IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(July 25, 2006 Session)

KEITH ALAN JORDAN v. QW MEMPHIS CORP., QUEBECOR WORLD DICKSON, INC., AND TRAVELERS INDEMNITY COMPANY OF ILLINOIS

Direct Appeal from the Circuit Court for Dickson County
No. CV-1671

No. M2005-02927-WC-R3-CV - Mailed - March 29, 2007
Filed - April 30, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court found that the employee had suffered a work-related back injury and awarded the employee permanent partial disability benefits of 57.5% to the body as a whole. The employer appeals, contending that the employee's back problems did not arise out of his employment. We affirm the trial court.

Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Dickson County Circuit Court Affirmed.

JEFFREY S. BIVINS, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and HOWELL N. PEOPLES, SP. J., joined.

Lee Anne Murray, Feeney & Murray, P.C., Nashville, Tennessee, for the Appellant, Quebecor Printing, Inc. and Traveler's Property Casualty..

Ann Buntin Steiner, Law Offices of Steiner & Steiner, Nashville, Tennessee, for the Appellee, Keith Alan Jordan.

MEMORANDUM OPINION

I. Facts

The Plaintiff, Keith Alan Jordan ("Jordan") was 32 years old at the time of the trial in this case. Jordan began working for Quebecor[1] on July 21, 2001, as a stacker. The job description for a stacker identifies this position as a physical job. Jordan had to be able to lift 15 to 35 pounds on a repetitive basis over a twelve hour shift. In addition to lifting, Jordan testified that the job entailed twisting and turning. His duties also included changing out cylinders that weighed over two thousand pounds. Prior to the injuries at issue in this case, Jordan typically worked three twelve hour days. He also typically worked anywhere from 12 to 24 hours of overtime each week.

Jordan's claims in this case focus on three separate instances of back pain. The first incident at issue occurred in March of 2002. Jordan testified that on March 26, 2002, he injured his lower back while pulling cylinders on the job site. Jordan continued to work and completed his shift. Once home, he took aspirin to relieve his back pain. The next day, on March 27, 2002, Jordan felt a snap in his back as he arose from the toilet in his home. He experienced pain in his back and in both legs. This pain caused Jordan to fall to the floor. He was taken by ambulance to Gateway Medical Center in Clarksville, Tennessee. Prior to the arrival of the ambulance, Jordan called Doug Ethridge at Quebecor and told Mr. Ethridge that he thought his work from the day before had caused the injury he had suffered that morning.

Jordan later filed a notice of injury with Quebecor. Quebecor provided Jordan with a panel of physicians, including Dr. Stark and Dr. Collins. Jordan first saw Dr. Collins and then was referred to Dr. Stark. Based upon Dr. Stark's advice, Jordan missed approximately two days of work and reported for light duty work for some additional days. He returned to full duty on April 4, 2002. On April 4, 2002, Quebecor denied Jordan's claim that this back injury was work related. On July 24, 2002, Jordan initiated the instant action against Quebecor, seeking workers' compensation benefits for this injury.[2]

On August 19, 2002, Jordan was working an overtime shift during which he had to tear a stacker apart. When he had to move the stacker, he noticed that his back was sore. He went to his supervisor's office that same day. He filed a notice of injury on August 19, 2002. Quebecor again provided Jordan with a panel of physicians. Jordan again saw Dr. Collins and was then referred to Dr. Daniels at the Bone & Joint Clinic in Dickson. Dr. Daniels directed Jordan to stay off work for a couple of days and gave him a back brace. Jordan returned to full duty and wore the back brace part

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[1] Jordan's Complaint names QW Memphis Corp. and Quebecor World Dickson, Inc. as his employer. The Complaint also names Travelers Indemnity Company of Illinois as the workers' compensation carrier for Quebecor at the times relevant to this case. The defendants point out that the correct corporate name of Jordan's employer is Quebecor Printing, Inc. and the correct name of the insurance carrier is Travelers Property Casualty. These differences do not appear to be a material issue in this appeal. The defendants will be collectively referred to as "Quebecor" throughout this opinion.

[2] This case presents a somewhat tortured procedural history. We have chosen to include only the history material to this appeal in this opinion.

of the time while he was working. Quebecor denied this claim, stating that the August 2002 problems were a result of the prior March 2002 incident.

Jordan testified that, during the months of September and October 2002, he started working less overtime because he needed days off to allow his back to rest from the pain he experienced. Jordan also testified that he began to experience "charlie horses" in his legs and would have spasms in his back around his kidney area. Jordan claimed that when he would get home from work during the September and October time period, he typically would take a shower, take some Tylenol, and go to bed.

He ultimately took three days off during October to recover from the pain. Jordan was off work October 16, 17 and 18, 2002. On October 18, 2002, he was sitting outside on a retaining wall, with his feet on the ground. When he began to get up from the retaining wall, he experienced a sharp pain in his back and fell to the ground. His family then took him to Premiere Medical in Clarksville. After Jordan returned home, his wife helped him get into the shower and started washing him. As he turned so she could wash his other side, "all hell broke loose" and he felt "the mother of all pain." He felt shooting pains going up and down his back and legs, and immediately hit the floor. Jordan was transported from his home by ambulance to Montgomery County Hospital. He was admitted there for a couple of days. After his release from the hospital, Premiere Medical performed a MRI scan on Jordan and referred him to Dr. Ray W. Hester, a neurosurgeon.

Dr. Hester began treating Jordan on November 5, 2002. Dr. Hester reviewed the MRI performed on October 20, 2002. The MRI revealed that Jordan suffered a herniation of the L5/S1 disc. Dr. Hester saw Jordan a number of times over the course of approximately the next six weeks. On December 13, 2002, Dr. Hester admitted Jordan to St. Thomas Hospital. Dr. Hester and his partner, Dr. Berkman, performed back surgery on Jordan. The surgery entailed a decompression procedure in which the disc was removed and a fusion using mechanical stabilization involving pedicel screws in the bone in the inner space. Jordan remained hospitalized from December 13, 2002 through December 15, 2002.

Dr. Hester testified that Jordan reached maximum medical improvement ("MMI") on April 16, 2003. Jordan had remained off work from November 21, 2002 through April 16, 2003. Dr. Hester did not place any restrictions on Jordan, but did sign a medical impairment rating of 23% to the body as a whole as a result of these injuries. Dr. Hester ultimately testified that Jordan had an underlying degenerative joint which had been repeatedly traumatized at work. He further testified that Jordan did have a degenerative disc and that the bulging or rupture of the disc played a part in his situation, but Dr. Hester opined that was not his primary problem. Dr. Hester testified that his primary problem was the bad joint which had been traumatized by his work related duties. Dr. Hester further testified that, in his opinion, Jordan's work activities either aggravated his underlying degenerative disc problem or caused the onset of it. In short, Dr. Hester testified to a reasonable degree of medical certainty that the injuries suffered by Jordan were work related.

Dr. Martin Wagner, a board-certified neurologist, testified on behalf of Quebecor in this matter. Dr. Wagner reviewed Jordan's medical records, Jordan's deposition testimony, and Jordan's job description. Dr. Wagner did not examine Jordan. Dr. Wagner opined that Jordan suffered a

herniated disc on March 27, 2002, when he arose from the toilet while at home on that date. Dr. Wagner also testified that Jordan's job at Quebecor did not cause or aggravate the herniated disc or his underlying back condition. Dr. Wagner considered the August 2002 episode to be a minor flare-up of pain unrelated to Jordan's job, causing only muscle soreness. Dr. Wagner considered the October 2002 retaining wall incident to be a "very serious" episode of back pain. Dr. Wagner concluded that this incident, along with the pain suffered by Jordan that evening in the shower, worsened his herniated disc syndrome. In summary, Dr. Wagner testified that none of Jordan's back problems was work-related.

The trial court conducted a final hearing in this matter on September 11, 2003.[3] In addition to Jordan, the trial court heard live testimony from Danny Pack, Elizabeth Donaldson, Gary Moran, and David Marlin, all co-workers of Jordan at Quebecor. Douglas Parker, Jordan's father-in-law, and Tracy Parker, Jordan's sister-in-law, also testified at the hearing. The trial court also considered the deposition testimony of Dr. Hester and Dr. Wagner.[4] The trial court issued its ruling on September 9, 2005. The final order memorializing this ruling was entered on December 2, 2005. The trial court concluded that Jordan had suffered a work-related injury and awarded Jordan a judgment based on a 57.5% vocational disability to the body as a whole.

II. Issues

Quebecor presents the following issue on appeal:

1. Whether the trial court erred in finding that Jordan carried his burden of proof in establishing a causal connection between his back injury and his employment with Quebecor?

III. Standard of Review

The standard of review in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann. § 50-6-225(e)(2)*. *See also Layman v. Vanguard Contractors, Inc.*, 183 S.W.3d 310, 314 (Tenn. 2006). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v.*

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[3] During the course of the proceedings before the trial court, Jordan filed an Amended Complaint and a Second Amended Complaint that, *inter alia*, place the August 2002 and the October 2002 incidents at issue.

[4] During the trial, Quebecor sought to introduce an attending physician's statement completed by Dr. Berkman on April 16, 2003. Counsel for Jordan objected on the basis of hearsay. The trial court ultimately sustained the objection. The parties did agree to take Dr. Berkman's deposition at a later time. The deposition of Dr. Berkman was taken on January 23, 2004, and filed with the trial court on January 29, 2004. It does appear from the record that the trial court considered this deposition testimony in making its decision.

United Parcel Service, 92 S.W.3d 380, 383-84 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This Court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

IV. Analysis

The sole issue raised by Quebecor is whether Jordan carried his burden of proving that his injuries arose out of his employment. Quebecor contends that the expert testimony in this case is not sufficient to establish medical causation. To be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. § 50-6-102(13). The phrase "arising out of" refers to the cause or origin of the injury. *Hill v. Eagle Bend Mfg, Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997). An injury arises out of employment "where there is apparent to the rational mind upon consideration of all the circumstances, a causal connection" between the work and the injury for which benefits are sought. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001).

The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). Additionally, *Reeser* provides as follows:

> Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that the given incident "could be" the cause of the employee's injury, where there is also lay testimony from which it reasonably may be inferred that the incident was, in fact, the cause of the injury.

Reeser, 938 S.W.2d at 692. Moreover, in *Fritts v. Safety Nat. Cas. Corp.*, 163 S.W.3d 673, the Supreme Court reiterated this holding:

> Acknowledging the imprecision and uncertainty of medical proof of causation, any reasonable doubt must be construed in favor of the employee. Benefits may properly be awarded upon medical testimony that shows the employment "could or might have been the cause" of the employee's injury when there is lay testimony from which causation reasonably can be inferred.

Fritts, 163 S.W.3d at 678.

In this case, the trial court considered expert testimony from Dr. Hester and Dr. Wagner. Dr. Hester testified that Jordan's back problems were related to his work. On the other hand, Dr. Wagner opined that Jordan's job duties at Quebecor did not cause or aggravate the herniated disc or his underlying back condition. The trial court also apparently considered the deposition testimony of Dr. Berkman that was taken and filed after the final hearing, but before the decision was rendered. Dr. Berkman testified that he could not state an opinion on causation.[5] The trial judge has the discretion to conclude that the opinion of one expert should be accepted over that of another expert. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1991). The trial court chose to accept the testimony of Dr. Hester over Dr. Wagner and concluded that Mr. Jordan had suffered an injury in the course of and scope of his employment. Additionally, the lay testimony of Jordan's co-workers and family members clearly bolsters the proof of causation in this case. *See Reeser*, 938 S.W.2d at 692. Accordingly, we find no error in the trial court's decision on causation.

Quebecor goes to great lengths to impugn the credibility of Dr. Hester based on the fact that, during the course of these proceedings, Dr. Hester filed an intervening petition seeking an award of his medical expenses from Quebecor. Quebecor raised this issue in its initial brief, focused heavily upon it in its reply brief and in oral argument, and addressed it at length again in its supplemental reply brief filed after oral argument.[6] In its reply brief, Quebecor attempts to equate the assertion of this claim by Dr. Hester to the Tennessee Supreme Court case of *Swafford v. Harris*, 967 S.W.2d 319 (Tenn. 1998). *Swafford* involved a contingency fee contract entered into by a doctor who provided deposition testimony for a plaintiff in a personal injury action. The contingency fee contract provided that the doctor would receive 15 1/3% of any recovery the plaintiff received in the personal injury action. *Id*. at 320. We find *Swafford* inapposite to the instant case. There is no evidence in the record that Dr. Hester entered into a contingency fee contract with Jordan. Dr. Hester's claim was for a specific amount of medical services already provided to Jordan. While the filing of the intervening petition was unnecessary, and perhaps unwise, we find that it is simply one fact to consider in assessing the credibility of the expert testimony at issue in this case.[7]

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[5] Quebecor relies heavily upon the fact that Dr. Berkman filled out an Attending Physician's Statement on Jordan, dated April 16, 2003, on which Dr. Berkman checked that Jordan's condition was not work related. We find that this point is simply one factor to consider on the issue of credibility.

[6] Pursuant to a *per curiam* order entered on July 5, 2006, both parties were allowed to file supplemental briefs.

[7] Interestingly, Dr. Wagner testified that he has referred patients to Dr. Hester and that Dr. Hester has a fine reputation in Nashville.

V. Conclusion

For the foregoing reasons, we conclude that the evidence does not preponderate against the trial court's decision in this case. Accordingly, the judgment of the trial court is affirmed. The costs of the appeal are taxed to the appellants, Quebecor Printing, Inc. and Travelers Property Casualty.

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JEFFREY S. BIVINS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JULY 25, 2006 SESSION

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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 Appellants, Quebecor Printing, Inc. and Travelers Property Casualty, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM