

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

January 12, 2009 Session

KEVIN CAMPBELL v. PML, INC.

**Direct Appeal from the Circuit Court for Henry County
No. 2991 Donald E. Parish, Judge**

No. W2008-01539-WC-R3-WC - Mailed March 31, 2009; Filed May 6, 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. Employee was injured while attempting to adjust a moving conveyor belt. A post-accident drug screen of Employee revealed the presence of THC in his system. The amount of THC in Employee's system was of such levels as to trigger the statutory presumption created by Tennessee Code Annotated section 50-6-110(c)(1) that his drug use was the proximate cause of his injury. Employer denied Employee's claim. The trial court found that Employee had rebutted the statutory presumption by a preponderance of the evidence and awarded benefits. Employer has appealed the trial court's finding that the presumption created by Tennessee Code Annotated section 50-6-110(c)(1) had been rebutted. Employee has also appealed both the trial court's award and denial of his motion for discretionary costs. Although we modify the denial of the motion for discretionary costs, we otherwise affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the
Circuit Court Affirmed**

TONY A. CHILDRESS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and D. J. ALISSANDRATOS, SP. J., joined.

James F. McGrath and Fredrick J. Bissinger, Nashville, Tennessee, for the appellant, PML, Inc.

Edward L. Martindale, Jr., Jackson, Tennessee, for the appellee Kevin Campbell.

MEMORANDUM OPINION

Factual and Procedural Background

Most of the facts in this case are undisputed. PML, Inc., (“Employer”) is a manufacturer of rubber products. It has been certified by the Department of Labor and Workforce Development as a Drug-Free Workplace pursuant to Tenn. Code Ann. section 50-9-101to-114. Kevin Campbell (“Employee”) worked in the mixing department. There were four employees in the department, and these employees rotated among four work stations during each shift.

The injury occurred on the morning of September 20, 2006. Employee was operating a machine called “the mill.” The mill, which mixes and compresses rubber, has a conveyor belt that transports the rubber product from a mixer to a machine that compresses the rubber. Employee testified that on the morning of the injury a belt on the mill had “shifted.” Since the belt had shifted, Employee “slowed the belt down and tried to slide the belt back over into its right position.” Employee did this by placing his right hand underneath the moving belt and his left hand on top of the moving belt. Employee was wearing gloves at the time, and Employee’s right thumb/glove got caught in a pulley. Employee’s right thumb/glove getting caught in the pulley resulted in part of Employee’s right thumb being severed from his hand. Employee was taken by ambulance to Henry County Medical Center, and the next day Employee was taken to Vanderbilt Medical Center.

Employee was given a drug screen while at Henry County Medical Center. The results of the drug screen came back positive for the presence of THC. Upon receiving these results Employer terminated Employee and denied further liability for the injury.

Employee testified that he had smoked marijuana on September 16, 2006, which was four days before the injury. When asked how he could remember it was that specific day, Employee testified that he could “[b]ecause we went to the Demolition Derby here in Paris. It was me, my sister, my ex-wife and her husband

all went.” Employee further testified that he did not smoke marijuana after that date nor had he ever smoked marijuana before that date. Employee testified that his supervisor, Randall Caskey, had demonstrated to him the procedure he attempted to perform on September 20. Employee added that he had seen Mr. Caskey and two-coworkers perform this procedure in the past. Mr. Caskey denied that he had demonstrated the procedure. Mr. Caskey and Eric Wallett, one of Employee’s coworkers, also denied that they had ever performed the procedure. Finally, Mr. Caskey and Mr. Wallett also testified that Employee did not appear to be impaired on the morning the injury occurred.

The medical proof consisted of the deposition of Dr. Samuel Chung. Dr. Chung, who conducted an IME at the request of Employee’s attorney, assigned an impairment of 28% to the right upper extremity. The doctor testified that Employee had limited or no sensation on the remaining part of his right thumb. The doctor also testified that Employee had a permanent loss of fine grip and grip strength and that he would be at risk for burns due to the loss of sensation.

Employee, who was thirty-one years old, had completed the eighth grade. On his job application for Employer, however, Employee indicated that he had completed the eleventh grade. Employee began working for Employer on March 13, 2000. Prior to his employment with Employer, Employee had worked as: (1) a “groundsman” for a tree trimming service; (2) a laborer for a business that made concrete lawn ornaments; and (3) a produce-stocker at Wal-Mart. Employee had also worked as a cook, but Employee had been convicted of burglarizing that employer. Except for one month when Employee worked as a construction laborer, Employee had been unemployed from the date of his injury up until the date of trial. Employee testified that the injury made it difficult to write and to grip and/or hold onto objects. Employee also testified that he had “no feeling” in the remaining part of his right thumb.

The trial court, which issued written findings and conclusions, found that Employee had successfully rebutted the presumption that his marijuana use was the proximate cause of his injury and awarded 28% permanent partial disability (“PPD”) to the right arm. Employee subsequently made a motion for discretionary costs, which the trial court denied. Both sides have raised issues on appeal. Employer asserts that the trial court erred by finding that Employee successfully rebutted the presumption contained in Tennessee Code Annotated section 50-6-110(c)(1). Employee contends that the award is inadequate and that the trial court erred by

denying his motion for discretionary costs.

Standard of Review

Review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As has been observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

1. Statutory Presumption

The parties agree that Tenn. Code Ann. section 50-6-110(c)(1) applies to this case. Employer has a certified drug-free workplace, and post-accident testing revealed that the level of THC in Employee's blood was sufficient to create a rebuttable statutory presumption that the marijuana was the proximate cause of his injury.¹ The trial court found that Employee had carried his burden of rebutting this statutory presumption. In doing so, the trial court noted that Employee's supervisor and coworker had testified that Employee did not appear to be impaired on the

¹ Tetrahydrocannabinol ("THC") is a marijuana metabolite that is stored in fat cells and can be detected in the body up to thirty days after smoking marijuana. Interstate Mech.Contractors, Inc. v. McIntosh, 229 S.W.3d 674, 677 (Tenn. 2007). The level of THC in Employee's blood was reported to be 64 ng/mL. Tenn. Comp. R. & Regs. 0800-2-12-.03(17)(a) (2006) defines the prohibited levels of THC as 50 ng/mL for an initial test and 15 mg/mL for a confirming test.

morning the accident occurred. The trial court also noted the absence of evidence concerning how the specific level of THC found in Employee's blood would have affected Employee. The trial court found that Employee had rebutted the statutory presumption in part because it found that Employee was "intellectually challenged" and that he was "therefore more likely to act unwisely and without caution around dangerous machinery than the typical reasonable worker."

The sole case construing Tenn. Code Ann. section 50-6-110(c) is Interstate Mech. Contractors, Inc. v. McIntosh, 229 S.W.3d 674 (Tenn. 2007), and both parties rely on McIntosh to support their respective positions. In McIntosh, the injured employee tested positive for THC after he had injured his hand. The injured employee had placed his hand on the machine, and a co-employee, unaware of that, engaged the machine. The machine crushed the injured employee's hand. Testimony established that the level of THC in the injured employee's system was of such levels as to impair his reaction time. Additional evidence showed, however, that once the machine was engaged there would have been no time for the injured employee to react and pull his hand away. On that basis the trial court found that there was no connection between the injured employee's reaction time and the injury. The Supreme Court affirmed. Id. at 676.

In this case, Employee notes that the level of THC in his system was much lower than that of the employee in McIntosh.² Employee also notes that he had worked without incident the previous day and that his supervisor and co-employees had testified that he did not appear to be impaired on the day of the injury. Employee argues that these factors are similar to the facts in McIntosh and that they rebut the presumption raised by section 50-6-110(c)(1).

Employer contends that McIntosh is distinguishable. For instance, Employer contends that the injured employee in McIntosh successfully rebutted the presumption because the evidence showed that the injury would have occurred even if the injured employee had not been under the influence of the drug that produces THC. In this case, Employer contends that the evidence showed that the injury would not have occurred if Employee had not been under the influence of the drug that produces THC. Employer supports these contentions by noting that Employee had received training concerning the proper operation of the machine. Employer also notes that the trial court expressed reservations about Employee's credibility, which

²Mr. McIntosh had a THC level of more than 900 ng/mL. McIntosh, 229 S.W.3d at 677.

Employer contends is significant in regard to Employee's testimony that his supervisor and coworker had previously attempted to adjust the conveyor belt while the machine was in operation. Employer reasons that if Employee's testimony on this point is not accepted then Employee's injury was the direct result of Employee's judgment being impaired by the THC in Employee's system. The additional risk of injury resulting from impaired judgment is, presumably, one of the adverse effects of drug or alcohol use which section 50-6-110(c)(1) is intended to address.

In McIntosh it was undisputed that the THC in employee's system was greatly above the levels that trigger the presumption that the marijuana was the proximate cause of employee's injury. Indeed, the employer supplemented the statutory presumption by introducing the testimony of a toxicologist who explained the effects of THC at the level detected in the employee's test. Nevertheless, Mr. McIntosh successfully rebutted the presumption raised by section 50-6-110(c)(1) with evidence that the actions of his co-employee was the proximate cause of his injury. Employee in this case has taken the position that, although the level of THC in his system was of such a level as to presume intoxication,³ the evidence proved that he was not intoxicated or impaired at the time of the injury. Also unlike the employer in McIntosh, Employer in this case chose to rely completely upon the statutory presumption and did not present any medical evidence concerning the effects of THC at the level detected in this case.

The trial court described Employee's credibility as "imperfect" and that finding is consistent with the record. It is clear from its ruling, however, that the court did not entirely disregard his testimony. In its ruling the trial court explicitly found that Employee had last smoked marijuana four days prior to his injury. The trial court also implicitly accepted Employee's testimony, as supported by the observations of his supervisor and coworker, that he was not impaired at the time the injury occurred. The trial court also implied in its findings that intellectual challenges that caused Employee "to act unwisely and without caution around dangerous machinery" was the proximate cause of Employee's injury.

³ Although Employee agrees that the level of THC in his system was of such a level as to presume intoxication, intoxication is not the issue in this case. Instead, pursuant to Tennessee Code Annotated section 50-6-110(c)(1), at the levels of THC in Employee's body, his drug use is presumed to be "the proximate cause of the injury." Thus, the issue in this case, and in cases where Tennessee Code Annotated section 50-6-110(c)(1) is triggered, is what was the proximate cause of the injury.

Section 50-6-110(c)(1) provides that the presumption created by a positive drug or alcohol test “may be rebutted by a preponderance of the evidence that the drug or alcohol was not the cause of the injury.” Applying this standard the trial court found that the presumption had been rebutted. While reasonable minds could have reached a different conclusion based upon this record, we are unable to find that the evidence preponderates against the trial court’s decision that Employee had carried his burden of rebutting the presumption.

2. Adequacy of Award

The trial court’s awarded permanent disability equal to the anatomical impairment. It could have awarded up to one and one-half times the impairment. Employee points out that he is poorly educated; that his work experience is primarily unskilled labor; and that the injury was physically severe. For those reasons, he argues that the trial court should have awarded the maximum amount. As previously discussed, the trial court found that Employee’s credibility was “imperfect.” The primary evidence in the record concerning the effect of the injury upon Employee’s ability to work was his own testimony. Just as the trial court was able to accept those portions of Employee’s testimony it found to be credible, it was likewise able to disregard those portions of his testimony it found to be unworthy of belief. It is apparent that the trial court did not accredit Employee’s testimony on this subject. We find that the evidence does not preponderate against that decision and that the award is consistent with the remaining evidence in the record.

3. Discretionary costs

The trial court denied Employee’s post-trial motion for discretionary costs, stating: “I feel as though this is a case in which it’s fair for each party to have borne their own costs” Employee contends that this was an abuse of discretion, as the items sought were all of the types specifically allowed by Rule 54.04 of the Tennessee Rules of Civil Procedure. He cites no case authority in support of his position.

Rule 54.04(2) provides in pertinent part:

Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses

for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees

(Emphasis supplied). The decision of the trial court concerning an award of discretionary costs will not be disturbed on appeal absent a showing that the trial judge abused his discretion. Crew v. First Source Furniture Group, 259 S.W.3d 656, 670 (Tenn. 2008). Tennessee Code Annotated section 50-6-226(c)(1), however, specifically requires that:

The fees charged to the claimant by the treating physician or a specialist to whom the employee was referred for giving testimony by oral deposition relative to the claim shall, unless the interests of justice require otherwise, be considered a part of the costs of the case, to be charged against the employer when the employee is the prevailing party.

(Emphasis added). In light of this specific statutory mandate, we conclude that it was an abuse of discretion for the trial court to deny Employee's motion as to Dr. Chung's deposition fee of \$750.00. We are unable to conclude that the trial court abused its discretion with regard to the remaining costs sought by Employee.

Conclusion

The judgment is modified to award \$750.00 to Kevin Campbell for discretionary costs. It is affirmed in all other respects. Costs shall be taxed to PML, Inc. and its surety, for which execution may issue if necessary.

TONY A. CHILDRESS, SPECIAL JUDGE
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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 Appellant, PML, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM