IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 23, 2007 Session

MARY PENNEWELL v. HAMILTON-RYKER

Direct Appeal from the Circuit Court for Henry County
No. 2694 Julian P. Guinn, Judge

No. W2006-1046-WC-R3-WC - Mailed August 15, 2007; Filed September 17, 2007

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 of findings of fact and conclusions of law. In this case, the trial court found the employee's elbow injury to be compensable and awarded benefits for 25% permanent partial disability to the left arm. The employer contends that the injury did not arise from or occur in the course of the employment and that the employee did not give timely notice of her injury in accordance with Tennessee Code Annotated section 50-6-201. We reverse the trial court's finding that the injury was compensable and dismiss the employee's complaint.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Circuit Court Reversed; Case Dismissed

DONALD P. HARRIS, SR. J. , delivered the opinion of the court, in which JANICE M. HOLDER, J., and ALLEN WALLACE, SR. J., joined.

Gregory D. Jordan and Todd Siroky, Jackson, Tennessee, for the appellant, Hamilton-Ryker.

Beth F. Belew, Paris, Tennessee, for the appellee, Mary Pennewell.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

At the time of trial, Mary Pennewell was fifty years old. She was hired by Hamilton-Ryker, a temporary labor agency, and was assigned to work at Clifty Farms where she worked two days, May 4 and 5, 2004. Her job on those two days consisted primarily of packing pork barbecue into plastic containers. She testified that the work was repetitive and also that she had bumped her elbow on a door frame while carrying pallets. She related that she had fatigue and pain in her arm after the

first day, which became worse on the second day. On May 6, which would have been her third day at Clifty Farms, she failed to report to work. Ms. Pennewell testified that she left a telephone message with Hamilton-Ryker on the morning of May 6, stating that her "arm was hurting" and that she was unable to work. A representative of Hamilton-Ryker testified that there was no record of this message being received.

As a result of Ms. Pennewell's failure to report for work, she was terminated by Hamilton-Ryker. She was, however, re-hired a few weeks later to work for a client referred to as "Gonzalez." According to Ladona Russom, a manager for Hamilton-Ryker , Gonzalez specifically requested that Ms. Pennewell be hired for a position at their plant. At Gonzalez, Ms. Pennewell operated a machine that cut rubber hoses. She continued in that position for about five months. According to Ms. Pennewell, she took a leave of absence from that job to have surgery on her elbow. By the time she recovered from the surgery and had undergone physical therapy, the plant had closed and her job there was no longer available. Ms. Pennewill testified she had not worked since her surgery and closure of the Gonzalez plant.

Ms. Pennewell testified that prior to going to work at Gonzalez she met with Patty Richards, a staffing coordinator for Hamilton-Ryker. She stated that as a prerequisite to being re-hired to work at Gonzalez Ms. Richards required her to give a written statement concerning the reason she stopped working at Clifty Farms. Ms. Pennewell testified that she told Richards of her alleged injury at that time. Ms. Richards testified, to the contrary, that the first time she was aware Ms. Pennewell was alleging a work injury was on October 29, 2004, when Ms. Pennewell came in and reported it to her. Ms. Richards initiated a workers' compensation claim at that time. Part of the necessary paperwork was a first report of injury completed, for the most part, by Ms. Pennewell. In the portion of the form requesting a description of the accident, Ms. Pennewell wrote "Couldn't move elbow." Ms. Richards did not recall Ms. Pennewell making a written statement prior to October 29, 2004, and asserted that had she been told Ms. Pennewell injured her arm in May 2004, she would have initiated a workers' compensation claim at that time.

Ms. Pennewell saw Dr. Michael Calfee, an orthopedic surgeon, on May 24, 2004, for left elbow pain. According to Dr. Calfee's medical records, she reported that her symptoms had begun two weeks earlier and had worsened over time. Dr. Calfee noted there was no history of a specific injury. He prescribed conservative treatment, including medication, bracing, and physical therapy. Dr. Calfee continued seeing Ms. Pennewell until September 2004. When she had not significantly improved by that time, he referred her to another orthopedic surgeon, Dr. Barry Phillips, for a second opinion.

Dr. Phillips, a board certified orthopedic surgeon, testified by deposition. He first saw Ms. Pennewell on October 11, 2004. At that time, she completed a patient registration form in which she stated that the duration of her symptoms was six months. Ms. Pennewell did not answer a question on the form inquiring whether the condition was work-related. Based upon a review of diagnostic testing ordered by Dr. Calfee, Dr. Phillips concluded that Ms. Pennewell had an osteochondral or bone fragment in her elbow. He recommended surgery, which was performed on November 2, 2004.

He continued seeing her until August 2005, when she reached maximum medical improvement. Dr. Phillips assigned a two percent permanent anatomical impairment to the left arm for the injury. He placed no restrictions upon her activities.

Dr. Phillips testified that the type of injury which Ms. Pennewell had was most often associated with the mechanics of throwing a baseball or with the type of repetitive landing on the elbow that might be experienced by a gymnast. According to Dr. Phillips, the injury could also occur as a result of a person falling forward and breaking the fall with an outstretched arm. He testified that it was not very likely the injury was caused by two days of repetitive work similar to that performed by Ms. Pennewell at Clifty Farms. He also testified bumping one's elbow on a door frame while carrying objects was not the type of activity that would have caused this injury. Ms. Pennewell gave Dr. Phillips no indication of how she might have injured her elbow. Dr. Phillips testified that he had patients with this type of injury that did not know how the injury occurred.

The transcript contains references to a C-32 from Dr. Robert Barnett. There is no C-32 contained in the record on appeal. There was a report from Dr. Barnett concerning Ms. Pennewell placed into evidence. According to the report, Dr. Robert Barnett, an orthopedic surgeon according to his letterhead,[1] examined Ms. Pennewell on November 21, 2005. Ms. Pennewell reported to Dr. Barnett that she was carrying skids weighing forty pounds and stumbled and hit her left elbow on a wall. While Dr. Barnett's report does not directly address causation, he states: "I would estimate that she has 20% loss of the left am (sic) as a result of her industrial injury." His opinion as to impairment of the left arm was based upon loss of grip strength and range of motion.

The trial court found Ms. Pennewell sustained a compensable injury during the course of her employment through Hamilton-Ryker on May 5, 2004, and had a 25% permanent partial disability to the left upper extremity as a result of that injury. The court further awarded temporary total disability benefits, reimbursement of past medical expenses, and future medical expenses.

Hamilton-Ryker contends that the evidence preponderates against the finding of the trial court that this injury arose from and occurred in the course of Ms. Pennewell 's work at Clifty Farms. In addition, Hamilton-Ryker argues that Ms. Pennewell did not provide notice of her alleged injury as required by Tennessee Code Annotated section 50-6-201.

II. 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) (Supp. 2006). When 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When the issues involve expert medical

[1] The trial judge described Dr. Barnett as a board certified orthopedic surgeon.

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. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). 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).

III. ANALYSIS

The medical evidence in the record consists of the deposition of Dr. Phillips, the records of Dr. Calfee, and a letter dated November 21, 2005, from Dr. Barnett. Dr. Phillips was questioned by both counsel very directly on the subject of causation. He testified that Ms. Pennewell did not mention a possible work injury to him during the time she was under his care. He stated that it was "not very likely" the activity of packing barbecue into small plastic tubs for two days caused the injury he treated her for. He also stated that bumping one's elbow on a door frame or wall is not the type of activity that would cause such an injury. He testified such injuries most often occur as a result of repeated heavy stress, such as that involved in pitching a baseball or performing gymnastics. According to Dr. Phillips, the injury could also be caused by falling forward with the arm outstretched in front of the person resulting in the transfer of the force experienced in the hand to the elbow resulting in trauma to that joint. On cross-examination, Dr. Phillips stated that the injury could be work-related if she had experienced such a fall at work.

Dr. Barnett's report recites a history that Ms. Pennewell stumbled and hit her elbow on a wall. That report does not make any direct statement about causation other than the one stated above. Ms. Pennewell contends that Dr. Barnett checked the "Yes" box regarding causation on a C-32, but that document is not in the record.

It is significant that the history which Ms. Pennewell gave to Dr. Barnett is different than that given to Drs. Calfee and Phillips. The records of both Dr. Calfee and Dr. Phillips, including a document containing Ms. Pennewell's handwriting, indicate that she could not ascribe her symptoms to any particular incident. In an answer to an interrogatory which requested a description of the accident or injury, Ms. Pennewell stated: "My job required me to lift 5 lb. containers of meat. After the second day of work my elbow was hurting. On the morning of the third day, my elbow was so painful I could not go to work." Her trial testimony pertaining to causation was unusually muddled. For example, the transcript contains the following questions and responses:

> Q: Do you recall banging your arm on anything in particular?
>
> A: Yeah. I mean, I bumped – you know, when you're trying to do your – When you're trying to do the best you can. I bumped, I tripped. I don't know exactly when or what day or what hour, but all I know is I was fumbling with those skids and falling and tripping and banging.

Q: What's important is, you did not remember falling.

A: No.

Q: You don't know how you hurt your arm, do you?

A: Not the - - No.

It is well-established that the plaintiff in a workers' compensation suit bears the burden of proving every element of the case by a preponderance of the evidence, including the existence of a work-related injury by accident. See Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989). Except in the most obvious cases, the claimant in a workers' compensation action must establish causation by expert medical evidence. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). It is appropriate for a trial judge to predicate an award on medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when the trial judge also has heard lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997) ; Orman, 803 S.W.2d at 676. Nevertheless, an employee's burden of proof cannot be met by proof that is merely speculative or conjectural. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997); White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992).

Since the medical testimony in this case was in the form of a deposition of Dr. Phillips, a written report from Dr. Barnett and the medical records of Dr. Calfee, we are able to review those documents and draw our own conclusions with regard to the issue of causation. Dr. Phillips was asked about specific activities Ms. Pennewell may have engaged in at Clifty Farms and testified these activities were probably not the cause of her injury. He did say such an injury could be caused by falling on an outstretched arm and, if she fell at work, that could have been the cause of her injury. Ms. Pennewell testified, however, that she did not remember a fall and, in fact, did not know how she hurt her arm. In our view, this evidence cannot be outweighed by Dr. Barnett's bare assertion that Ms. Pennewell's disability was the "result of her industrial injury." Without an explanation from Dr. Barnett as to how her injury could have been caused by her work activities, any finding her injury was work-related would be based upon mere speculation or conjecture. Based upon our independent review of the record, we find that Ms. Pennewell failed to prove by a preponderance of the evidence that her injury was caused by her two days of work for Hamilton-Ryker at Clifty Farms.

Hamiltion-Ryker also alleges the trial court erred in finding Ms. Pennewell gave proper notice of her injury required by Tennessee Code Annotated section 50-6-201. With regard to this issue, Ms. Pennewell testified she phoned Hamilton-Ryker the first morning she failed to report for work and left a message that her arm was hurting. She also testified she gave Patty Richards, the staffing coordinator of Hamilton-Ryker, a written report of the circumstances of her discontinuing her employment at Clifty Farms three weeks later. Hamilton-Ryker has no record of the phone message and Ms. Richards testified she could not recall taking a written statement. In view of the

deference we must afford the trial court with regard to the credibility of witnesses who testify in person, we cannot find that the evidence preponderates against the finding of the trial court.

IV. CONCLUSION

The judgment of the trial court is reversed. The complaint is dismissed. Costs are taxed to Mary Pennewell and her surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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MARY PENNEWELL v. HAMILTON-RYKER

Circuit Court for Henry County
No. 2694

No. W2006-01046-WC-R3-WC - Filed September 17, 2007

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 Appellee, Mary Pennewell, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM