

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 29, 2007 Session

**MYRON L. ROBBINS v. GRAPHIC PACKAGING INTERNATIONAL,
INC. ET AL.**

**Direct Appeal from the Circuit Court for Lawrence County
No. CC-1692-04 Jim T. Hamilton, Judge**

**No. M2006-02213-WC-R3-WC - Mailed - July 26, 2007
Filed - August 31, 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 a hearing and a report of findings of fact and conclusions of law to the Supreme Court. The trial court awarded 50% permanent partial disability to the body as a whole to the employee. The employer asserts that the trial court erred by finding that the employee sustained a compensable aggravation of his pre-existing congenital condition. In the alternative, the employer contends that the trial court erred by finding that the employee did not have a meaningful return to work and by awarding more than two and one-half times the medical impairment under Tennessee Code Annotated section 50-6-241(a). We affirm the finding of compensability, reverse the finding that the employee did not have a meaningful return to work, and modify the award to 37.5% permanent partial disability to the body as a whole.

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

GARY R. WADE, J., delivered the opinion of the court, in which JERRY SCOTT, SR.J. and JON KERRY BLACKWOOD, SR.J., joined.

Richard C. Magelsdorf, Jr. and Catherine E. Cunningham, Nashville, Tennessee, for the appellants, Graphic Packaging International, Inc. and Liberty Mutual Insurance Company.

David J. Deming, David M. Drobny, and William D. McGee, Nashville, Tennessee, for the appellee, Myron L. Robbins.

MEMORANDUM OPINION

Factual and Procedural Background

Myron L. Robbins ("Employee") began working for Graphic Packaging International

("Employer"), a manufacturer of folding cartons, in 1994. His job involved moving stacks or "kicks" of unfinished cartons from the cutting table to a palletizer, which then loaded the cartons onto a pallet for further processing. It was sometimes necessary to lift and shake a kick, or a portion of it, so that the individual pieces were properly aligned.

On October 25, 2002, while he was working in the cutting department, the Employee attempted to move a kick when he felt a sharp pain between his shoulder blades. He immediately reported this injury to a supervisor and was referred to Dr. Matthew Dobias, who treated him with medication and physical therapy and directed certain work restrictions. Dr. Dobias later referred the Employee to Dr. Angelo Difelice, who eventually removed all of the work restrictions. When the Employee continued to have symptoms of pain and numbness in his right shoulder and arm, he requested a second opinion and was referred to Dr. Paul Thomas, an orthopaedic surgeon. Dr. Thomas ordered an MRI scan, which revealed the presence of a spinal cord defect known as a syrinx, or syringomyelia. In October of 2003, a year after the incident, the Employee was referred to Dr. Everette Howell, a neurosurgeon. According to the Employee, he alternated between his regular job and the die shop during this period of time, claiming that his supervisors "didn't care" what his restrictions were.

On the date of trial, the Employee was forty-one years old married with three sons. He had completed high school and one semester at a community college. His prior employment history included assembly line, retail management, and loading dock work.

Dr. Howell, who testified by deposition, stated that the Employee suffers from a congenital abnormality at the base of his skull known as a Chiari Malformation. He related that because the back part of the skull was misformed at birth, the flow of spinal fluid was altered, which eventually caused the formation of a ten to twelve inch cyst, called a syrinx, within the marrow of the spinal cord. In November of 2003, Dr. Howell performed a surgical procedure to repair the Chiari Malformation and thus reduce the syrinx. Complications occurred, and there was a second surgical procedure in December of 2003. Four months later, Dr. Howell released the Employee to return to work with a permanent fifty-pound lifting restriction. He assigned a permanent impairment of 15% to the body as a whole.

Dr. Howell testified that both the Chiari Malformation and the syrinx existed prior to the October 2002 incident. As part of his medical history, the Employee reported that he had an episode of right arm numbness while weight lifting in 1983. He had undergone a myelogram at that time but had not had any significant symptoms since then. Based upon that history, Dr. Howell opined that the October 2002 incident aggravated the syrinx and ultimately resulted in the November and December 2003 surgeries:

The syrinx was there. It was a result of the Chiari, and the work injury did not cause it, but if his story was correct, that he had had no significant symptoms before the time of his injury, in my opinion, the injury would have cause[d] his [syrinx] to become symptomatic and then lead to treatment.

On cross-examination, Dr. Howell was confronted with the medical records of Dr. Ed Benny, a neurologist, and Dr. Lee Hunter, an orthopaedic surgeon, indicating that in 1999 the Employee had been treated for approximately five months for pain and numbness in his right arm. Dr. Howell acknowledged that this episode was consistent with the syrinx and, over objection, the records were made exhibits to his deposition. While the basis of the objection is not apparent from the record, the same objection was made at trial. In any event, Dr. Howell concluded that these records caused him to doubt the completeness of the history given by the Employee. He also conceded that the Employee's symptoms "could just as easily [have] been with a soft tissue or a muscle injury in his shoulder or in his neck."

Dr. M. Robert Weiss examined the Employee on two occasions at the request of the Employer. He agreed that the Chiari Malformation and the syrinx existed prior to the alleged injury. It was his opinion that there was no anatomical change in the syrinx when the Employee attempted to move the kick to the palletizer. He testified that it is common for a person with this condition to have intermittent acute symptomatic episodes followed by a period without pain. Dr. Weiss was of the opinion that although the Employee did suffer a soft tissue strain or sprain in October of 2002, the Chiari Malformation was not involved in the injury.

The medical records from Drs. Vance Roy, J. Fredrick Wade, Benny, Hunter, and Kenneth Moore were attached to the depositions of Drs. Howell and Weiss. In 1984, Dr. Roy saw the Employee for pain in his right shoulder due to the weightlifting incident. Dr. Wade treated him for right shoulder pain in 1996. Dr. Benny examined the Employee for right upper extremity complaints in 1999. That same year, the Employee complained to Dr. Moore of a five-year history of pain in the arm. Dr. Hunter also treated the Employee in 1999 for "vague right arm pain."

After he was released by Dr. Howell in April 2005, the Employee returned to work. He was initially placed back in his pre-injury position in the cutting department. While he had previously worked on the day shift, a reduction in force resulted in his assignment to the night shift. His wage was equal to or greater than the rate he had received prior to his injury. According to the Employee, his co-workers assisted him when his job required lifting in excess of his fifty-pound restriction. He testified that he was unable to perform this job at his prior level and "had to have help on almost everything."

The Employee remained in the cutting department for less than one month. Thereafter, he was moved to the day shift in the die shop, where he worked practically every day as a substitute for co-workers either on leave or on vacation. On occasion, the Employee was required to work on the night shift. While on light-duty status in 2002 and 2003, he had worked in the die shop and described this as a light-duty job, "easier work," and with a pay upgrade of over \$2.50 per hour. In June of 2005, a little more than one year after being moved to the die shop, the Employee resigned without notice and went to work for a competitor of the Employer. His new job was also in a die shop, a position very similar to that with the Employer. At the request of the Employer, the Employee wrote that his reasons for leaving were a "better job, problems with hours, [and] working conditions" and, "[t]oo large kicks, weight management[;] did not care." A supervisor from his new

place of employment, who was aware of the Employee's lifting restriction, testified that the Employee never made any complaints about his ability to perform his job. The new position provided the Employee with guaranteed day shift and he could work overtime when necessary.

In a memorandum order issued two weeks after the trial, the trial court specifically found "that the Plaintiff testified with candor and honesty." The trial court concluded that the event of October 25, 2002, had aggravated the Employee's pre-existing condition and therefore qualified as a compensable injury. Moreover, the trial court determined that the Employee had not experienced a meaningful return to work and awarded the Employee 50% permanent partial disability to the body as a whole.

In this appeal, the Employer contends that the trial court erred by finding that the Employee had suffered a compensable aggravation of a pre-existing condition. It asserts that the work incident merely caused a temporary increase of the symptoms incident to Chiari Malformation. In the alternative, the Employer argues that the trial court erred by concluding that the Employee did not have a meaningful return to work.

Scope of Review

In a workers' compensation case, appellate review of the findings of fact made by the trial court is de novo upon the record of the trial court accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006). The application of this standard requires this Court to weigh the factual findings and conclusions of the trial court in workers' compensation cases in more depth to determine where the preponderance of the evidence lies. Vinson v. United Parcel Serv., 92 S.W.3d 380, 383-84 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, considerable deference is given to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When, however, medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

1. Causation

An incident which aggravates a pre-existing condition is compensable if it causes an "anatomical change' in the pre-existing condition" or "an actual progression . . . of the underlying disease" and is caused by the employment. Sweat v. Superior Indus., 966 S.W.2d 31, 33 (Tenn. 1998) (citations omitted). In contrast, an injury which merely causes "increased pain or other symptoms caused by the underlying condition" is not compensable. Id. An injury which causes a previously asymptomatic or minor condition to become disabling is compensable. See Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997). The key is determining whether the "employment caused a progression or worsening of the . . . underlying disease or merely aggravated

[the] symptoms.” Sweat, 966 S.W.2d at 32. The Employee bears the burden of proof in showing causation between his or her employment and the progression of the injury. Hall v. Auburntown Indus., Inc., 684 S.W.2d 614, 616 (Tenn. 1985).

The resolution of this issue turns upon the expert medical testimony. In that regard, both doctors agree that: (1) the Employee’s Chiari Malformation was a congenital condition which was neither caused nor aggravated by the work incident; (2) the syrinx in his spinal cord developed from the Chiari Malformation; and (3) the syrinx existed before the incident.

Dr. Howell, however, testified that because the Employee was relatively asymptomatic before the event, the event aggravated the pre-existing condition to such an extent that surgery became necessary. Dr. Weiss thought that the Employee’s symptoms were more likely the result of a soft tissue injury which bore no relationship to the pre-existing condition. Neither doctor examined the Employee until nearly a year after the incident. Dr. Howell, who was the treating physician, had significantly more contact with the Employee. Dr. Weiss, who based his opinion upon a more complete medical history than the one provided to Dr. Howell by the Employee, nevertheless stated that the work incident could have, but most likely did not, aggravate the syrinx.

Although causation cannot be based upon speculation or conjectural proof, absolute medical certainty is not required and any reasonable doubt as to the cause of an injury must be construed in favor of the employee. White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992). Even though there was medical evidence that the Employee had suffered from an ongoing physical condition and upper right extremity pain as recently as the winter of 1999, he was arguably asymptomatic from that time until the incident at work in 2002. The trial court specifically found the Employee to be credible. Dr. Howell testified that the syrinx was, in his opinion, aggravated by the work injury. See Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997).

This Court has held that an award may be predicated ““on medical testimony to the effect that a given incident ‘could be’ the cause of the plaintiff’s injury when [there is] lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury.”” Tindall v. Waring Park Ass’n, 725 S.W.2d 935, 938 (Tenn. 1987) (quoting P & L Const. Co., Inc. v. Lankford, 559 S.W.2d 793, 794 (Tenn. 1978)). The workers’ compensation law is “a remedial statute which shall be given an equitable construction by the courts to the end that the objects and purposes of this chapter may be realized and attained.” Tenn. Code Ann. § 50-6-116 (2002). Even in cases where the evidence allows an inference which could support either party, we are bound by the strong public policy of our workers’ compensation law to resolve conflicts and doubts in favor of the claimant. See Curtis v. Hamilton Block Co., Inc., 466 S.W.2d 220, 222 (Tenn. 1971). This legislative mandate applies to the issue of causation of an injury, and, as indicated, “any reasonable doubt as to whether an injury arose out of employment is to be resolved in favor of the employee or his dependents.” Williams v. Preferred Dev. Corp., 452 S.W.2d 344, 345 (Tenn. 1970).

In our view, the evidence does not preponderate against the trial court’s finding that the incident of October 25, 2002, advanced the Employee’s pre-existing condition. Thus the injury is

compensable.

2. Meaningful Return to Work

Considered in the context of a petition for reconsideration, the Court held in Hardin v. Royal & Sunalliance Ins., 104 S.W.3d 501, 506 (Tenn. 2003), that an employee who resigned after returning to her pre-injury employment could escape the lower cap set out in Tennessee Code Annotated section 50-6-241(a) (1999) “only if the resignation was reasonably related to the injury.” In Lay v. Scott County Sheriff’s Dep’t., 109 S.W.3d 293, 297-299 (Tenn. 2003), the Court considered the application of section 50-6-241(a) where, as here, the employee resigns before the trial on his claim for permanent disability benefits. In Lay, the employee was limited to two and one-half times his medical impairment when he returned to work at his pre-injury job for five months and then left to take a better job.

In this instance, the trial court found that the Employee “resumed his pre-injury duties which exceeded his work restrictions. He could not do his job without help. It was therefore unreasonable for him to continue working there.” From our review, it appears that the trial court concluded that the Employee remained in the cutting department after his return to work until his resignation. The Employee testified, however, that he was in the cutting department for only about a month and was moved afterward to the die shop, where he remained for over a year until his resignation. He had worked in the die shop while on a light-duty status prior to his surgery. He testified that his new job was very similar to his duties in his previous employment. Further, he did not mention any physical inability to perform as a reason for his resignation. Applying the standards described in Lay and Hardin, we conclude that the Employee did have a meaningful return to work. Any unfounded anxiety that he might ultimately lose his job if he returned to the cutting department does not alter our conclusion.

Under these circumstances, Tennessee Code Annotated section 50-6-241(a) limits the maximum award in this case to two-and-one-half times the medical impairment. Both Drs. Howell and Weiss assigned an impairment of 15% to the body as a whole. The award is, therefore, modified to 37.5% permanent partial disability to the body as a whole.

CONCLUSION

The judgment of the trial court that the Employee sustained a compensable injury is affirmed. The award of benefits awarded to the Employee for permanent partial disability is modified to 37.5% to the body as a whole. Costs are taxed to the appellee, Myron L. Robbins, for which execution may issue if necessary.

GARY R. WADE, JUSTICE

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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 appeals 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 Appellee, Myron L. Robbins, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM