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

June 28, 2005 Session

DAVID SHANE SALYERS v. JONES PLASTIC & ENGINEERING COMPANY, LLC., ET AL.

Appeal from the Circuit Court for Benton County
No. 4CCV-903 Julian P. Guinn, Judge

No. W2004-02979-WC-R3-CV - Mailed August 30, 2005; Filed September 29, 2005

From the determination by the trial court that the Worker sustained 28% vocational disability apportioned to the right leg, the Employer appeals. The Employer contends that the Worker's injuries neither arose out of nor occurred in the course of his employment. We conclude otherwise and, thus, affirm the trial court's judgment.

Tenn. Code. Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT E. CORLEW, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ARNOLD B. GOLDIN, SP. J., joined.

Clinton H. Scott, Jackson, Tennessee, for the Appellant, Jones Plastic & Engineering Company.

Charles L. Hicks, Camden, Tennessee, for the Appellee, David Shane Salyers.

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 the 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. Jones Plastic & Engineering Co., LLC ("Employer") has appealed the action of the trial court, which determined that David Salyers ("Worker") sustained 28% vocational disability apportioned to the right leg, asserting primarily that, although the Worker did experience a minor fall while working for the Employer, this incident did not result in any injury. The Employer further asserts that the problems resulted from a motorcycle accident before the Worker became

employed by the Employer and not from any work-related incident. For the reasons stated below, we affirm the decision of the trial court.

FACTUAL BACKGROUND

The Worker was twenty-nine years of age at time of trial. He is a high school graduate, with no further education other than limited welding classes. He is a divorced father of three. After working for brief periods of time for an HIS factory, where he "pulled pants," for Emerson Tool, where he ran a press in the "iron section," for Ray Smith Chevrolet, where he painted cars and did mechanic work, and for himself, briefly, diving for mussel shells for his father's business, the Worker began working for the Employer on May 4, 2002. After working for some nine months, he fell on February 14, 2003 while pulling a mold out of a press. As he was attempting to "break some bolts loose" so he could remove the mold, his wrench slipped, causing him to slip in some oil which had been spilled on the floor of the plant. The Worker testified that his right leg "popped real bad." No one saw the Worker fall, although his supervisor reached the scene immediately after the fall, before the Worker had arisen from the floor. The Worker then reported the incident to his supervisor, who completed an incident report. The Worker did not indicate any desire to see a physician at that time, however. In fact, the Worker did not seek to see a physician for nearly two months after this incident.

The Employer asserts that the Worker's injuries were due to a prior accident that did not occur within the course and scope of the Worker's employment. The evidence is undisputed that the Worker had, prior to beginning work for the Employer, been injured in a motorcycle accident. The Worker asserted that his injuries from the motorcycle accident had been minor. He acknowledged such an injury, which the proof showed occurred either in 1994, 1997, or 1999, and also involved the right leg. The Worker testified, however, that his prior accident involved no permanent injuries, but "just a little scratches and stuff." He further asserted that after the motorcycle incident, he had no problems performing any job for the Employer or for any prior employer, and he had been employed in some very physically demanding jobs.

Although he continued to work for nearly two months after the February 14, 2003 incident, the Worker and his mother both testified as to problems which began immediately and which he had not experienced previously. He testified that his leg would "pop out of joint . . . and I'd have to get down on the ground and try to pop my leg back in joint and it was painful." Pam Salyers, the Worker's mother, testified that she saw the Worker twice a week prior to the injury at bar and that she did not observe any problems with his leg. After February 14, 2003, however, Ms. Salyers observed the Worker "limping a lot and—and if he—he squatted down, he had a lot of trouble getting up." Further she observed "a lot of swelling in it around his knee area." Nonetheless, the Worker waited until April 8, 2003 before he went to see a doctor.

Because the Worker waited a period of time before seeking medical attention and also because of statements made by the Worker about his injury, questions continued as to whether the

Worker had, in fact, sustained an injury on February 14, 2003, or whether he simply required further treatment due to his old motorcycle injury. The Employer denied the Worker's claim and refused to provide a physician for him. The Worker then selected his own physician, choosing Claiborne A. Christian, a physician who specialized in orthopedics. Dr. Christian's medical records were considered by the trial court by stipulation of the parties. They show that on April 8, 2003, the Worker first went to see Dr. Christian. On that date, the Worker indicated on an "Information Sheet" that the injury was to the right knee and was not related to employment, but on a page titled "Patient Information" signed the same day, he indicated the injury was work-related, though the date of injury was listed as "not sure." The "Patient Information" sheet further indicated that the question was asked "Is this visit related to an injury (not work related)?" to which the Worker wrote "no," and then wrote the following in answer to the causation of his injury: "I was pulling a mold out of a press and I slipped on some oil on the floor and feel (sic) down and my knee was hurt." The physician's note from April 8, 2003 includes: "HISTORY: This patient tells me that he had a motorcycle accident in 1994. At that time he injured his right knee. He has had an MRI that was apparently normal but he still has problems with his knees giving out and locking and catching."

The Worker explained why he completed the information sheets in such a confusing manner. He testified that Dr. Christian asked him whether he had prior injuries, and that he completed the papers referencing his prior injury,

> Because the way they told me—the way they explained it, that—'cause I didn't understand the question. I had to ask the lady there. And she told me—she said well, just put down the first time you had an accident. That's what she told me to do so that's what I did.

The question was further complicated by the manner in which the Worker completed a Short Term Disability Claim Statement. The Worker provided information that he had only one child (despite his testimony at trial that he had three children), and then listed the following information:

> A. Date of Accident or date you first noticed symptoms of your illness: *1-15-03*
> B. Describe in detail how, when and where the accident occurred or describe the nature of your illness and its first symptoms: *Motorcycle accident—broke ACL ligament in right knee*
> C. Date you were first treated by a physician: *3-15-03*
> D. Name, address, and phone number of first treating physician: *Dr. Christian [address and phone]*
> E. Is your condition due to injury or sickness related to your job? *No*
> F. Have you filed or do you intend to file a Workers' Compensation Claim: *No*

Lisa Gail Hampton, the payroll clerk for the Employer who also had responsibility for workers' compensation benefits, testified that the Worker told her that the problem "was a motorcycle accident. . . . He said, you know, it was like this prior." She never observed the Worker limping nor did she observe swelling in his knee.

David Davidson, a supervisor for the Employer testified that before the incident of February 14, 2003, the Worker "wouldn't run or nothing out there at work. He's—he didn't get around as quick. Said his leg was hurting some and I don't even recall what it was from."

The Worker continued to work for the Employer until he began treatment in April, 2003, but has not worked since. He applied for, and received, Short Term Disability payments for three months. When those payments ran out, the Employer provided a job for the Worker, but on a different shift than he had worked previously. The Worker quit because of the change of shift and because he was to go back to the same job he was doing at the time of the injury, which the Worker felt he could not do. The Worker was unemployed at the time of trial.

Medical treatment for the Worker included a surgical procedure followed by physical therapy. The Worker was released to full duty without restrictions, by Dr. Christian on August 7, 2003. Robert J. Barnett, M.D., who performed an Independent Medical Evaluation assigned a 15% anatomical impairment rating, apportioned to the right leg. His Form C-32 filed with the court states that the injury was work-related, and lists a number of restrictions, including thirty pound maximum lift, fifteen pound frequent lift, occasional lift less than three hours (without further explanation), stand and walk less than three hours (without further explanation), sit six hours, limited push or pull (without further explanation), environment restriction (without further explanation), with further restrictions that the Worker can occasionally balance and twist, but never climb, stoop, kneel, crouch or crawl. Dr. Barnett's written report, also filed with the court, provides that the Worker has "good range of motion but does lack a few degrees of full extension of the right knee. . . ." Measurements of his calf muscles shows 15½ inches of the injured right limb and 15-3/4 of the uninjured left limb and ½ inch enlargement of the joint.

Other than the Form C-32 from Dr. Barnett, there were no medical opinions presented. No depositions were taken, no medical providers testified live before the Court, and no other Forms C-32 were presented. The parties stipulated that certain medical records could be considered by the court. The Evaluation from Sports Plus Rehab Centers lists as the "Major Complaint/History" the motorcycle accident of "1999" without mention of any work incident, and an "Outpatient One-Time Assessment" from Baptist Rehabilitation also references the motorcycle accident without mention of a work-related incident, but cites a date of 1994 for the motorcycle accident.

At the time of the trial, the Worker expressed serious problems. He testified that he "can't do stuff like I used to." He complained that he experiences swelling daily and that his leg "is stiff." He cannot run, and he has trouble playing with his children. He complained that "I can't like bend down and I can't hardly—I can't get back up on my own." He testified that he has pain "when I get up in the morning, when I go to get up out of the chair, when I'm, you know, doing stuff around the house."

STANDARD OF REVIEW

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). Conclusions of law established by the trial court come to us without any presumption of correctness. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825 (Tenn. 2003).

ANALYSIS

We have carefully conducted an independent examination of the record to determine where the preponderance of the evidence lies, as the law requires us to do. *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 446 (Tenn. 1999). We have remembered, in our review, that the law establishes a presumption of correctness of the trial court's factual determinations, unless the evidence preponderates to the contrary. Tenn. Code Ann. § 50-6-225(e); *Murray v. Goodyear Tire & Rubber Co.*, 46 S.W.3d 171, 175 (Tenn. 2001).

Although we recognize that the evidence is not uncontroverted, our duty is simply to determine where the preponderance of the evidence lies, and in doing that, we must recognize the presumption that the trial court correctly found the facts. We cannot find that the trial court erred in its factual finding that the Worker fell while on the job, inasmuch as the evidence clearly preponderates in favor of such a finding. There is no evidence that the Worker was not physically at his place of employment of February 14, 2003, nor is there any evidence he was not engaging in an activity for the benefit of the employer. Further, we cannot find that the trial court erred in finding that the Worker sustained an injury as a result of his fall. He so testified, and an incident report was filed at the time of the Worker's fall because of his complaints at that time. We cannot find that the injury suffered by the Worker is not permanent, inasmuch as the only expert medical opinion presented, that of Dr. Barnett, so stated. Further we cannot find that the evidence preponderates against a finding that the Worker exacerbated a pre-existing problem with his right leg, again because the only expert testimony presented shows that the injury resulted from employment.

Closely considering the facts, the Worker testified that, at the time of his February 14, 2003 incident, he was pulling a mold out of a press. As he was attempting to "break some bolts loose" so he could remove the mold, his wrench slipped, causing him to slip in some oil which had been spilled on the floor of the plant. The Worker testified that his right leg "popped real bad. " Although no one saw the Worker fall, there was no evidence to the contrary. Whether this evidence establishes that, at the time of the incident of which the Worker complains, he was working within the course and scope of his responsibilities for the employer, is a mixed question of fact and law. After considering the facts and applying the law, we find that, at the time of the February 14, 2003 incident, the Worker was engaged in an activity within the course and scope of his employment.

Further, the factual issue is raised as to whether the Worker suffered a permanent injury as a result of the February 14, 2003 incident. Whether one sustains a permanent injury must be

established by expert testimony except in the most unusual of circumstances. *E.g., Whirlpool v. Nakhoneinh*, 69 S.W.3d 164, 168 (Tenn. 2002); *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997); *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991). The only expert opinion presented, that of Dr. Barnett, is that the Worker's permanent injury was related to employment. Thus, the proof preponderates heavily in favor of a finding of permanence of the injury.

Further, the court must consider whether there is a causal connection between the injury and the permanent condition. Causal connection also must be established by expert evidence, except in the most unusual of events. *E.g., Beasley v. U.S. Fidelity & Guaranty Co.*, 699 S.W.2d 143, 146 (Tenn. 1985); *Simpson v. Satterfield*, 564 S.W.2d 953, 956 (Tenn. 1978). Again, the only expert opinion, Dr. Barnett's C-32 Form, establishes a casual connection between the injury and the Worker's employment. The lay testimony of the Worker and his mother also buttresses the expert opinion that the February 14, 2003 incident caused the injury.

No expert witnesses testified. The equivalent of such testimony is before us, however, because the Worker presented the Form C-32 completed by Dr. Barnett. We may take judicial notice of the fact that the standard form C-32 has been established by the commissioner of labor and workforce development. The legislature has established by law that all courts are to consider a Form C-32 as though the writer of the Form had testified in Court. Tenn. Code Ann. § 50-6-235(c). Pertinent portions of this provision are as follows:

> (c)(1) Any party may introduce direct testimony from a physician through a written medical report on a form established by the commissioner of labor and workforce development. ... A reproduced medical report which is not originally signed is not admissible as evidence unless accompanied by an originally signed affidavit from the physician or the submitting attorney verifying the contents of the report. . . .
> (2) The written medical report of a treating or examining physician shall be admissible at any stage of a workers' compensation claim in lieu of a deposition upon oral examination, ...

See Martin v. Lear Corp., 90 S.W.3d 626, 628 (Tenn. 2002).

Where the Form C-32 is used and no deposition testimony is presented, the duty of the court is difficult where the language in the form is unclear. *See, Ferrell v. Cigna Prop. & Cas. Co.*, 33 S.W.3d 731, 734 (Tenn. 2000). We see no lack of clarity in the Form C-32, though, at a deposition, questions could have addressed inconsistencies between the opinions of the physician and factual issues addressed in the medical records which were admitted without the opinions of the treating physicians.

After we determine the facts, we next are required to apply the law to the facts of the case. When we consider the law, we attach no presumption to the legal conclusions reached by the trial

court. Nonetheless, we reach the same conclusion reached by the Trial Court after our consideration of the evidence.

The provisions of Tennessee Code Annotated section 50-6-103 establish that one is entitled to receive workers' compensation "for personal injury or death by accident arising out of and in the course of employment . . . ." The case law has variously defined the term "arising out of" employment. A recent decision has emphasized the distinction between the requirements that an injury arise out of employment and arise during the course of employment. *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004). *Clark* suggests that "an injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Id; accord, Conner Bros. Excavating Co., Inc. v. Long*, 98 S.W.3d 656, 660 (Tenn. 2003); *Woodlawn Memorial Park, Inc. v. Keith*, 70 S.W.3d 691, 695 (Tenn. 2002). *Clark* also contrasts the phrase "in the course of" employment, which simply focuses on the question whether the "employee was performing a duty he or she was employed to perform" when the injury occurred. It "focuses on the time, place, and circumstances of the injury. *Clark*, 129 S.W.3d at 47*; accord, Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002); *Hill*, 942 S.W.2d at 487.

Further, the law is clear that one who, while so engaged, sustains an injury which exacerbates an underlying condition, is entitled to be compensated under the terms of the Workers' Compensation law. *E.g., Thomas*, 812 S.W.2d at 284; *Sweat v. Superior Indust.*, 966 S.W.2d 31, 32 (Tenn. Workers' Comp. Panel 1998)*; Luedtke v. Travelers Ins. Co.,* 100 S.W.3d 188, 192 (Tenn. Workers' Comp. Panel 2000).

CONCLUSION

Thus, we find that the trial court correctly determined that the Worker sustained a compensable injury. The evidence is undisputed that, at the time of his complaint on February 14, 2003, the Worker was physically on the job at the Employer's facility, and that the work day had not yet concluded. Further, it is undisputed that the Worker was pulling a mold out of a press, which was a part of his regularly assigned duties as an employee of the Employer. We thus find that the proof preponderates in favor of a finding that the incident of February 14, 2003 arose out of the employment and during the course of employment.

Although the evidence is further undisputed that at some point prior to the occurrences before the court the Worker sustained a non-work-related motorcycle accident, the undisputed medical evidence is that, at the time of the February 14, 2003 incident, the Worker exacerbated that pre-existing condition caused by his prior motorcycle accident in such a manner that there was a further permanent anatomical impairment.

Considering all of the circumstances, then, we agree with the trial court that the Worker sustained a compensable injury. The percentage of vocational disability has not been addressed by the parties and is not before us on appeal.

The decision of the trial court is affirmed. Costs must be paid by the Employer or its sureties for which execution my render if necessary.

____

ROBERT E. CORLEW, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 28, 2005 Session

DAVID SHANE SALYERS v. JONES PLASTIC & ENGINEERING COMPANY, LLC., et al.,

Circuit Court for Benton County
No. 4CCV-903

No. W2004-02979-WC-R3-CV - Filed September 29, 2005

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, Jones Plastic & Engineering Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM