IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2012 Session

SUE CROSS v. R & R LUMBER COMPANY, INC.

Appeal from the Circuit Court for Anderson County
No. BOLA0379 Donald Ray Elledge, Judge

No. E2012-00492-WC-R3-WC-MAILED-11-26-12/FILED-12-26-12

A lumber company employee with a history of heart bypass surgery died suddenly at a job site. After learning that the employee's work activities could have triggered an arrhythmia or myocardial infarction, the widow filed suit for workers' compensation benefits. The treating cardiologist of the employee concluded that his physical activities on the job contributed to his death, while a cardiologist who examined the medical records disagreed. The trial court awarded benefits, and the employer appealed. Pursuant to Tennessee Supreme Court Rule 51, the appeal has been referred to a special workers' compensation appeals panel for a hearing and a report of findings of fact and conclusions of law. We affirm the judgment of the trial court.

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

GARY R. WADE, C.J., delivered the opinion of the Court, in which E. RILEY ANDERSON, SP. J., and J. S. "STEVE" DANIEL, SP. J., joined.

Lee Anne Murray, Nashville, Tennessee, for the appellant, R & R Lumber Company, Inc.

Sam G. Smith, Jr., Knoxville, Tennessee, for the appellee, Sue Cross.

MEMORANDUM OPINION

I. Facts and Procedural Background

Bill Cross (the "Employee") was employed as a heavy equipment operator by R & R Lumber Company, Inc. (the "Employer") from 1981 until his death in 2009. The Employee's job consisted primarily of operating a bulldozer and a "skidder," which is a large tractor-like vehicle used to transport cut trees over rough terrain to an area where they can be loaded onto trucks. Sixty-four years of age at the time of his death, the Employee had known Bernie

Roberts, co-owner of the R & R Lumber Company, since their fifth grade in school.

On Monday, November 9, 2009, the Employee met Roberts at the latter's residence at 5:45 a.m. The two men drank coffee and waited on other employees before having some breakfast and traveling for thirty or more minutes to a job site in rural Anderson County. Upon their arrival at the site, the two men climbed into the skidder's cab, which is located several feet above ground level. Roberts then drove approximately ten minutes into the tree-cutting area, parked the skidder where the trees were to be cut, and stepped down to ground level. After some discussion about their work plan, Roberts carried a chainsaw and cable some fifteen to twenty feet up a hill while the Employee carried two chokers.[1] The Employee watched as Roberts began to cut one of the trees with the chainsaw. When Roberts struck a vine, the chain came off his saw and, as he turned toward the skidder, he saw that the Employee was lying on the ground. Roberts asked his son, Brian, who was working nearby, to call 911. By the time emergency medical technicians arrived some time later, the Employee had died.

On August 20, 2010, Sue Cross, the widow of the Employee, filed suit for workers' compensation benefits, claiming that the Employee, who had a prior history of heart and coronary artery disease, died as a result of his activities on the job. In response, the Employer denied that the Employee's job activities either caused or contributed to his death, contending that his death was not in any way work related.

A statement of undisputed facts filed by the Employer indicated that the Employee and Roberts arrived at the job site between 7:00 a.m. and 7:30 a.m., traveled by skidder into the woods for several minutes until they reached the logging site, and then walked about twenty feet to a tree. The Employer stipulated that the chokers carried by the Employee weighed approximately three pounds each and that prior to Roberts' use of the chainsaw, he and the Employee had conversed for approximately fifteen minutes, discussing how to remove a tree that had been previously cut down. Counsel for the parties agreed that the Employee's average weekly wage was $629.23 and that if his death was compensable, the Employee's widow would be entitled to a weekly compensation rate of $314.61. It was further stipulated that the Employee's death was the result of sudden cardiac arrest, that the cost of ambulance service was $100, and that the expense of the funeral was $5274.18.

At trial, Ms. Cross, a licensed practical nurse, testified that the Employee attended high school until his junior year. She stated that after he began working for the Employer in 1981, he typically left their residence before 5:45 in the morning and usually returned between 3:30 and 5:00 in the afternoon, Monday through Friday. According to Ms. Cross,

[1] A choker is a piece of equipment used for logging and skidding.

the Employee sometimes worked on Saturdays. She testified that he usually wore blue jeans and thick denim shirts as protection from possible injury, and recalled that when he returned from work at the end of each day, his clothes were usually "very dirty, . . . torn, [and] sweaty" and his hands were "calloused and stained." Ms. Cross testified that the Employee had a history of heart disease for which he had bypass surgery in 1999, but stated that he had made no complaints about his health on the morning of his death.

Bernie Roberts' son, Brian, testified that the drive from the Roberts' residence to the job site at Beech Grove in Briceville was between thirty and forty-five minutes. On the date of the Employee's death, Brian saw his father and the Employee at the landing site for the cut trees before they left on the skidder, but did not see the Employee engage in any activities other than climbing several feet into the cab of the skidder. He described the skidder as having a solid suspension in the back and a floating suspension in the front, with tires five feet in diameter. While Brian had testified at his discovery deposition that the Employee had driven the skidder from the loading site to the tree cutting area, he stated at trial that he had learned afterward that his father was actually driving. He recalled that some fifteen to twenty minutes after their departure, he received a call from his father who asked him to telephone 911. He met the ambulance within ten minutes of his call and, upon its arrival, led the medical personnel in a four-wheel drive vehicle to the logging site where his father waited with the Employee.

Bernie Roberts, who owns R & R Lumber Company in partnership with his brother, described the Employee as a good worker. He stated that the Employee built the roads used for logging with a bulldozer and occasionally drove a skidder and a loader. Roberts described the skidder as being ten feet in height with four steps up into the cab. He testified that the drive in the skidder on the morning of the Employee's death lasted five to six minutes and maintained that the vehicle operated "pretty good . . . [,]not [a] real rough ride." Roberts recalled that he drove uphill over a dirt logging road before stopping at a "level place" near the location of the timber. He testified that he carried the chain saw and cable while the Employee carried two chokers to a tree some fifteen to twenty feet away from where he had parked. After discussing work plans for fifteen minutes or so, Roberts began to cut the top out of the tree before striking "a grapevine that kicked the chain off." When he turned toward the skidder, he saw the Employee on the ground. Roberts acknowledged that he was aware that the Employee had suffered a heart attack in 1999 for which he had quadruple bypass surgery, but asserted that since the Employee's return to work, he had never complained about chest pain or shortness of breath.

Dr. James R. Michel, a cardiologist, performed the quadruple bypass surgery on the Employee in August of 1999 and served as his treating physician until his death. He last examined the Employee in April of 2009, six or seven months prior to his death. Dr. Michel,

who testified by deposition, stated that the Employee had returned to work without restrictions and had few problems during the ten-year period after his surgery. In preparation for his testimony, Dr. Michel had reviewed his own records, the medical records pertaining to the Employee's death, and the depositions of Bernie and Brian Roberts. From these sources, he concluded that the most likely cause of death was "sudden cardiac death from a life-threatening arrhythmia, mainly ventricular fibrillation," describing arrhythmia as "an irregularity of the heart rhythm, . . . life-threatening or death causing . . . where the main pumping chambers of the heart just fibrillated and as such didn't perform adequate pumping function to keep the circulation going." He testified that it was "quite likely that [the physical exertion described by Bernie and Brian Roberts] could have triggered the heart attack and the arrhythmia." Dr. Michel further noted that heart attacks are statistically more likely to occur on Monday mornings, during the first three hours of work. He stated that under the conditions that existed, activities that did not require a significant amount of exertion could lead to a heart attack—such as "a rough ride, . . . [or] carrying some chokers attached to a cable to haul a tree." On cross-examination, Dr. Michel acknowledged that heart attacks could also occur without physical exertion and that fifty percent of bypass grafts fail within ten years. Even though Dr. Michel agreed that the activities of the Employee on the morning of his death, as described by the Roberts, may have involved comparatively "little physical exertion," he nevertheless opined that they were sufficient to have caused the arrhythmia which resulted in the Employee's death. It was his further opinion that a healthy person without coronary artery disease would not have died as a result of the physical activities described but that the Employee, because of his "underlying structural heart disease," was vulnerable to arrhythmia even while engaged in limited activities.

At the request of the Employer, Dr. Todd Tolbert, also a cardiologist, conducted a review of the Employee's medical records. Dr. Tolbert, who testified by deposition, examined the same depositions and medical records reviewed by Dr. Michel. In his opinion, however, the most likely cause of death was "an acute unprovoked cardiac dysrhythmia." Dr. Tolbert considered it unlikely that the Employee had suffered a myocardial infarction because of the absence of symptoms immediately before his collapse. It was his belief that only a strenuous level of activity would have provoked either arrhythmia or myocardial infarction, and that the Employee's activities were not sufficiently strenuous to cause a sudden cardiac death. On cross-examination, Dr. Tolbert conceded that the Employee, because of his hypertension, high cholesterol, obesity, and history of a previous heart attack was predisposed for sudden cardiac arrest. It was his opinion that the Employee's level of activity prior to his death constituted three metabolic equivalents ("METs"), with one MET being the amount of energy used in a sedentary state and six METs qualifying as "strenuous." Dr. Tolbert acknowledged, however, that the MET study was "artificial" because the measurements from sedentary to strenuous involved healthy populations rather than individuals like the Employee, who had high risk factors.

The trial court, after reciting in detail the evidence presented at trial, granted benefits, holding that the Employee's death was "more likely than not" caused by his work activities on the morning of November 9, 2009. The trial court made findings that the Employee had traveled from the landing site up a hill in the skidder, which had both seat belts and hand holds, with "seats . . . moving up and down," before stepping down from the skidder and walking up a hill a short distance to the cutting area. The trial court concluded that "by a preponderance of the evidence, more likely than not[,] . . . this heart attack was caused as a result of his employment . . . and the activities . . . described . . . by the witnesses." In this appeal, the Employer asserts that the evidence preponderates against the trial court's findings as to causation.

II. Standard of Review

Initially, the trial court's findings of fact are subject to "de novo [review] 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 us to examine, in depth, a trial court's factual findings and conclusions.'" Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, 487 (Tenn. 2012) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). When the trial court has seen and heard the witnesses, considerable deference must be afforded to the trial court's findings of credibility and the weight that it assessed to those witnesses' testimony. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008) (citing Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002)). The same deference need not be extended to findings based on documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Indeed, where medical expert testimony is presented by deposition, we may independently assess the content of that proof in order to determine where the preponderance of the evidence lies. Williamson, 361 S.W.3d at 487 (quoting Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008)). On questions of law, our standard of review is de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007) (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)).

III. Analysis

The employee bears the burden of proving each element of his cause of action in a workers' compensation case. Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992). "Although workers' compensation law must be construed liberally in favor of an injured employee, it is the employee's burden to prove causation by a preponderance of the evidence." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008).

Any employee seeking to recover workers' compensation benefits must prove that the injury both arose out of and occurred in the course of the employment. See Tenn. Code Ann.

§ 50-6-102(12). "The phrase 'arising out of' refers to the cause or origin of the injury and the phrase 'in the course of' refers to the time, place, and circumstances of the injury." Crew, 259 S.W.3d at 664. An injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. Trosper, 273 S.W.3d at 604; Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). Except in the most obvious cases, causation must be established by expert medical evidence. Glisson, 185 S.W.3d at 354.

In Cloyd v. Hartco Flooring Co., this Court described the application of the causation rule as follows:

> 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. 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.

274 S.W.3d 638, 643 (Tenn. 2008) (quoting Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004)) (citations omitted); see also Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004) ("Any reasonable doubt as to whether or not an injury arose out of employment is to be resolved in favor of the employee."). By this standard, "benefits may be properly awarded to an employee who presents medical evidence showing that the employment could or might have been the cause of his or her injury when lay testimony reasonably suggests causation." Glisson, 185 S.W.3d at 354; see also Fitzgerald v. BTR Sealing Sys. N. Am. – Tenn. Operations, 205 S.W.3d 400, 404 (Tenn. 2006).

Further, an employer takes an employee "as is," thereby assuming the responsibility for a long-term or pre-existing condition aggravated by a work-related injury which might not affect an otherwise healthy person. Hill v. Eagle Bend Mfg. Inc., 942 S.W.2d 483, 488 (Tenn. 1997). Thus, "an employer is 'liable for disability resulting from injuries sustained by an employee arising out of and in the course of his employment even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case.'" Trosper, 273 S.W.3d at 604 (quoting Baxter v. Smith, 364 S.W.2d 936, 942-43 (Tenn. 1961)).

In this instance, the trial court was presented with conflicting medical opinions. Dr. Michel testified that the Employee's pre-existing medical condition placed him at a greater risk for sudden cardiac arrest and that his limited work activities "quite likely triggered the heart attack . . . ." Dr. Tolbert generally concurred in Dr. Michel's assessment but differed as to whether the Employee's relatively limited exertion in the hour before his death was

sufficient to induce sudden cardiac death. As pointed out by the trial court, Dr. Michel had treated the Employee for over ten years, whereas Dr. Tolbert was required to rely upon his review of the medical records. In Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991), we provided several factors for consideration by trial courts, including "the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." The trial court has considerable discretion when choosing which expert to accredit. Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990); Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996).

When physical exertion precipitates death caused by heart disease or myocardial infarction, "the rule is well settled that if the physical activity or exertion or strain of the employee's work produces the heart attack, or aggravates a preexisting heart condition, the resulting death or disability is the result of an accident arising out of and in the scope of the employment." Bacon v. Sevier Cnty., 808 S.W.2d 46, 49 (Tenn. 1991); Shelby Mut. Ins. Co. v. Dudly, 574 S.W.2d 43, 44 (Tenn. 1978). As explained in Bacon,

> [i]t makes no difference that the employee, prior to the attack, suffered from a preexisting heart disease, or that the attack was produced by only ordinary exertion or the usual physical strain of the employee's work. In other words, no extraordinary exertion or unusual physical strain need be established in order to obtain a recovery. The causational key to recovery or denial of benefits turns on whether the disabling heart attack is precipitated by the physical activity or exertion or physical strain of the employee's job.

808 S.W.2d at 49-50 (citations omitted); see also 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 46.03[8] (2000).

The medical proof in this case was taken by deposition, so the weight and credibility must be assessed from the contents of the transcripts admitted at trial. In that regard, we may make our own assessment of the evidence to determine where the preponderance of the evidence lies. Crew, 259 S.W.3d at 665; Wilhelm, 235 S.W.3d at 127. The Orman factors provide some guidance in what we view as a particularly close question on the issue of causation. In this instance, each of the cardiologists presented impressive qualifications. Dr. Michel, however, as the treating physician of the Employee for over ten years, was in a better position to make an assessment as to causation than Dr. Tolbert, who had to rely exclusively on medical records. For this reason, the testimony of Dr. Michel was, in our view, entitled to accreditation, as observed by the trial court. While the lay testimony did not indicate by ordinary standards a high level of physical exertion on the part of the Employee immediately prior to his death, we cannot say that the evidence preponderates against the trial court's

findings that there was a causal connection between his physical activities that morning and, given the weakened condition of the Employee's heart, his ultimate death. Moreover, the trial court acted in accordance with Tennessee law by resolving any reasonable doubt as to causation in favor of the Employee. See Cloyd, 274 S.W.3d at 643.

IV. Conclusion

Because the evidence does not preponderate against the findings of the trial court, the judgment in favor of the Employee is affirmed. Costs are assessed against the Employer, for which execution may issue if necessary.

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GARY R. WADE, CHIEF JUSTICE

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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 assessed against the Employer, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM