IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 26, 2010 Session

MONTRAIZE THOMISON v. YATES SERVICES, LLC

Appeal from the Circuit Court for Rutherford County
No. 52675 Robert E. Corlew, III, Chancellor

No. M2009-01556-WC-R3-WC - Mailed - June 4, 2010
Filed - July 8, 2010

Employee alleged that he sustained two compensable injuries to his left knee. The first injury occurred on December 12, 2004, was accepted as compensable by employer, and resulted in an award of 15% permanent partial disability to the left leg. That award is not contested on appeal. Employee alleged that a second injury occurred on September 26, 2006. Employer denied liability for that injury. The trial court found that Employee sustained a second injury and awarded 30% permanent partial disability to the left leg. On appeal, Employer asserts that the trial court erred by finding that a compensable injury occurred, or in the alternative, that Employee sustained a permanent disability as a result of the injury. We conclude that the record contains no medical evidence of a causal nexus between the second injury and the alleged disability. Accordingly, we reverse the judgment of the trial court and remand the case.[1]

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

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

John R. Rucker, Jr., Murfreesboro, Tennessee, for the appellant, Yates Services, LLC.

---

[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.

Robert O. Bragdon, Murfreesboro, Tennessee, for the appellee, Montraize Thomison.

MEMORANDUM OPINION

Factual and Procedural Background

Yates Services, LLC ("Employer") provides support services at the Nissan assembly plant in Smyrna, Tennessee. Montraize Thomison ("Employee") began working there in 2001. He performed various tasks including cleanup, driving a forklift, and supplying parts to workers on the assembly line.

Employee sustained an injury to his left knee in December 2004, which is not at issue in this appeal. Employee alleged that he also sustained a second injury on September 26, 2006. He testified that the injury occurred in the early morning hours as he was stepping over a conveyer belt with a "tote" containing parts to be taken to a nearby area on the assembly line. He stated that he twisted his leg, stumbled forward, fell against a "stack of totes" on the opposite side of the conveyor, but he did not fall to the ground. He had immediate pain in the knee; however, he was able to "finish stocking the line." At that point, it was time for a scheduled lunch break, and he went to the plant medical office. Employee's account of the event was confirmed by the testimony of Malachi Carmichael, a co-worker.

Employee testified that at the medical office he spoke to safety manager Ed Toombs,[2] who then called Employee's supervisor, Jamie Hall. Employee further testified that he told Mr. Toombs and Mr. Hall that he had hurt his leg and that he wanted to go to the emergency room.[3] Mr. Hall reportedly told him that he would need to speak to day shift safety manager Gerald Shaw who would arrive later in the morning. Employee requested and received permission to leave work, and he did so between four and five o'clock in the morning.

Mr. Hall testified at trial and confirmed that he spoke with Employee in the medical department on that morning. However, he stated that Employee told him only that his knee was swollen and hurting, and Employee specifically denied that any injury had occurred. He agreed that he gave Employee permission to leave work early at that time.

Employee made an appointment to see Dr. Christopher Gafford, his primary care

---

[2]Mr. Toombs passed away prior to the trial.

[3] While it is not clear whether Employee explicitly said that the injury had occurred on the job, a fair reading of his testimony is that he considered it to be obvious that he was reporting a work injury.

physician, later that morning. Dr. Gafford testified by deposition, stating that his office note concerning Employee's visit states that Employee's chief complaint at that time was "left knee pain with edema (swelling) for three days." Dr. Gafford also testified that Employee reported no injury at that time.[4] Dr. Gafford ordered an MRI and took Employee off work for a week; Employee testified that he faxed a copy of Dr. Gafford's work excuse to Mr. Shaw. The MRI was performed on October 6, 2006, and Employee returned to Dr. Gafford on October 9. It is not disputed that Employee contacted Mr. Shaw around that time. Employee testified that he asked to fill out an "incident report" but that he was not permitted to do so because his (then) attorney would not release the result of the MRI to Employer. Mr. Shaw denied that Employee made any mention of a work injury at that point in time.

On October 16, Employee's attorney sent a letter to Employer's attorney, which states, "Apparently, [Employee] has sustained another [meniscus] tear from regular duty work he has been performing. . . . I do not know, of course, whether this is a new injury yet[.]" The letter requested that an appointment with Dr. Steineagle be arranged, but this did not occur. Employee was given a panel of physicians for referral, from which he selected Dr. Baxter. Dr. Baxter, however, would not see him. A second panel was given, and Employee selected Dr. O'Brien.[5]

Employee's claim was ultimately denied, and he continued to work for Employer. He was referred through a primary care physician (other than Dr. Gafford) to Dr. William Jekot, an orthopaedic surgeon. Dr. Jekot performed an arthroscopic surgical procedure on February 4, 2008. During that procedure, he found and sought to repair extensive arthritic changes in the knee. While under Dr. Jekot's care, which lasted until July 2008, Employee exhausted his FMLA leave and was terminated as a result. He sought employment and retraining thereafter, but he remained unemployed at the time of the trial.

Dr. David Gaw, an orthopaedic surgeon, performed two medical examinations at the request of Employee's attorney. He completed a C-32, which was submitted by Employee in accordance with Tenn. Code Ann. § 50-6-235(c) (2008). Employer then exercised its right to take a cross-examination deposition. Dr. Gaw's first examination occurred on August 30, 2006, and pursuant to American Medical Association Guides, he assigned 10% impairment to the left leg based upon the surgical procedures performed by Dr. Steineagle. Dr. Gaw's second examination occurred on November 3, 2008, and he assessed an additional 10% impairment to the leg based upon arthritic changes shown on x-rays. Dr. Gaw testified

---

[4] Employee disputed this assertion, testifying that he did inform Dr. Gafford of the work injury during the September 26, 2006 appointment

[5] Although Employer references Dr. O'Brien's report in its brief, that document is not in the record.

that Employee told him only of the initial December 2004 injury and did not mention the September 2006 injury to him. Dr. Gaw did agree that Dr. Jekot's note of his first appointment with Employee, which was among the records reviewed as part of the medical examination, referred to the second alleged injury. However, Dr. Gaw was not asked for, nor did he offer, an opinion concerning the causal relationship between the alleged September 2006 injury and the additional impairment he assigned in November 2008.

On the date of the trial, Employee was twenty-eight years old. He was a high school graduate with no additional education. Prior to being hired by Employer, he worked as a stocker at a grocery store and as part of a tree-trimming crew for Fayetteville Utility. When he was in the ninth grade, he sustained a torn ACL in his left knee. That injury was surgically repaired, and he was able to return to playing basketball and other activities thereafter. Employee testified that his knee had been painful and tended to swell after the December 2004 injury. The two surgeries performed by Dr. Steineagle had only slightly improved his symptoms. However, he had been able to return to work for Employer in his regular job after being released by Dr. Steineagle. He testified that his knee "[S]wells a lot. It aches a lot. I can't be on it for a long period of time. I pretty much can't do the things I was doing before." He reported that he had daily pain in the knee which constituted a five to a nine on a numeric pain scale of ten. He took over-the-counter pain relievers such as Tylenol and Advil. He had unsuccessfully looked for work.

The trial court found that Employee had sustained injuries in December 2004 and September 2006. It awarded 15% PPD to the left leg for the first injury and 30% PPD to the leg for the second injury. Employer has appealed, asserting that the trial court erred by finding that Employee sustained a second compensable injury on September 26, 2006.

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 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. *Madden v. Holland Group of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). 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 Systems, 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

Employer contends that the trial court erred by finding that Employee sustained a compensable injury on September 26, 2006. It states that "there is no medical evidence in the record which proves that the employee had an injury arising out of his employment." Its position is that the evidence tends to show that no event at all occurred on September 26, or if such an event did occur, there is no medical evidence that it caused an additional injury to Employee's left knee.

As to the first contention, Employee testified that the second injury in September 2009 occurred, and his account was confirmed by the testimony of his co-worker, Mr. Carmichael. It is undisputed that he went to the medical office shortly thereafter and that he spoke to Mr. Toombs and Mr. Hall about his knee, although the particulars of those conversations are disputed. He left work early and sought medical treatment from his personal physician that morning. Dr. Gafford testified that Employee did not tell him of a particular injury at that time; however, Employee had symptoms which were significant enough to warrant an MRI and being excused from work for a week.

It is also undisputed that Employee's attorney advised Employer's attorney within approximately ten days of the date of the MRI scan of a possible new injury, and Employee advised Dr. Jekot that a specific event occurred on September 26, 2006. Dr. Jekot ultimately found reason to perform a surgical procedure on the knee. Additionally, Dr. Gaw found that Employee's impairment increased between August 2006 and November 2008. However, he was unaware of the alleged September 2006 event and was not asked to express an opinion concerning a causal relationship between such an event and the changes he observed in the condition of Employee's knee at the time of his second examination.

As to the second contention regarding causation, we are mindful of our obligation to resolve all reasonable doubts as to causation in favor of the Employee, *Phillips v. A. & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004), and of the presumption of correctness which attaches to the trial court's findings, *Skinner v. CNA Ins. Co.*, 824 S.W.2d 164, 166 (Tenn. 1992). Even taking those factors into account, we conclude that the evidence in this record preponderates against the trial court's finding that Employee sustained an additional permanent injury as a result of the alleged September 2006 event. Although the occurrence of that event is disputed, there is both direct evidence, in the testimony of Employee and Mr. Carmichael, and circumstantial evidence, in the form of Employee's visits to the medical department and his personal physician within hours of the event, to support a finding that he twisted his knee at that time. However, there is simply no medical evidence of a causal

relationship between that event and Dr. Gaw's subsequent finding of increased impairment.

"In all but the most obvious cases, such as the loss of a limb or of an eye, medical causation and the permanency of an injury must be established by expert medical testimony." *Washington County Bd. of Ed. v. Hartley*, 517 S.W.2d 749, 751 (Tenn. 1974). The employee's burden can be satisfied by "medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury." *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). Dr. Gaw's primary diagnosis after his November 2008 examination was: "Traumatic arthritis at patellofemoral joint of the left knee." The relationship between that condition and the September 2006 incident is not as "obvious . . . as the loss of a limb or an eye," *Hartley, supra,* and neither Dr. Gaw nor or any other physician stated that the incident "could be the cause" of that condition. *See Excel Polymers v. Broyles*, 302 S.W.3d 268, 274-75 (Tenn. 2009). Considering all the evidence, we are constrained to conclude that the evidence preponderates against the trial court's conclusion that Employee sustained additional permanent disability as a result of the September 2006 incident.

Conclusion

The case is remanded for entry of a new judgment. The award of 30% permanent partial disability to the left leg for an injury of September 2006 is reversed and that portion of Employee's claim is dismissed. The award of 15% permanent partial disability for an injury of December 2004 is undisturbed. Costs are taxed to Montraize Thomison, for which execution may issue if necessary.

_____

WALTER C. KURTZ, SENIOR JUDGE

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

MONTRAIZE THOMISON v. YATES SERVICES, LLC

Circuit Court for Rutherford County
No. 52675

No. M2009-01556-WC-R3-WC - Filed - July 8, 2010

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 are taxed to Montraize Thomison, for which execution may issue if necessary.

PER CURIAM