FILED
December 1, 2016
TENNESSEE
WORKERS' COMPENSATION
APPEALS BOARD
Time: 8:35 A.M.

TENNESSEE BUREAU OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

Gary Thompson	)	Docket No. 2016-05-0208
	)	
v.	)	State File No. 77822-2014
	)	
Mesa Interior Construction Co., Inc., et al.	)	
	)	
	)	
Appeal from the Court of Workers'	)	
Compensation Claims	)	
Dale Tipps, Judge	)	

Affirmed and Remanded - Filed December 1, 2016

In this interlocutory appeal, the employee disputes the trial court's determination that he is not entitled to additional medical treatment for his low back complaints. The employee suffered injuries to his cervical and lumbar spine as a result of falling from a scaffold, and the employer provided medical care, including a cervical fusion. The treating physician referred the employee for pain management treatment due to ongoing cervical complaints. The employer authorized pain management for the cervical injury, but refused to authorize further treatment for the employee's lumbar complaints based on the treating physician's opinion that the lumbar complaints were not caused by the work-related injury. Following an expedited hearing, the trial court found the employee had failed to establish he will likely prevail on the merits of his request for additional medical treatment for his low back complaints and denied his request for additional treatment. The employee has appealed. Having carefully reviewed the record, we affirm the trial court's decision and remand the case for further proceedings as may be necessary.

Judge David F. Hensley delivered the opinion of the Appeals Board in which Presiding Judge Marshall L. Davidson, III, and Judge Timothy W. Conner joined.

Michael Fisher, Nashville, Tennessee, for the employee-appellant, Gary Thompson

Alex B. Morrison, Knoxville, Tennessee, for the employer-appellee, Mesa Interior Construction Co., Inc.

Memorandum Opinion[1]

Gary Thompson ("Employee") asserts he sustained compensable cervical and lumbar spine injuries on October 1, 2014, that arose primarily out of and in the course and scope of his employment with Mesa Interior Construction Company, Inc. ("Employer"). Specifically, he alleges that while coming down from scaffolding, he lost his footing and fell backwards, striking his neck and back. Employer accepted the claim as compensable and provided medical care. Employee ultimately came under the care of Dr. Douglas Mathews, a neurosurgeon, who first saw him on May 11, 2015. At that visit, he reported back and neck pain and denied having experienced problems in his back or neck prior to his October 2014 accident. After reviewing Employee's cervical spine MRI, Dr. Mathews recommended surgery to correct a herniated disc at C3-4 that was causing radiculopathy, which was performed on July 7, 2015.

Employee returned to Dr. Mathews on July 15, 2015, complaining of cervical and arm pain and swelling at the incision site. He was instructed to go to the emergency room if he experienced swelling in the neck to the point that he had trouble swallowing or breathing. When he returned on July 29, 2016, he reported that he continued to experience left shoulder and arm pain. He was instructed to follow up in three or four months.

When Employee next presented at Dr. Mathews' office on October 26, 2015, he indicated that he "would like to address his lower back pain." In addition to cervical disc degeneration and radiculopathy, the assessment in the October 26, 2015 report indicated low back pain and lumbar disc degeneration, and a lumbar MRI was recommended. Following the MRI, Employee returned to Dr. Mathews on November 23, 2015. The report of that visit noted some low back pain, but without radiculopathy. Employee's MRI revealed "some facet arthropathy causing mild stenosis at L4-L5 and L5-S1." After reviewing the MRI results with Employee and diagnosing low back pain and spondylosis without radiculopathy, Dr. Mathews referred Employee for pain management for his ongoing cervical complaints. Although Dr. Mathews did not see Employee again, on December 7, 2015, he completed a "Final Medical Report" that indicated Employee was released to restricted duty on November 24, 2015.

Employee was initially seen by Dr. Steven Urban at Pain and Spine Consultants-Nashville on January 26, 2016 "for management of neck [and] arm pain." The report noted that "we are to see him only for his neck." Employee signed a treatment agreement, was prescribed medication, and was requested to follow up in one month. However, the next pain management medical report included in the record on appeal is a

[1] "The Appeals Board may, in an effort to secure a just and speedy determination of matters on appeal and with the concurrence of all judges, decide an appeal by an abbreviated order or by memorandum opinion, whichever the Appeals Board deems appropriate, in cases that are not legally and/or factually novel or complex." Appeals Bd. Prac. & Proc. § 1.3.

July 22, 2016 report evidencing that Employee was seen by Dr. John Nwofia.[2] Dr. Nwofia provided pain management for Employee's ongoing cervical complaints. His July 22, 2016 report, like that of Dr. Urban's January 26, 2016 report, states that "we are to see him only for his neck."

On April 28, 2016, Employee's attorney sent correspondence to Dr. Mathews seeking his opinion with respect to whether Employee's current low back complaints were causally related to the October 2014 work injury. Dr. Mathews opined in a written response that Employee's "back injury" was related to the October 2014 incident and that he retained no impairment as a result of the low back injury.

The parties subsequently attempted to resolve Employee's claim. However, due to their inability to resolve issues concerning future medical treatment for Employee's low back complaints, they deposed Dr. Mathews. He testified that, "based on [his] years of experience, that a lumbar strain should maximally resolve at six months; and if he complains of something further, then it's something unrelated to the strain." He further opined that "[i]t's [his] opinion that it's more likely than not that the strain he suffered as a result of that injury has resolved and that his continued - - his recurrent complaints are related to aging effects of the spine." When questioned about the need for further medical care for Employee's lumbar complaints, Dr. Mathews testified that "[a]s long as he has complaints, there are people there to treat him. I don't feel that it's related to the strain injury that he had with work."

On cross-examination, Dr. Mathews reiterated his opinion that Employee's lumbar complaints are related to the natural aging process, stating "[his] continued complaints related to [his low back] are due to his degenerative condition and not related to that strain."

Based on Dr. Mathews' testimony and the medical evidence in the record, the trial court determined that although Employee established he would likely prevail in proving he suffered a compensable lumbar spine injury, he had not presented sufficient evidence to establish he would likely prevail in proving any need for ongoing medically necessary treatment related to the low back injury. Employee appealed, asserting he sustained a compensable injury and is therefore "entitled to future medical treatment that is causally related by the authorized treating physician." Employer contends that Employee presented insufficient proof of a work-related low back injury, and that any need for medical treatment for Employee's low back complaints was not causally related to the employment.

[2] The report indicates Employee participated in pain management in the interim since his initial visit with Dr. Urban, but the record on appeal does not include those records.

An injured worker has the burden of proof on every essential element of his or her claim. *See* Tenn. Code Ann. § 50-6-239(c)(6) (2015); *see also Buchanan v. Carlex Glass Co.*, No. 2015-01-0012, 2015 TN Wrk. Comp. App. Bd. LEXIS 39, at *5 (Tenn. Workers' Comp. App. Bd. Sept. 29, 2015). At an expedited hearing, an employee is able to meet this burden by presenting sufficient evidence from which the trial court can determine that the employee is likely to prevail at a hearing on the merits, as set out in Tennessee Code Annotated section 50-6-239(d)(1) (2015). *See McCord v. Advantage Human Resourcing*, No. 2014-06-0063, 2015 TN Wrk. Comp. App. Bd. LEXIS 6, at *9 (Tenn. Workers' Comp. App. Bd. Mar. 27, 2015). This lesser evidentiary standard "does not relieve an employee of the burden of producing evidence of an injury by accident that arose primarily out of and in the course and scope of employment at an expedited hearing, but allows some relief to be granted if that evidence does not rise to the level of a 'preponderance of the evidence.'" *Buchanan*, 2015 TN Wrk. Comp. App. Bd. LEXIS 39, at *6. In reviewing a trial court's determination that the evidence presented at an expedited hearing is sufficient to find an employee is likely to prevail at trial, we must determine if the preponderance of the evidence supports the trial court's conclusion. *See* Tenn. Code Ann. § 50-6-239(c)(7).

The only expert medical opinion in the record addressing Employee's low back complaints is the opinion of the authorized treating physician, Dr. Mathews. He opined that Employee suffered a compensable low back injury, which he characterized in his deposition as a strain that had resolved. He stated that such a condition is temporary and that any ongoing complaints are more likely than not related to the natural aging process rather than the work-related injury. Although Employee is correct in his argument that he is entitled to medical treatment that is reasonable and necessary as a result of his work-related injury, he has presented no expert opinion to establish or suggest that any treatment recommended for his lumbar complaints is causally related to the work injury.

Employee asserts that his currently authorized physician, Dr. Nwofia, should be authorized to evaluate his low back to determine whether his lumbar complaints are causally related to the work injury. As we have previously stated, "[w]hile an injured worker who meets the applicable statutory requirements is entitled to medical benefits, there is no 'right to a causation opinion' as such. If a trial court determines that medical benefits are appropriate, the court can order the initiation of such benefits. However, it is the parties' responsibility to secure expert opinions or other evidence necessary to address any applicable burden of proof." *Pool v. Jarmon Trans.*, No. 2015-06-0510, 2016 TN Wrk. Comp. App. Bd. LEXIS 1, at *9-10 (Tenn. Workers' Comp. App. Bd. Jan 4, 2016) (citation omitted). Here, Employee did not present an expert medical opinion to contradict that given by Dr. Mathews. Thus, the only proof in the record addressing whether Employee's lumbar complaints are causally related to the work injury is Dr. Mathews' opinion that Employee's ongoing low back complaints are caused by the natural aging process rather than the work injury. Accordingly, the record supports the trial court's determination that Employee is not likely to prevail at a hearing on the merits

in establishing that treatment for his lumbar complaints is reasonable and necessary as a result of the work-related injury.

Finally, Employer asserts that Employee has not presented sufficient evidence to establish he is likely to prevail at a hearing on the merits in proving he suffered a compensable low back injury. As noted above, Dr. Mathews addressed this issue, opining that Employee's low back strain, albeit having resolved, was causally related to the October 2014 work incident. Employer has presented no expert medical opinion to the contrary, and accordingly, the evidence does not preponderate against the trial court's finding on this issue.

For the foregoing reasons, we hold that the evidence does not preponderate against the trial court's decision at this interlocutory stage of the case. Nor does the trial court's decision violate any of the standards set forth in Tennessee Code Annotated section 50-6-217(a)(3). The trial court's decision is affirmed, and the case is remanded for any further proceedings that may be necessary.

FILED
December 1, 2016
TENNESSEE
WORKERS' COMPENSATION
APPEALS BOARD
Time: 8:35 A.M.

TENNESSEE BUREAU OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

Gary Thompson	)	Docket No. 2016-05-0208
	)	
v.	)	State File No. 77822-2014
	)	
Mesa Interior Construction Co., Inc., et al.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appeals Board's decision in the referenced case was sent to the following recipients by the following methods of service on this the 1st day of December, 2016.

Name	Certified Mail	First Class Mail	Via Fax	Fax Number	Via Email	Email Address
Michael Fisher					**X**	mfisher@ddzlaw.com
Alex Morrison					**X**	abmorrison@mijs.com
Dale Tipps, Judge					**X**	Via Electronic Mail
Kenneth M. Switzer, Chief Judge					**X**	Via Electronic Mail
Penny Shrum, Clerk, Court of Workers' Compensation Claims					**X**	Penny.Patterson-Shrum@tn.gov

Jeanette Baird

Jeanette Baird
Deputy Clerk, Workers' Compensation Appeals Board
220 French Landing Dr., Ste. 1-B
Nashville, TN 37243
Telephone: 615-253-0064
Electronic Mail: Jeanette.Baird@tn.gov