

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

November 26, 2012 Session

**CARL BOHANNON v. EXPEDITED TRANSPORT ASSOCIATES, INC.
ET AL.**

Appeal from the Circuit Court for Putnam County

No. 10N0059 Amy V. Hollars, Judge

No. M2012-00694-WC-R3-WC - Mailed March 8, 2013

Filed April 10, 2013

In this workers' compensation appeal, the employee, a truck driver, alleged that he injured his right shoulder and low back when his tractor-trailer overturned. His employer stipulated that the shoulder injury was compensable, but denied that he had sustained a permanent back injury. Instead, the employer contended that the employee's back symptoms were the result of a previous back injury, which had been the subject of a previous workers' compensation claim and settlement. The trial court determined that the employee had suffered a new, compensable back injury and was permanently and totally disabled. The trial court apportioned 80% of the liability for the award to the employer and 20% to the Second Injury Fund. Employer has appealed, contending that the trial court erred by finding that a new, compensable back injury occurred. In the alternative, it argues that the trial court incorrectly apportioned the award. 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

DONALD P. HARRIS, SP. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and WALTER E. KURTZ, SR. J., joined.

Mary Dee Allen, Cookeville, Tennessee, for the appellants, Expedited Transport Associates, Inc. and Praetorian Insurance Company.

Walter S. "Pat" Fitzpatrick, III, Cookeville, Tennessee, for the appellee, Carl Bohannon.

Robert E. Cooper, Jr., Attorney General & Reporter; William E. Young, Solicitor General; Dianne Stamey Dycus, Deputy Attorney General, for the appellee, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

Carl Bohannon began working as an over-the-road truck driver for Expedited Transport Associates (“Expedited Transport”) in September 2002. On October 15, 2008, Mr. Bohannon was injured when his truck and trailer overturned in Gilmer County, Georgia. After receiving medical treatment at a local emergency room, he was transported to his home in Cookeville, Tennessee. Immediately after the accident, Mr. Bohannon had pain in his right shoulder, a bruise on his right hip, pain in his left hip, and his “lower back was starting to hurt a little bit.” His back pain increased over the following days and he began to experience pain in his left leg. Mr. Bohannon believed that as a result of this injury, he had been rendered permanently disabled and could no longer perform his job.

Mr. Bohannon exhausted his administrative remedies through the Department of Labor Benefit Review and the parties reached an impasse. Mr. Bohannon then filed a claim for workers’ compensation benefits on March 5, 2010. Expedited Transport filed an Answer on May 6, 2010, denying liability and asserting that Mr. Bohannon’s injuries and disability were not related to an injury sustained in the scope of his employment with Expedited Transport in 2008 but were actually caused by an injury he sustained in 2007 and for which he had already been compensated. The case went to trial on July 29, 2011, in the Circuit Court for Putnam County.

Evidence at trial showed that Mr. Bohannon was referred to Dr. Gregory Roberts, an orthopaedic surgeon, for treatment of his shoulder injury. Dr. Roberts, testifying by deposition, stated that he initially diagnosed Mr. Bohannon with a right rotator cuff tear that Dr. Roberts believed had been caused during the motor vehicle accident. Dr. Roberts recommended surgery to repair the injury and the procedure was performed on January 19, 2009. During surgery, Dr. Roberts discovered two labral tears. In addition to repairing the rotator cuff injury, he also debrided these tears and performed a distal clavicle resection. He continued to treat Mr. Bohannon after the surgery and prescribed medication, physical therapy and home exercise. Mr. Bohannon still complained of pain associated with certain activities, but “was overall doing okay.” On December 1, 2009, Dr. Roberts determined that Mr. Bohannon had reached maximum medical improvement. At that time, he assigned Mr. Bohannon 15% permanent impairment of the right upper extremity due to his shoulder injury

and surgery, based upon the AMA Guides to the Evaluation of Permanent Impairment (Sixth Edition) (“AMA Guides”).¹ Based on a functional capacity evaluation conducted after Mr. Bohannon was released from his care, Dr. Roberts recommended permanent activity restrictions of sustained overhead work but stated that Mr. Bohannon could occasionally lift up to forty pounds overhead. He testified that Mr. Bohannon was capable of lifting “any amount of weight as long as his arms were at his side.”

The record indicates that Mr. Bohannon had suffered health problems prior to the October 2008 accident. Although Dr. Roberts’s primary concern in treatment was Mr. Bohannon’s shoulder injury, Mr. Bohannon also reported pain in his left leg that “was similar to a previous injury that he had had surgery for.” This prior injury occurred in April 2007, when Mr. Bohannon fell from a truck and injured his back. He primarily received treatment from Dr. Manuel Weiss, who performed L4-5 disc surgery. Dr. Weiss assigned a 10% permanent impairment to the body as a whole and recommended a forty-pound lifting restriction. In September 2007, Mr. Bohannon returned to his job and worked without incident or difficulty until the October 2008 motor vehicle accident. The prior injury resulted in a workers’ compensation settlement that the Department of Labor and Workforce Development approved on December 14, 2007. Additionally, as a result of a childhood injury, Mr. Bohannon underwent right hip replacement surgery in 1991 and a subsequent revision of that surgery in 2001. Mr. Bohannon’s activities had been subject to a forty-pound lifting restriction as a result of these surgeries.

In 2009, Mr. Bohannon was referred by Expedited Transport’s workers’ compensation insurer to Dr. Jeffrey Hazlewood, who is board certified in physical medicine and rehabilitation with a subspecialty in pain medicine, for treatment of his back and leg pain. Dr. Hazlewood testified by deposition and stated that he first examined Mr. Bohannon on August 11, 2009, and performed an EMG study shortly thereafter. That study “showed definite nerve damage” and revealed chronic left L5 radiculopathy. Dr. Hazlewood testified that this condition had been present for at least six months. Although he treated Mr. Bohannon with various medications, he was unable to completely alleviate the pain. Dr. Hazlewood ordered a functional capacity evaluation, and based on the results, recommended several permanent activity restrictions or limitations for frequently lifting from floor-to-waist fifteen pounds, waist-to-shoulder eighteen pounds, shoulder-to-overhead twenty pounds, carrying fifteen pounds, pushing thirty-nine pounds, and pulling forty-eight pounds. Dr. Hazlewood also advised that Mr. Bohannon could occasionally lift from floor-to-waist thirty pounds, waist-to-shoulder thirty-five pounds, shoulder-to-overhead forty pounds, carry no more than thirty pounds, push no more than seventy-eight pounds, and pull no more than

¹ The parties stipulated that this impairment converts to 9% to the body as a whole, according to the Guides.

ninety-six pounds. Dr. Hazlewood also recommended that Mr. Bohannon limit his activities to occasional bending, squatting, crawling, climbing, standing, walking, and reaching overhead. Dr. Hazlewood further recommended that Mr. Bohannon should sit for no more than forty minutes per hour – a limitation that would preclude him from being an over-the-road truck driver.

With regard to whether the 2007 or 2008 back injury caused the radiculopathy he diagnosed, Dr. Hazlewood testified that Mr. Bohannon reported to him that “[h]e had not had any pain after this previous lumbar surgery” and that “[h]e was pain free until this injury . . .” He was unwilling to state with a reasonable degree of medical certainty that an objective anatomical change had occurred as a result of the 2008 injury but did testify that “with that violent a deal, he could maybe stretch the nerve or something and irritate it.” He testified as follows:

I think there’s a chemical radiculopathy where the nerve gets irritated and you have this pain shooting down a nerve and the MRI doesn’t show any structural mechanical impingement that you’d see from mechanical radiculopathy, and that’s thought to be due to an inflammatory nerve process. So I don’t think the nerve itself is damaged but the fibers around the nerve or epineurium or the connective tissue around the nerve can become inflamed. And I’m sure you’d see inflammatory cells under a microscope on that, but it’s not nerve damage.

* * * *

Again, I’ve not been able to convince myself that I can prove or feel within a reasonable degree of medical certainty there’s nerve damage or radiculopathy from this accident, but I think he definitely has pain down that L5 nerve. He fit very well within that, which very few people do. So I think, yes, his nerve pain was real. . . . It just got fired up and it wasn’t there before [the October 2008 accident], he says, and I’m basing it on what he told me he didn’t have pain before.

When asked whether that change could have taken place without some intervening cause or event, Dr. Hazlewood testified:

I mean, usually, there’s something that has provoked it, I would say. In this case, I think definitely the mechanism of injury could have provoked it. So I have no problem saying that. I think one can get a disk herniation and a pinched nerve with no injury at all. I’ve had one where I didn’t do

anything. I woke up with a disk herniation, so it can happen. But in this case, his pain started with this and it all matched up pretty well, so I think the truck accident caused his nerve pain, in my opinion.

Dr. Hazlewood assigned 2% permanent impairment to the body as a whole based on the AMA Guides. He stated that the impairment was causally related to the October 2008 accident.

Dr. Robert Landsberg, an orthopaedic surgeon, examined Mr. Bohannon at the request of his attorney on August 11, 2010. Dr. Landsberg testified by deposition. In his opinion, based in part on new radicular complaints, Mr. Bohannon sustained a “new injury” to his lower back as a result of the October 2008 accident.² He assigned 12% permanent anatomical impairment of the upper extremity (7% to the body as a whole) due to the shoulder injury, and 3% impairment to the body as a whole due to the lower back injury. These impairments combined for a 10% impairment to the body as a whole. In addition to the restrictions imposed by Dr. Roberts and Dr. Hazlewood, Dr. Landsberg recommended that Mr. Bohannon “should alternate standing, sitting, and walking, with no standing in one position for more than five or ten minutes and no walking for more than five or ten minutes.” He also recommended that Mr. Bohannon should “avoid overhead use with the left shoulder. He can lift some with the right shoulder overhead.” He did not believe Mr. Bohannon was capable of being an over-the-road truck driver.

The parties stipulated to the introduction of the records of Dr. Manuel Weiss, who performed Mr. Bohannon’s 2007 back surgery. Dr. Weiss examined Mr. Bohannon after the October 2008 accident and ordered an MRI. After reviewing the December 2008 MRI results, he noted: “This man’s enhanced MRI scan revealed only some postoperative change at the site of the prior surgery, which was done remotely. I do not see any new structural phenomena that would correlate with his automobile accident, or any of his current low back and leg symptoms.”

Gary Palk, owner of Expedited Transport, testified that Mr. Bohannon competently performed his job before the October 2008 accident. Based upon doctors’ statements he had received after the accident, Mr. Palk did not think Mr. Bohannon was capable of returning to work as a truck driver.

Curtis Lair, safety director for Expedited Transport, testified that the accident had damaged the truck and trailer beyond repair. He also outlined the physical requirements of

² On cross-examination, Dr. Landsberg testified that he had reviewed images of a December 2008, MRI of Mr. Bohannon’s lumbar spine, but had only reviewed a report of the pre-injury MRI from July 2007.

Mr. Bohannon's job, which included being able to hook and unhook trailers, sitting for long periods of time and being able to deal with emergencies. Mr. Lair had been aware that Mr. Bohannon had some activity restrictions prior to October 2008. He testified that Mr. Bohannon was a good worker. Further, Mr. Lair stated that it was impossible for Expedited Transport to accommodate the restrictions imposed by Mr. Bohannon's doctors as a result of the 2008 accident.

Mr. Bohannon testified that he was sixty-two years old at the time of the trial. He attended school through the tenth grade and later obtained a GED. He earned a certificate in mechanical drafting in the 1970s, and completed a computer operator class in 1993. Prior to becoming a truck driver, he had worked as a janitor, a deliveryman, an assembly worker in furniture and automobile factories, a route salesman and supervisor for a soft-drink company, and a computer file reviewer for the State of Tennessee. He believed that the effects of his accident prevented him from returning to any of those jobs.

Mr. Bohannon testified that the 2007 injury caused back and left leg pain. After the surgery by Dr. Weiss, he continued to have some back pain, but his leg pain gradually ended. He was able to return to work in September 2007 and performed his job without any special accommodations until October 2008.

Mr. Bohannon now walks with a cane. He described his back pain as constant, but manageable. The pain he experiences in his back and leg dramatically increases when he stands for more than five or ten minutes. He experiences sharp pain in his shoulder when he holds items, such as a skillet, with his arm outstretched. He is able to drive an automobile by using his left arm to steer, but he could not drive a tractor-trailer because he would not be able to perform repetitive gear shifting with his right arm. He also reported difficulty performing household chores and personal activities such as vacuuming, shaving, and yard work.

On cross-examination, Mr. Bohannon agreed that he had already been under a forty-pound lifting restriction from his 1991 and 2001 hip surgeries. He also conceded that he had injured his back in a fall in 2004 and had received medical treatment for that injury. He denied, however, that he had any "long-standing" lower back problems because of those injuries.

Dr. Rodney Caldwell, a vocational evaluator, examined Mr. Bohannon at his attorney's request. Dr. Caldwell's testing revealed that Mr. Bohannon was able to read and perform math at a twelfth-grade level. Based upon the restrictions imposed by Dr. Roberts, Dr. Caldwell believed that Mr. Bohannon had a 40% vocational disability. Based on Dr. Landsberg's restrictions for the right shoulder, Dr. Caldwell estimated a disability of 80-

85%. Based upon the functional capacity evaluation, Dr. Caldwell testified that Mr. Bohannon was totally disabled. On cross-examination, he stated that Mr. Bohannon had a 40-50% vocational disability based upon the restrictions from his hip replacement. Dr. Roberts's restrictions added 5-10% to that amount.

The trial court ruled that Mr. Bohannon sustained a "new and distinct" injury to his lower back from the October 2008 accident. The trial court found that Mr. Bohannon had sustained a permanent disability of 80% from the combined shoulder and back injuries and that he was permanently and totally disabled as a result of the combined effects of those injuries, his previous injury and his pre-existing conditions. The trial court therefore apportioned the award 80% to Expedited Transport and 20% to the Second Injury Fund. Expedited Transport has appealed, contending that the trial court erred by finding that a new and distinct back injury occurred. In the alternative, Expedited Transport asserts that the trial court incorrectly apportioned the award.³

Standard of Review

We are statutorily required to review the trial court's factual findings "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006).

³ Expedited Transport also argues that the trial court erroneously awarded permanent disability benefits for a prior injury simultaneously with benefits for a new injury because both injuries were to the same body part. However, as noted by appellees in their brief, neither the trial court order nor a notice of appeal from the reconsideration case appears in this record. Therefore, the trial court's decision in the reconsideration case is not before this Panel and will not be reviewed in this opinion.

Analysis

Back Injury

Expedited Transport's first contention is that the trial court erred by finding that Mr. Bohannon sustained a new and distinct back injury from the October 2008 accident. Expedited Transport relies primarily upon Dr. Weiss's opinion, set out in his December 29, 2008 clinical note, that the December 19, 2008 MRI showed no structural change from an MRI performed in July 2007. Expedited Transport also points out that Dr. Hazlewood reached a similar conclusion concerning the two MRIs, although it appears that Dr. Hazlewood viewed the radiologists' reports rather than the actual results. It notes that Dr. Landsberg, who testified that an anatomical change had occurred, viewed an image of the 2008 scan, but only a report of the 2007 scan. Expedited Transport argues that these facts are analogous to those in Foreman v. Automatic Systems, Inc., 272 S.W.3d 560 (Tenn. 2008). We disagree.

In Foreman, an employee had long-standing lower back problems, for which she periodically sought treatment from either an orthopaedic or surgeons over a period of several years. Her symptoms worsened, and her surgeon suggested possible surgical intervention. Id. at 565. The employee injured her back at work shortly thereafter. Id. She returned to the same physician, who opined that the work injury had caused a "temporary exacerbation of her symptoms" and found no change in her underlying condition based upon comparison of pre- and post-injury MRIs. Id. at 566. The employee eventually had the same surgical procedure that had been suggested prior to her work injury and sought workers' compensation benefits. Id. at 567-68. The trial court found that the work injury had caused only a temporary exacerbation of the employee's underlying condition and denied benefits for the surgery and permanent disability. Id. at 570. Accrediting the testimony of the physician who had treated both before and after the work injury over that of an evaluating physician, the judgment was affirmed on appeal. Foreman at 574-75.

In the present case, Dr. Weiss, who had treated the 2007 injury, saw Mr. Bohannon on one occasion after the 2008 accident and ordered an MRI. Similarly to the physician in Foreman, Dr. Weiss found that a comparison of pre- and post-injury MRIs did not reveal any anatomical change in Mr. Bohannon's spine. However, unlike the physician in Foreman, Dr. Weiss did not testify and his opinion was only presented to the trial court by means of a clinical note. Instead, Dr. Hazlewood testified that he did not disagree with Dr. Weiss's opinion concerning the MRIs, but presented an alternative explanation of the causal relationship between the October 2008 accident and Mr. Bohannon's previous pain: that the trauma of the October 2008 accident caused inflammation of the tissues surrounding the L5 nerve root. Dr. Hazlewood's explanation is consistent with the undisputed evidence that Mr.

Bohannon was able to perform his job without significant difficulty until he was involved in a violent motor vehicle accident, after which he was unable to perform his job. Dr. Hazlewood's testimony that Mr. Bohannon's pain was limited to the L5 dermatome and was consistent with the theory a new injury had occurred and the objective medical findings.

“[I]f 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). In our view, Dr. Hazlewood's testimony is sufficient to support a finding that the October 2008 work injury significantly advanced the severity of Mr. Bohannon's pre-existing condition. Expedited Transport did not present either testimonial or documentary evidence disputing or contradicting Dr. Hazlewood's opinion. We therefore conclude that the evidence does not preponderate against the trial court's finding on this issue and affirm the judgment of the circuit court.

Apportionment of Award

Expedited Transport also argues that the trial court erred by apportioning 80% of the permanent disability award to it. The apportionment of the award in this case is governed by Tennessee Code Annotated section 50-6-208(a)(1) (2008), which provides:

If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, the employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation to which the employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to the compensation for a subsequent injury, and after completion of the payments for the subsequent injury, then the employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the second injury fund.

When applying this section,

[I]t is essential that the trial court determine the extent of disability resulting from the subsequent injury without consideration of the prior injury. In other words, the trial court must find what disability would have resulted if a person

with no preexisting disabilities, in the same position as the plaintiff, had suffered the second injury but not the first.

Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 (Tenn. 2001) (citation omitted).

In large measure, Expedited Transport's argument on this issue is premised on its position that Mr. Bohannon did not sustain a new, compensable, back injury from the October 2008 accident and that Dr. Hazlewood's restrictions should not be considered in assessing the permanent disability arising from that accident. We have rejected Expedited Transport's position concerning the back injury. Both Dr. Hazlewood and Dr. Landsberg restricted Mr. Bohannon from sitting for extended periods of time. Dr. Roberts's restrictions permit Mr. Bohannon to perform only minimal overhead work. Expedited Transport's representatives confirmed that these work restrictions would prevent Mr. Bohannon from returning to work as a truck driver. Mr. Bohannon is sixty-two years old and his work history consists primarily of unskilled labor. His certifications in mechanical drafting, obtained almost forty years ago, and computer operation, obtained twenty years ago, are of questionable value in the twenty-first century labor market. He now walks with a cane as result of his work injury. Taking these factors into consideration, we are unable to conclude that the evidence preponderates against the trial court's finding that Mr. Bohannon sustained an 80% permanent partial disability solely as a result of the October 2008 accident and its consequent apportionment of the permanent disability award.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Expedited Transport Associates, Inc. and Praetorian Insurance Company and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SPECIAL 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 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 Expedited Transport Associates, Inc. and Praetorian Insurance Company and its surety, for which execution may issue if necessary.

PER CURIAM