IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
September 15, 2006 Session

MIKE CURRAN v. NEW GENERATIONS, INC., ET AL.

Direct Appeal from the Circuit Court for Carroll County
No. 4572 (including 03CV21 and 02CV4572) Hon. Creed G. McGinley, Judge

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No. W2005-02800-WC-R3-CV - Mailed January 29, 2007; Filed March 1, 2007

The trial court awarded compensation to the Employee for two separate injuries on two different days. No appeal is asserted with regard to the findings concerning the first injury. The Employer appeals all issues regarding the second injury, however, and contends that the proof does not preponderate in favor of causation of the injury, permanency of an injury, and further that the evidence does not support an award against the workers' compensation insurance carrier that provided insurance at the time of the second injury. The Special Workers' Compensation Panel concludes that the evidence does not preponderate against the trial court's award of 30% disability to the body as a whole.

Tenn. Code Ann. §50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court Affirmed.

ROBERT E. CORLEW, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SR. J., joined.

Lee Anne Murray and Byron K. Lindberg, Nashville, Tennessee for the Appellants, New Generations, Inc. and Tennessee Forestry Assoc. A Selective Workers' Compensation Group.

Glenn K. Vines, Jr., Memphis, Tennessee, for the Appellee, Mike Curran.

Michael L. Mansfield, Jackson, Tennessee, for the Defendants, Legion Insurance Company and Tennessee Insurance Guaranty Assoc.

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with the provisions of Tennessee Code Annotated §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. New Generations, Inc. ("the Employer") has appealed the action of the trial

court, which determined that Mike Curran ("the Employee") suffered a compensable injury to his right shoulder on March 19, 2001, and then suffered an aggravation of that pre-existing injury on January 24, 2002. The trial court found that the Employee suffered 36% permanent vocational disability to the body as a whole as a result of the first injury and 30% permanent vocational disability to the body as a whole as a result of the second injury. We have considered the evidence and conclude that the proof does not preponderate against the holding of the trial court as to the liability of the Employer. We therefore affirm the findings of the trial court with regard to these issues.

FACTS

The facts before the Panel are largely undisputed. On March 19, 2001, the Employee was employed with the Employer and was cutting leather when he began to feel a pain in his right shoulder, down the right arm, and into his right hand. The employee sought treatment from Dr. Riley Jones, who performed arthroscopy of the right shoulder on December 12, 2001. On January 18, 2002, six days prior to the injury before the panel on appeal, Dr. Jones saw the Employee and determined he was "doing better." Dr. Jones also stated, "He has basically full range of motion but he lacks strength. I want him to continue therapy three times a week for two weeks. He's light duty. He will increase the use of his arm but no overhead and I'll see him back in two weeks."

On January 24, 2002, the Employee asserts that he again injured his shoulder, his neck, and his body as a whole when he reached to catch a piece of falling leather and aggravated his pre-existing injury. Dr. Jones saw the Employee on January 25, 2002, one day after the incident that is the subject of this appeal. On that day, the Employee reported the January 24 incident to Dr. Jones, who objectively observed "mild swelling" and "full range of motion." Dr. Jones felt the Employee "just pulled the shoulder and maybe pulled some scar." On March 25, 2002, an MRI was performed, revealing an apparent partial tear of the infraspinatus. As a result, a second arthroscopic surgical procedure was performed on July 24, 2002. Though this procedure revealed that there were in fact no tears of the infraspinatus tendon or rotator cuff, debridement of scars from the earlier surgical procedure was conducted. Following the procedure, the Employee showed some considerable improvement in his right shoulder pain. The Employer was then returned to light duty, using only his left hand, on July 29, 2002, and continued to work one-handed until August 30, 2002.

However, during his light duty on August 16, 2002, the Employee reported complaints of medial scapular pain that he associated with his January 24, 2002, injury. A course of treatment for the medial scapula pain then commenced, which included cervical epidural steroid injections, resulting in no lasting relief. A cervical MRI demonstrated a possible advancement of a preexisting disc protrusion, which Dr. Jones felt might have been responsible for the medial scapula pain. Upon referral to Dr. John Brophy, M.D., and Dr. James C. Varner, M.D., these physicians opined that the neck protrusion was not responsible for the medial shoulder issues. However, Dr. Varner stated that his opinion was not held with a reasonable degree of medical certainty. On October 11, 2002, Dr. Jones allowed the Employee to return to full duty, and the Employee worked at his job until he was laid off some four months later on February 7, 2003. Dr. Jones released the Employee at maximum medical improvement on May 16, 2003. It was Dr. Jones' opinion that the Employee suffered a paracentral C3-4 disc protrusion with stenosis as a result of the second injury and that this condition

caused the Employee to experience pain in his shoulder.[1] Dr. Jones concluded that the January 24, 2002 injury resulted in a 5% anatomical impairment to the body as a whole.

Evidence presented from Dr. Joseph Boals, who performed an independent medical examination, clouds the issue. Dr. Boals initially determined that the Employee sustained 16% anatomical impairment, but he did not recognize the existence of the second injury, and placed all of the responsibility for the Employee's disability upon the initial injury. Subsequently, Dr. Boals revised that opinion, determining that 15% more accurately represented the Employee's anatomical impairment. Dr. Boals testified that there was not a causal relationship between the neck injury and the scapular pain, but based his impairment rating on the Employee's ongoing neck pain. Dr. Boals stated that the Employee suffered from a "pain syndrome coming from degenerative arthritis in the neck that has been aggravated" and concluded that the second injury resulted in an anatomical impairment of 5% to the body as a whole.

The Employee was forty-nine years of age at the time of trial. He completed only the eleventh grade. His prior work experience involves general labor in a small variety of jobs. Suit was filed on December 12, 2002, and the case was tried on August 30, 2005.

The trial court awarded 36% vocational disability as a result of the first injury, which was tried at the same time as were issues with regard to the January 24, 2002 injury. This award is not contested on appeal. The trial court further awarded 30% vocational disability to the Employee as a result of the January 24, 2002 injury, which is the subject of this appeal. In addition, the trial court found that there was not a meaningful return to work. Although the Employer contests the extent of the award resulting from the January 24, 2002 injury, it does not contest that the Employee did not have a meaningful return to work. The trial court also found that the Employee was entitled to payments of temporary total disability from a period one week after his February 7, 2003 lay-off until he reached maximum medical improvement on May 16, 2003, which award is also now before us.

ANALYSIS

Our review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). "When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings." Hill v. Eagle Bend Mfg., 942 S.W.2d 483, 487 (Tenn.

[1]The Employer asks us to totally discount Dr. Jones' opinions with regard to causation of the shoulder problems resulting from the January 24, 2002 incident because Dr. Jones referred the Employee to Dr. John Brophy for a second opinion, and Dr. Brophy felt that the C3-4 progression of the disc did not cause the Employee's problems. The Employer asserts that its position is supported by the fact that during the cross-examination of Dr. Jones, Dr. Jones stated that he would have asked Dr. Brophy to have performed surgery, had surgery been necessary, and the fact Jones stated further that he "would defer to Dr. Brophy regarding what effect if any this disc in the neck had on . . . Mr. Curran." Nonetheless, we have examined the entire deposition of Dr. Jones and have determined that both in direct and re-direct examination, Dr. Jones expressed the opinion that the neck injury was responsible for the shoulder pain.

1997). However, when all of the medical proof is presented by deposition, we must determine the weight to be given to the expert testimony and draw our own conclusions with regard to the issues of credibility. E.g., 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); Cooper v. Ins. Co. of N. Am., 884 S.W.2d 446, 451 (Tenn. 1994). The trial court's conclusions of law are reviewed without any presumption of correctness. Watt v. Lumbermens Mut. Cas. Ins. Co., 62 S.W. 3d 123, 127 (Tenn. 2001).

We first consider the issues raised by the Employer with regard to the causation of the Employee's second injury of January 24, 2002. The proof of the causal connection may not be speculative, conjectural, or uncertain. E.g., Clark v. Nashville Mach. Elevator Co., Inc., 129 S.W.3d 42, 47 (Tenn. 2004); Simpson v. H.D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990); Tindall v. Waring Park Ass'n, 275 S.W.2d 935, 937 (Tenn. 1987). Absolute certainty with respect to causation is not required, however, and the Court must recognize that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005).

We have considered the testimony of the Employee, which clearly supports the occurrence of an incident on January 24, 2002. In considering this testimony, we have recognized a presumption of correctness of the findings of the trial judge, inasmuch as he heard the testimony of the Employee and had the opportunity to observe him as he testified. E.g., Banks v. United Parcel Service, Inc., 170 S.W.3d 556, 560 (Tenn. 2005); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002); Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992).

The issues regarding the treatment of the Employee after the January 24, 2002 incident are twofold: 1) whether the subsequent surgical procedure was related to the 2002 injury, or whether it was actually related to an earlier injury in 2001, and 2) whether a cervical disc protrusion advanced by the 2002 incident contributed to the Employee's medial scapular pain. A surgical procedure was performed in response to an MRI, which results were thought to show a partial tendon tear. When surgery was performed, however, no tear was discovered and scar tissue from the surgery following the initial injury of March 19, 2001, was debrided. The evidence shows this procedure provided relief to the Employee. Defendants New Generations, Inc. and Tennessee Forestry Association Selective Workers' Compensation Group and Legion Insurance Company assert that, because it was determined that there was no tendon tear, surgery was not necessitated by the second injury but should be considered treatment for the first injury. We conclude that the undisputed proof is that the treatment provided in the second surgery was limited to the debridement of scar tissue that, in fact, developed as a result of the first injury. However, we also conclude that the undisputed evidence shows that, prior to the second injury, the Employee was making excellent progress toward maximum medical improvement. It thus appears that the second injury caused the asymptomatic shoulder to become symptomatic. Thus, it appears that the surgical procedure was necessitated by the second injury and not the first.

The second issue is the occurrence of the cervical injury. The MRI performed before the occurrence of the January 2002 injury showed some mild disc protrusion at the C3-4 level. The MRI performed after the January 2002 injury indicated the possibility of some advancement of the injury, but was somewhat equivocal. Dr. Jones opined that the January 2002 injury exacerbated the

previous condition, and Dr. Boals agreed. There was no expert testimony to the contrary other than statements within the medical records, some of which were equivocal. The primary question is whether progression of the disc protrusion caused the medial scapula injury of which the Employee complained. Again, Dr. Jones opined that, to a reasonable degree of medical certainty, it did. Dr. Boals did not believe that the disc protrusion caused the Employee's scapular pain. Dr. Varner stated that the advancement of the protrusion did not appear to contribute to the medial scapula pain but could not so state to a reasonable degree of medical certainty.[2] Dr. Brophy was of the opinion that the cervical protrusion and the medial scapula pain were unrelated.

Without question, the issues with regard to the January 24, 2002 incident are unclear. What is clear, however, is that the treating physician, Dr. Riley Jones, provided a lengthy course of care for the Employee. He exhaustively explored opportunities for diagnosis and treatment. He appropriately sought the opinions of other physicians. Dr. Jones' experience and training appear to provide to him the qualifications to make a proper diagnosis and provide appropriate opinions for the Court's consideration. Despite opinions to the contrary, Dr. Jones appears to have appropriately weighed all of the medical tests, reports, and opinions. The lay testimony of the Employee is consistent with the opinions of Dr. Jones.

The Workers' Compensation laws should be "liberally construed to promote and adhere to the (purposes of the Workers' Compensation) Act of securing benefits to those workers who fall within its coverage." Martin v. Lear Corp., 90 S.W.3d 626, 629 (Tenn. 2002). Nonetheless, the burden of proving each element of his cause of action rests upon the worker in every Workers' Compensation case. Cutler-Hammer v. Crabtree, 54 S.W.3d 748, 755 (Tenn. 2001). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A. & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004); Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Our courts have "consistently held that an award may properly be based upon 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, 938 S.W.2d at 692; accord, Long v. Tri-Con Indus., Ltd., 996 S.W. 2d 173, 177 (Tenn. 1999); P & L Constr. Co. v. Lankford, 559 S. W.2d 793, 794 (Tenn. 1978); GAF Bldg. Materials v. George, 47 S.W.3d 430, 433 (Tenn. Workers' Comp. Panel 2001). The element of causation is satisfied where the "injury has a rational, causal connection to the work." Braden v. Sears, Roebuck & Co., 833 S.W.2d 496, 498 (Tenn. 1992).

We agree with the trial court that, though there is evidence to the contrary, the preponderance of the evidence shows that there is a causal connection between the Employee's

[2]Although a doctor's degree of certainty is relevant to the weighing of the expert medical testimony, we note that doctors are not required to state their opinions to a reasonable degree of medical certainty in workers' compensation cases. See P& L Const. Co. v. Lankford, 559 S.W.2d 793, 794 (Tenn. 1978) ("[A] trial judge may properly predicate an award on medical testimony to the effect that a given incident "could be" the cause of the plaintiff's injury, when he also has before him lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury."); Johnson v. Midwestco, 801 S.W.2d 804, 806 (Tenn. 1990) ([A]ny expert medical witness presented must give testimony that preponderates in favor of permanency to qualify as having probative value on that issue.").

subsequent shoulder problem and the January 24, 2002, work-related incident. The preponderance of the evidence further supports a finding that the January 24, 2002 incident involved an injury to the neck, though the Employee did suffer from pre-existing cervical disc disease. The evidence preponderates in favor of a finding that the January 24, 2002 injury caused the further protrusion of the Employee's neck at the C3-4 level, causing the medial scapula area to become symptomatic. Thus, we conclude that the Employer is responsible for payment of benefits for the January 24, 2002, incident.

Finally, we reach the question of the percentage of vocational disability. The determination of vocational disability is reviewed "de novo upon the record of the trial court accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2); George v. Building Materials Corp. of Am., 44 S.W.3d 481, 488 (Tenn. 2001). We conclude that the evidence does not preponderate against the trial court's award for the employee's neck injury. The trial court accepted Dr. Jones finding that Mr. Curran's neck injury resulted in a 5% impairment to the body as a whole. The trial court also found that the employee was entitled to the maximum permanent partial disability award allowable under Tennessee Code Annotated section 50-6-241(b), six times the medical impairment rating. As required by Tennessee Code Annotated section 50-6-241(c), the trial court supported its award with specific findings of fact. The trial court found that maximum award was justified by the Employee's lack of formal education, lack of job skills, job history, and the fact that the Employee was unable to find employment after his separation from the Employer. Furthermore, the fact that the Employee was able to return to work for approximately four months before being laid off does not preclude a finding of vocational disability. We have held that "vocational impairment is measured not by whether the employee can return to her former job, but whether she has suffered a decrease in her ability to earn a living." George, 44 S.W.3d at 488 (quoting Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. Workers' Comp Panel 1999). We conclude that the trial court adequately weighed the relevant factors under Tennessee Code Annotated 50-6-241(c) and that its findings are supported by a preponderance of the evidence. Accordingly, we affirm the trial court's award of 30% vocational disability for the Employee's neck injury.

CONCLUSION

We affirm the decision of the trial court in all respects. The costs on appeal are taxed against the Employer.

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ROBERT E. CORLEW, SPECIAL JUDGE

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No. 4572(including 03CV21 and 02CV4572)

No. W2005-02800-WC-R3-CV - Filed March 1, 2007

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, New Generations, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM