

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

January 28, 2013 Session

JAMES REED v. CENTRAL TRANSPORT NORTH AMERICA, INC.

Appeal from the Circuit Court for Knox County
No. 1-339-10 Dale Workman, Judge

No. E2012-00535-WC-R3-WC-MAILED-MARCH 28, 2013/FILED-APRIL 29, 2013

In this workers' compensation action, the employee suffered a compensable back injury. Surgery did not relieve his symptoms of severe pain. The trial court awarded 84% permanent partial disability benefits. The employer filed a motion to set aside the judgment based on the employee's alleged failure to supplement his discovery responses. The trial court denied the motion. The employer has appealed, contending that the award is excessive and that the trial court erred by denying its post-trial motion. The 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 in accordance with Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

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

PAUL G. SUMMERS, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J. and JOHN K. BLACKWOOD, SR. J., joined.

Robert M. Asbury, Knoxville, Tennessee, for the appellant, Central Transport North America, Inc.

T. Scott Jones and Chris W. Beavers, Knoxville, Tennessee, for the appellee, James Reed.

MEMORANDUM OPINION

Factual and Procedural Background

James Reed (“Employee”) began working for Central Transport North America, Inc. (“Employer”) as an over-the-road truck driver in 2007. He had previously worked as a driver for other employers and also as a motorcycle mechanic. He injured his lower back on October 22, 2008, as he was pulling a large crate to place it on a forklift. He immediately reported the injury to his supervisors. He initially received medical care from a walk-in clinic, but was later referred to Dr. Patrick Bolt, an orthopaedic surgeon, for treatment. Dr. Bolt prescribed physical therapy and injections; but these efforts did not improve Employee’s condition. In May 2009, Dr. Bolt performed surgery on Employee’s back, removing a ruptured disc at the L4-5 interspace. Unfortunately, that procedure did not provide any relief to Employee. Post-surgical therapy and injections likewise did not alleviate Employee’s symptoms.

When the trial occurred in October 2011, Employee had not worked or applied for work since his injury. He was thirty-nine years old and a high school graduate. He testified that he was unable to bend, squat, or walk more than short distances; and he had to alternate sitting, standing, and walking due to back pain. He did not believe he was capable of driving a truck or performing any of his previous jobs. He had recently undergone a trial implantation of a spinal cord stimulator. That device had provided about 40% relief of his symptoms.

During cross-examination, Employee stated that he had a work-related shoulder injury while working for a previous employer. He had been off work approximately one year as a result of that injury, but had been able to return to full duty. He agreed that he had used crutches at the time of a functional capacity evaluation ordered by Dr. Bolt but no longer used the crutches. The record is not clear as to who prescribed the crutches for him. Dr. Bolt denied that he had done so. Employee also admitted that he had a work-related back injury in 2003. He received treatment at a walk-in clinic and returned to work without restrictions within about two weeks. He admitted that he did not mention this injury during his pre-employment physical for Employer, stating that he considered it to be minor.

Dr. Bolt testified by deposition. He ordered an MRI, which was performed on December 1, 2008. That test showed a herniated disc at the L4-5 level and also a hematoma. Dr. Bolt thought the presence of the hematoma “might have indicated that it was a recent injury.” His observations during the surgery were consistent with the MRI results. He opined that the procedure had a “good radiological result,” in that the ruptured disc material was removed, but a “poor clinical result,” in the absence of any improvement

of Employee's symptoms. Dr. Bolt opined that Employee retained a 14% permanent anatomical impairment as a result of the injury and surgery.

Dr. Bolt also referred Employee for a functional capacity evaluation ("FCE"). The evaluator found that Employee was not able to perform a full range of sedentary work. However, because the evaluator found that Employee self-limited a number of activities, Dr. Bolt opined that the results represented his lowest level of potential functioning rather than his highest. He further stated that it was not unusual for patients with severe pain to self-limit their activities. He stated that the FCE results were consistent with his own observations of Employee and that he did not believe Employee was malingering.

Dr. Jeffrey Uzzle, also an orthopaedic surgeon, evaluated Employee on September 30, 2010, at Employee's attorney's request. Dr. Uzzle testified by deposition. He noted that Employee had an "anoxic brain event" in May 2010, apparently as a result of an overdose of pain medication. He stated that Employee did not include his 2003 back injury in his medical history; but after reviewing medical records concerning the event, he opined the injury had resolved within a short time and was unrelated to the October 2008 injury. Dr. Uzzle testified that Employee demonstrated four of a possible five Waddell's signs, which suggested that "non-organic" factors may have played a role in Employee's condition. He opined that Employee had chronic pain disorder with depression. He did not perform an analysis of Employee's impairment, but agreed with Dr. Bolt's opinion on the subject.

Two vocational evaluators testified at trial. Dr. Craig Colvin interviewed Employee at his attorney's request. He also reviewed Dr. Bolt's deposition, Dr. Uzzle's report, and the FCE. Based on that information, he opined that Employee had a 100% vocational disability. Dr. Rodney Caldwell evaluated Employee at Employer's request. He administered the Wide Range Achievement Test. That test showed that Employee's word reading was at the twelfth grade level, and his sentence comprehension and arithmetic were at the seventh grade level. Dr. Caldwell opined that, based on the FCE results, Employee was totally disabled. However, he was unable to express an opinion regarding disability based on the depositions of Dr. Bolt or Dr. Uzzle.

The trial court issued its findings of fact and conclusions of law from the bench. The trial court found that Employee sustained a compensable injury as alleged. It further found that Employee's 2003 back injury was a mild lumbar strain of no significance; employee's failure to disclose it in his employment application or to Dr. Bolt did not affect the compensability of the October 2008 injury. After reviewing Employee's non-compliance with his physical therapy, his self-limiting effort during the FCE, his education, and work experience, the trial court determined that Employee sustained an 84% permanent partial disability to the body as a whole. Judgment was entered in accordance with the court's

findings. Employer filed a motion to set aside the judgment, alleging that Employee had failed to supplement his interrogatory responses and that it had been prejudiced by that failure. The trial court denied the motion. Employer has appealed, contending that the award of permanent disability benefits was excessive and that the trial court erred by denying its motion to set aside.

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 & Supp. 2012). 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. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman’s Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court’s conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Excessive Award

Employer contends that the award of 84% permanent partial disability is excessive. It correctly points out that the award was six times Dr. Bolt’s 14% anatomical impairment rating, the maximum permitted by Tennessee Code Annotated § 50-6-241(d)(2)(A)(2008 & Supp. 2012). It argues that the evidence preponderates against a maximum award. That argument is based on several specific issues, including: Employee’s failure to disclose the 2003 injury to Employer or his treating physician; his use of crutches not prescribed by his physician; suggestions in the medical records that he was not fully compliant with his physical therapy program; discrepancies between Employee’s anatomical condition and symptoms noted by Dr. Uzzle; and Employee’s questionable effort during the FCE.

The trial court found that the 2003 injury was inconsequential, and Employee’s failure to disclose it was immaterial to the issues of causation and disability. That finding was consistent with the testimony of Dr. Bolt and Dr. Uzzle. There is no evidence to the contrary in the record. Two vocational evaluators, one of whom was called on behalf of Employer, testified that if the FCE was accepted at face value, Employee was totally disabled. No

evidence was presented that Employee was capable of working at any particular occupation. Both Dr. Bolt and Dr. Uzzle opined that, in spite of the self-limiting behavior during the FCE and his unprescribed use of crutches, Employee was not malingering. Again, the record contains no evidence contradicting those opinions.

“The extent of an injured worker's permanent disability is a question of fact.” *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005)(citing *Jaske v. Murray Ohio Mfg. Co., Inc.*, 750 S.W.2d 150, 151 (Tenn. 1988)). In this case, the trial court was presented with a considerable amount of evidence that Employee suffered a serious injury to his lower back. Surgery did not alleviate his symptoms, and his future employment opportunities were severely limited. We conclude that the evidence does not preponderate against the trial court’s assessment of Employee’s disability.

Motion to Set Aside

Employer also contends that the trial court erred by failing to grant its motion to set aside the judgment. The basis for that motion was Employee’s alleged failure to supplement his interrogatory responses when he moved from Seymour, Tennessee to Sevierville, and when he and his wife divorced. Employer alleges that it was “unable to conduct surveillance on the Plaintiff as to his degree of day-to-day mobility and also unable to question/subpoena the Plaintiff’s estranged wife on the issue of the Plaintiff’s activities of daily living,” because of this alleged failure to supplement. This Panel notes that Employer’s counsel stated at trial that surveillance of Employee had been conducted. However, it chose not to introduce evidence concerning that surveillance.

Counsel’s statement does not indicate when the surveillance of Employee was conducted. Employer’s motion to set aside does not state what, if any, efforts were made to conduct additional surveillance. The motion does not state what, if any, efforts were made to depose Employee’s estranged wife. There is no transcript of the hearing on the motion. Trial court decisions concerning discovery issues are reviewed on an abuse of discretion standard. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). We find no basis in the record of this case to support a conclusion that the trial court abused its discretion by denying Employer’s post-trial motion.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Central Transport North America, Inc. and its surety, for which execution may issue if necessary.

PAUL G. SUMMERS, 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 Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to Central Transport North America, Inc., and its surety, for which execution may issue if necessary.

PER CURIAM