IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 24, 2008 Session

DEBORAH SMARTT v. M-TEK, INC., ET AL.

Direct Appeal from the Chancery Court for Coffee County
No. 07-26 L. Craig Johnson, Judge

No. M2008-00824-WC-R3-WC - Mailed - February 18, 2009
Filed - April 24, 2009

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee had chronic obstructive pulmonary disease ("COPD") as a result of cigarette smoking. She was exposed to residual smoke and odors from a fire which occurred in the building she worked in. Shortly thereafter, she was hospitalized with acute breathing problems. She has been unable to return to work since that time. The trial court found that she had sustained a compensable aggravation of her pre-existing COPD, and awarded permanent total disability benefits. Her employer has appealed, asserting that the trial court erred in finding that she had sustained a compensable injury. We affirm the judgment on that issue. However, we reverse the trial court's award of reimbursement of health insurance premiums paid by employee.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and JON KERRY BLACKWOOD, SR. J., joined.

Randolph A. Veazey and Thomas W. Tucker, III, Nashville, Tennessee, for the appellants M-Tek, Inc. and Sompo Japan Insurance Company of America.

Russell D. Hedges, Tullahoma, Tennessee, for appellee, Deborah Smartt.

MEMORANDUM OPINION

Factual and Procedural Background

Deborah Smartt ("Employee") alleged that she sustained a compensable injury to her lungs as a result of inhaling smoke after an April 2005 fire at her place of employment. On the date of the trial, she was fifty-four years old. She began working for M-Tek ("Employer") a manufacturer of automobile parts, in 1994. She had attended school through the seventh grade. Her prior work history consisted primarily of factory labor and sewing in the garment industry.

A fire occurred at Employee's place of employment on April 26, 2005. At that time, her job was placing labels on "jack covers." The fire was caused by an electrical failure. It occurred in an area of the building approximately one hundred yards from Employee's work station. All employees were evacuated from the building for a period of one to two hours. The fire was extinguished, or burned itself out, before the fire department arrived. When Employee and her co-workers returned to the building, electricity had not been restored to the entire facility. Employee testified that the area was hazy with smoke and that she began to have trouble breathing at that time. She finished her shift and worked for the following two days. She testified that she continued to have breathing difficulty during that time. She also testified that an odor remained in the plant during those two days. Co-workers gave somewhat varying testimony concerning the extent of smoke and odor in the area on the day of the fire and thereafter. Employer introduced evidence that the building in which Employee worked was 800,000 square feet in size, that Employee's work area was separated from the area of the fire by partitions, and that several large fans were used to ventilate the building.

Employee was scheduled to be off of work for the following two days, which were Friday and Saturday. She continued to have difficulty breathing. On Saturday, she sought treatment at the emergency room of a local hospital. She was admitted to the hospital, where she remained for several days. She was placed on various medications and was also prescribed oxygen at this time. She did not return to work after that date.

Employee had been diagnosed with COPD in 1999. Prior to that time, she had smoked approximately one pack of cigarettes per day for thirty years. It is undisputed that the COPD was caused by smoking. Employee quit smoking for a brief period after receiving her diagnosis. However, she resumed after three months. The evidence suggests that she smoked one-half to one-third of a pack per day thereafter. It does not appear that she received any medical treatment for COPD between the 1999 episode and 2005.

The medical evidence consisted of the depositions of Dr. Albert Brandon and Dr. Clyde Heflin, and the live testimony of Dr. Jones Kalnas. Dr. Brandon is a family practioner. He first saw Employee when she was hospitalized in April 2005, and continued to provide treatment to her thereafter. In summary, Dr. Brandon opined that Employee's pre-existing COPD had been permanently worsened as a result of her exposure to smoke after the fire of April 25, 2005. He testified that she was unable to work at the time she was discharged from the hospital and continued to be unable to do so thereafter. He assigned 20% permanent impairment to the body as a whole as a result of the April 2005 event.

Dr. Heflin is a pulmonary specialist. Employee was referred to him by Dr. Brandon. He reviewed the results of testing performed on Employee in 1999, and stated that those tests showed she had an "FEV1"[1] of 1.45, which meant that her lung capacity was approximately one-half of the

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[1] This is the amount of air that a patient is able to forcibly expel from her lungs in one second.

normal amount for a person of her age and height. He stated a person with that amount of lung capacity would be able to engage in most activities. Dr. Heflin further testified that testing performed after April 2005 showed an FEV1 of approximately 1.0. Dr. Heflin considered the decline to be significant, because a person with that level of lung function would be unable to perform many normal activities, such as climbing stairs, walking or standing for extended periods, or lifting. He specifically stated that Employee would not have been able to perform her job for Employer with that level of lung function. He further testified that, based upon population studies, the decline in Employee's pulmonary function after 1999 was greater than would be expected to result from smoking alone. On that basis, he concluded that the exposure to smoke in April 2005 had caused an acute, and permanent, worsening of Employee's pre-existing COPD. He testified: "If there was smoke in the environment to the extent that she said it was . . . I think that's totally typical of things I have seen in other patients who have had smoke inhalation or other noxious fume inhalation with this . . . pre-existing degree of lung impairment." He opined that she had an impairment of 50% to the body as a whole in 1999, and an additional impairment of 20% in 2005 and thereafter. He testified that she was not capable of working.

Dr. Kalnas was an occupational medicine specialist. He did not examine Employee, but reviewed medical records, the depositions of Drs. Brandon and Heflin, and additional information. He disagreed with Dr. Heflin's opinion that the April 2005 fire caused any change in Employee's breathing capacity. He agreed, generally, with the method used by Dr. Heflin, but testified that there were two deficiencies in it. The first was that Dr. Heflin had used a figure from population studies for calculating the rate of deterioration attributable to smoking. Dr. Kalnas used data specific to Employee, which led him to conclude that smoking caused a more rapid deterioration in Employee's breathing capacity than calculated by Dr. Heflin. Dr. Kalnas also testified that the aging process alone caused predictable decline in lung function, a factor which Dr. Heflin had not taken into account in his calculations. As a result of these two factors, he opined that the measured decrease in Employee's pulmonary function studies between 1999 and 2005 was caused solely by the combined effects of aging and smoking. On cross-examination, he agreed with Dr. Heflin's opinion that Employee would have been unable to perform her job for Employer with an FEV1 of 1.0 or less.

The trial court found that Employee had suffered a compensable aggravation of her pre-existing COPD. It awarded benefits for permanent total disability. It also ordered that Employer pay various medical expenses incurred by Employee, including premiums paid by her for health insurance under COBRA, after her employment was terminated. Employer has appealed, raising two issues. First, it contends that the trial court erred by finding that Employee sustained a compensable injury. In the alternative, it argues that the trial court erred by awarding payments for health insurance premiums paid by Employee after her employment ended.

Standard of Review

We review a trial court's findings of fact in a workers' compensation case de novo with a presumption of correctness "unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, we must extend considerable deference to the trial court's factual findings. *Whirlpool Corp. v. Nakhoneinh*, 69

S.W.3d 164, 167 (Tenn. 2002). We extend no deference to the trial court's findings when reviewing documentary evidence such as depositions, however. *Id.* As to questions of law, our standard of review is de novo with no presumption of correctness. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

1. Causation

Employer argues that the evidence preponderates against the trial court's finding on the issue of causation. It relies primarily upon Dr. Kalnas' testimony concerning the errors in Dr. Heflin's method of estimating the predictable decrease of Employee's lung capacity from 1999 to 2005. On the basis of that testimony, and Dr. Kalnas' more specific calculations, Employer contends that Employee's condition was solely the result of her pre-existing COPD and the aging process.

We agree that Dr. Kalnas' testimony provides support for Employer's position. However, we find that the testimony of all of the physicians that Employee would have been unable to perform her job if her FEV1 had been 1.0 or less in March and April of 2005 is more persuasive. It is undisputed that she was able to perform, and was performing, all elements of her job satisfactorily prior to the fire. The close temporal relationship between the smoke exposure and the onset of the acute episode which led to her hospitalization cannot be ignored. After that episode, her FEV1 results were consistently below the 1.0 level, and she was clearly unable to exert the effort necessary to perform her job for Employer.

Diseases of the lung arising out of and in the course of any type of employment shall be deemed to be occupational diseases by Tennessee Code Annotated section 50-6-301(6). "As we said in *American Ins. Co. v. Ison*, 519 S.W.2d 778 (Tenn. 1975), there can be no recovery for aggravation of an alleged 'occupational disease' which pre-existed the employee's current employment." *Gregg v. J. H. Kellman Co.*, 642 S.W.2d 715, 716 (Tenn. 1982). However, in *Fritts v. Safety Nat'l. Cas. Corp.*, 163 S.W.3d 673, 681 (Tenn. 2005), the Supreme Court held that a chemical exposure which caused a coughing fit which resulted in a collapsed lung constituted a compensable injury. This was so, even though the employee had pre-existing COPD, caused by smoking, which was also a cause of the coughing fit. In *Manis v. Peterbilt Motors Co.*, No. 01S01-9407-CV-00065, 1995 WL 274487 *1 (Tenn. Workers' Comp. Panel May 8, 1995), the employee had severe COPD as a result of smoking. He alleged that exposure to diesel fumes in his workplace aggravated that condition. The trial court awarded benefits, and the Special Workers' Compensation Appeals Panel affirmed. *Id.* at *2.

An employer takes an employee as they find him and is liable under the Workers' Compensation Act for disabilities which are the result of the aggravation of the pre-existing weakness, condition or disease brought on by the occupation. *Arnold v. Firestone Tire & Rubber Co.*, 686 S.W.2d 65, 67 (Tenn. 1984). Further, reasonable doubt concerning the cause of the injury should be resolved in favor of the employee. *Whirlpool Corp.*, 69 S.W.3d at 168.

Based upon our review of the entire record, we are unable to conclude that the evidence preponderates against the trial court's findings. We note that: (1) a single, distinct event occurred; (2) Employee's symptoms commenced shortly thereafter; and (3) she was unable to return to work.

2. Health Insurance Premiums

Employer contends that the trial court erred by awarding to Employee her payments for health insurance after her termination from Employment. It points out that the workers' compensation statute does not provide for such expenses to be awarded. Employee cites *Elliott v. Blakeford at Green Hills Corp.*, No. M2000-00512-WC-R3-CV, 2001 WL 456482, *7 (Tenn. Workers' Comp. Panel May 1, 2001), in which an award which included payments for insurance premiums was affirmed. The panel in that case apparently considered these payments to be medical expenses under Tennessee Code Annotated section 50-6-204, but cited no case law or specific statutory authority for that conclusion. It does not appear that the panel in *Elliott* was asked to consider whether or not insurance premiums are recoverable under the workers' compensation law generally, but rather whether certain medical expenses, including premiums, were recoverable at all under the facts of the case. We do not find the decision to be persuasive.

> The Workers' Compensation Act is a complete substitute for an employee's common law remedies against an employer for a work-related injury. Tenn. Code Ann. § 50-6-108. *See also Liberty Mut. Ins. Co. v. Stevenson*, 212 Tenn. 178, 182, 368 S.W.2d 760, 762 (1963). Under the Act, an employee is not required to prove fault on the employer's part, Tenn. Code Ann. § 50-6-103, and the employer may not resort to the common law defenses, such as contributory negligence. Tenn. Code Ann. § 50-6-111. In exchange for these employee advantages, the legislature limited employers' liability to a schedule intended to compensate employees for the loss or loss of use of a member or of the body as a whole.

Newman v. Nat'l Union Fire Ins. Co., 786 S.W.2d 932, 935 (Tenn. 1990). *See also Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 572 (Tenn. 2005). It is clear that the relief available to an injured employee is limited to those items specified in the statute. These are medical treatment and burial expenses, Tenn. Code Ann. § 50-6-204; temporary disability payments, § 50-6-207(1) & (2); permanent disability payments, § 50-6-207(3) & (4); and death benefits for his dependents, § 50-6-210(e). There is no basis in the statute for reimbursement of insurance premiums paid by an injured employee. We conclude that the trial court erred by ordering Employer to do so.

Conclusion

The portion of the judgment awarding reimbursement of health insurance premiums paid by Employee is reversed. The judgment is affirmed in all other respects. Cost are taxed to M-Tek, Inc. and Sompo Japan Insurance Company of America, and their sureties, for which execution may issue if necessary.

ALLEN W. WALLACE, SENIOR JUDGE

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No. M2008-00824-SC-WCM-WC - Filed - April 24, 2009

ORDER

This case is before the Court upon the motion for review filed by M-Tek, Inc. and Sompo Japan Insurance Company of America, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to M-Tek, Inc.and Sompo Japan Insurance Company of America, and their sureties, for which execution may issue if necessary.

PER CURIAM

CLARK, J., NOT PARTICIPATING