.*, 724 P.2d 63, 69, 69 n.4 (Ariz. Ct. App. 1986).

[3] Although Employee testified that the injury occurred on April 5, 1998, the Report of Work Injury (continued...)

area started hurting." Although he told a team leader he was having pain, he did not seek any medical attention at that time. While Employee had the next two days off, he noticed that his shoulder "did not bother" him. Upon returning to work, however, his "right shoulder blade began to hurt again" toward the end of his shift. A team leader suggested that Employee report the problem the next day if he continued to have pain. On April 9, 1998, Employee was pulling on material to clear a jam from the tire machine when he heard his right shoulder "snap" and "immediately had numbness and tingling" in his right hand.

Employee testified that he reported the incident to Employer's health services nurse. The injury report states that Employee's "right shoulder started hurting while building tires" on April 4, 1998. The injury report further describes the injury as "pushing or pulling – strain – causing right shoulder pain." According to Employee, the health services nurse gave him Motrin and a cold-pack. He resumed working, but his symptoms worsened.

After receiving a list of Employer's healthcare providers, Employee was examined by Dr. Don Arms at the McMinnville Orthopedic Clinic. Dr. Arms, who suspected a "thoracic sprain," ordered a thoracic MRI and other diagnostic testing. Although the MRI was normal, Dr. Arms prescribed pain medication and physical therapy. During a follow-up appointment, Employee saw Dr. Douglas Haynes and reported increased pain in his right arm and right leg, as well as in his left arm and left leg. Dr. Haynes ordered a cervical MRI and imposed various work restrictions.

Employee testified that he also sought an examination from a neurologist, Dr. Ronald Wilson, who had previously treated him for headaches. After reviewing Employee's medical records and ordering additional diagnostic testing, Dr. Wilson diagnosed a "brachial plexus stretch injury," and he prescribed pain medication and physical therapy. Although Employee returned for additional examinations and Dr. Wilson imposed a number of work restrictions, Employee continued to have pain. Eventually Employee was referred to the Mayo Clinic and underwent surgery for thoracic outlet syndrome.

Employee testified that he had no problems with his right shoulder prior to the events in April of 1998. Although Employee admitted that his injuries improved after the surgery, he stated that he no longer hunts, plays tennis, or performs various other tasks. At the time of the trial, Employee was working for a company that makes plastic pellets. Although this job requires that he occasionally lift 55-pound bags, he rarely lifts more than ten pounds. Employee acknowledged that he initially reported to Employer that his injury occurred while "pushing or pulling" and that he did not describe a "snap" or a "snapping sensation" at any

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[3](...continued)
indicates the injury occurred on April 4, 1998. The discrepancy is not material.

time prior to trial. He also admitted telling a workers' compensation claims representative that he "wasn't doing any strenuous or unordinary [sic]" activity before his right shoulder started to hurt.

Dr. Ronald Wilson testified by deposition that he examined Employee on August 10, 1998. Employee reported pain and fatigue in his right arm, and he described a work-related incident which gave Dr. Wilson "the impression that [Employee's] right arm went backwards and twisted at the same time." Dr. Wilson concluded that Employee "had stretched or injured a bundle of nerves in his right upper extremity called the brachial plexus." He described the brachial plexus as "the set of nerves" that "come out as roots in your neck" and "go to the arm." Dr. Wilson testified that Employee's injury occurred when Employee "pulled his shoulder in this fashion at work" and "stretched the nerve fibers." However, Dr. Wilson admitted during cross examination that the injury was "fairly uncommon," that Employee's thoracic and cervical MRIs revealed "no significant pathology," that EMG and nerve conduction test results were normal, and that there was "no electrical evidence of brachial plexopathy."

Dr. Wilson testified that he examined Employee on October 5, 1998, and that Employee seemed to be improving. In December of 1998, an MRI of Employee's brachial plexus "was entirely normal," and EMG and nerve conduction studies were likewise normal; however, in June of 1999, Employee described several non-work related incidents in which he had pain when turning his head or raising his arm higher than his chest. Dr. Wilson noted that Employee's symptoms on that visit appeared to be "consistent with a C7 radiculopathy" and were also "suggestive of possible vascular problems." Although he recommended additional testing, his "clinical impression" was that Employee "sustained a brachial stretch injury," and he assigned ten percent (10%) permanent impairment to the body.

Dr. Jean Panneton, a vascular surgeon at the Mayo Clinic in Minnesota,[4] testified by deposition that he diagnosed Employee with "a combination of neurogenic and vascular thoracic outlet syndrome." Dr. Panneton stated that Employee's pain and fatigue in his right arm was caused by two congenital anomalies: a "cervical rib" and an "anomalous ligament." He explained that Employee's cervical rib "compress[ed] both the brachial plexus and the subclavian artery," causing Employee to feel "upper arm fatigue" and pain when exercising or raising his arm. He further explained that Employee's anomalous ligament also compressed his subclavian artery. As a result, Dr. Panneton performed a "thoracic outlet decompression by a transaxillary first rib resection and . . . a supraclavical cervical rib resection." After the surgery, Employee began to improve, and his prognosis "for the

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[4] While not mentioned in the deposition, medical reports introduced at trial reflect that Employee was first seen at the Mayo Clinic on November 22, 2000.

vascular component of his thoracic outlet" was excellent.

Dr. Panneton testified that Employee's anatomical condition was "a congenital problem" that did not have "any relationship with work trauma." Although Employee reported that his problem began when he suffered a work injury,[5] Dr. Panneton stated that none of the diagnostic testing supported a diagnosis of brachial plexus injury. He did testify during cross-examination that the injury was "possible" but not "probable." Dr. Panneton further testified, however, that "the majority of patients that [he] would operate on for thoracic outlet syndrome do not have trauma in their history." He also testified that Employee did not describe an event indicating his condition was "traumatically induced."

Dr. Leon Ensalada performed an independent examination of Employee in March of 2000, and his written report was admitted at trial. He found "no right brachial plexopathy causally related to [the] injury of record" and "no permanent physical condition causally related to [the] injury of record." He concluded that Dr. Wilson's "opinion that [Employee] has right brachial plexopathy [was] erroneous and should not be used as a basis for additional diagnostic testing or treatment." He further noted that Employee's description of the injury was inconsistent with the "hyperextension" or "extreme downward thrust" typically associated with brachial plexus injuries. Similarly, Employee's normal neurologic examination, normal musculoskeletal examination, and normal diagnostic testing were inconsistent with Dr. Wilson's diagnosis.

In a second deposition, Dr. Wilson testified that he examined Employee in 2008 and that he adhered to his diagnosis of a stretched or injured brachial plexus. He acknowledged that Employee "had some relief" following surgery, but he noted that Employee "continued to have some of the numbness in his hand, and some of the pain in his arm, and some limitation of function of his arm."

The trial court entered a January 25, 2011 order deciding this case. The court succinctly reviewed the evidence and then concluded:

> The [Employee] did not suffer an injury by accident while in the employ of [Employer]. The [Employee] suffers from a congenital abnormality which may have caused pain or numbness while at work but his work did not exacerbate or increase the damage to his arm and shoulder.

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[5]Dr. Panneton noted that a hospital admission summary indicated that Employee had been having pain for eight years. This appears to be the only such reference in the record.

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 the trial court has heard in-court testimony, considerable deference must be afforded in reviewing 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 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

Employee argues that the trial court erred in finding that he did not suffer a work-related injury. He relies on Dr. Wilson's diagnosis of a stretched or injured brachial plexus, and he notes that Dr. Panneton acknowledged that a traumatic event "could" have caused his underlying thoracic outlet syndrome to become symptomatic. In contrast, Employer maintains that the evidence does not preponderate against the trial court's finding that Employee failed to establish a work-related injury.

Our Supreme Court has recently reviewed the standard to be applied in evaluating evidence concerning the issue of causation in workers' compensation cases:

> 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 . . . .

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

Our Supreme Court also has provided guidance in cases where an employee seeks compensation on the grounds that a work injury has aggravated a pre-existing injury or condition.[6] Generally, "an employer takes an employee 'as is' and assumes the responsibility of having a pre-existing condition aggravated for any work-related injury which might not affect an otherwise healthy person, but which aggravates a pre-existing injury." *Cloyd*, 274 S.W.3d at 643 (citing *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d. 483, 488 (Tenn. 1997)).

> [An] employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable.

Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 607 (Tenn. 2008). *See also Smith v. Smith's Transfer Corp.*, 735 S.W.2d 221, 225-26 (Tenn. 1987).

In *Smith v. Smith's Transfer Corp.*, the Court held that although the employee's work aggravated her pre-existing condition by making the pain worse, "it did not otherwise injure or advance the severity of her thoracic outlet syndrome or result in any other disabling condition." *Smith*, 735 S.W2d at 225-226. In that case, the employee, who started working for the employer in March of 1980, first noticed numbness in her hands in August of 1980. In October of 1981, she told a physician that she had been having tingling, burning, and pain in her arm for over a year and that the symptoms had worsened in the previous three months. The physician diagnosed the employee with thoracic outlet syndrome. *Id.* at 222. In concluding that the employee did not establish a work-related injury, the Court explained:

> *Irrespective of whether [the employee] had trouble with her arms and shoulder prior to August 1980 or its symptomology appeared for the first time in August 1980, there is no evidence whatever that it had its origin in anything connected to [the employee's] work for [the employer]. [The physician] testified that thoracic outlet syndrome was primarily of congenital*

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[6]As pertinent to this case, "injury" means "an injury by accident arising out of and in the course of employment that causes either disablement or death of the employee and shall include occupational diseases arising out of and in the course of employment that cause either disablement or death of the employee and shall include a mental injury arising out of and in the course of employment." Tenn. Code Ann. § 50-6-102 (13) (2005). The legislature has since amended the definition by adding that "[a]n injury is 'accidental' only if the injury is caused by a specific incident, or set of incidents, arising out of and in the course of employment, and is identifiable by time and place of occurrence." Tenn. Code Ann. § 50-6-102 (12)(A)(i) (2011).

> *origin, such as a cervical rib or congenital variance of the musculature in front of and behind the blood vessels and nerves* . . . Both [the employee] and [the physician's] testimony unequivocally negate the possibility that any traumatic injury on or off the job was a factor in the origin of [the employee's] thoracic outlet syndrome.

Id. at 224 (emphasis added).[7]

We conclude that the evidence does not preponderate against the trial court's finding that Employee did not establish a work-related injury. Employee reported feeling pain in his right shoulder while working in April of 1998, and he received medication and physical therapy. Although he testified that he had no problems with his right shoulder prior to the work incident, the evidence showed that his condition originated from two congenital anomalies: a cervical rib and an anomalous ligament. As Dr. Panneton explained, Employee's cervical rib "compress[ed] both the brachial plexus and the subclavian artery," causing Employee to feel "upper arm fatigue" and pain when exercising or raising his arm. Dr. Panneton testified that he performed "thoracic outlet decompression by a transaxillary first rib resection and . . . a supraclavical cervical rib resection," and Employee improved following the surgery.

While Dr. Panneton acknowledged the possibility that a traumatic injury "could" have caused his symptoms, Dr. Panneton negated such conjecture by stating that Employee did not describe a traumatic incident, but rather reported that his right shoulder simply "started hurting" while he was working and that the pain worsened when he was clearing a jammed machine several days later. Although Employee relies on Dr. Wilson's diagnosis of an injured brachial plexus, Dr. Wilson's diagnosis was not supported by the diagnostic testing; in contrast, Dr. Panneton's conclusion that Employee's symptoms stemmed from his congenital abnormalities was fully supported by the diagnostic testing. We conclude that the evidence does not preponderate against the trial court's determination.

Conclusion

For the foregoing reasons, the trial court's judgment is affirmed. Costs are assessed to Employee, Joe Sissom, for which execution may issue if necessary.

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[7] The Court also emphasized that there "was no medical evidence that plaintiff's keyboard activity or bill of lading grasping produced any physical change or advanced the incidence of thoracic outlet syndrome other than increased pain." *Id.*

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SENIOR JUDGE WALTER C. KURTZ

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Joe Sissom pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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 Joe Sissom, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

William C. Koch, Jr., J., not participating