

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT MEMPHIS
June 19, 2017 Session

THOMAS LEE v. FEDERAL EXPRESS CORPORATION

**Appeal from the Court of Workers' Compensation Claims
No. 2015-08-0247 Jim Umsted, Judge**

No. W2016-02126-SC-R3-WC – Mailed September 29, 2017; Filed October 30, 2017

Thomas Lee (“Employee”) worked for Federal Express Corporation (“Employer”). He worked in the Audio-Visual department, located in Collierville, Tennessee. He filed this claim, alleging that he sustained a compensable injury to his left shoulder on July 24, 2014. Employer denied the claim, based on conflicting descriptions of the incident to various medical personnel. A Compensation Hearing was held on August 15, 2016. The trial court found Employee had failed to sustain his burden of proof and dismissed the claim. Employee appealed to the Supreme Court pursuant to Tennessee Code Annotated section 50-6-239(c)(7). The 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right;
Judgment of the Court of Workers’ Compensation Claims Affirmed**

JAMES F. RUSSELL, J., delivered the opinion of the court, in which HOLLY KIRBY, J., and RHYNETTE N. HURD, J., joined.

William Steven Taylor, Memphis, Tennessee, for the appellant, Thomas Lee.

Stephen W. Vescovo and Laura L. Deakins, Memphis, Tennessee, for the appellee, Federal Express Corporation.

OPINION

Factual and Procedural Background¹

Employee testified that he had worked for Employer for twenty-three years, and had recently retired for reasons unrelated to his alleged injury. His department was responsible for all events at Employer's World Technology Center ("WTC"), including all audio-visual materials, managing the auditorium, and otherwise preparing it for events. Employee testified that he injured himself on July 24, 2014, while moving a "pelican case" containing heavy audio cables. He was in the process of clearing a path for some stools that were being delivered from Target. After confusion arose about the date of injury, he obtained a shipping document that placed the delivery on July 24.

Employee was alone in the auditorium when the incident occurred. He testified that he reported the incident to his supervisor, Glenn Davis, on the following day. Mr. Davis asked Employee if he wanted to file a workers' compensation claim, and Employee answered that he did not. Employee stated that he made this decision because he "didn't think it was anything major," and didn't want to go through the workers' compensation process.

Medical records showed that Employee went to his primary care provider, Baptist Medical Group ("BMG") on August 4, 2014. At that time, Employee reported to his physician that he had left shoulder pain for three weeks, and that the injury was not caused by a fall or trauma. He was referred to Campbell Orthopaedic Clinic. His first appointment was on August 6, 2014. On that date, he completed an intake form stating that his complaint was "frozen shoulder," which had started two or three weeks earlier, and was not related to his work. The accompanying note of the physician's assistant who saw him said that Employee reported a gradual onset of left shoulder pain, with a significant increase in the previous week.

Employee was then referred to physical therapy. A physical therapist's evaluation, dated August 13, 2014, stated Employee had awakened one morning with (indecipherable) and there were no precipitating factors. At that time, Employee also answered "No" to the question "Is this a workers' compensation claim?" on an intake form. After several physical therapy treatments, Employee was referred to Dr. Patrick Toy, an orthopaedic surgeon, for additional evaluation and treatment. He had previously seen Dr. Toy for a separate problem.

¹ The trial court based its decision on the credibility of Employee's account of his alleged injury. It did not examine the medical evidence in depth, and we will limit our discussion of the medical evidence to matters relevant to that issue.

The first date that Dr. Toy evaluated Employee's shoulder was September 15, 2014. He gave Dr. Toy no information about the cause of the injury at that time. Dr. Toy's initial diagnosis was chronic tendinitis. Employee was referred to Dr. Santos Martinez for conservative treatment.

Dr. Martinez saw Employee on three occasions. On the first visit, October 9, 2014, Employee stated on his intake form that the injury might be work-related. The injury date given was August 6, 2014. Dr. Martinez treated Employee with steroid injections and medications. These provided only temporary relief. Employee returned to Dr. Toy on March 9, 2015. Dr. Toy performed surgery on Employee's left shoulder on March 23, 2015. During the procedure, Dr. Toy observed some arthritis, a labral tear, a partial tear of the biceps tendon and a type II acromion. By May 13, Employee's physical therapist reported full range of motion. On June 15, he had full range of motion and no weakness. Dr. Toy permitted Employee to work without restrictions.

Dr. Toy opined that Employee's shoulder conditions were degenerative in nature. He did not find any basis to find that Employee had suffered a work-related injury. He stated "My opinion is that this was something that would happen over time as opposed to something that had happened in one episode." Dr. Toy had not been asked to evaluate the extent of any residual impairment, but stated that it would be minimal, based on his findings.

Dr. Apurva Dalal, an orthopaedic surgeon, performed an independent medical evaluation of Employee on May 20, 2015. Employee gave him a history of injuring his shoulder at work on July 23, 2014. In response to a hypothetical question from Employee's attorney, Dr. Dalal opined Employee had sustained a work-related tear of his biceps tendon, although his biceps tendinitis was preexisting. He assigned 7% anatomical impairment based on diminished range of motion of the shoulder. He was unconcerned about the variety of dates and mechanisms of injury described by Employee at various times, because the injury and pathology were consistent with the event described to him.

The trial court took the case under advisement and issued its opinion as a written Compensation Hearing Order. The court found that Employee had failed to carry his burden of proof. Specifically, the court found that the inconsistencies between Employee's trial testimony and the statements made to medical providers concerning the date and mechanism of injury rendered any finding on the subject to be speculative. The claim was dismissed, the order became final and Employee appealed to the Supreme Court, which has assigned the appeal to this Panel. We affirm the trial court's judgment.

Analysis

The standard of review of issues of fact in a workers' compensation case 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(a)(2) (2014). When the trial judge has had the opportunity to observe a witness's demeanor and to hear in-court testimony, we give considerable deference to factual determinations made by the trial court. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898 (Tenn. 2009) (citing Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008)). When the issues involve expert medical testimony given by deposition, the weight and credibility must be drawn from the contents of the depositions; therefore, as a reviewing court, we may draw our own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008) (citing Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006)). A trial court's conclusions of law are reviewed de novo with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009) (citing Goodman v. HBD Indus., Inc., 208 S.W.3d 373, 376 (Tenn. 2006); Layman v. Vanguard Contractors, Inc., 183 S.W.3d 310, 314 (Tenn. 2006)).

Employee raises two issues in this appeal. First, he contends that the trial court erred by finding that Employee did not sustain a compensable injury. In addition, he asserts that the existence of a preexisting condition does not preclude him from recovery, if he satisfies the standard set out in Tennessee Code Annotated section 50-6-102(12) (2014). We conclude that the first issue is dispositive, and, therefore, the second issue is moot.

The trial court explained its decision as follows:

The Court finds Mr. Lee provided inconsistent statements when describing how his left-shoulder pain began, and it would be speculative for the Court to accept Mr. Lee's current explanation that it occurred at work. Therefore, based upon the evidence and the applicable legal principles, the Court holds Mr. Lee failed to satisfy the burden of proving his left-shoulder injury arose primarily out of and in the course and scope of his employment.

Employee was the only witness at trial. He testified that his injury occurred on July 24, 2014. The trial court had to evaluate the credibility of that testimony against numerous statements made by Employee to medical personnel in the months after the alleged injury. Medical records placed into evidence demonstrated that Employee gave different dates, or no particular date at all, for the onset of his symptoms. He gave different descriptions of how his shoulder symptoms arose, stating to one medical provider that the symptoms arose

gradually over time but telling another that he simply awoke with shoulder pain that increased quickly. Several documents, some in Employee's own handwriting, state that the injury was not related to his work.

The trial court had the opportunity to see and hear Employee testify in open court. It implicitly found his explanations for his prior inconsistent statements to be wanting. It is our obligation to give deference to a trial court's findings as to the credibility of live testimony. Madden, 277 S.W.3d at 898. Based on that deference, we conclude that the trial court did not err by finding that Employee failed to satisfy his burden of proof of compensability.

Conclusion

The judgment is affirmed. Costs are taxed to Thomas Lee and his surety, for which execution may issue if necessary.

JAMES F. RUSSELL, JUDGE

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

THOMAS LEE v. FEDERAL EXPRESS CORPORATION

**Appeal from the Court of Workers' Compensation Claims
No. 2015-08-0247**

No. W2016-02126-SC-R3-WC – Filed October 30, 2017

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 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 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 assessed to Thomas Lee and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM