

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT Knoxville
February 26, 2007 Session

DAVID WAYNE MOORE V. PEDDINGHAUS MODERN TECHNOLOGIES, LLC

**Direct Appeal from the Circuit Court for Hawkins County
No. CV-2010 Kindall T. Lawson, Judge
Filed June 13, 2007**

No. E2006-01094-WC-R3-WC - Mailed May 8, 2007

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 findings of fact and conclusions of law. The trial court found that the employee was permanently and totally disabled as a result of a work-related knee injury and awarded permanent and total disability benefits until the employee is, by age, eligible for full benefits in the Old Age Insurance Benefits Program under the Social Security Act. Tenn. Code Ann. § 50-6-207(4)(B)(2003). The employer has appealed the trial court's award contending that the trial court erred in finding that the employee gave notice of the work-related injury and that the trial court erred in considering a summary of the medical depositions as opposed to having read the medical depositions before rendering a decision. After careful review of the record, we conclude that the trial court should be affirmed.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right;
Judgment of the Circuit Court Affirmed**

J. S. (Steve) Daniel, Sr. J., delivered the opinion of the court, in which William M. Barker, C.J., and Jon Kerry Blackwood, Sr. J., joined.

J. Eddie Lauderback, Johnson City, Tennessee, for the appellant, Peddinghaus Modern Technologies, LLC.

James M. Davis, Morristown, Tennessee, for the appellee, David Wayne Moore.

OPINION

I. Facts and Procedural History

Mr. David Moore was thirty-five years of age at the time this matter came on to be tried. Mr. Moore is a single person with no children who has a tenth grade education. He received a GED

before joining the United States Army in 1995. After serving three years in the United States Army, Mr. Moore was honorably discharged and returned to civilian employment. His civilian employment activities have been that of a laborer for the most part. Prior to his work-related injury, he had been employed as a laborer in the landscape business, loading trucks, as a machine operator and as a mechanic for various employers. For a short period of time he worked for the city of Myrtle Beach, South Carolina, picking trash up on a trash truck. He has also worked as a mobile pressure washer operator and has used his mechanical abilities to assemble computers. He worked for Berkline, separating parts, and then was employed by Peddinghaus Modern Technologies, LLC, hereinafter referred to as PMT. Initially Mr. Moore was employed by a temporary service and thereafter earned permanent employment with PMT.

Mr. Moore's medical history shows that when he was thirteen or fourteen years old, he suffered bilateral knee injuries as a result of playing sandlot football which required surgeries on both knees. He recovered from those injuries. His physical examination prior to his entry into military service cleared him for that service. In 2000 he had arthroscopic surgery on his left leg as a result of a farm accident in which a log rolled over and hit that leg. Mr. Moore made a complete recovery from that injury and in 2001, went to work for PMT. Prior to being engaged as a full-time employee, Mr. Moore underwent a complete employment physical. The physical was performed at the request of PMT by Dr. Breeding June 11, 2001. Dr. Breeding evaluated Mr. Moore's knees and rendered an opinion that he was "physically qualified for any job."

On June 5, 2003, Mr. Moore was working a second shift which was from 3:00 p.m. to 11:00 p.m. In the course of his work activity, Mr. Moore twisted and reached to get the next part on the production line, when he heard his knee pop. Immediately after, his knee began to swell and gave way. According to Mr. Moore, as the shift ended, he sought to notify his supervisor, Mr. Mark Fraiser, about his work-related injury but could not find him. He enlisted the help of another employee, John Horne, who also tried to find Mr. Fraiser. Horne made a call on the PA system seeking that Mr. Fraiser return to final inspection. Mr. Horne testified at the trial and corroborated Mr. Moore in his claim that he hurt his knee on this date at work and their efforts to find Mr. Fraiser and report the injury. However, Mr. Fraiser was not found and Mr. Moore went home.

When he returned the next day for his work shift, Moore was noticeably limping. He had not previously limped. According to Mr. Moore, as he was entering the plant, Mr. Mark Frasier came up from behind him and asked him why he was limping. At that time Mr. Moore reported to Mr. Frasier that he had twisted his leg and that it had popped while he was working the previous night on line 4. Mr. Frasier testified at the trial for PMT that Mr. Moore was a good employee and that prior to the summer of 2003, he had not limped at work. However, at some point he noticed Mr. Moore limping. When he inquired what had happened to him, Mr. Moore told him he had a knee injury from his army service that was the cause of the limp. Mr. Frasier denied he was informed that the knee injury was work-related.

Over the next few weeks after the injury, Mr. Moore continued to work. However, the limp progressively got worse and ultimately he could not perform the job because he was unable to stand and work the production line. Over this period, other employees asked Mr. Moore about why he was

limping. According to Moore, he explained that he had been hurt on the line. Mr. Moore says he made this explanation to Mr. Dwight Sexton who was the first shift supervisor. However, Mr. Sexton at the trial, denied being told of the injury. Ultimately, Mr. Moore went to Dr. Boonie Vick who is listed as an approved doctor for PMT's health insurance. Dr. Vick gave Mr. Moore some pain medication and x-rayed him and ultimately set up an appointment with a Dr. Stefan A. Prada. Mr. Moore initially saw Dr. Prada August 7, 2003. Dr. Prada took a medical history from Mr. Moore which included the knee pop and pain during his work shift. Dr. Prada examined Mr. Moore and concluded that he needed knee surgery.

Moore testified that he had never filed a workers' compensation action. However, on three or four occasions with PMT, he had metal dust enter his eyes as a result of grinding activities associated with his work. When those events occurred, he told his supervisor, Mr. Frasier, and was taken to the emergency room or eye doctor where his eyes were flushed out. Later Mr. Frasier would bring forms around and Moore would fill them out a few weeks after his treatment.

Dr. Vick saw Mr. Moore July 22, 2003. As a result of her examination, she relieved him from returning to work. She also referred him on that date to Dr. Prada who saw Mr. Moore August 7, 2003. Mr. Moore continued to work until July 31, 2003. On August 1, 2004, he went to see Ms. Anita Wilder who was PMT's payroll and benefits clerk. Ms. Wilder handled the payroll and benefits such as short and long term disability. Another employee, Mr. Doug Chappell, was actually the Human Resource Manager and handled all workers' compensation claims. When Mr. Chappell was not available, Ms. Wilder would deal with initial workers' compensation issues but would immediately turn those issues over to Mr. Chappell.

Mr. Moore testified that, on August 1st, he explained that he was desirous of being off work to have knee surgery. At the time, he felt that the knee surgery would be successful in repairing his problem and returning him to work. He sought short term disability benefits. He also explained the source of his injury as being the incident on Line 4, twisting and reaching for a part, causing his knee to pop. Ms. Wilder testified at the trial and supported the fact that Mr. Moore did in fact come into the office after his work shift and indicated he desired to have the benefits of family medical leave and short term disability, based on what appeared to be a work-related incident. According to Ms. Wilder, she suggested that this was a workers' compensation claim and that Mr. Moore should take this matter up with Mr. Chappell. According to Wilder's testimony, Mr. Moore declined that request and indicated that his knee problems were associated with an injury he had had during the service and he desired to take short term disability benefits. Ms. Wilder never notified Mr. Chappell of the work-related claim. Even though she had knowledge that the knee injury was work-related, she complied with Mr. Moore's request to initiate a short and long term disability claim.

The record and testimony indicate that there are apparently three separate parts to the disability claim process. One part of the claim form is filled out by the employee. A second part of the claim form is filled out by the physician and a third portion of the form is filled out by the employer. As a result, each of these portions of the total short and long term disability claim form bear separate dates. Mr. Moore filled out his portion of the claim form and in answer to the question,

"Describe in detail how and when and where the accident occurred and the nature of your injuries." Mr. Moore stated "twisted left knee at work. Popped loudly and swelling with pain." Dr. Prada filled out the physician's portion of the claim form and indicated that his treatment was for a medial meniscus tear and that he did not know whether the tear was related or arising out of the patient's employment. The employer's portion of the form appears to have been filled out by Ms. Wilder. She marked that the requested benefits were for treatment of a condition which did not arise out of the employee's work, and was not related to a workers' compensation claim even though she knew otherwise. Although Ms. Wilder's and Mr. Chappell's offices are across the hall from each other, Ms. Wilder and Mr. Chappell did not discuss the Moore case. Mr. Chappell discussed the Family Medical Leave Act with Mr. Moore and completed the employer portion of the form indicating that the leave was for a "serious health condition that the employee had which made him unable to perform the functions of his job." However, no inquiry was made as to whether his medical problems were work-related and Mr. Moore did not sign the form.

After completing these various forms and assembling them, Ms. Wilder faxed the forms to the insurance company and Mr. Moore received his surgical treatment using his medical health coverage and short term disability. The surgery was unsuccessful and ultimately, when the short and long term disability benefits expired, he was terminated on March 10, 2004.

PMT employees, Anita Wilder, Doug Chappell, David Clonce, and Michael Manis testified at trial that Mr. Moore, on occasions, had stated that his knee injury was not related to work but was as a result of a knee injury he received while serving in the army. Mr. Moore denies ever making those statements and unequivocally states that he had never had any knee injuries during the service. Apparently Mr. Moore had knee surgery for the 2000 farming accident in a Veterans Administration Hospital but had never had knee injuries while serving in the army.

After Dr. Prada operated on the left knee, Mr. Moore became much worse. His care was transferred to a Dr. Dennis G. Harris, who tried various medications including spinal block injections. These provided no relief. As of the date of trial, Mr. Moore had undergone seven separate surgeries, including installation of spinal cord stimulators on two separate occasions. Unfortunately, Mr. Moore developed reflex sympathetic dystrophy, which causes intense, unrelenting pain which has not been capable of being relieved. Dr. Steven Baumrucker and Dr. Harris each rendered opinions as to Mr. Moore's medical impairment. Dr. Baumrucker assigned an impairment rating of 37%, and Dr. Harris 39%, to the body as a whole. According to Mr. Moore, the pain is so intense and so unrelenting that he is considering having his leg removed.

On April 7, 2004, Mr. Moore filed a workers' compensation complaint which was served on PMT. PMT filed an answer in which they contended that service of the lawsuit was the first notice of workers' compensation claim. After appropriate discovery, the trial of this matter was held on April 4 and 5, 2006. At the conclusion of the trial, the trial judge indicated that he had not read the medical depositions. He stated that he would do so, but if the attorneys preferred to summarize them, he would proceed. After the court announced that it accredited the employee and his witnesses' position that notice had been appropriately given to the employer, the following colloquy occurred:

Court: If you think I need to read them and that there's something different there, I'll do it.

Mr. Lauderback: Well, that's . . . I mean, Your Honor apparently is going to make that finding because two of them said that. I'll leave that up to Your Honor.

Following this, the court found Moore to be totally and permanently disabled under the provisions of Tennessee Code Annotated section 50-6-207(4)(B) which provides benefits "shall be paid during the period of permanent total disability until the employee is, by age, eligible for full benefits in the Old Age Insurance Benefit Program under the Social Security Act."

PMT has appealed the court's decision contending that the court erred in failing to dismiss the case because Mr. Moore failed to give proper notice. It also contends that the court erred in failing to read the medical depositions prior to rendering a ruling in this case. PMT does not appeal the permanent and total disability finding.

II. Standard of Review

Review of the findings of fact made by the trial court is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this "panel to examine in depth the trial court's factual findings and conclusions." GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel 2001). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002); Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992). Our standard of review of questions of law is de novo without a presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003). When medical testimony is presented by deposition, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000); Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001).

III. Analysis Notice

PMT has appealed contending that Mr. Moore failed to give the company notice of the work-related injury and violated Tennessee Code Annotated section 50-6-201(a) and that the trial court erred in failing to dismiss the claim for failure to give this notice before the institution of the lawsuit ten months after the work injury event. Tennessee Code Annotated section 50-6-201(a)

requires the employee or his representative to give notice of the injury immediately upon the occurrence or as soon thereafter as is reasonable and practicable where the employer has no actual notice of the injury. The notice required is written notice and,

[n]o compensation shall be payable under the provisions of this chapter, unless such written notice is given to the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented

The notice must "reasonably convey to the employer that the employee has suffered injury arising out of and in the course of the employment." Jones v. Sterling Last Corp., 962 S.W.2d 469, 471 (Tenn. 1998). The notice obligation under Tennessee Code Annotated section 50-6-201(a) is for the purpose of allowing the employer an opportunity to make an investigation while the facts are accessible and to enable the employer to provide timely and proper treatment for the injured employee. McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. Workers' Comp. Panel (1995)). Delay in asserting compensable workers' compensation claims are reasonable and justified if an employee has limited understanding of his condition, his rights and his duties under the Workers' Compensation Act. McCaleb, 910 S.W.2d at 413.

The trial court accredited the testimony of Mr. Moore and Mr. Horne that he attempted to give his supervisor notice of the work-related injury on the date of the injury and that Mr. Moore actually provided his supervisor notice of the injury when he returned to work the next day after the injury. The record also demonstrates that Mr. Moore provided written notice of the work-related nature of the injury in the portion of the forms that he filled out the last day before entering short term disability status and that the doctor's history of the injury reflected its work-related nature. The trial court having considered and seen the witnesses and their testimony accredited the testimony of Mr. Moore on this issue and failed to accredit the testimony of the employer's witnesses. Where the trial court had seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference is accorded to those circumstances on review, McCaleb, 910 S.W.2d at 415, because it is the trial court which had the opportunity to observe the witness's demeanor and to hear the in-court testimony. Long v. Tri-Con Indus., LTD., 996 S.W.2d 173, 178 (Tenn. 1999).

After making a de novo review of the record, we conclude that there is considerable evidence to support the trial court's decision on the notice issue. We, therefore, find no reversible error.

IV. Deposition Summaries

PMT asserts that the trial court failed to read the medical depositions before rendering its opinion and this action constituted reversible error. As described above, the trial court readily admitted that it had not read the medical depositions and offered to read each of them or allow the

attorneys to present summaries of the same. Summaries were presented by both sides without objection. When the trial judge ruled adversely to PMT's position on notice, counsel for PMT left it to the trial court to determine whether it would read the deposition of Dr. Prada or to accept the summary. Now on appeal, counsel takes the position that the trial court erred. However, no objection was raised at the time to this process. For that reason, we find that the issue is waived. We nevertheless state that failure to read the medical depositions before rendering a verdict in a workers' compensation case is error. However, such an error would have to be evaluated in light of all other proof to determine whether the error was harmless. "Under Tenn. R. Civ. P. 36(b), an error does not of itself necessarily require reversal; a judgment 'shall not be set aside unless, consideration the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.'" Blackburn v. Murphy, 737 S.W.2d 529, 533 (Tenn. 1987). Therefore, unless the error affected the result, the error is considered harmless and we are compelled to affirm the trial court's judgment. Bass v. Barksdale, 671 S.W.2d 476, 486 (Tenn. Ct. App. 1984). Here, since no objection was raised to the summary presentation of the evidence encapsulated in the medical depositions and no issue has been raised about the total disability of Mr. Moore, we find no reversible error in the trial court considering the summaries.

V. Conclusion

After a careful review of the record, we conclude that the judgment of the trial court should be affirmed. Costs of this appeal are taxed to the appellant, Peddinghaus Modern Technologies, LLC, and its sureties, for which execution may issue.

J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

**DAVID WAYNE MOORE V. PEDDINGHAUS MODERN
TECHNOLOGIES, LLC**
Hawkins County Circuit Court
No. CV-2010

Filed June 13, 2007

No. E2006- 01094-WC-R3-WC

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, Peddinghaus Modern Technologies, LLC, for which execution may issue if necessary.