IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 23, 2013 Session

GEORGE HOLLARS v. UNITED PARCEL SERVICE, INC., ET AL.

Appeal from the Chancery Court for Wilson County
No. 2012-CV-42 C. K. Smith, Chancellor

No. M2013-00144-WC-R3-WC - Mailed December 23, 2013
Filed March 7, 2014

In this workers' compensation appeal the employer asserts that the evidence preponderates against the trial court's finding that the employee's injury was permanent. The employee, a package car driver for United Parcel Service, experienced two episodes of heat exhaustion while at work. The trial court found the heat exhaustion to be permanent and awarded benefits for permanent partial disability and the employer appealed. The 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 pursuant to Tennessee Supreme Court Rule 51. We reverse the decision of the trial court.

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

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and DON R. ASH, SR. J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellants, United Parcel Service, Inc. and Liberty Mutual Insurance Corporation.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee, for the appellee, George Hollars.

OPINION

Factual and Procedural Background

George Hollars ("Employee") graduated from high school, worked for one year as a grocery clerk and three years as a quality control and inventory clerk at Hap Com, Inc. – an

assembly plant. Thereafter he was employed by United Parcel Service ("Employer") as a package car driver from 1975 until July 2011. His package car was not air-conditioned but was loaded for him by UPS. For the last twenty-three years he drove a route that included parts of Green Hills, Forest Hills, and Bellevue in Davidson County, Tennessee, averaging 155 to 165 stops per day.

On June 2, 2011, he began to feel ill while making a delivery in Green Hills. He stopped to rest off Hillside Road, drank some water and Gatorade, and after 15 minutes he felt like he had "recovered somewhat" and resumed his route. He delivered for 2 ½ miles and again began to feel lightheaded and sick. He parked his vehicle on Chickering Court in front of the home of Clara Bass, where he was to make a delivery, and put his head down on the wheel. Clara Bass arrived home a few minutes later, saw he was in distress and invited him into her home to rest. After he was inside he laid himself down on the floor. Ms. Bass called 911. Following 911 instructions, Ms. Bass placed towels soaked in cold water on him. Employee was taken to the Emergency Room at St. Thomas Hospital, where he was examined, treated with fluids and an IV and after one hour was released to go home. The emergency room doctor instructed him to stay inside for four days. Employee testified the temperature outside was 95-100 degrees that day based on his recollection from the radio, however his temperature when taken at the emergency room was normal.

After 4 days inside he returned to his employer, met with his supervisor and was sent to the employer's physician, Concentra Medical Care for examination and treatment. After examination, the physician at Concentra recommended an additional week without work. After a week off, Employee returned to regular duty work in mid-June, 2011, and continued to work until the first week of July without problems. He then took a previously-scheduled two-week vacation. During the first week of the vacation, he traveled to Pigeon Forge and Gatlinburg and during the second week, he returned home and "stayed inside." He returned to work on July 18 and worked without problems. On July 19, after returning to work on his route, he began to feel ill at mid-morning. He called his supervisor, who accompanied him for 4 hours before leaving to assist another driver. After his supervisor left Employee had 10 to 15 more stops and was able to finish his route in an hour and return to the terminal. When he arrived he felt hot, weak, and shaky but he did not see a doctor. He told his supervisor that he would not be able to work the following day. Employee testified that the temperature was in the mid to upper 90's that day.

On the next day, July 20, a meeting was held with Employee, his union representative, and the district manager. A supervisor instructed the employee to consult his personal physician, Dr. William Baucom, to find the cause of his medical problem. Dr. Baucom examined Employee and found his condition normal. Based on his history the doctor thereafter wrote a series of conflicting notes concerning Employee's ability to work. On July 22, 2011, Dr. Baucom wrote a note stating that Employee was "completely able to perform

all essential job functions, with the restriction that he needs to avoid extended exposure to temperatures consistently above ninety degrees." Employer would not allow employee to return with that restriction. Thereafter, Dr. Baucom wrote a note stating that Employee was able to return to work with no restrictions, but Dr. Baucom then wrote a third note, stating Employee "will need to avoid prolonged exposure to heat indefinitely." Finally, Dr. Baucom then wrote a fourth note, dated September 19, 2011, which stated Employee "is able to return to work with no restrictions on September 20, 2011." On November 16, 2011, however, Dr. Baucom completed a questionnaire sent to him by Employer. In the questionnaire, he stated that Employee could perform all functions of his position, "except for heat exposure." In addition Dr. Baucom stated that Employee "needs to avoid excessive heat exposure >90°." Dr. Baucom's diagnosis was "heat stroke," and the restriction was described as "life long." Employer refused to allow Employee to return to work with Dr. Baucom's final restrictions and Employee never returned to work for Employer. Soon after he retired, retroactive to July 20, 2011.

Employee then decided to pursue a workers' compensation claim. He filed a request for a Benefit Review Conference with the Department of Labor, which was held on February 8, 2012. The parties were unable to settle their differences, and Employee filed this suit in the Chancery Court for Wilson County on February 8, 2012.

At trial on November 14, 2012, Employee testified that he was sixty years old and that he has no additional education beyond high school. He also stated he had previous instances of heat exhaustion, once in 2010 and another in 2008 or 2009. Employee testified that he was no longer able to work outdoors for any length of time when it was hot and that he helped his wife a little bit with yard work. Employee had not worked since his retirement, but had applied for jobs at Cracker Barrel, Enterprise Rent-a-Car, DHL delivery service, Motor Air Delivery and Better Courier Service. Employee testified that several of the jobs he had applied for since retiring were delivery jobs similar to his work for Employer and he felt that he was capable of performing any of those jobs.

Employee was sent to Dr. Richard Fishbein, an orthopaedic surgeon, for an evaluation. Dr. Fishbein testified by deposition. He said that in addition to evaluations he also ran primary medical clinics and pain clinics and saw "at least 75 people a week who have various diseases from respiratory to diabetes." However, he no longer performs surgery due to age and health issues. Dr. Fishbein conceded that heat exhaustion is a condition that would typically be treated by internal medicine specialists, general practitioners, or emergency room doctors, rather than orthopaedic surgeons. He agreed that he did not treat heat exhaustion in the course of his practice.

Dr. Fishbein met and interviewed Employee, but did not conduct a medical examination, because he did not believe it was necessary under the circumstances. He stated

that Employee appeared to be normal on the day of the interview and was not suffering from heat exhaustion at that time. He testified that, according to the records of St. Thomas's emergency department, Employee had gotten sick twice on June 2, 2011, but had recovered. He agreed that neither St. Thomas nor Dr. Baucom had administered any medications for heat exhaustion. Dr. Fishbein reviewed Dr. Baucom's records for visits on June 8, July 5, and July 22 which all showed Employee to be medically stable and that he was not suffering from heat exhaustion on any of those occasions.

Dr. Fishbein opined that Employee had suffered "heat exhaustion due to electrolyte imbalance" that had been "caused by his work at [Employer]." He testified that the condition was permanent and recommended that Employee avoid excessive exposure to heat over ninety degrees. Dr. Fishbein opined that Employee retained an 8% impairment to the body as a whole. He explained that heat exhaustion was not addressed by the AMA Guides to the Evaluation of Impairment. He stated that he arrived at the 8% figure because it represented a "moderate loss of way of life and activities of daily living." He believed his method for arriving at that opinion was accepted by the medical community, based on "ten thousand evaluations."

Employer referred Employee to Dr. Jonas Kalnas for an evaluation. Dr. Kalnas testified by deposition. He stated that he is an occupational and environmental medicine physician, employed by Vanderbilt University. He also holds Master's degrees in Industrial Health and in Environmental and Health Science from Harvard University and trained at the Mayo Clinic. He described his medical specialty as "primarily a preventive activity which focuses on identifying and understanding occupational and environmental diseases or injuries so that those could be prevented . . . in the future." Dr. Kalnas had specific training about heat-related problems in the workplace during the occupational medicine and industrial hygiene programs he completed. He also had direct experience with heat exposure problems while employed as medical director for a petrochemical company and later as medical director for the regulatory agency for Occupational Health and Safety for the province of Alberta, Canada. Dr. Kalnas recently researched two cases of alleged work-related heat exhaustion in Tennessee. In addition Dr. Kalnas was certified as a member of the American Academy of Disability Evaluating Physicians.

Dr. Kalnas interviewed Employee for two hours and reviewed his deposition, but did not conduct a medical examination. Employee described the June 2 and July 19, 2011 episodes of heat exposure and told Dr. Kalnas that the number of deliveries he was required to make per day had increased shortly before those incidents, and he had generally begun to feel overheated and exhausted since the increase in deliveries. Dr. Kalnas concluded that both the June 2, 2011 and July 19, 2011 episodes were cases of mild heat exhaustion. Employee also told Dr. Kalnas that he took Benadryl, an antihistamine used as a sleep aid, and Atenolol, a blood pressure medication, during the summer of 2011. According to Dr.

Kalnas, this information was significant, because both of those medications affected the ability of the body to function in heat. Dr. Kalnas said one side effect of Benadryl was to decrease sweating, making it more difficult for the body to cool itself and Atenolol is a "beta-blocker," which decreases heart rate, which in turn decreases circulation, reducing the body's ability to cool itself. Dr. Kalnas also reviewed the medical records of Dr. Baucom, Employee's primary care physician, which reflected he reduced the dosages of both of these medications after the summer 2011 episodes of heat exhaustion.

Dr. Kalnas testified that the medical records of Dr. Baucom also contained the results of a stress test administered in June 2010 which showed that Employee had poor exercise tolerance. Based on the information provided by Employee, Dr. Kalnas concluded that he got little exercise away from the workplace. Further, the nature of Employee's job, though active, consisted of alternating periods of driving, with intermittent short walks to make deliveries of small packages. According to Dr. Kalnas such activity does not improve aerobic ability or the function of the heart and lungs.

Dr. Kalnas checked the weather data for the June 2, 2011 episode. He found that the temperature at eleven o'clock in the morning was eighty-eight degrees with a relative humidity of 55%. The temperature at one o'clock in the afternoon was ninety degrees, with a relative humidity of 45%. In each case, the heat index, which combines the effects of heat and humidity, was ninety-three degrees. At this level, according to Dr. Kalnas's review of the medical literature, heat exhaustion is possible and heat exhaustion becomes likely when the heat index reaches one hundred five degrees.

Dr. Kalnas analyzed the temperature data according to a method known as the Wet Globe Bulb Temperature, which takes into account additional information such as the type of clothing being worn by workers and the level of exertion required by their work. Dr. Kalnas testified that even considering those additional factors, the temperature on June 2, 2011 was not likely to cause heat exhaustion. Dr. Kalnas therefore concluded that the additional factors of Employee's low exercise tolerance and the effect of the medications he was taking contributed to his episodes of heat exhaustion.

Dr. Kalnas further concluded that the episodes of heat exhaustion had no permanent effect on Employee. He stated that the medical literature considers heat exhaustion to be a temporary phenomenon and recovery is complete after two or three days. Dr. Kalnas said that was the reason that the AMA Guides did not provide a permanent impairment for heat exhaustion. Dr. Kalnas testified that the more serious condition of heat stroke, which occurs when the body temperature reaches one hundred six degrees, can cause permanent damage to internal organs. He testified there was no evidence that Employee's body temperature reached anywhere near that level in either episode. The records of the St. Thomas emergency department stated that Employee's body temperature was less than ninety-eight

degrees and all physical examinations of Employee thereafter were normal. In addition, hematology testing ordered by Dr. Baucom in September 2012 indicated normal function of the liver and kidneys. Dr. Kalnas concluded that Employee did not, therefore, suffer from heatstroke and that Employee had no permanent impairment from his work activities.

The trial court concluded that Employee suffered from a permanent diminution of his ability to work in high temperatures as a result of his employment. It found that he had an 8% anatomical impairment and that he had sustained a 48% permanent partial disability to the body as a whole. Employer has appealed, asserting that the evidence preponderates against the trial court's finding that Employee sustained a permanent injury.

Standard of Review

Courts reviewing an award of workers' compensation benefits 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 conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008) requires the reviewing court to "[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." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp*., 254 S.W.3d. 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc*., 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

In the present case, the primary issue is whether episodes suffered by Employee in June and July 2011 caused a permanent injury to Employee. "Medical causation *and permanency* of an injury must be established in most cases by expert medical testimony." *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991) (citing *Smith v. Empire Pencil Co.*, 781 S.W.2d 833 (Tenn.1989) and *Corcoran v. Foster Auto GMC, Inc*., 746 S.W.2d 452, 458 (Tenn.1988)) (emphasis supplied). In this case, the trial court was presented with conflicting expert medical testimony on the issue of permanency. "When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, to consider 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." *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991). Because all of the medical proof in this case was presented by deposition, we analyze the trial court's findings without a presumption of correctness. *Orrick v. Bestway Trucking, Inc*., 184 S.W.3d at 216; *Bohanan v. City of Knoxville*, 136 S.W.3d at 624.

We begin, as *Orman* suggests, by considering the relative qualifications of the experts. Dr. Fishbein is an orthopaedic surgeon. He professed familiarity with the subject of heat exhaustion, but conceded that the condition was more likely to be treated by physicians in other specialties. Dr. Kalnas, on the other hand, has received specific training concerning heat exposure in the workplace, both in medical school and in graduate programs in Industrial Health and Environmental and Health Science. He has also been required to study and address the subject in his roles as medical director for a petrochemical company and for the occupational health agency of the province of Alberta. In those roles he had significant actual experience with worker exposure to both heat exhaustion and heat stroke. As a result, he published literature addressing the question of how to prevent heat exposure in the workplace for employees. We conclude that Dr. Kalnas is better qualified than Dr. Fishbein to express an opinion on heat exposure in the workplace and whether or not it results in permanent injury.

In considering the circumstances of their examination and the information available to each expert neither doctor found it necessary to examine Employee. Each reviewed the medical records of St. Thomas Hospital and Dr. Baucom. Dr. Kalnas, however, made frequent references to specific information in those records, such as the result of the 2010 stress test and the 2012 hematology analysis which showed no organ damage. Moreover, he obtained additional information, including weather data and information concerning Employee's job duties and non-work activities in order to make his analysis. He also addressed the potential relationship between Employee's medication regimen and the episodes of June and July 2011. Dr. Fishbein did not seek or consider any of that information. In addition, Dr. Kalnas researched the medical literature and found that it is undisputed that heat exhaustion is not a permanent condition.

Dr. Kalnas also expressed a greater familiarity with the AMA Guides, as they apply to heat-related medical conditions, and was able to explain why the Guides contain no impairment for heat exhaustion. Dr. Kalnas was certified as a member of the American Academy of Disability Evaluating Physicians which provides special training in the AMA Guides. Dr. Fishbein is not a member. Although Dr. Fishbein asserted that his methodology in this case was consistent with the Guides, he was unable to cite any reference, article, or medical opinion other than his own experience of providing orthopaedic evaluations to support that assertion. Nor did he provide any explanation or description of the nature of the permanent change to Employee's physiology alleged to be the result of his workplace exposure to heat.

Although reference is made to Dr. Baucom's records, his findings and testing of the employee were essentially normal including the histology testing which showed no damage to organs such as the liver and kidney. His opinion is based on the history supplied by the employee. His deposition was not taken and there is no evidence of whether he had ever treated heat exhaustion and no evidence of his knowledge of its effects. His conflicting opinions about permanence do not engender confidence and his final opinion that the employee suffered heat stroke is completely contrary to the undisputed medical literature, the temperature data and the balance of the evidence.

Finally, we note that it is undisputed that all of the medical examinations or tests administered to Employee after the episodes of heat exhaustion yielded completely normal results. He had applied for several jobs that were substantially similar to his work for Employer and he testified he felt he could perform those jobs. Considering the record as a whole, we conclude that the evidence preponderates against the trial court's finding that Employee sustained permanent disability as a result of his two episodes of heat exhaustion during the summer of 2011. For that reason, we reverse the judgment of the trial court and dismiss the complaint.

Conclusion

The judgment of the trial court is reversed. The complaint is dismissed. Costs are taxed to George Hollars, for which execution may issue if necessary.

_____

E. RILEY ANDERSON, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

GEORGE HOLLARS v. UNITED PARCEL SERVICES, INC. ET AL.

Chancery Court for Wilson County
No. 2012CV42

No. M2013-00144-SC-WCM-WC
Filed March 7, 2014

Judgment Order

This case is before the Court upon the motion for review filed by George Hollars pursuant to Tennessee Code Annotated section 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 George Hollars, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

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