

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 24, 2006 Session

YATES SERVICES, L.L.C. v. DONALD E. BLACK, JR.

**Direct Appeal from the Circuit Court for Rutherford County
No. 49910 Robert E. Corlew, Judge**

**No. M2005-02694-WC-R3-CV - Mailed - October 27, 2006
Filed - November 29, 2006**

This worker's 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 of findings of fact and conclusions of law. The trial court determined the employee, Donald E. Black, Jr. (Black), had sustained a work-related injury resulting in a permanent partial disability amounting to 26% of the body as a whole, and awarded temporary total disability and future medical benefits. The employer, Yates Services, L.L.C. (Yates) has appealed and contends that the trial court erred (1) by allowing Black to present his evidence first at trial, (2) by holding that Black sustained a gradual back injury caused by his employment, and (3) by finding that Black had given adequate notice of his injury to his employer. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and FRANK F. DROWOTA, III, SP. J., joined.

John R. Rucker, Murfreesboro, Tennessee, for the Appellant, Yates Services, L.L.C.

K. Cody Allison, Nashville, Tennessee, for the Appellee, Donald E. Black, Jr.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Yates initiated this suit as a declaratory judgment action. At trial, the court allowed Black to present his proof first over an objection by Yates. The trial court stated that it frequently allowed

employee-defendants to present first in workers' compensation cases because the burden of proof lies with the employee.

Donald Eugene Black, Jr., was born November 27, 1980. He took remedial courses at Springfield High School but graduated and thereafter completed an auto collision course at Nashville Tech. At the time of trial, Black had been employed for three-and-a-half years at Yates, a provider of maintenance services for the Nissan automotive plant in Smyrna, Tennessee. Black worked with a pressure washer called a hydroblaster with which he cleaned mats and grates. The mats and grates were heavy and required lifting in order to clean them. He also cleaned booths and mopped floors. His activities, other than work, were not strenuous.

Black could not pinpoint when he became injured, but, beginning in October 2003, he developed symptoms that became progressively worse. He believed his injury was caused by his work because he did frequent lifting and hydroblasting.

Black testified that he reported experiencing problems to his supervisor, Jimmy Woods. On November 7, 2003, the day after seeing a physician, Black testified he told Woods that his foot was numb, he was experiencing back problems and that he was unsure whether his injury occurred at work. At trial, Woods denied this conversation took place. Darren Wayne Smith, a hydroblaster for Yates, testified that he heard Black telling Woods about his foot going numb and that he did not know what the problem was.

On December 10, 2003, Black saw Dr. Jason Hubbard. Dr. Hubbard examined Black, reviewed an MRI taken at Vanderbilt University Medical Center that revealed two herniated discs and recommended surgery. Black claimed to have related this information to Jimmy Woods, but Woods also denied this conversation. About the middle of January 2004, Black related to Gerald Shaw, the Safety Manager for Yates that he was going to have surgery on his back and believed he had been hurt at work. Shaw testified, to the contrary, that Black said he did not know how he had become injured. Black testified that Shaw told him to go to the Human Resources office and apply for disability.

Black did so and obtained an application for short-term disability from a Human Resources Specialist, Renee Vanplete. On the application, Black stated with regard to his injury, "I'm pretty sure it happened at work. I do a lot of lifting, and I work with hydroblaster." According to Ms. Vanplete, short term disability refers to illness or injury unrelated to work. If it was Black's intention that it be filed as such, the claim could not have been successfully filed as it was submitted to her. Vanplete sent Black to the Safety Department where a workers' compensation claim could be filed. Black showed Shaw the disability application. Shaw suggested to him that Yates would probably deny a workers' compensation claim for lack of notification or investigation into it. He suggested that if he wanted to receive his benefits for a short-term disability that he needed to change the application. At the bottom of the original short term disability application form in Ms. Vanplete's handwriting it states "This was the original. We had him change the form." Black testified that he changed the application to indicate it was not a work-related injury because he

needed some type of funds while he was out of work following surgery. The second application for disability was filed January 23, 2004.

Dr. Hubbard performed surgery on January 27, 2004. He returned to work March 22, 2004, and performed his previous job. While his work activity causes pain and stiffness, Black relieves the pain by stretching and does not take any kind of pain-relieving medication.

II. MEDICAL EVIDENCE

Black was evaluated by Dr. David Gaw. Dr. Gaw is certified by the Board of Orthopaedic Surgeons and is a Fellow in the American Academy of Orthopaedic Surgeons. He also is a member of the American Academy of Disability Evaluating Physicians and the American Board of Independent Medical Examiners.

Dr. Gaw's report was admitted into evidence through a Form C-32, Standard Form Medical Report for Industrial Injuries. Dr. Gaw reported that Mr. Black related a gradual onset of pain in October 2003. Three or four days after the pain in his back, he began to have pain in his left leg. He also began having numbness in his toes. Black sought medical attention on November 2, 2003 and had an MRI scan, which revealed a disc herniation. He subsequently underwent surgery on January 27, 2004, consisting of L4-5 and L5-S1 discectomy. Following surgery he was better. The left leg pain was significantly reduced, and Black had returned to work. While working, his back became sore and stiff but the pain was tolerable. His left leg continued to have numbness, especially in the little toe side of his foot. He felt there was some weakness in the use of his leg as he did not have the endurance that he had prior to the onset of his problem. Soreness, stiffness and achiness in his back was in direct proportion to the amount of twisting, bending and lifting that he did. He did not have any radicular pain in his legs.

According to Dr. Gaw, Mr. Black was able to walk without a limp. He exhibited some trouble getting up and down but had good functional movement of the lumbar spine. There was moderate soreness and tenderness in his back but no muscle spasm. Dr. Gaw observed the absence of an ankle reflex in the left which was present on the right. There was a 1.5 centimeter atrophy of the leg muscles on the left as compared to the right. There is weakness of the all toe extensors on the left as compared to the right.

Based upon the patient's history, Dr. Gaw was of the opinion that the most likely cause of his condition was the type of work that he described as doing for Yates. Pursuant to the Fifth Edition of the AMA Guides, Dr. Gaw was of the opinion Mr. Black has an eleven percent (11%) permanent partial impairment to the whole person due to the surgery and a seven percent (7%) permanent partial impairment to the whole person due to the loss of movement, for a combination of seventeen percent (17%) permanent partial impairment to the whole person.¹ Dr. Gaw reported that Mr. Black should

¹The trial court found an 18% impairment, but this finding has not been challenged on appeal.

avoid lifting more than sixty to seventy pounds occasionally or more than thirty to thirty-five pounds frequently. He should avoid continuous twisting or bending activities.

Dr. Jason Hubbard testified by way of deposition. He is a neurosurgeon with a practice in Nashville, Tennessee. Dr. Hubbard first saw Donald Black on December 22, 2003, for the numbness and weakness in his left foot. Black did not relate to Dr. Hubbard any particular incident or accident which brought on the pain. He described numbness in the left foot along with weakness and back pain that had been going on for approximately two months. On his new patient medical questionnaire, he was asked "Were you injured at work?" The answer was "Not sure." The same response was made to the question, "Are your symptoms accident related?" Upon examination, Dr. Hubbard observed that Black had a left foot drop or weakness of the left foot with dorsiflexion. Dr. Hubbard had an MRI that revealed two disc herniations at L4-5 and L5-S1. Dr. Hubbard recommended surgery. Dr. Hubbard emphasized to Mr. Black that surgical decompression was necessary to avoid permanent nerve damage.

Dr. Hubbard performed a lumbar discectomy on January 27, 2004. The surgery went well, without problems or complications. Dr. Hubbard last saw Black on May 12, 2004, and observed that he was doing well and was back at work. He still had some numbness but otherwise was much better. He instructed him to return as needed and has not seen him since. Dr. Hubbard placed no work restrictions on Mr. Black. Dr. Hubbard testified there was nothing in Black's medical history to indicate his injury was work-related. He acknowledged Black's condition or injury was one that a person could sustain when performing a job with a lot of physical activity. Normally, however, according to Dr. Hubbard, there would have been a sudden onset of symptoms.

III. RULING OF THE TRIAL COURT

The trial court found Mr. Black was entitled to compensation under the Workers' Compensation Act and determined his vocational disability to be twenty-six percent (26%). This conclusion was based upon the trial court's finding that Mr. Black had suffered gradual injury to his back. The trial judge credited the testimony of Dr. David Gaw, a "very experienced and certified orthopedic surgeon," that Mr. Black's injury was job-related. The trial court determined its finding was not inconsistent with the opinion of the treating physician, Dr. Jason Hubbard, who concentrated more significantly upon treatment rather than the causation of the condition.

Implicit in the judgment of the trial court is a finding that the notice of injury given by Mr. Black was adequate. The court found it to be undisputed that written notice was given on February 16, 2004. The trial court also determined that Mr. Black had given notice that his injury was work-related on January 19, 2004, by way of the short-term disability application.² The trial court also found the employer had no opportunity to direct the worker's treatment, and, therefore, had no liability for Mr. Black's medical care and treatment through the surgery but would be liable for

²The trial court noted that there was a dispute as to whether Black reported to his immediate supervisor, Jimmy Woods, that he may have a work related injury on November 7, 2003, and again in December 2003. The trial court made no findings with regard to whether such a report was made.

future medical treatment of the injury. The trial court also awarded Black temporary total disability benefits from the time of his last day of work prior to surgery, January 27, 2004, through the date he was released to return to work, March 22, 2004.

IV. ISSUES PRESENTED FOR REVIEW

Yates has appealed from the judgment of the trial court. On this appeal, Yates raises three separate issues and alleges:

1. The trial court erred by allowing the employee to present his evidence first at trial when Yates was the initial plaintiff in the case.
2. The trial court erred in finding that Black sustained an injury arising out of his employment and that his condition was caused by his employment.
3. The trial court erred in finding Black provided notice of his injury to his employer.

V. 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 of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989). Where credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Long v. Tri-Con Industries, Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

VI. ANALYSIS

1. Order of Evidence

The employer argues that the trial court erred by allowing Black to present his evidence first at trial. The trial court reasoned that Black should present its testimony first because the employee had the burden of proof on the chief issues in the case. The employer claims that this ruling prevented it from presenting its case-in-chief and then submitting rebuttal proof. This issue presents a question of law reviewed by this court *de novo* with no presumption of correctness.

We leave questions of the order of proof in a trial to the sound discretion of the trial court. See Morris v. Swaney, 54 Tenn. 591, 595 (1872). In a workers' compensation action, the Tennessee Supreme Court indicated it would approve of a trial court's decision to allow a defendant to put on proof before the plaintiff when doing so would be in accord with the burden of proof. See City of Bristol v. Reed, 402 S.W.2d 124, 128-29 (Tenn. 1966).

In the case before us, Yates filed the original complaint as a declaratory judgment action seeking to have the trial court determine the rights and obligations of Yates to Black pursuant to the Workers' Compensation Act. Black filed a counterclaim for workers' compensation benefits. The trial court, in effect, determined that a trial on the employee's counterclaim would resolve Yates declaratory judgment action. Tennessee Rule of Civil Procedure 42.02, allows a trial court to order a separate trial of any one or more claims, counterclaims or issues for convenience or to avoid prejudice. We are of the opinion this rule is broad enough to support a trial court's conclusion that it was more appropriate or convenient to proceed on the employee's counterclaim than upon the original complaint under the circumstances of this case.

In addition, Tennessee Rule of Evidence 611(a) provides the "court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel." While this case did not present a threat of abuse by counsel, this rule is illustrative of the broad discretion a trial judge has in determining the manner in which evidence should be presented.

We are of the opinion that, under the existing case law and the stated rules of evidence and procedure, the trial court has the discretion to determine the order in which evidence is to be submitted at trial. In this case, the trial court supported its decision by stating that the party who has the burden of proof should present first. This rationale is consistent with the procedure followed in most trials, where the party with the burden of proof first presents evidence to establish its claim, and then the other party may present evidence to refute the claim. Therefore, the trial court's decision to allow Black to present first was not arbitrary and did not amount to an abuse of discretion.

2. Work-related Injury and Causation

The employer contends that the trial court erred in finding that Black sustained an injury arising out of and caused by his employment. The Tennessee Workers' Compensation Act provides that accidental injuries "arising out of and in the course of employment" are compensable. Tenn. Code Ann. § 50-6-103(a). This Court has recognized that "gradually-occurring injuries are compensable as accidental injuries" even when identifying a particular accident is difficult. Mahoney v. NationsBank of Tennessee, 158 S.W.3d 340, 344 (Tenn. 2005). However, to succeed on a worker's compensation claim, the employee must prove each element of the case by a preponderance of the evidence. Talley v. Va. Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989). The employee must establish by expert medical evidence a casual connection between the employment activity and the claimed injury. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

The employer asserts that two exhibits establish that Black's injury was caused by his 1998 automobile accident and not his employment. First, Dr. Lavin's medical records contain the following language:

The patient also complains of two weeks of lower back pain; he has a history of this since a car accident in '98 but the current bout is worse than usual; he is unable to id any triggers for this event. He denies major trauma with the car accident including whiplash just bruising related to the seat belt.

Second, Black wrote he was "not sure" if his back symptoms were related to the accident on Dr. Hubbard's patient questionnaire.

None of the medical experts whose opinions were before the court related Black's condition to the automobile accident. The trial judge expressly relied upon Dr. Gaw's C-32 form that established Black's employment as the cause of the injury or the exacerbation of a pre-existing injury.

The plaintiff in Long v. TriCon., Ltd., 996 S.W.2d 173, 177(Tenn. 1999) presented a situation similar to the case before us. In Long, the plaintiff had an admitted history of back injury. She could not identify a precise moment when the pain started or a specific motion or movement that caused the pain. The plaintiff sought medical treatment where an MRI revealed that she had herniated disks at L4-L5 and at L5-S1. Her physician made a written statement that her condition was "felt to be work related" and testified at trial that he felt "there was a reasonable chance that work experience could be related to that injury." The Tennessee Supreme Court affirmed the trial court's award of workers' compensation benefits, stating:

Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required, and reasonable doubt must be extended in favor of the employee. Accordingly, a trial judge may properly predicate an award in favor of an employee based on medical evidence that an incident "could be" the cause of the injury, where the trial judge has also heard lay testimony from which it reasonably inferred that the incident was in fact the cause of the injury. (citations omitted).

Id. at 177.

Here, as in Long, the plaintiff testified about frequently having to lift heavy mats and grates made heavier by sealer that fell onto them. He was required to lift the mats and grates in order to clean them with a hydroblaster. He sometimes used the hydroblaster cleaning mats and grates for entire shifts. Dr. David Gaw testified that the most likely cause of Black's back injury was his work activities at Yates. Dr. Hubbard testified that Black's condition was one that could be caused by work involving heavy activities. From our independent review of the medical evidence, we find the employee's back injury could have and more probably did result from his activities at work. We,

therefore, affirm the trial court's finding that Mr. Black suffered a work-related injury that caused the permanent impairment of his back and left leg.

3. Notice

The Tennessee Workers' Compensation Act sets forth specific requirements for when notice of an injury is to be given to the employer by the employee. Because gradually occurring injuries are rarely precipitated by a specific, work-related traumatic event, the statute provides different notice requirements for such injuries:

(b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or such injured employee's representative shall provide notice to the employer of the injury within thirty (30) days after the employee:

(1) Knows or reasonably should know that such employee has suffered a work-related injury that has resulted in permanent physical impairment; or

(2) Is rendered unable to continue to perform such employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

Tenn. Code Ann. §50-6-201(b) (Supp. 2004).

Recently, in Barnett v. Earthworks Unlimited, Inc., 197 S.W.3d 716 (Tenn. 2006), the Supreme Court of Tennessee refined the principles regarding when notice is required in a gradually occurring injury case. The Court stated:

“The purpose of the notice requirement is to give the employer ‘the opportunity to make a timely investigation of the facts while still readily accessible, and to enable the employer to provide timely and proper treatment for the injured employee.’” Banks v. United Parcel Serv., Inc., 170 S.W.3d 556, 562 (quoting Jones v. Sterling Last Corp., 962 S.W.2d 469, 471 (Tenn. 1998)). However, “[w]here the employee is ignorant of the work-connected nature of his injury, . . . the employer's interest must yield to the remedial purpose of the statute.” *Id.*

In Banks, we interpreted section 50-6-201 and held that “employees are relieved from the notice requirement until they know or reasonably should know that their injury was caused by their work and that the injury has either impaired them permanently or has prevented them from performing normal work activities.” 170 S.W.3d at 561. This comports with prior cases in which we recognized that “an employee who sustains a gradually-occurring injury may be unsure of the cause of his or her injury, and therefore is relieved of the notice requirement, until the diagnosis is confirmed

by a physician." Id. (citing Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 169-70 (Tenn. 2002); Pentecost v. Anchor Wire Corp., 695 S.W.2d 183, 186 (Tenn. 1985)).

Id. at 720-721.

Based upon the foregoing, we find Mr. Black was required to give notice of his injury within thirty days from the last day he worked prior to his surgery. The trial court found Mr. Black's application for short-term disability dated January 19, 2004, met the requirement of written notice that Mr. Black felt he had suffered a work-related injury. Moreover, the trial court found it undisputed that Mr. Black's counsel gave written notice on February 16, 2004. Because both of these writings were delivered prior to the expiration of 30 days from Mr. Black's last day on the job prior to his January 27, 2004, surgery, the notice given complied with the requirements of Tennessee Code Annotated section 50-6-201(b).

VII. CONCLUSION

For the reasons stated, the judgment of the trial court is affirmed. The costs of this cause shall be assessed against the employer, Yates Services, L.L.C.

DONALD P. HARRIS, SR. J.

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**Circuit Court for Rutherford County
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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 appeals 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 will be paid by the Employer/Appellant, Yates Services, L.L.C., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM