

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

March 23, 2009 Session

**JIMMY COLLINS v. COCA-COLA BOTTLING COMPANY
CONSOLIDATED, INC. ET AL.**

**Direct Appeal from the Chancery Court for Madison County
No. 63542 James F. Butler, Chancellor**

No. W2008-01889-SC-WCM-WC - Mailed July 8, 2009; Filed September 29, 2009

Employee alleged that he sustained a gradual injury to his lower back as a result of his work as a route salesman for a soft drink company. He was treated by several doctors, to whom he gave differing histories concerning how his injury occurred. The trial court found that he had sustained a compensable injury and awarded 70% permanent partial disability apportioned between Employer and the Second Injury Fund. Employer appeals, contending the evidence preponderates against the trial court's finding. We affirm the judgment.¹

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

WILLIAM C. COLE, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, C. J., and WALTER C. KURTZ, SR. J., joined.

P. Allen Phillips, Jackson, Tennessee, for the appellant, Coca-Cola Bottling Company Consolidated, Inc.

Art D. Wells, Jackson, Tennessee, for the appellee, Jimmy Collins.

Robert E. Cooper, Jr., Attorney General & Reporter; Michael E. Moore, Solicitor General; and Joshua Davis Baker, Assistant Attorney General, for the appellee, The Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

¹ This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law.

Jimmy Collins (“Employee”) was a route salesman for Coca-Cola Bottling Consolidated (“Employer”), a soft drink distributor. His job consisted of driving to various industrial facilities in West Tennessee and delivering cases of bottled drinks to on-site cafeterias or snack bars. He began working for Employer in 1981 and became a route salesman in 1990. He alleged that he sustained a gradual injury to his back as a result of his employment.

Employee was examined by one chiropractor, Dr. Fowler, and several surgeons, including Dr. John Brophy, Dr. John Campbell, Dr. Glen Barnett, and Dr. Apurva Dalal. These doctors agree that Employee suffers from spondylolisthesis, which is a slippage of the vertebrae, and that the condition is the result of a congenital spine defect known as a pars defect. The doctors disagree, however, as to whether Employee’s work worsened the condition.

The complaint alleges that Employee suffered an accidental injury on or about July 10, 2005. Employee’s first interrogatory responses state:

On or about July 2nd or 3rd, 2005, I was restacking my delivery truck when I experienced pain in my back and it started going down my leg. This happened between 5:30 and 6:00 a.m. I had experienced back pain off and on over the years, but it had never gone down my leg.

Shortly before trial, Employee filed supplemental interrogatory responses, stating:

I sought medical treatment for a problem I was having with my leg on July 11, 2005. I saw Dr. Rex Fowler. Two days later, I discovered I had a back condition which caused my leg pain. Prior to July 11, 2005, I had leg pain going back to approximately 2000, when I had a leg injury. Dr. Fowler told me I had an injury due to lifting and handling cases of drinks over a long period of time. I notified my supervisor. I experienced back and right leg pain off and on over the years; but I had never been to the doctor for it.

Employee testified at trial that in July 2005 he had pain running from his right hip down his right leg to his toe. He had hip pain for a year and a half or two years, which had gradually worsened over time. He initially believed that this was the result of knee surgery in 2000. At the time Employee reported the injury to his employer, however, he considered the hip pain to be the result of wear and tear from years of lifting and stacking cases of drinks, as well as pulling and pushing dollies containing those cases. As outlined below, he told some of his examining doctors about specific incidents that caused his pain to increase. Employee testified that similar incidents had occurred without appreciably changing his symptoms. He explained that he described these events to some of the doctors because he believed that he was required to identify a specific date and event in order to file a workers’ compensation claim.

Employee first saw Dr. Rex Fowler, a chiropractor, for right leg pain on July 11, 2005. Dr. Fowler’s note for July 15 states that Employee gave a history of a “gradually occurring injury over time.” That note also states that Employee “told me this a.m. that this will be a W.C. & to call his work.”

Employee reported his injury to Employer and selected Dr. David Johnson, an orthopedic surgeon, from a list of physicians provided to him. Dr. Johnson examined him on August 17, 2005. Dr. Johnson's record reflects that Employee was "having problems with his back, radiating down his right hip and down his right lower extremity. He says he has been having trouble with it for years and it has just gotten progressively worse." Dr. Johnson ordered an X-ray that revealed spondylolisthesis at the L4-5 level of the spine and degenerative disc disease at the L5-S1 level. Employee testified that Dr. Johnson ordered an MRI and after reading the test results, recommended surgery, but he did not perform the recommended procedure. Employee was referred to Dr. John Brophy, a neurosurgeon.

Dr. Brophy testified by deposition. Employee gave him a history of two and a half years of "slowly progressive intermittent back pain," which had recently progressed into his right hip and leg. He did not describe any specific incident or injury. Dr. Brophy's primary diagnosis was lumbar radiculopathy secondary to congenital spondylolisthesis. He testified that the spondylolisthesis was caused by a congenital defect in the posterior elements of the spine, referred to as a pars defect. He agreed that Employee was a candidate for lumbar fusion surgery. Dr. Brophy also opined that Employee's symptoms were not related to his employment but represented the natural progression of the congenital defect. He testified that the condition was just as likely to progress in a person who engaged in mainly sedentary activities as one who engaged in more vigorous activities. Dr. Brophy qualified this testimony by stating that the development of radiculopathy *could be* considered an aggravation of the underlying condition if caused by a specific work injury. Employee did not mention such an event to him, however, and therefore Dr. Brophy concluded that the injury was not work-related. Dr. Brophy advised both Employee and Employer of his conclusions. Employer thereafter denied the claim.

Employee sought treatment through his health insurance. His primary care physician referred him to Dr. Glen Barnett, a neurosurgeon. Employee initially saw Dr. Barnett on October 14, 2005, giving a history of increasing problems with his back, hip, and leg for one and one-half years. Dr. Barnett agreed with the previous recommendations for surgery. Like Dr. Johnson, Dr. Barnett did not perform that type of procedure, so he referred Employee to his partner, Dr. John Campbell.

Dr. Campbell testified by deposition. Employee gave him a history of low back and right leg pain, which "[went] back to earlier this year back in July." Dr. Campbell's diagnosis and recommendations were consistent with those of Drs. Johnson, Brophy, and Barnett. Dr. Campbell advised Employee that the surgery could not take place until he stopped smoking because that activity interfered with the healing process. Employee quit smoking and returned to Dr. Campbell in May 2006. Dr. Campbell performed a two-level lumbar fusion on May 30, 2006. Employee had substantial, though not complete, relief of his back and leg pain. Employee reached maximum medical improvement on September 15, 2006. At that time, Dr. Campbell recommended permanent restrictions against lifting more than forty pounds and "severe" bending or stooping. He subsequently assigned 30% permanent anatomical impairment to the body as a whole.

Dr. Campbell testified that Employee's pars defect and the resulting spondylolisthesis were not the result of a gradual work injury. He explained that the defect could be caused by either a

degenerative process or a congenital problem. During the surgery, he observed a “Gill fragment,” which indicated a congenital condition. Counsel for Employee asked a hypothetical question:

[I]f [Employee] had reported to you that he never had any radicular pain and then after pulling on a couple of cases of Cokes off of a truck, and more than expected, more than two cases came off the truck, he caught them, and at that time experienced radicular pain in his leg and since that time it was persistent, would that change your opinion about the relationship between Mr. Collins’ employment and the condition for which you treated him?”

Dr. Campbell said that those facts, if true, would change his opinion. Dr. Campbell also testified that in addition to spondylolisthesis, Employee had a thickening of the large ligament that holds the vertebrae in place. He was questioned at length about the effect of the thickened ligament and its relationship to Employee’s normal work duties. He testified:

What I’m saying is that if you look at [Employee’s] occupation and the lifting that he did, I think that was a contributing factor in the body’s response to his underlying problem, which was a slippage of one bone on the other, and the body’s response to that continued heavy work was to try to strengthen the joint, thicken that ligament, and stabilize that joint. The problem is as the ligament thickens it causes more neurologic compression which causes more symptoms in the patient.

....

What I’m saying is that it didn’t contribute to more slippage necessarily, but it did, I think, contribute to more thickening of the ligament, which in turn caused him to have more stenosis and narrowing along the neurologic structures that course through that part of the spine.

Q: Okay. And that would be what necessitated, in your opinion, the fusion?

A: That is correct.

Dr. Apurva Dalal, an orthopaedic surgeon, performed an independent medical examination at the request of counsel for Employee on March 7, 2007. Employee gave a history of an injury occurring on July 13, 2005, stating that he was pulling a dolly loaded with cases of soft drinks “when the dolly became out of balance. [He] had sharp pain in the back and down to the right leg.” Dr. Dalal opined that this incident had exacerbated Employee’s pre-existing degenerative arthritis. Counsel for Employee also asked if repetitive lifting of cases of soft drinks “might have had any impact on” Employee’s back. Dr. Dalal responded:

Repetitive picking up of weights, especially what he described as several cans of Cokes and pulling a dolly can and does result into acceleration of the degenerative condition of the lower back, not only that, just picking up weights and pulling and tugging all the time. You must understand that the Pars defect which occurs can occur due to the stresses. And what we call it in medical terms is it’s slow, progressive small microtraumas which occur in the spine just keeps breaking this small bone in the spine.

Dr. Dalal assigned an impairment of 22% to the body as a whole. He suggested that Employee limit his lifting to no more than ten pounds at a time.

Dr. Robert Kennon, a vocational evaluator, testified that Employee had a vocational disability of 95%-99% as a result of the limitations placed upon him by Dr. Dalal.

Employee was fifty-one years old on the day of the trial. He graduated from high school and attended a community college for about a year. Prior to being hired by Employer, he worked in grocery stores as a night manager and a frozen food manager. He first worked on the bottling line and as a truck mechanic for Employer before becoming a route salesman. Dr. Campbell's activity restrictions were incompatible with Employee's job, which required lifting up to seventy-five pounds. He therefore did not return to work for Employer. At the time of trial, Employee was working for an equipment rental business owned by a friend. The parties stipulated that Employee had prior workers' compensation awards totaling 51.2% to his body as a whole.

Employee testified that no specific incident had caused or worsened his back and leg pain. He believed that his symptoms were the result of years of lifting, bending, and twisting on the job. He said that he understood statements made by Dr. Brophy to mean that only traumatic injuries were compensable under workers' compensation and that gradual injuries were not. For that reason, he gave histories of such an event to Dr. Dalal and in his interrogatory responses.

The trial court issued its findings in the form of a letter to counsel. It found that Employee was a credible, honest witness, who had no intent to deceive in giving differing histories concerning his injury. The trial court found that the evidence was sufficient to establish causation and awarded 70% permanent partial disability to the body as a whole. The award was apportioned 48.8% to Employer and 21.2% to the Second Injury Fund. Employer has appealed, contending that the trial court erred by finding that Employee sustained a compensable injury.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court, accompanied by a presumption of correctness unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Rhodes v. Capital City Ins. Co., 1545 S.W.3d 43, 46 (Tenn. 2004). When credibility and weight of testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987); Houser v. Bi-Lo, Inc., 365 S.W.3d 68, 71 (Tenn. 2001). A reviewing court, however, may draw its own conclusions about the weight and credibility to give expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Employer argues that because Employee gave inconsistent histories to various doctors and through his discovery responses, any medical evidence supporting a finding of causation is thus speculative.

Causation in this case is a medical issue. Three medical depositions were placed into evidence. Dr. Brophy, working from a history of an alleged gradual injury, testified that Employee's condition was congenital and was neither aggravated nor accelerated by his employment. Dr. Dalal, who had been given a history of a specific traumatic injury, testified that the event had aggravated the underlying arthritic condition. Dr. Dalal's testimony was rendered moot, however, because Employee ultimately denied that such an event occurred. Dr. Dalal also testified that the pars defect could be a result of gradual microtrauma over time. Dr. Campbell agreed that a pars defect could occur over time but testified that based on his direct observation of Employee's spine during surgery, Employee's injury did not occur in that way.

Dr. Campbell also testified at length that Employee's spinal ligament was abnormally thick, which increased his spinal stenosis. Dr. Campbell performed surgery to treat the spinal stenosis. Dr. Campbell testified that repetitive heavy lifting, such as that required by Employee's job, contributed to the ligament's thickening. Both Dr. Brophy and Dr. Dalal discussed this subject in a general way, and neither expressed a contrary opinion.

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). Further, all reasonable doubts as to causation and whether an injury arose out of employment should be resolved in favor of the employee. Phillips v. A. & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). Given Dr. Campbell and Dr. Dalal's testimony that Employee's work aggravated his back condition, and resolving any doubts in favor of Employee, we conclude that the evidence does not preponderate against the trial court's finding that Employee sustained a compensable injury to his lower back.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed one-half to Coca-Cola Bottling Consolidated, Inc. and its surety, and one-half to the Second Injury Fund, for which execution may issue if necessary.

WILLIAM C. COLE, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by the appellant, Coca-Cola Bottling Company Consolidated, pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed one-half to Coca-Cola Bottling Consolidated, Inc. and its surety, and one-half to the Second Injury Fund, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Janice M. Holder, C.J., not participating.