IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 21, 2015 Session

KEITH A. LAY V. BRIDGESTONE AMERICAS, INC., a/k/a BRIDGESTONE AMERICAS HOLDING, INC., and OLD REPUBLIC INSURANCE CO.

Appeal from the Circuit Court for Rutherford County
No. 62385; J. Mark Rogers, Judge

No. M2015-00057-SC-R3-WC – Mailed November 17, 2015
Filed December 29, 2015

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. The trial court found that Employee suffered work-related injuries to both shoulders and awarded twenty percent permanent partial disability to the body as a whole. Employer argues that the trial court erred in finding that Employee suffered a work-related injury and contends that the award was excessive. We affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right; Judgment of the Trial Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which JEFFREY BIVINS, J., and BEN CANTRELL, J., joined.

Nicholas S. Akin and Chad Marcus Jackson, Nashville, Tennessee, for the appellants, Bridgestone Americas, Inc., and Republic Insurance Co.

Roger Steven Waldron, Murfreesboro, Tennessee, for the appellee, Keith A. Lay.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Keith A. Lay ("Employee") was born on September 3, 1977. After graduating from high school in 1995, Employee began working for Bridgestone ("Employer") in July of 1996 at its plant in Decatur, Illinois. His duties included loading rubber and

driving a forklift. After being laid off in December of 2001, he was transferred to Employer's plant in LaVergne, Tennessee, in March of 2002. His duties included loading rubber onto conveyor belts and working in the stock cutter department.

Employee described his work as physically demanding.[1] In particular, he often was required to clear rubber from jammed hopper bins, which required him to stand on his toes, reach over his head, place a metal bar inside the hopper, and pull down on the bar with great force. In July of 2004, he injured both shoulders while engaged in this activity; although he reported the incident to his supervisor, he did not receive medical treatment and did not miss any work. Sometime in 2005 or 2006, Employee felt a popping sensation in both shoulders while again clearing a jammed hopper bin. He saw Dr. Lane Tippens in Employer's medical department, who advised him to take ibuprofen and to do home exercises. Dr. Tippens did not send Employee for an MRI, nor did he impose any work restrictions. Employee did not miss any time from work. According to Employee, the injuries improved to a point where he felt "decent" and did not have pain or extreme discomfort unless he was clearing hopper bins.

On September 23, 2008, Employee was once again clearing a jammed hopper bin when he felt a "pop" and "burning" in both shoulders. Although the symptoms were similar to those he suffered on the prior occasions, Employee testified that the injury was different because the pain in his right shoulder affected his underarm and the pain in his left shoulder extended into his neck. After reporting the injuries to Employer and seeing Dr. Janet Pelmore, Employee returned to Dr. Tippens, who prescribed ibuprofen and physical therapy. When he continued to have pain, Employee was referred to another physician for a series of cortisone shots. The cortisone shots provided limited relief for four or five days at a time. Employee did not miss any work or have any restrictions due to the injuries even though he was working twelve-hour shifts and overtime.

Employee was laid off in March of 2009 and collected unemployment benefits for a period of time. During the layoff, he completed a one-month course in heating and air conditioning and received his HVAC certification. Although he worked for a heating and air company in November of 2009, he quit after only two days because he did not think the company was honest and because his left knee injury made it difficult to work under houses. Employee's shoulders did not hurt when he was not working, and he did not seek additional treatment in 2009. Employee admitted that he aggravated his shoulders in November of 2009 in two non-work related incidents.[2] Thereafter, in January or February

[1] In 1996 or 1997, Employee injured his back and received a settlement. In 2001, he injured his left knee, which resulted in two surgeries and restrictions against bending or lifting; he received a settlement of $23,000.

[2] One incident involved getting out of his pickup truck and the other involved putting a five-gallon gas can in his truck.

of 2010, Employee obtained a position making toothpaste tubes with Cebal Americas in Shelbyville, Tennessee.

In March of 2010, Employee was called back to work by Employer, but he was to be sent to a plant in Des Moines, Iowa. He accepted the position even though he initially had to leave his wife and children in Tennessee. He admitted that he did not report any problems with his shoulders when he underwent a physical exam before returning to work; however, he explained that he did not have a diagnosis for his shoulder injuries because he had never received an MRI. Although Employee later had an opportunity to return to the plant in LaVergne, he declined because he was offered a lower hourly rate. At the Des Moines plant, Employee primarily drove a forklift, which did not cause pain in his shoulders; however, he experienced pain in his shoulders when he was assigned to put springs on tires.

In November of 2010, Employee reported ongoing problems with his shoulders to his primary care physician, and he was sent to Dr. Cook for an MRI. Although Employee believed that his ongoing symptoms related to his September of 2008 injury, he had continued to work without restrictions because he could not afford to take time off. In May of 2012, Employee underwent surgery on his right shoulder performed by an orthopedic surgeon in Iowa; in September of 2012, he underwent surgery on his left shoulder. Employee testified that both shoulders improved following surgery, though he re-injured his left shoulder during subsequent physical therapy. Employee testified that at the time of trial, both shoulders felt "pretty good," though he had occasional pain or discomfort.

Dr. David Gaw, a board-certified orthopedist, testified that he examined Employee on April 15, 2013. According to Dr. Gaw, Employee reported that he suffered work-related injuries to his right and left shoulders in September of 2008 and that he underwent surgery on both shoulders in 2012. Employee stated that his right shoulder felt better after surgery, but that his left shoulder did not improve as much. He also developed pain in his chest during physical therapy after the surgeries. Employee reported that his left shoulder was painful when he engaged in pushing or pulling activities and when he brought his left arm across his body; he had pain in his right shoulder when he reached overhead. He did not have pain or other symptoms when he kept his arms down by his side with his hands at waist level.

Dr. Gaw testified that he reviewed Employee's medical records, including the results of an MRI conducted in December of 2010. He stated that Employee had an impingement in his right shoulder and a labral tear in his left shoulder. Dr. Gaw testified that Employee had well-healed scars from his surgeries but no other visual abnormalities. Employee had a normal range of motion in his left shoulder; although he had no weakness in the left shoulder girdle, "there was some pain to externally rotate the shoulder against resistance." Employee had a normal range of motion in his right

shoulder, but he had "moderate soreness and tenderness around the acromioclavicular joint, over the acromion, and around the rotator cuff." Dr. Gaw testified as follows:

> [Employee] is post-operative right shoulder surgery and arthroscopy with subacromial decompression for impingement syndrome. He is post-operative left shoulder surgery arthroscopy and debridement for a labral tear as well as subacromial decompression for impingement syndrome. [Employee] had a pectoralis muscle strain on the left side . . . .

Dr. Gaw stated that Employee had received excellent care for the injuries and that the surgical procedures were medically necessary. He concluded that, "[b]ased on the history given to me by the patient, I think it's more likely than not that the incident of [September 23, 2008] is the most likely cause." In reaching this conclusion, he explained that it was "[b]ecause of the mechanism of exerting a lot of pressure, feeling a pop and associated with pain, and then based upon just my experience of seeing similar people at this workplace complain with the same problem, doing the same type of work." He assigned an impairment rating of five percent to the body as a whole, which was based on three percent impairment for the left shoulder and two percent impairment for the right shoulder.

Dr. Gaw acknowledged that he did not provide any treatment to Employee and that he did not impose any specific work restrictions. He conceded that Employee had a normal range of motion in both shoulders and that he did not take medication. He agreed that his opinions were based on the history he was given by Employee, as well as Employee's medical records. Dr. Gaw conceded that Employee did not tell him he injured his shoulders at work on two prior occasions. Dr. Gaw acknowledged that Employee did not receive any medical treatment on his shoulders from February of 2009 to November of 2009, and that in November of 2009, Employee told his primary care physician that he aggrivated his shoulders in non-work related activities. Dr. Gaw agreed that the impingement in Employee's right shoulder "would probably be consistent with a previous ongoing problem that may have been aggravated" by the Employee's work activities. Dr. Gaw also opined that the labral tear in Employee's left shoulder was consistent with a "pop" sensation:

> if [Employee] is pulling down and the rubber is stuck and the jerking sensation and he felt a pop and pain, I think that would be consistent with a labral tear . . . But, certainly, if it happened like he says, that would be consistent with causing his problem or aggravating a pre-existing problem that may have been present.
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> …
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> Well, I think the labral tear would be more consistent with a pop. That's – that's kind of not unusual when people tear the labrum, they -- they hear or feel a pop.

Dr. Gaw acknowledged that Employee underwent two physical exams in 2010 but did not report any problems with his shoulders; he also noted that Employee did not have any treatment in 2011. After hearing Employee's testimony and considering all of the evidence, the trial court found that Employee suffered a work-related injury to both shoulders that resulted in five percent impairment to the body as a whole. The trial court further determined that Employee suffered twenty percent vocational disability. In this appeal, Employer argues that the trial court erred in finding that Employee suffered compensable injuries and contends that the award was excessive.

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(a)(2); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). 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, 732 (Tenn. 2002). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676-77 (Tenn. 1983). 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 without limitation of any presumption of correctness afforded to the trial court's conclusions. *Gray v. Cullom Machine, Tool & Die, Inc.*, 152 S.W.3d 439, 443 (Tenn. 2004); *Tucker v. Foamex, L.P.*, 31 S.W.3d 241, 242 (Tenn. 2000).

ANALYSIS

Causation

Employer argues that the trial court erred in finding that Employee suffered a work-related injury and that the incident on September 23, 2008 caused "only an increase in pain of [Employee's] pre-existing shoulder injuries." Employer further argues that the incident did not advance the severity of Employee's symptoms or produce an anatomical change in Employee's pre-existing condition. Employee argues that the evidence does not preponderate against the trial court's findings.

"'Except in the most obvious, simple and routine cases,' a claimant must establish by expert medical evidence the causal relationship between the claimed injury and the employment activity." *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008) (quoting *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)). The

claimant must establish causation by the preponderance of the expert medical testimony, as supplemented by the evidence of lay witnesses. *Id*. An employee "does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain." *Trosper v. Armstrong Wood Prods, Inc.*, 273 S.W.3d 598, 607 (Tenn. 2008). "However, if 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." *Id.* at 607. "[T]he claimant is granted the benefit of all reasonable doubts regarding causation of his or her injury." *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 274 (Tenn. 2009).

In applying these principles, the trial court emphasized that Employee had a good employment history and was "an excellent employee." The trial court found that on September 23, 2008,

> [Employee] was doing the same type or similar work that he had undertaken in a physically demanding, rigorous/work that had caused problems in 2004 and 2005/2006, [and] . . . he had this injury of September 23, 2008, when a hopper jammed and his shoulders popped again. He felt the injury was different. In his right arm, under his arm and in his armpit it hurt, and in the left shoulder it crammed up into his neck.

The trial court found that "from that date forward, [Employee] continued to have problems with both shoulders" and "never made a satisfactory or complete recovery." In addition, Dr. Gaw explained that Employee's description of the September 23, 2008 incident was "consistent with causing a problem or aggravating a pre-existing problem" and that "it's more likely than not that [the] incident of September 23, 2008, is the most likely cause."

In our view, the evidence does not preponderate against the trial court's finding that Employee suffered a compensable injury to both shoulders. In addition to making detailed findings of fact, the trial court emphasized that Employee was "as credible as any witness this Court ever heard." Moreover, although Employer made much of the fact that Employee went several months without seeking treatment, the trial court specifically found that these periods were due to Employee's work ethic and desire to work. Accordingly, we affirm the trial court's judgment as to causation.

Vocational Disability

Employer argues that the trial court erred in imposing an excessive award because Employee maintained the ability to work in numerous capacities and was not vocationally impaired. Employee argues that the medical evidence of his impairment was undisputed and that the evidence does not preponderate against the trial court's findings.

"'In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition.'" *Story v. Legion Ins. Co*., 3 S.W.3d 450, 456 (Tenn. 1999) (quoting *Walker v. Saturn Corp*., 986 S.W.2d 204, 208 (Tenn. 1998)); *see* Tenn. Code Ann. § 50-6-241. The claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn. 1975); *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972). The trial court is not bound to accept physicians' opinions regarding the extent of an employee's disability but should consider all the evidence, both expert and lay testimony, to decide the extent of the employee's disability. *Hinson*, 654 S.W.2d at 677.

The trial court, having "carefully considered all of [the] factors," concluded that "the disability rating that [Employee] retains for purposes of vocational disability is 20 percent to the body as a whole based upon his 5 percent to the body as a whole impairment." As the trial court noted, the only medical evidence was Dr. Gaw's deposition. After reviewing Employee's medical history and conducting an examination, Dr. Gaw assigned two percent impairment to the body as a whole for Employee's right shoulder injury and three percent impairment to the body as a whole for Employee's left shoulder injury. Although Employer argued that Employee failed to show that his shoulder injuries affected his ability to work or his vocational opportunities, the trial court accredited Employee's testimony and found him to be "totally and completely credible." In our view, the evidence does not preponderate against the trial court's award.

CONCLUSION

For the foregoing reasons, the trial court's judgment is affirmed. Costs are assessed to Employer, and its surety, for which execution shall issue if necessary.

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ANDY D. BENNETT, 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 the appellants, Bridgestone Americas, Inc. and Republic Insurance Co., and its sureties, for which execution may issue if necessary.

PER CURIAM