

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
February 23, 2009 Session

**DON R. DILLEHAY v. UNITED PARCEL SERVICE, INC.**

**Direct Appeal from the Circuit Court for Lincoln County  
No. C07-00039 F. Lee Russell, Judge**

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**No. M2008-01855-WC-R3-WC - Mailed - June 15, 2009  
Filed - August 17, 2009**

In this workers' compensation action, the employee alleged that he sustained injuries to his back and neck. He reported two separate injuries, about a month apart, that occurred in different counties. The employer accepted the back injury as compensable, but denied the neck injury. The trial court found both the back and neck injuries to be compensable, that the claim was not barred by the statute of limitations, and that venue was proper in the county of the first injury. The employer has appealed, alleging the trial court's findings were in error.<sup>1</sup> We affirm the judgment.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and ALLEN W. WALLACE, SR. J., joined.

David T. Hooper, Nashville, Tennessee, for the appellant, United Parcel Service.

Timothy S. Priest, Winchester, Tennessee, for the appellee, Don R. Dillehay

**MEMORANDUM OPINION**

**Factual and Procedural Background**

The employee, Don Dillehay, is a delivery driver for United Parcel Service ("UPS") and is a resident of Coffee County. He injured his back on May 6, 2005, while maneuvering a dolly used to link semi-tractor trailers during a delivery at Genesco, in Fayetteville, Lincoln County, Tennessee.

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<sup>1</sup>The appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law.

Mr. Dillehay reported the incident to UPS's workers' compensation insurer that evening by means of a toll-free number provided for that purpose. It is undisputed that he advised the insurer of an injury to his lower back at that time. Mr. Dillehay testified that he may have also mentioned an injury to his neck, but was not certain that he did. The insurer's record of the conversation does not contain any reference to a neck injury. Medical treatment was offered, but Mr. Dillehay declined. He returned to work, and continued to work his regular job until June 8, 2005. He did not seek or receive medical treatment during that time.

On June 8, he again injured his back while lifting a package at DESA International, which is located in Manchester, Coffee County, Tennessee. He reported this injury to the insurer on the same day. Again, he initially declined an offer of medical treatment, but on June 15, sought and received approval to see a chiropractor, Dr. Marvin Carson. On an intake form that he filled out for Dr. Carson, Mr. Dillehay indicated that his major complaint was "Lower Back Pain/Stiffness. Dull Pain down back of left leg." On a medical history form, he reported that he had frequent muscle pain or stiffness in his neck. He advised Dr. Carson that the onset of his symptoms was June 8<sup>th</sup>, and that the he had injured himself while "picking up a box on rollers." He also reported a similar incident two to three months prior to his examination by Dr. Carson.

Mr. Dillehay received chiropractic treatments for his lower back on June 17, 20, and 22. He did not seek or receive any other medical or chiropractic care until September 13, 2005, when he went to a walk-in clinic in Murfreesboro. The clinic was on UPS's list of approved providers for workers' compensation injuries, but Mr. Dillehay did not seek approval from UPS or its insurer, or advise either of the appointment until after it had occurred. MRI studies of both his neck and low back were taken and both revealed abnormalities. Mr. Dillehay was advised that the neck problem was the more serious of the two. He contacted the insurer at that time.

The insurer arranged for an evaluation of Mr. Dillehay to be conducted by Dr. Richard Berkman, a neurosurgeon. Dr. Berkman's office was apparently not informed that Mr. Dillehay's injuries were the subject of a workers' compensation claim and, as a result, Dr. Berkman would not examine him. According to Mr. Dillehay, Dr. Berkman did review his MRI studies on an informal basis and advised him that the neck problem was serious and would require surgery.

Mr. Dillehay was referred by the insurer to another neurosurgeon, Dr. Steven Abram. The insurer's letter to Dr. Abram referred to a low back injury that occurred when Mr. Dillehay was "pulling a set of dollies to hook up his trailers." The letter noted that Mr. Dillehay complained of cervical pain and asked for Dr. Abram's opinion as to whether the cervical injury was related to his work since Mr. Dillehay had not mentioned it during his initial report. During his first visit with Dr. Abram, Mr. Dillehay completed a "New Patient Medical Questionnaire." On that document, he gave the following history: "I hurt my lower back on 6/8/05. I have dull pain down the back of my left leg. My neck hurts and I have pain in my left arm along with numbness and tingling." He described the details of his injury as: "Lifting and pulling dolly to hook up two trailers."

Dr. Abram reviewed the MRI films, examined Mr. Dillehay, and ordered a myelogram for evaluation of the lumbar and cervical areas. He concluded that Mr. Dillehay had an L5 pars defect, which is a congenital defect in the lumbar area, and degenerative arthritis and effacement of neural elements in the cervical spine. He opined that a patient could “have a degenerative problem and then . . . can have trauma that exacerbates that.” Dr. Abram prescribed conservative treatment for both the neck and lower back problems. When Mr. Dillehay’s cervical spine did not improve, Dr. Abram performed an anterior cervical discectomy and surgical fusion at two levels to correct the problem in January 2006.

While Mr. Dillehay was recovering from surgery, the insurer received medical records from the chiropractor, and Dr. Abram. On the basis of those records, it concluded that the neck injury was not work-related and denied further disability or medical payments for that condition. It continued to provide benefits for the lower back injury. The low back injury did not require surgery. Mr. Dillehay ultimately returned to work in the same job he had previously held. Dr. Abram assigned 26% permanent anatomical impairment for the cervical spine and 20% impairment for the lower back injury.

Mr. Dillehay filed a request for a benefit review conference with the Department of Labor which gave the date of injury as June 8, 2005, but also stated that it occurred in Lincoln County, while “hooking up 2 trailers.” After an impasse was reached in that process, suit was filed in Lincoln County. The complaint alleged an injury date of June 8, 2005. UPS immediately raised venue as a defense. Mr. Dillehay reviewed the records of UPS and discovered the date he reported the injury which occurred when he was hooking up the trailers at Genesco was actually May 6, 2005. He was permitted to amend his complaint to allege May 6, 2005, as the injury date.

Mr. Dillehay was fifty-two years old. He was a high school graduate and, additionally, had completed a vocational program in auto mechanics. He began working for UPS as a truck driver in 1982 and continued to work there at the time of the trial. His prior work history was as a truck driver. He testified that, after returning to work from his injury, he was able to perform his job but had difficulty with bending and heavy lifting. On cross examination, he testified that he did not request medical care before the June 2005 incident because he did not think he needed it. He said that his lower back pain was more troublesome than his neck, and that he was surprised when Drs. Berkman and Abram told him that the neck problem was more serious. He also stated that his condition had been improving after the May 2005 injury, but became dramatically more painful after the June 2005 event.

The trial court found that Mr. Dillehay had sustained injuries to his neck and back in Lincoln County on May 6, 2005, while attempting to couple the two trailers and awarded 69% permanent partial disability to the body as a whole. UPS has appealed, contending that the trial court erred by finding that Mr. Dillehay’s claim for an injury of May 6, 2005, was not barred by the statute of limitations. In the alternative, UPS asserts that the trial court erred by finding that Mr. Dillehay sustained a permanent injury as a result of the May 6, 2005, incident and by finding that venue was properly in Lincoln County.

## 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. 2007). 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). 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. 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); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

## Analysis

### *Statute of Limitations*

UPS argues that any claim for injuries arising from the May 6, 2005, incident is barred by the statute of limitations, Tennessee Code Annotated section 50-6-203(b)(1).<sup>2</sup> It contends that no payments of any sort were made for this claim. Rather, all claims for medical expenses and temporary disability benefits were paid under a separate claim set up after Mr. Dillehay reported the June 8, 2005, injury. Mr. Dillehay requested a benefit review conference in January 2007 (giving June 8 as the injury date), and filed this lawsuit on February 27, 2007 (alleging June 8 as the injury date). Mr. Dillehay first alleged the May 6 injury date when he filed a motion to amend his complaint on June 20, 2007. That motion was filed in response to a motion to dismiss filed by UPS.

On the basis of these facts, UPS argues that suit was filed more than one year after the date of the alleged injury, and, therefore, the claim was barred by section 50-6-203(b)(1). Mr. Dillehay concedes that the benefit review conference request used the June date, but points out that the mechanism of injury described in that document and the location of its occurrence is consistent with the May, rather than the June, event. He also points to deposition testimony of an adjuster, Angela Frazer, who handled Mr. Dillehay's claim from June 2005 until February 2006. She testified that no payments were made under the claim number assigned to the May 2005 injury. However, she also testified that the insurer's records referred to payments made under the claim number assigned

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<sup>2</sup>“In those instances where the employer has not paid workers' compensation benefits to or on behalf of the employee, the right to compensation under this chapter shall be forever barred, unless the notice required by § 50-6-202 is given to the employer and a benefit review conference is requested on a form prescribed by the commissioner and filed with the division within one (1) year after the accident resulting in injury.”

to the June injury which described that injury as arising from hooking up the trailers. That history is, of course, consistent with the May 2005 event, rather than the June event, which involved picking up a box.

The trial court found that Mr. Dillehay simply made a mistake in using the June date on Dr. Abram's questionnaire and the request for a benefit review conference. Given that the description of the injury-causing event in each of these documents is consistent with the May event, and inconsistent with the June event, that finding was justified by the evidence. Moreover, we note that there is no evidence that Mr. Dillehay knew or had reason to believe that the insurer had assigned separate claim numbers for the two events. Thus, he had no reason to know or believe that the period for filing suit as to the May event might be running until UPS raised the issue in its answer to the complaint. Indeed, it is fair to state that the evidence demonstrates that Mr. Dillehay viewed the June event as a continuation of the initial injury, and that UPS and its insurer treated them as such until at least February 2006. On the basis of these factors, we conclude that the trial court did not err by finding that Mr. Dillehay's action was not barred by the statute of limitation.

#### *Permanency*

UPS makes an alternative argument that, if the May 2005 injury was the subject of the lawsuit, then the trial court erred by finding that Mr. Dillehay sustained permanent disability as a result of that incident. It argues that (a) Mr. Dillehay's low back injury is attributable to the June 2005 incident, and (b) his neck injury did not arise from the May 2005 incident. Both arguments are based primarily upon statements made by Mr. Dillehay or his trial testimony. Concerning the lower back injury, UPS points to Mr. Dillehay's statements to an adjuster, confirmed at trial, that he was "just about over" the first injury at the time the second injury occurred; that he never requested medical treatment after the May incident; and that he continued to work his normal job after that incident.

As to the neck injury, UPS points to the testimony of the adjuster, not contradicted at trial, that no mention of a neck injury was made at the time of the initial report on May 6, and Mr. Dillehay's testimony that his neck symptoms "ebbed and flowed" after that event depending upon what he was doing at work.

Mr. Dillehay testified that symptoms in both his lower back and neck began in May and never completely disappeared. While the medical records and other documents sometimes referred to June 8, 2005, nearly all reflected a history of an injury occurring as a result of attempting to hook two trailers together. That incident occurred in May 2005. Dr. Abram testified that both the neck and lower back injuries were consistent with such an event. In light of that evidence, we are unable to conclude that the trial court erred in finding that both injuries were caused by the May 2005 incident.

*Venue*

Mr. Dillehay is a resident of Coffee County. Tennessee Code Annotated section 50-6-225(a)(2) establishes venue for a workers' compensation action in either of two places: the county in which employee resides, or the county in which the injury occurred. Mr. Dillehay asserts that his injury occurred in Lincoln County on May 6, 2005, and that venue is, therefore, properly in that county. UPS argues, in effect, that the injury which caused Mr. Dillehay to seek medical care and from which his permanent disability arises occurred in June 2005 in Coffee County, and that proper venue is, therefore, in that county alone. This argument is without merit in light of our having affirmed the trial court's finding that Mr. Dillehay's injury occurred in Lincoln County in May 2005.

**Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to United Parcel Service, Inc., and its surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

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**No. M2008-01855-SC-WCM-WC - Filed - August 17, 2009**

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by United Parcel Service, Inc. 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 United Parcel Service, Inc., and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

William C. Koch, Jr., J., not participating