IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
December 15, 2005 Session

CURTIS O. MCCONKEY v. VONORE POLICE DEPARTMENT

Direct Appeal from the Circuit Court for Monroe County
No. V04044H John B. Hagler, Judge

FiledMarch 21, 2006

No. E2005-01342-WC-R3-CV - Mailed February 13, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court 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 trial court awarded plaintiff sixty (60) percent permanent, partial vocational disability to the right leg. On appeal, the employer contends that the employee's injury did not arise out of his employment and is therefore not compensable. The employer alternatively argues that the trial court's permanent, partial vocational disability award is excessive. We affirm the judgment of the trial court.

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

THOMAS R. FRIERSON, II, SP. J., DELIVERED THE OPINION OF THE COURT, IN WHICH E. RILEY ANDERSON, JUSTICE, AND ROGER E. THAYER, SP. J., joined.

John T. Batson, Jr., Knoxville, Tennessee, for Appellant, Vonore Police Department.

C. Edward Daniel, Knoxville, Tennessee, for Appellee, Curtis O. McConkey.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff, Curtis O. "Butch" McConkey, was 47 years of age at the time of trial. On or about January 22, 2004, while serving in the capacity as acting Chief of Police for the City of Vonore, the Plaintiff was engaged in general employment activities including administrative duties,

scheduling, answering telephone calls and preparing reports. Mr. McConkey therefore was responsible for the day to day operations of the Vonore Police Department.

On the day of his injury, the Plaintiff was sitting at a desk, attending to necessary paperwork of his office. In connection with his work, Mr. McConkey rose from a swivel-type chair, turned and upon standing, experienced immediate and excruciating pain when his "knees snapped".

Mr. McConkey was initially examined by his family physician, Dr. Howard Holmes. The Plaintiff ultimately came under the care and treatment of Dr. Edwin Michael Holt, a board certified orthopedic surgeon. Following his review of x-rays and an M.R.I. scan, Dr. Holt concluded that the Plaintiff presented a disrupted anterior cruciate ligament and torn medial cartilage of his right knee. Dr. Holt thereafter performed a surgical reconstruction of Plaintiff's anterior cruciate ligament, as well as a repair of the torn medial meniscus. Mr. McConkey returned to work in approximately four weeks. Dr. Holt opined that the Plaintiff presented an anatomical impairment rating of 11 percent to the his lower extremity, with 9 percent based upon the AMA Guidelines and 2 percent based upon pain in his patellofemoral joint.

By judgment filed June 3, 2005, the trial court concluded, *inter alia*, that Plaintiff's injury was compensable within the meaning of the Tennessee Workers' Compensation Act and that by reason of his work related injury, Mr. McConkey sustained a 60 percent permanent, partial vocational disability to the right leg.

II. STANDARD OF REVIEW

The standard of review in a workers' compensation case 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, T.C.A. 50-6-225(e)(2); Houser v. Bi-Lo, Inc., 36 S.W.3d 68 (2001). We are required to conduct an independent examination of the record to determine where the preponderance of the evidence lies, Wingert v. Government of Sumner Co., 908 S.W.2d 921 (1995). Moreover, we are required by law to examine in depth a trial court's factual findings and conclusions, GAF Building Materials v. George, 47 S.W.3d 430 (2001). "Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances", Orman v. Williams-Sonoma, Inc., 803 S.W.2d 672 (1991).

Where the medical testimony in a workers' compensation case is presented by deposition, we may make an independent assessment of the medical proof to determine where the preponderance of the proof lies, Cooper v. INA, 884 S.W.2d 446 (1994). Conclusions of law are subject to *de novo* review on appeal without any presumption of correctness, Nutt v. Champion International Corp., 980 S.W.2d 365 (1998).

III. COMPENSABILITY OF INJURY

Tennessee courts recognize that for an employee to be eligible for workers' compensation benefits under the controlling statutory scheme, he/she must suffer an "injury by accident arising out of and in the course of employment", T.C.A. 50-6-102(13). The Supreme Court has concluded that these two statutory requirements are not synonymous, although both elements must exist to establish a work connection to the injury for which the employee seeks benefits, Blankenship v. American Ordinance Systems, 164 S.W.3d 350 (2005).

An injury occurs "in the course of employment" if it takes place while the employee was performing a duty he or she was employed to perform, Fink v. Caudle, 856 S.W.2d 952 (1993). The "course of employment" requirement focuses upon the time, place and circumstances of the injury, Hill v. Eagle Bend Manufacturing, Inc., 942 S.W.2d 483 (1997).

By contrast, an injury "arising out of" employment occurs where there is a causal connection between the conditions under which the work is required to be performed and the resulting injury, Fritts v. Safety National Casualty Corp., 163 S.W.3d 673 (2005). "The mere presence of the employee at the place of injury because of the employment is not enough, as the injury must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work", Blankenship, *supra*; Thornton v. R.C.A. Service Co., 221 S.W.2d 954 (1949). An injury which is only "coincidental, or contemporaneous or collateral" with the employment will not be considered as one arising out of the employment, Jackson v. Clark and Fay, Inc., 270 S.W.2d 389 (1954). Any reasonable doubt as to whether an injury arose out of the employment is to be resolved in favor of the employee, Bell v. Kelso Oil Co., 597 S.W.2d 731 (1980).

The employer's argument that the instant action is controlled by the reasoning elucidated by the opinion in Connor v. Chester County Sportswear Co., 2002 W.L. 31348662 (T.W.C.P. 2002) is unpersuasive. In Connor, the employee sustained an injury to her knee as she stood and twisted to flush the toilet while using the restroom at work. The panel concluded that claimant's injury maintained no rational connection to her work duties. The factual circumstances of Connor are distinguishable from the case at bar and therefore, the opinion is not controlling.

The present case is analogous to the circumstances found in Martin v. Flagship Airlines, 1994 W.L. 902440 (T.W.C.P. 1994). In Martin, a gate agent was deboarding an aircraft by descending a set of stairs when she stepped from the bottom step and felt a sharp pain in her left knee. The panel in Martin concluded that the evidence preponderated against the trial court's determination that Ms. Martin's injury did not arise out of and in the course of her employment.

With this panel having conducted an independent examination of the record, we conclude that the evidence does not preponderate against the trial court's conclusion that Mr. McConkey's injury did arise out of and in the course of his employment in January 2004. A causal connection existed between the conditions under which the work was required to be performed and Mr. McConkey's resulting injury. Hence, his work-related injury is compensable under the

provisions of the Tennessee Workers' Compensation Act.

IV. EXTENT OF VOCATIONAL DISABILITY

The extent of vocational disability in a workers' compensation environment is a question of fact to be determined from all of the evidence, including lay and expert testimony, Worthington v. Modine Mfg. Co., 798 S.W.2d 232 (1990). In determining vocational disability, the question is not whether the employee is able to return to work being performed when injured, but whether the employee's earning capacity in the open labor market has diminished by residual impairment caused by work related injury, Corcoran v. Foster Auto, G.M.C., 746 S.W.2d 452 (1988). The assumption does not exist in the law that one's earning capacity is impaired in direct proportion to anatomical disabilities, Morgan v. Cashion, 638 S.W.2d 387 (1982); Acuff v. Vinsant, 443 S.W.2d 669 (1969).

The extent of vocational disability can be established by lay testimony, Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123 (1995). An injured employee is competent to testify as to his own assessment of his physical condition and such testimony should not be disregarded, Tom Still Transfer Company v. Way, 482 S.W.2d 775 (1972). The court may consider many pertinent factors including age, job skills, education, training, duration of disability and job opportunities for the disabled in addition to anatomical impairment for the purpose of evaluating the extent of the claimant's permanent, vocational disability, T.C.A. 50-6-241; McCaleb v. Saturn Corporation, 910 S.W.2d 412 (1995); Cleek v. Walmart Stores, Inc., 19 S.W.3d 770 (2000).

The employer argues that the trial court's award of sixty (60) percent permanent, partial vocational disability to the right leg is excessive considering the employee's anatomical impairment and lack of permanent, physical restrictions. The trial court considered the medical testimony of Dr. Holt, as well as the testimony of Plaintiff, finding Mr. McConkey to be a "very credible witness." Having made an independent review of the evidence, we conclude that the evidence does not preponderate against the trial court's conclusion that, resulting from his work-related injury, Plaintiff presents a permanent, partial vocational disability of sixty (60) percent to the right leg.

Finally, the employer posits that the trial court assigned an excessive permanent, partial vocational disability in view of the General Assembly's promulgation of the Tennessee Workers' Compensation Reform Act of 2004. The Tennessee Constitution states, "[T]hat no retrospective law, or law impairing the obligations of contracts, shall be made", Tennessee Constitution, Article I, Section 20. Statutes are presumed to operate prospectively unless the legislature clearly indicates otherwise, Shell v. State, 893 S.W.2d 416 (1995). "Generally, the statute in effect at the date of the worker's injury governs the rights of the parties under workers' compensation law absent an indication of the legislature's contrary intent, Nutt, *supra*; Presley v. Bennett, 860 S.W.2d 857 (1993). An exception to the rule exists for statutes which are remedial or

procedural in nature, Shell, *supra*. "Statutes deemed remedial or procedural apply retrospectively to causes of action arising before such acts became law and to suits pending when the legislation took effect", Nutt, *supra*.

A procedural statute addresses the mode or proceeding by which a legal right is enforced, Saylors v. Riggsbee, 544 S.W.2d 609 (1976). Remedial statutes are defined as "legislation providing means or method whereby causes of action may be effectuated, wrongs redressed and relief obtained....", State v. Defriece, 937 S.W.2d 954 (1996). "Statutes that create a new right of recovery or change the amount of damages recoverable are, however, deemed to have altered the parties' vested right and thus are not considered remedial", Nutt, *supra.*

We find the applicable amendments to T.C.A. 50-6-241 to be neither remedial nor procedural. Further, the statute specifically restricts application of new maximum limits to injuries occurring on or after July 1, 2004. The panel concludes that the statute in effect on the date of the worker's injury governs the rights of the parties for the case at bar.

V. CONCLUSION

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the employer and its surety.

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Thomas R. Frierson, II, Special Judge

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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 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Vonore Police Department, for which execution may issue if necessary.