IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 24, 2011 Session

ROBERT BRIGHT v. SHOUN TRUCKING COMPANY, INC.

Appeal from the Law Court for Sullivan County
No. C37933C E. G. Moody, Judge

No. E2011-00542-WC-R3-WC-FILED-DECEMBER 7, 2011

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The employee, a truck driver, filed suit for benefits, alleging that he developed bilateral rotator cuff tears and carpal tunnel syndrome as a result of his job responsibilities. His employer contended that his injuries were not related to his employment. At the conclusion of the evidence, the trial court found in favor of the employee and awarded 50% permanent partial disability to the body as a whole. The employer has appealed, contending that the evidence preponderates against the trial court's findings (1) that the injuries arose out of and in the course of employment, and (2) that five times the medical impairment was appropriate under the circumstances. Because the evidence does not preponderate against the findings of the trial judge, the judgment is affirmed.

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

GARY R. WADE, J., delivered the opinion of the court, in which JON KERRY BLACKWOOD, SR. J., and E. RILEY ANDERSON, SP. J., joined.

Pamela B. Johnson and Adam F. Rust, Knoxville, Tennessee, for the appellant, Shoun Trucking Company, Inc.

Jack M. Vaughn, Kingsport, Tennessee, for the appellee, Robert Bright.

MEMORANDUM OPINION

Factual and Procedural Background

Robert Bright ("Employee"), employed by Shoun Trucking Company ("Employer")

between 2003 and 2008, drove a tractor trailer, picking up and delivering goods to various locations and accumulating an average of 146,000 miles per year during the course of his employment. On occasion, his job responsibilities included unloading cargo. One of the trucks he regularly drove had a leak in its power steering system, which would intermittently result in the loss of power steering, making the truck far more difficult to maneuver until motor oil was added to the system.

After experiencing pain in his shoulders in May of 2007, the Employee reported his symptoms to his personal physician, who referred him to an orthopedic surgeon at Holston Medical Group. The orthopedic surgeon, who saw the Employee only one time, ordered an MRI, but retired before the follow-up appointment several months later. Dr. Jason Park, who was in the same medical group as the orthopedic surgeon and assumed the Employee's care, determined that the Employee had a torn left rotator cuff as a result of his employment and recommended surgery. On the day following his diagnosis, the Employee gave notice of the injury to the Employer. Thereafter, the Employee received medical treatment through his private health insurance.

On March 25, 2008, Dr. Park performed surgery on the Employee's left shoulder. The nature of the injury required two additional procedures, each of which required anesthesia and manipulation in order to release adhesions. During his recovery, the Employee developed carpal tunnel symptoms in both wrists and pain in his right shoulder. Dr. Park performed carpal tunnel release surgery on the left wrist in September of 2008 and on the right wrist in June of 2009. After discovering a rotator cuff tear in the Employee's right shoulder, Dr. Park performed corrective surgery in March of 2009.

On September 25, 2008, the Employee filed suit, claiming workers' compensation benefits for each of the four injuries. In response, the Employer contended that the Employee's medical condition did not "[arise] out of or occur[] within the course and scope of his employment."

Dr. Park testified by deposition that the Employee reached maximum medical improvement from his various surgeries on December 7, 2009. In his opinion, the Employee experienced a 10% anatomical impairment to the body as a whole as a result of the shoulder injuries, but no permanent impairment as a result of the carpal tunnel syndrome in each hand. Dr. Park, who found the Employee to be "honest and forthright," recommended that the Employee limit his lifting and carrying to fifteen pounds, if done frequently, and to thirty-five pounds, if occasional. He further restricted the Employee's lifting or carrying to three hours of an eight-hour workday, limited his standing and walking to six hours, and confined his sitting to three hours. According to Dr. Park, however, these limitations were based in part upon a back problem not related to the Employee's work injury.

Dr. Park further testified that the Employee's shoulder and wrist problems were related to his work:

> Again, this is all under speculation, but from what I can see, from what I have heard from [the Employee], the job that he does, having a history of no trauma, I can only gather that his work is probably related to it. You don't find too many people who are 42, 44 years old . . . having rotator cuff problems in both shoulders . . . . So in that regard, I would probably say there's a very good chance that it's related to the job he had done up until now.
> . . . .
>
> I think in his case, it's probably more repetitive type activity that he'd done.

During cross examination, Dr. Park acknowledged that he had not reviewed a description of the Employee's job and had assumed that the Employee was required to load and unload his truck repetitively. When informed that the Employee did so only on occasion, however, Dr. Park held firm to his view that the Employee's job responsibilities caused the injury. On further cross-examination, Dr. Park, while concluding that the Employee's smoking a pack of cigarettes a day would accelerate the degeneration process, denied that there was any known medical connection between smoking and rotator cuff disease.

Dr. Jack Williams, an orthopedic surgeon, conducted an independent medical evaluation of the Employee at the request of the Employer and also testified by deposition. In his opinion, neither the shoulder nor wrist problems were employment-related. He stated that the Employee's rotator cuff tears were caused by arthritis, a "congenital down-sloping of his acromion," "a probable lack of vascularity" in the joint, and aging. Dr. Williams also stated that carpal tunnel syndrome is "most likely . . . due to a congenital predisposition [and that] the carpal tunnel is smaller in some people than in others." He noted that the Employee did not report any specific incident or series of incidents that caused his symptoms to arise.

The Employer also introduced a C-32 form from another orthopedic surgeon, Dr. Thomas Koenig. In Dr. Koenig's view, the Employee's rotator cuff tears were the result of "genetics and smoking," and the carpal tunnel syndrome was related to a "congenital predisposition."

The Employee, forty-six years old at the time of trial, left school before completing the tenth grade, and had no additional education. His reading and writing skills were at an eighth grade level. The Employee had worked as a truck driver nearly all of his adult life, but had also operated bulldozers, backhoes, and similar heavy equipment. He had not

worked since the last day of his employment for the Employer on March 17, 2008. He stated that he could no longer work as an over-the-road truck driver, explaining that because his left shoulder would occasionally "freeze up," he "had to work with it to get it free, to get it broke loose." He also thought that his shoulder stiffness could be a safety problem if he continued to drive a truck. He testified that he was no longer able to "check under the hood," hook the trailer to the tractor, or attach air lines. Further, because he had been prescribed Percocet for his pain and it was illegal to operate a commercial truck while taking a narcotic medication, he believed that any further employment as a truck driver was not possible.

Tommy Shoun, the co-owner of the Employer, testified that drivers in his employ rarely loaded their trucks. According to Shoun, unloading was only occasionally required, mainly at grocery warehouses, but unloading services were usually available even at those locations. He stated that when the services were available, the Employer would either pay for the unloading service or pay the driver an additional amount if he unloaded the truck himself. Shoun denied that the Employee had informed him of any problems with the power steering in his truck or of any pain in his shoulders and hands.

By agreement of the parties, the issues of compensability and disability were considered separately. On November 18, 2010, the trial court ruled in a lengthy and detailed opinion that the Employee's injuries to his shoulders and wrists, while gradual in nature, were employment-related and, therefore, compensable. Because "Dr. Park had substantially greater contact with the [Employee]," the trial court afforded greater weight to his testimony. Later, at the conclusion of the hearing on disability, the trial court, finding that the Employee had not had a meaningful return to work, awarded temporary total disability benefits, medical expenses, and 50% permanent partial disability benefits five times the medical impairment rating to the body as a whole. As rationale in support of the award for permanent partial disability, the trial court, among other things, specifically noted the Employee's inability to return to work, his level of education, his numerous surgeries, the medical impairment rating, and the need for additional physical therapy.

Standard of Review

The trial court's findings of fact must be reviewed "de novo upon the record . . . accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). This standard of review requires a careful examination of the factual findings and conclusions made by the trial court. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008); Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). When credibility and weight to be given testimony are involved, considerable deference must be given the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002).

"The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony." Guess v. Sharp Mfg. Co. of Am., 114 S.W.3d 480, 484 (Tenn. 2003). Medical evidence offered by deposition, however, is subject to de novo review. Id. Questions of law must also be reviewed de novo with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003). The interpretation and application of our workers' compensation statutes are questions of law. See Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009). Our primary objective when engaging in statutory construction is to carry out the intent of the legislature without unduly broadening or restricting the statute. Arias v. Duro Standard Prods. Co., 303 S.W.3d 256, 260 (Tenn. 2010).

Applicable Law

The workers' compensation statute in Tennessee permits recovery for injury "by accident arising out of and in the course of employment." Tenn. Code Ann. § 50-6-103(a). It is well-established that an injury must both "arise out of" as well as be "in the course" of employment in order to be compensable under the workers' compensation statute. Thornton v. RCA Serv. Co., 221 S.W.2d 954, 955 (Tenn. 1949). The terms are not synonymous. Blankenship v. Am. Ordnance Sys., LLS, 164 S.W.3d 350, 354 (Tenn. 2005). "[T]he phrase 'in the course of' refers to time, place and circumstances, and 'arising out of' refers to cause or origin." Brimhall v. Home Ins. Co., 694 S.W.2d 931, 932 (Tenn. 1985). "[A]n injury by accident to an employee is 'in the course of' employment if it occurred while he was performing a duty he was employed to do; and it is an injury 'arising out of' employment if caused by a hazard incident to such employment." Travelers Ins. Co. v. Googe, 397 S.W.2d 368, 371 (Tenn. 1965) (citing Shubert v. Steelman, 377 S.W.2d 940, 942 (Tenn. 1964)). "An accidental injury arises out of one's employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. Workers' Comp. Panel 1993); see also Cunningham v. Shelton Sec. Serv., Inc., 46 S.W.3d 131, 135-36 (Tenn. 2001). "[G]enerally, an injury arises out of and in the course of employment if it has a rational causal connection to the work and occurs while the employee is engaged in the duties of his employment . . . ." Hall v. Auburntown Indus., Inc., 684 S.W.2d 614, 617 (Tenn. 1985); see also Wilhelm v. Krogers, 235 S.W.3d 122, 127 (Tenn. 2007); Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005) (stating that when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury, the injury arises out of the employment); Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

"'Except in the most obvious, simple and routine cases,' a claimant must establish by expert medical evidence the causal relationship between the claimed injury and the employment activity." Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008)

(quoting Orman, 803 S.W.2d at 676). The relationship is to be established by the preponderance of the expert medical testimony, as supplemented by the lay evidence. Id. "'Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain . . . .'" Id. (quoting Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004)). Any reasonable doubt must be resolved in favor of the employee. White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992).

Tennessee law likewise recognizes that a worker may sustain a compensable gradual injury as the result of continual exposure to the conditions of employment. Tenn. Code Ann. § 50-6-201(b); see also Cent. Motor Express, Inc. v. Burney, 377 S.W.2d 947, 948-50 (Tenn. 1964). This is so because there is no requirement that the injury be traceable to a definite moment in time or triggering event in order to be compensable. Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008); Banks v. United Parcel Serv., Inc., 170 S.W.3d 556, 561 (Tenn. 2005). Gradually occurring injuries have been described as a new injury each day at work. Crew, 259 S.W.3d at 668; Barker v. Home-Crest Corp., 805 S.W.2d 373, 376 (Tenn. 1991). Employees are "relieved from the [statutory] notice requirement until they know or reasonably should know that their injury was caused by their work . . . ." Banks, 170 S.W.3d at 561; see also Tenn. Code Ann. § 50-6-201(b)(1) (providing that the employee must give notice to the employer within thirty days after the employee "knows or reasonably should know" that the injury is work-related).

Analysis

Causation

The Employer first asserts that the evidence preponderates against the trial court's finding that the Employee's injuries were caused by his work activities. In support of this contention, the Employer first points out that the Employee did not identify any particular date on which his symptoms arose, nor any specific event that caused the injuries, relying on the testimony of Dr. Williams, who described a July 2007 MRI scan as reflecting chronic changes due to a probable "lack of vascularity" in that area of the body. The Employer also asserts that Dr. Williams's testimony suggests that chronic rotator cuff disease is related to "a multiplicity of causes" and cites Dr. Koenig's opinion that the Employee's long history of smoking likely accelerated degenerative processes throughout his body. Finally, the Employer notes that both Dr. Williams and Dr. Koenig, as board-certified orthopedic surgeons with decades of practice, have superior credentials to Dr. Park, who is only "board-eligible" because he has been in practice for a shorter period of time.

The trial court, however, concluded that because Dr. Park was the Employee's treating physician, and therefore had regular contact with him over a period of years, he was in a better position to evaluate the injuries, whereas Dr. Williams examined the Employee on a

single occasion and Dr. Koenig based his testimony solely upon a review of the medical records. Further, the Employee asserts that the absence of a specific injurious event is irrelevant, because the injuries at issue occurred gradually as a result of repetitive activity conducted over a long period of time.[1]

It is well-established that a trial court may properly award benefits based upon medical testimony that the employment could be the cause of the employee's injury when there is also lay testimony supporting a reasonable inference of causation. Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274-75 (Tenn. 2009); Fitzgerald v. BTR Sealing Sys., 205 S.W.3d 400, 404 (Tenn. 2006); Fritts, 163 S.W.3d at 678. Driving a truck naturally requires a person to keep his or her arms outstretched for long periods of time, continuous or repetitive gripping of the steering wheel, and occasional forceful exertion of the shoulders and arms to maneuver the vehicle. Moreover, there was testimony that the Employee sometimes had to unload his truck and that it was occasionally necessary to exert extra force to steer the truck due to problems with the power steering mechanism. Dr. Park testified that these activities could cause the Employee's injuries. Dr. Williams opined that they did not cause the injuries, but conceded that there were differences of opinion within the medical community concerning the effect of such activities. Dr. Koenig expressed the view that smoking was the cause of the Employee's shoulder and wrist problems, but neither Dr. Park nor Dr. Williams agreed with that assessment.

A trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996); see also Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). Our review of deposition testimony, however, is de novo. Guess, 114 S.W.3d at 484. Nevertheless, all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004); Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Applying those standards to the record before us, we are unable to conclude that the testimony, both lay and medical, preponderates against the trial court's conclusion that the Employee sustained compensable injuries to his shoulders and wrists. Having independently reviewed the content of the medical depositions and reports, our conclusions are in accord with the findings of the trial court.

Extent of Disability

In the alternative, the Employer submits that the trial court's award of 50% permanent

[1] The Employee also points out that Dr. Williams conceded that there was a difference of opinion among physicians concerning the effects of repetitive motion and that Dr. Williams disagreed with Dr. Koenig's theory that smoking was a potential cause of joint or ligament problems.

partial disability to the body as a whole is excessive. When assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and the capacity to work at the kinds of employment available in the employee's disabled condition. See Tenn. Code Ann. § 50-6-241(d)(2)(A); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn.1972). When the award includes "a multiplier of five (5) or greater, then the court shall make specific findings of fact detailing the reasons for awarding the maximum impairment." Tenn. Code Ann. § 50-6-241(c). For injuries arising after July 1, 2004, if there is no meaningful return to work, the maximum benefit "may not exceed six (6) times the medical impairment rating." Tenn. Code Ann. § 50-6-241(d)(2)(A).

In deciding to apply a multiplier of five times Dr. Park's medical impairment rating, the trial court made extensive findings of fact. Indeed, the Employee, forty-six years old at the time of trial, attended school into the tenth grade and had no additional schooling. He had been a long-haul truck driver his entire adult life, although he had some additional experience operating heavy equipment. The trial court, implicitly accrediting the testimony of the Employee, found that as a result of his work injuries, he is no longer able to perform any of those jobs, and that it is probable that he will need additional education and training to successfully reenter the workforce. In our view, the trial court's assessment of the extent of the Employee's disability is wholly consistent with the evidence, both lay and medical.

Conclusion

The judgment is affirmed. Costs are taxed to Shoun Trucking Company, Inc. and its surety, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

October 24, 2011 SESSION

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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 appeals 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 of this appeal are taxed to Shoun Trucking Company, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM