

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 25, 2008 Session

TRINIDY WARE v. McKESSON CORPORATION

**Direct Appeal from the Chancery Court for Shelby County
No. CH-02-1633-3 Kenny W. Armstrong, Chancellor**

No. W2007-01181-WC-R3-WC - Mailed February 17, 2009; Filed March 30, 2009

In this workers' compensation action, the employee alleged that he sustained an injury to his lower back on May 1, 2002. The trial court ruled that the employee had failed to carry his burden of proving that he had sustained a compensable injury. The employee appealed, contending that the evidence preponderates against the trial court's finding. We affirm the trial court's judgment.¹

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, C. J., and DAVID G. HAYES, SR. J., joined.

Christopher L. Taylor, Memphis, Tennessee, for the appellant, Trinity Ware.

Thomas P. Cassidy, Jr. and Clifton V. Bodine, III, Memphis, Tennessee, for the appellee, McKesson Corporation.

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Trinity Ware drove a forklift and similar machines for McKesson Corporation's pharmaceutical warehouse. He alleged that he sustained an injury to his lower back on May 1, 2002, as a result of stepping down awkwardly from a forklift. Mr. Ware testified that he suffered immediate sharp pain at the time of the incident but continued to work. Later during the shift, his

¹This 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 a hearing and a report of findings of fact and conclusions of law.

supervisor noticed him grimacing and suggested that he go home and rest. Mr. Ware testified that he went home as suggested but did not advise the supervisor of the alleged incident.

On May 2, 2001, Mr. Ware saw his primary care physician, Dr. Charles Woodall. He reported left hip and low back pain “without any injury.” Dr. Woodall conducted an examination and reached a tentative diagnosis of left hip tendinitis and low back pain. He prescribed an oral steroid medication and ordered an MRI of the hip joint. After the initial May 2, 2001, visit, Mr. Ware never complained to Dr. Woodall of having back pain. The MRI was performed on May 10, 2001, and was reported as normal. Dr. Woodall prescribed physical therapy, which appeared to improve Mr. Ware’s symptoms. On July 27, Dr. Woodall released Mr. Ware to full activities.

Mr. Ware consulted Dr. Woodall for unrelated medical problems in September and October 2001. He reported no problem with his hip during these visits. In December, he again sought treatment for left hip pain. Mr. Ware had no further consultations with Dr. Woodall.

Prior to May 2, 2001, Mr. Ware had been treated for similar symptoms by Dr. Jonathan Brody, who was also a primary care physician. Dr. Brody testified that he saw Mr. Ware on March 19, 2001. At that time, Mr. Ware reported low back and left hip pain. Dr. Brody prescribed Motrin for the low back pain. Mr. Ware returned to Dr. Brody on April 18, 2001, “complaining of the same discomfort and back pain.” Dr. Brody prescribed viox, an anti-inflammatory medication, and soma, a muscle relaxer. Mr. Ware returned five days later on April 23, with no improvement of his symptoms. Dr. Brody ordered an MRI of the lumbar spine, which was performed on April 27. Although Mr. Ware did not return to Dr. Brody, the report of the MRI was reviewed by Dr. Woodall, and subsequent physicians. That report noted a “small L-5 disk extrusion with prominent central disk protrusion.”

Mr. Ware testified in his discovery deposition and stated in response to written interrogatories that he had no low back problems and had received no treatment for low back pain prior to May 1, 2001. At trial, he admitted that he did have back pain prior to May 1 and that he received the treatment outlined by Dr. Brody.

Payroll records introduced by McKesson indicate that Mr. Ware received short term disability benefits beginning in late April 2001 until June 24, 2001. Mr. Ware returned to full duty at that time.

Mr. Ware consulted Dr. Hal Bishop, an orthopaedic surgeon, on April 3, 2002. He reported to Dr. Bishop that he had been having back pain for about a year, beginning when he twisted while stepping off of a machine. Dr. Bishop examined Mr. Ware and reviewed reports of the MRI studies ordered by Dr. Brody and Dr. Woodall. Dr. Bishop testified by deposition. He diagnosed Mr. Ware as having degenerative disk disease, which was aggravated by “jumping down consistently, always on the left leg from a height of 6 to 7 inches, doing this repeatedly”

A little more than a month later, on May 7, 2002, Mr. Ware gave written notice of his work injury to McKesson. McKesson referred Mr. Ware to a Concentra medical center that subsequently

referred him to Dr. Gary Kellett, a neurosurgeon.² Dr. Kellett examined Mr. Ware on May 30, 2002. He concluded that Mr. Ware was not a surgical candidate and released him to work without restrictions.

Mr. Ware was then provided with a panel of physicians, from which he selected Dr. John Varner, an orthopaedic surgeon. Dr. Varner testified by deposition. He examined Mr. Ware on June 7, 2002. Dr. Varner opined that Mr. Ware had a “remote left hip strain.” He also stated that Mr. Ware did not require additional treatment for his back, was able to return to work with no restrictions and retained no permanent anatomical impairment.

Mr. Ware was evaluated by Dr. K. Blake Ragsdale, another orthopaedic surgeon, on June 12, 2002. He was seen by Dr. Ragsdale’s partner, Dr. Michael H. Lynch, on July 3, and again by Dr. Ragsdale on July 10, 2002. At that time, Dr. Ragsdale recommended an epidural steroid injection, but Mr. Ware’s workers’ compensation claim was denied by McKesson and that treatment was not received. Dr. Ragsdale did not consider surgery appropriate for Mr. Ware.

Mr. Ware returned to Dr. Bishop, who in turn referred him to Dr. Harry Friedman, a neurosurgeon. Dr. Friedman initially evaluated Mr. Ware on September 18, 2002. He ordered a second MRI scan of the lower back, which showed a “bulging or ruptured” disk at the L5-S1 level. Dr. Friedman recommended surgery, which was performed on September 27, 2002. Dr. Friedman testified by deposition. He expressed his opinion that the condition which he surgically repaired was related to the May 1, 2001 incident “[a]ssuming there was no [antecedent] injury and everything started with that particular injury and, then, there was a continuum up until I saw him.” He assigned an anatomical impairment of 10% to the body as a whole. He did not place any permanent restrictions upon Mr. Ware’s activities.

On the date of trial, Mr. Ware was thirty-one years old. He had attended school into the tenth grade and subsequently obtained a GED. At the time the trial took place, he was taking classes to become a licensed loan officer but had not completed that course of instruction. He had previously worked in restaurants, a day care center, manufacturing, and in warehouses, including a prior period of work for McKesson. He returned to work after his surgery, but was subsequently terminated in April 2004. The event that led to his termination occurred when he left the premises on his lunch period without passing through security, in violation of company rules. After termination, he obtained a job with a competitor of McKesson, earning a greater wage.

The trial court issued a written decision, finding that Mr. Ware had failed to sustain his burden of proof that he had suffered a compensable injury, and dismissed the claim.³ Mr. Ware has

²Dr. Kellett died at an unspecified date thereafter. His clinical note is included in the record as an exhibit.

³The trial court also found that Mr. Ware’s claim was not barred by the statute of limitations but this finding has not been appealed.

appealed from the judgment, asserting that the trial court erred by finding that he did not sustain a compensable injury.

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) (Supp. 2007). 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where 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. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992).

ANALYSIS

Mr. Ware contends that the evidence preponderates against the trial court's finding on the issue of causation. In its decision, the trial court referred specifically to three issues raised by the evidence: (1) discrepancies between Mr. Ware's testimony regarding the alleged May 1, 2001 injury and the contemporaneous medical records; (2) discrepancies between Mr. Ware's trial testimony and his discovery responses; and (3) discrepancies between the proof at trial and the factual assumptions relied upon by Dr. Friedman in reaching his opinion on the causation issue.

The trial court noted that, although Mr. Ware saw Dr. Woodall on the day after the alleged injury occurred, he did not mention a work injury to the doctor and instead gave a history of back pain without an injury. Further, he did not mention such an injury to Dr. Woodall at any of the several subsequent visits for treatment of the symptoms alleged to have been the result of that event. Moreover, the symptoms that Mr. Ware described to Dr. Woodall on May 2, 2002, were essentially the same as those that he described to Dr. Brody during the weeks prior to the alleged injury. Mr. Ware asserts that he did not tell Dr. Woodall about the May 2001 incident because he did not know he had a work-related injury until he saw Dr. Bishop in April 2002. In support of his argument, he cites Banks v. United Parcel Service, Inc., 170 S.W.3d 556 (Tenn. 2005) and other cases addressing the interplay between the notice requirement, Tennessee Code Annotated section 50-6-201 (Supp. 2001), and gradually-occurring injuries.

Mr. Ware's argument is misplaced in two respects. First, notice is not at issue in this appeal. Second, Mr. Ware contended at trial that he sustained a specific injury on a particular date—May 1, 2001. The absence of any reference to that injury in subsequent medical records generated shortly after the alleged event casts doubt upon Mr. Ware's account of the occurrence. In our opinion, the

trial court was justified in considering Mr. Ware's failure to report the incident to his physician the day after he alleges it occurred.

Mr. Ware does not address in his brief the discrepancies between his discovery responses and his trial testimony. Those differences also lessen the credibility of his testimony and provide support for the trial court's conclusion that Mr. Ware did not sustain his burden of proving causation.

Dr. Friedman testified that his opinion regarding causation was based upon the assumption that Mr. Ware's symptoms began on the date of the alleged injury and continued thereafter. Dr. Brody's records disprove the first assumption. Dr. Woodall's testimony that Mr. Ware's condition was "resolved" in July 2001, and that Mr. Ware did not report any low back pain during office visits in September, October, and December 2001 tend to disprove Dr. Friedman's second assumption.

Mr. Ware asserts that the testimony of Dr. Bishop that Mr. Ware had sustained a gradual injury as a result of his work provides an alternative or additional basis for his theory of causation. However, Dr. Bishop's testimony is at odds with Mr. Ware's theory of a specific injury occurring on May 1, 2002. Moreover, Dr. Bishop's opinion was based in large measure upon the April 27, 2001, MRI scan, which was taken *before* the date of the alleged injury. The factual bases of the testimony of Dr. Varner and the opinion of the late Dr. Kellett, as expressed in his clinical note, are more consistent with the evidence in the record than the assumptions relied upon by Dr. Friedman and Dr. Bishop. In consideration of these factors, we cannot conclude that the evidence in this record preponderates against the findings of the trial court.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to the appellant, Trinity Ware, and his surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

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JUDGMENT ORDER

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 on appeal are taxed to the Appellant, Trinity Ware, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM