IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 6, 2004 Session

SAMUEL WARREN v. AUTO-OWNERS INSURANCE COMPANY

Direct Appeal from the Chancery Court for Madison County
No. 60492 James F. Butler, Chancellor

No. W2003-02017-WC-R3-CV - Mailed May 20, 2004; Filed June 21, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The employer argues that the Chancellor erred in determining that the employee suffered a compensable injury to his right leg and in awarding lump sum benefits. After reviewing the record and applicable authority, we conclude that the evidence in the record does not preponderate against the Chancellor's finding that the employee suffered a compensable injury to his right leg, but we also conclude that the Chancellor erred in awarding the employee lump sum benefits. Accordingly, the judgment is affirmed in part and reversed in part.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part

E. RILEY ANDERSON, JUSTICE, delivered the opinion of the court, in which JANICE M. HOLDER, J., and ALLEN W. WALLACE, SR. J., joined.

Kyle C. Atkins and Paul B. Conley, III, Humboldt, Tennessee, for the Appellant, Auto-Owners Insurance Company.

Robert B. Vandiver, Jr., Jackson, Tennessee, for the Appellee, Samuel Warren.

MEMORANDUM OPINION

BACKGROUND

On September 9, 2002, in Jackson, Tennessee, the employee, Samuel Warren, was injured as he stepped out of a customer's car that he had test-driven for his employer, Dennis Mitchell Automotive. Warren filed a claim for workers' compensation benefits in the Chancery Court of Madison County, Tennessee.[1] The following evidence was presented at trial.

Samuel Warren, age 34, testified that he had worked as an automotive mechanic for Dennis Mitchell Automotive since February of 2000. Warren's duties included maintenance and basic repairs of engines, struts, shocks, and tires. Warren was also responsible for test-driving customers' cars after repairs were made. As to how his injury occurred, Warren testified:

> As I stepped out of the car, I felt something -- it felt like it was under my foot or something. It felt like my foot rolled or something. I heard a loud pop, and I immediately couldn't put any weight on my foot.

After notifying his employer, Warren went to the emergency room of Humboldt General Hospital in Humboldt, Tennessee. On the day after the injury, Warren's employer referred him to Convenient Care, a division of The Jackson Clinic, where he was seen by Dr. Melanie Hoppers who took x-rays, which revealed a broken foot, and placed him in a Cam walker. Warren was referred by Dr. Hoppers to Dr. Rodney Staton, a board certified podiatrist.

Dr. Staton testified that he examined Warren on September 26, 2002, and that he reviewed Dr. Hoppers' record and history of September 10, 2002, which stated "he was getting out of a customer's car when he stepped out the wrong way and injured his right foot." Warren gave the following history to Dr. Staton:

> His chief complaint was he broke his foot. He stated that on September 10th, he stepped out of a customer's car while at work, heard a pop in his right foot and felt sharp pain. At that time, he went to Humboldt General Hospital, and then to Convenient Care where he was told that he had a broken fifth metatarsal and was placed in a Cam walker.

Dr. Staton said that additional x-rays taken on September 26, 2002, revealed that the fracture site had "widened" and that the fractured pieces were "coming apart." He performed surgery to clean the two ends of the fracture and to insert a screw in Warren's right foot that would hold the fractured bones

[1] The workers' compensation claim was filed against the appellant in this case, Auto-Owners Insurance Company, which was the employer's insurance carrier.

together. Warren's right foot was placed in a cast, and he was told not to place any weight on his foot.

Dr. Staton stated that he saw Warren several times following the surgery. In November of 2002, Dr. Staton removed the cast and took additional x-rays that showed the screw was in "good position" and that the fracture was "healing normally." In December of 2002, Dr. Staton referred Warren for physical therapy after he had reported that he was having "swelling" and "soreness" on the outside of his right foot. On December 30, 2002, Warren reported that he "started having pain on the outside of his right foot." Dr. Staton instructed him to continue physical therapy and released him to work for four hours per day. After Warren finished the therapy, he was released to return to "light work." He found out, however, that he had been replaced by his employer.

After Dr. Staton released Warren to return to work in January of 2003, Warren later returned and reported pain and swelling in his right foot. Dr. Staton testified that x-rays showed that the fracture site had healed and that the screw was intact. He prescribed arch support inserts and advised Warren to lose weight. In May of 2003, Warren complained to Dr. Staton of pain in his right foot whenever he stood or walked. Dr. Staton believed that the fracture had healed and that nothing more could be done other than removing the surgical screw. Although Warren initially agreed to have surgery to remove the screw, he later changed his mind.

Dr. Staton testified that Warren suffered a permanent injury based on the pain in his right foot. Dr. Staton estimated that the employee's permanent impairment due to the fifth metatarsal fracture was seven percent (7%) to his right foot based on the AMA Guidelines, Fifth Edition. Dr. Staton concluded that the cause of Warren's injury was that he "stepped out of a car at his job and broke his foot."

Dr. Lawrence F. Schrader, a board certified orthopaedic surgeon, testified that he examined Warren on March 28, 2003, that Warren told him that he was injured during a test drive of a vehicle as he was exiting the car, and that he had an inversion injury to his right foot and ankle. Dr. Schrader explained that an inversion injury is where the outside of the ankle rolls toward the outside of the foot and the foot rolls underneath the person, i.e., an ankle sprain. He found that Warren walked with an "antalgic gait on the right" and that the "amount of time spent on [the right] leg during walking was significantly shortened either because of weakness or pain." He also found that Warren had tenderness, decreased sensation, and decreased range of motion in his foot.

Dr. Schrader concluded that Warren sustained a fracture of "the bone across the base of the metatarsal of the fifth toe . . .[,] in the midportion of the foot, which is also a musculotendinous injury . . . ." He explained that the fracture involved a break "closest to the heel where a tendon attaches" and that the tendon, which goes around the ankle and up the side and back of the leg, stabilizes the heel and foot while walking or standing. After stating that this injury was "more difficult to treat than other comparable breaks" because "it's more of a tendon injury," Dr. Schrader testified that he used range of motion and strength evaluations for determining Warren's percentage of impairment to his right leg. He concluded that Warren had eighteen percent (18%) impairment

to the lower right extremity due to the loss of motion and seventeen percent (17%) impairment to the lower right extremity due to the loss of strength.

Warren testified that his right foot and leg were "fair" and that he walked with a limp at the time of the trial. Although he had briefly obtained another job as a mechanic, he needed to take "quite a few breaks" because standing and carrying heavy objects caused pain and swelling in his foot. He lost the new job because he was unable to meet required production levels and because he missed time for doctor appointments. Warren testified that he has opted not to have additional surgery to remove the screw from his foot for fear of infection.

The Chancellor concluded that the employee, Samuel Warren, had suffered a compensable injury to his right lower extremity resulting in fifty percent (50%) vocational disability. The Chancellor awarded lump sum benefits.

STANDARD OF REVIEW

In a workers' compensation action, an employee must establish that he or she suffered a work-related injury by a preponderance of the evidence. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997). A work-related injury is an "injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. § 50-6-102(12) (Supp. 2003).

Appellate review of the trial court's ruling in a workers' compensation case is de novo upon the record, accompanied by a presumption of correctness of the trial court's findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2003). Where medical testimony differs, the trial court has the discretion to accredit the opinion of one witness over that of another witness. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). Where medical testimony is presented by deposition, the reviewing court may make an independent assessment to determine where the preponderance of the evidence lies. See Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002).

ANALYSIS

Causation

The employer first argues that the Chancellor erred in finding that the employee, Samuel Warren, suffered a compensable injury. It contends that Warren merely suffered an idiopathic fall that was not related to a condition of employment and did not present an additional hazard to employees. The employee argues that the evidence supported the Chancellor's finding that the employee was injured as he stepped out of a customer's car that he had been test-driving.

An employee must establish that he or she suffered an injury "arising out of and in the course of employment." Tenn. Code Ann. § 50-6-102(12). The phrase "arising out of" refers to causation

and requires proof of a causal connection between the employment and the resulting injury. Reeser v. Yellow Freight Sys. Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Although causation may not be based on speculative proof, absolute certainty is not required and any reasonable doubt must be construed in favor of the employee. Hill, 942 S.W.2d at 487.

After hearing the testimony of the employee and reviewing the depositions of Dr. Staton and Dr. Schrader, the Chancellor made extensive findings of fact and found that the evidence established the element of causation as follows:

> I find that this was incurred in the scope of his employment. He was working. He wasn't just walking from one place to another. He was actually getting in and out of a customer's car. I'm not sure I heard any proof as to whether or not the ground was level or not. [Warren] did say that he thought something was under his foot.
>
> There's no proof to the contrary that [this] was an unusual and extraordinary event at that time when he got out of the car. . . .
>
> This was an activity other than just walking from one place to another. He was actually twisting and getting out of the car. He said that his ankle rolled.

The Chancellor's findings demonstrate that he accredited the employee's testimony as to the occurrence of the injury. There were slight differences in the histories given to Drs. Hoppers, Staton, and Schrader, which the Chancellor found to be understandable. Dr. Schrader testified that it was an inversion injury, i.e., an ankle turn, which was consistent with the "Jones" fracture found. To the extent that there is a question whether there was a particular or additional hazard to the employee, we must construe any reasonable doubts in the employee's favor. Accordingly, we agree with the Chancellor's determination that Warren's injury arose out of his employment.

Lower Right Extremity

The employer next argues that the Chancellor erred in finding that Warren suffered a compensable injury to his lower right leg and not just his right foot. Warren argues that the evidence does not preponderate against the Chancellor's finding.

The record indicates that the Chancellor emphasized Dr. Schrader's testimony, which was based on "range of motion and things of that nature." The Chancellor also noted that Dr. Staton's testimony was based on finding a "foot injury." Our review of the medical proof likewise reflects that Dr. Schrader, a board certified orthopaedic surgeon, detailed the injury and the more extensive effects of the injury suffered by Warren. Dr. Schrader stated that the location of the fracture affected a tendon that runs from the leg to the ankle, impaired the stability of the heel and foot while standing or walking, and decreased strength and mobility in the leg and ankle. He testified that he performed

a wide range of strength and motion evaluations, which he incorporated into his determination of the employee's impairment to his right leg. Dr. Staton, on the other hand, based his determination of impairment solely upon the injury to the employee's right foot and complaints of pain. Dr. Staton did not mention tendon damage and did not evaluate range of motion or strength.

It is well-settled that an injury to a scheduled member may authorize an award of benefits for disability or loss of use to another scheduled member. See Seal v. Charles Blalock and Sons, Inc., 90 S.W.3d 609 (Tenn. 2002). Accordingly, we conclude that the evidence in this record does not preponderate against the Chancellor's award of benefits based on an injury to the right lower extremity.

Lump Sum

Finally, the employer contends that the lump sum award was erroneous because the Chancellor failed to properly consider the relevant statutory factors and because the evidence established that the employee had filed bankruptcy twice, that his home was being foreclosed, and that he had a history of not managing his money wisely. The employee has conceded that the Chancellor erred in awarding lump sum benefits.

The lump sum statute, Tennessee Code Annotated section 50-6-229(a), requires the trial court to consider whether a lump sum will be in the best interest of the employee and whether the employee has the ability to wisely manage and control the lump sum award. In our view, the parties are correct that the Chancellor did not properly consider the statutory factors and erred in awarding lump sum benefits in this case. See Henson v. City of Lawrenceburg, 851 S.W.2d 809, 814 (Tenn. 1993).

Accordingly, the judgment awarding lump sum benefits is reversed and the case is remanded for additional proceedings and a determination of the remaining periodic payments to be made to the employee.

CONCLUSION

After reviewing the record and applicable authority, we conclude that the evidence in the record does not preponderate against the Chancellor's finding that the employee suffered a compensable injury to his right leg, but we also conclude that the Chancellor erred in awarding the employee lump sum benefits. Accordingly, the judgment is affirmed in part and reversed in part, and the case remanded for a determination of the remaining periodic payments to be made to the employee. Costs are assessed one-half to the appellant, Auto-Owners Insurance Company, and its surety, and one-half to the appellee, Samuel Warren.

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E. RILEY ANDERSON, JUSTICE

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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 one-half to the Appellant, Auto Owners Insurance Company, and one-half to the Appellee, Samuel Warren, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM