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

April 23, 2007 Session

WARREN TRUSS v. HARDIN'S SYSCO FOOD SERVICES, INC.

Direct Appeal from the Circuit Court for Shelby County
No. CT-007015-03   Rita L. Stotts, Judge

No. W2006-00857-WC-R3-CV - Mailed August 9, 2007; Filed September 14, 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 section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court found that the employee did not sustain a permanent disability and was not entitled to temporary total disability benefits. The employee has appealed, contending that the trail court erred by giving more weight to the opinion of the treating physician than to the evaluating physician and by finding that he did not sustain a permanent injury. We affirm the trial court's ruling in all respects.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Circuit Court Affirmed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ALLEN WALLACE, SR. J., joined.

Alex C. Elder, Memphis, Tennessee, for the appellant, Warren Truss.

Thomas P. Cassidy, Jr., Memphis, Tennessee, for the appellee, Hardin's Sysco Food Services, Inc.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Warren Truss was employed by Hardin's Sysco Food Services, LLC, ("Hardin Sysco") as a truck loader beginning in January 2001. He became a "spotter," a job where one moves empty semi-tractor trailers from one location to another within the "yard." In September 2003, at his request, he began training as a truck driver. On September 19, 2003, Mr. Truss testified that the refrigeration unit of the truck on which he was training malfunctioned and that it was necessary for the truck to be unloaded by hand. While Mr. Truss was assisting the trainer and some sales personnel in unloading the truck, he experienced a pain in his groin. The incident occurred near the

end of the work day on Friday, and Mr. Truss did not recall whether he advised his trainer of the injury at the time.[1] The trainer, Raymond Slavings, testified that Mr. Truss did not tell him or otherwise indicate that he was injured at any time during the day on which the alleged injury occurred. Over the weekend, Mr. Truss' pain increased, and on that Sunday he sought treatment at a local emergency room. Mr. Truss testified that he called Hardin Sysco and informed a person he identified as "Craig," the router at Hardin Sysco, that he had injured himself at work and was seeking medical treatment.

Mr. Truss received treatment at the emergency room and was referred to an orthopaedic surgeon, Dr. Ana K. Palmieri. On the next day, Monday, September 22, Mr. Truss called Hardin Sysco to advise that he would not be at work pending Dr. Palmieri's examination. Shortly thereafter, Hardin Sysco arranged for Mr. Truss to begin receiving short-term disability benefits. The record is not clear as to how or by whom that process was initiated. Dr. Palmieri treated Mr. Truss conservatively, referring him to Dr. Alan Kraus for an epidural spinal block.

On November 7, 2003, Mr. Truss came to Hardin Sysco's premises and completed paperwork to initiate a workers' compensation claim. He was offered a panel of physicians, and he selected Dr. John J. Lochemes. Dr. Lochemes, an orthopaedic surgeon certified by the American Board of Orthopaedic Surgery and the National Board of Medical Examiners, testified by deposition. He first saw Mr. Truss on November 26, 2003. Mr. Truss reported the September 19 injury and the resulting low back pain. Dr. Lochemes reviewed x-rays and an MRI of Mr. Truss' spine that revealed significant degenerative changes in the thoracic and upper lumbar vertebrae. In Dr. Lochemes' opinion, these changes pre-existed his injury, would not have been aggravated by lifting, and were not involved in his low back pain. He also noted an annular bulge at the L4-5 level but testified that condition would be normal for a person of Mr. Truss' age. In Dr. Lochemes' opinion, Mr. Truss had sustained a mechanical back sprain with no anatomical change and would return to his pre-injury condition over time. He initially placed Mr. Truss on light duty and ordered a functional capacity evaluation. Dr. Lochemes also recommended a work hardening program. Because Mr. Truss was non-compliant with that program and had previous experience with fitness training in a gym, Dr. Lochemes suggested he devise his own conditioning program. Dr. Lochemes continued to follow Mr. Truss until January 13, 2004. He felt at the time that after another sixty days of conditioning, Mr. Truss would have returned to his pre-injury condition and established March 13, 2004, as the date of maximum medical improvement. As of that date, Dr. Lochemes felt there was no need for further restrictions on Mr. Truss's activities. Dr. Lochemes believed Mr. Truss would retain no permanent impairment as a result of his injury.

Dr. Joseph Boals, an orthopaedic surgeon also certified by the American Board of Orthopaedic Surgery, testified by deposition. He conducted an independent medical evaluation of Mr. Truss on March 2, 2004. In Dr. Boals' opinion, Mr. Truss had aggravated his pre-existing arthritic condition as a result of the September 19, 2003, incident. He did not base his opinion on

[1] Notice was a contested issue at trial. The trial court ruled that Mr. Truss did not give timely notice of his injury but that Hardin Sysco was not prejudiced by the delay. That issue has not been raised in this appeal.

objective findings but deduced there must have been an anatomical change in Mr. Truss' back condition because of the increased pain he suffered following the incident. Dr. Boals assigned an impairment of 8% to the body as a whole. He suggested that Mr. Truss should avoid activities which might cause increased pain, such as prolonged walking, standing, stooping, squatting, bending, excessive movement of the back, rotation, or bending.

Following Mr. Truss' initial appointment with Dr. Lochemes, Hardin Sysco placed him in a light duty position as a security guard. Mr. Truss remained in that position until March 2004, when he had surgery for an unrelated foot problem. After his release from that surgery to return to work in June 2004, Hardin Sysco offered him a position as a truck driver. Mr. Truss declined the offer and testified he did not think he could perform the loading and unloading required of a driver. He thought he could perform the duties of a spotter, but that job was not offered him. Mr. Truss and his wife were co-owners of a sports memorabilia shop which they had opened in November 2003, and from June 2004 to June 2005, he worked in that business.

In June 2005, Mr. Truss obtained new employment as a spotter for Star Transportation. In connection with his application, Mr. Truss signed a document setting forth the job description for the position he was seeking. The description stated he would be required to lift objects weighing one hundred pounds with frequent lifting, stooping, crawling, and crouching. On his job application, Mr. Truss stated there were no functions enumerated in the job description that he would be unable to perform. On a Medical Examination Report, signed by Mr. Truss, he indicated he had no chronic low back pain although he did note the September 19, 2003, injury. Also, in the application process Mr. Truss executed a Workers' Compensation Background Check in which he disclosed the September 19, 2003, injury, described it as a "lower back strain," and indicated he had no permanent impairment as a result.

The case was tried on July 14, 2005. In its written findings of fact and conclusions of law, the trial court stated that it found "the opinion of the treating physician to be more persuasive than that of Dr. Boals, particularly in light of [Mr. Truss's] own testimony and his vocational ability." The trial court went on to rule that the injury did not result in a permanent vocational disability.

Mr. Truss has appealed contending that the trial court erred by giving greater weight to the testimony of the treating physician, Dr. Lochemes, than to the testimony of the evaluating physician, Dr. Boals. Mr. Truss further contends that the trial court erred by finding that his injury did not result in permanent partial disability.

II. STANDARD OF REVIEW.

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). The existence and extent of permanent partial disability are questions of fact. Walker v. Saturn Corp., 986 S.W.2d 204,

207 (Tenn. 1998). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). This 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). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. Gray v. Cullom Machine, Tool & Die, 152 S.W.3d 439, 443 (Tenn. 2004).

III. ANALYSIS.

The trial court issued written findings of fact and conclusions of law which state, inter alia, that "[t]he Court finds the opinion of the treating physician to be more persuasive than the opinion testimony of Dr. Boals, particularly in light of the Plaintiff's own testimony and his vocational ability." Mr. Truss argues that the evidence preponderates against this finding. Both Dr. Boals and Dr. Lochemes testified by deposition. Therefore, the appellate court is able to make an independent review of that testimony. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004). However, when expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996); Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983).

In the case before us, both physicians observed that Mr. Truss was suffering from a pre-existing degenerative disc disease. The general rule is that aggravation of a pre-existing condition may be compensable but not if it results only in increased pain or other symptoms caused by the underlying condition. Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d 888, 891 (Tenn. 1991). An employer is responsible for workers' compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, but only if the employment causes an actual progression or aggravation of the prior disabling condition or disease. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 488 (Tenn. 1997); White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992); Talley v. Va. Ins. Reciprocal, 775 S.W.2d 587, 592 (Tenn. 1989). While it is true that an employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability greater than if he or she had not had the pre-existing conditions; if work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident. Sweat v. Superior Indus., Inc., 966 S.W.2d 31, 32-33 (Tenn. 1998). To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. Id.

Dr. Lochemes was the treating physician but saw Mr. Truss relatively few times. He based his conclusions upon a review of the diagnostic testing – an x-ray and an MRI; whether the significant degenerative disk disease he observed in those images matched the history and complaints of Mr. Truss; and, in part, upon the reports of the functional capacity evaluation that was performed. Dr. Boals saw Mr. Truss shortly after he was discharged by Dr. Lochemes. He was skeptical about

the usefulness of the functional capacity evaluation and deduced there had been an aggravation of Mr. Truss's pre-existing arthritic condition because he suffered additional pain following the incident. In our view, Dr. Boals' testimony that there must have been an aggravation of the pre-existing condition based solely upon the fact he suffered increased pain fails to meet the legal standard set out above, i.e., that an employee must prove something more than increased pain from a pre-existing condition in order to recover benefits under the workers' compensation law. Dr. Lochemes' conclusions can be fairly characterized as being more persuasive in view of the legal standards applicable to pre-existing conditions and more consistent with the subsequent activities of Mr. Truss and the statements made by him in the application process at Star Transportation. For that reason, the trial court's decision to accredit the testimony of Dr. Lochemes is not only within its discretion but is supported by other facts and circumstances contained within the record.

Mr. Truss also contends that the trial court erred in finding that he did not sustain a vocational disability as a result of his injury. Extent of disability is a question of fact. Collins v. Howmet Corp., 970 S.W2d 941, 943 (Tenn. 1998). The trial court's finding on this issue is supported by the opinion testimony of Dr. Lochemes. In addition, Mr. Truss's eventual return to a job nearly identical to the one he held prior to his injury and the statements made by Mr. Truss in his subsequent job application that he was capable of lifting up to one hundred pounds, that he suffered no chronic low back pain, and that he retained no impairment as a result of this injury also support the trial court's finding. After our independent review of the evidence, we conclude that the evidence does not preponderate against the trial court's finding that Mr. Truss did not sustain a permanent disability.

CONCLUSION

The judgment of the trial court is affirmed in all respects. Costs are taxed to Warren Truss and his surety, for which execution may issue if necessary.

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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, Warren Truss, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM