IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 20, 2017 Session

HOWARD MCABEE v. CROWN AUTOMOTIVE GROUP, INC., et al.

Appeal from the Chancery Court for Davidson County
No. 14-244-IV Russell T. Perkins, Chancellor

No. M2016-01319-SC-R3-WC – Filed July 28, 2017
MAILED May 26, 2017

Howard McAbee ("Employee") was employed by Crown Automotive Group, Incorporated, ("Employer"), as a courtesy van driver. On August 2, 2013, Employee sustained injuries to his hip when he fell to the ground during a scuffle with a co-worker. After the scuffle, Employer fired Employee and his co-worker. Employer denied Employee's claim for workers' compensation benefits asserting the injury did not arise out of the employment and the injury was caused by Employee's misconduct. The trial court found that the injury was compensable as it arose out of and in the course of employment and that Employee was permanently and totally disabled. The trial court ordered Employer to pay Employee's permanent disability benefits in a lump sum. Employer has appealed contending, the trial court erred by finding the case compensable; finding Employee permanently and totally disabled rather than limiting the award based on the statutory cap when there was misconduct; awarding a lump sum payment; and ordering Employer to pay medical expenses. 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 affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014). Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. ACREE, JR., SR.J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C.J., and ROBERT E. LEE DAVIES, SR.J., joined.

Alaina M. Beach and Christopher Kim Thompson, Nashville, Tennessee, for the appellants, Crown Automotive Group, Inc., and Penn National Insurance Company.

Brian Dunigan, Goodlettsville, Tennessee, for the appellee, Howard McAbee.

OPINION

Factual and Procedural Background

Employee was born August 26, 1931. At the time of trial he was eighty-four years old. He completed the tenth grade and dropped out of high school during the eleventh grade. Employee did not earn a high school diploma or GED. During high school he worked at body shops. After high school, he served four years in the United States Navy. Following his military service, Employee worked in the construction industry.

In 2004, Employee began working for Employer as a part-time utility aide. The job consisted of driving out-of-state to pick up cars. Employee transitioned to a full-time position as the courtesy van driver. His job involved providing courtesy rides to customers who left vehicles for service at Employer's service department. He also picked up parts for the service department.

On August 2, 2013, Employee sustained injuries to his hip when he fell to the ground during a scuffle with a co-worker. The precise sequence of events that led to his injury is not clear. There were only two witnesses to the incident, Employee and his co-worker, Billy Joe McCabe. Employee and Mr.

McCabe testified at trial, but their accounts were largely inconsistent. The trial court found neither version to be accurate.

The trial court found the likely sequence of events between Employee and Mr. McCabe to be as follows: Mr. McCabe was in an area of the shop where several computer terminals were located, and he was working at one of the terminals. Employee entered the area to put his lunch and drinks in the cooler. At some point, either when he was entering or leaving the area, Employee pushed or shoved a chair at an adjacent table which disturbed the papers that were on the table.

Then, Mr. McCabe approached Employee saying an expletive. Mr. McCabe either pushed the chair toward Employee or shoved him which caused him to fall to the floor. Mr. McCabe then left the premises. Employee was unable to get off of the floor so other co-workers placed him into a chair. Co-workers also called an ambulance and Employee requested to be taken to the Veterans' Administration ("VA") hospital. The supervisor, Chuck Nichols, appeared and asked Employee about the situation. Mr. Nichols immediately fired Employee and Mr. McCabe. The trial court believed it started out as horseplay. We conclude that the trial court's findings as to the likely sequence of events are supported by a preponderance of the evidence.

The evidence, in its entirety, provided that Employee and Mr. McCabe disliked each other. Employee testified that Mr. McCabe was a "goof-off" who did not perform his job well. Mr. McCabe testified that Employee verbally abused him and slapped the back of his head on two occasions. There was also evidence that Mr. Nichols counseled the employees several months prior to the injury advising them to stay away from each other if they could not get along.

Employee presented to the hospital with pain in his left hip and minor injuries on his left wrist and face. The nurses ordered diagnostic x-rays for his left hip, and it was determined that Employee had injuries typically described as a broken hip in more than two places.

On the same day, Employee was referred to Dr. Michael McHugh, an orthopedic surgeon, at the VA hospital. Dr. McHugh performed a hemi-arthroplasty surgical procedure on Employee. Dr. McHugh testified that this procedure consists of replacing the upper part of the femur, including the ball of the hip joint without replacing the socket or cup portion of the joint.

Employee remained hospitalized for two weeks after the surgery. Then, he was transferred to McKendree Village, a rehabilitation facility. Dr. McHugh continued to follow Employee after his discharge from McKendree. On August 4, 2014, Dr. McHugh declared Employee at maximum medical improvement. He assigned an impairment of 7% to the left lower extremity. Dr. McHugh also assigned the following permanent restrictions to Employee: (1) Employee should use a cane in his right hand for ambulation; (2) lifting while standing should be limited to ten pounds with the right arm and twenty-five pounds with the left arm;[1] (3) Employee should carry no more than ten pounds when using the left arm only; (4) pushing should be limited to what can be easily pushed with one hand; (5) squatting should be permitted only a few times per day.

Prior to the injury, Employee lived independently in his own home. He was discharged from McKendree to his daughter's home and has remained in her home. He uses a cane, and sometimes a walker, to assist locomotion. His daughter prepares meals for him, does his laundry, and performs similar chores. Before his injury, he performed these tasks himself. Employee testified that he is able to drive a car for short distances, but would not trust himself to drive a van with passengers. He also reported difficulty getting into, and out of, vehicles because of diminished motion of his left leg.

The trial court announced its findings at the conclusion of the proof.

[1] It is likely that Dr. McHugh was mistaken as to the restrictions for each arm because Employee sustained an injury to his left hip, and Dr. McHugh later testified that Employee should carry no more than ten pounds in his left arm only. The likely limitation is: lifting while standing should be limited to ten pounds with the *left* arm and twenty-five pounds with the *right* arm.

The court found that Employee's injury was compensable as it arose from and in the course of his employment. Specifically, the court found that the incident was related to employment because there was an inherent connection to employment. Although there was not a dispute over performance, pay, or termination, the incident was connected to employment because Employee and Mr. McCabe had no outside connection, and they could not have imported a personal or domestic dispute into the workplace. Further, the court found that Employee was permanently and totally disabled as a result of his injury with an impairment of 7% to the left lower extremity which the court equated to 3% to the body as a whole. The court awarded Employee a lump sum and payment of certain medical expenses.

The trial court entered judgment in accordance with those findings. Employer timely filed its appeal to the Supreme Court. The Court has referred the appeal to this Panel pursuant to Tennessee Supreme Court Rule 51.

Issues

On appeal, Employer contends: (1) the evidence preponderates against the trial court's finding that Employee's injury was compensable; (2) the evidence preponderates against the trial court's finding of permanent total disability rather than limiting the award to a scheduled member, and the trial court erred by not limiting the award to one and one-half times the anatomical impairment due to misconduct; (3) the trial court erred by awarding benefits in a lump sum; and (4) the trial court erred by ordering Employer to pay certain medical expenses.

Analysis

We review findings of fact in a workers' compensation case 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. Tenn. Code Ann. § 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014). "When the trial court has heard in-court

testimony, considerable deference must be afforded in reviewing the trial court's findings of credibility and assessment of the weight to be given to that testimony." Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). "When 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." *Foreman v. Automatic Sys. Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). We review the trial court's conclusions of law de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Compensability

Employer contends the trial court erred by concluding that Employee sustained a compensable injury to his hip. It points out that Employee disliked his co-worker and his dislike toward his co-worker motivated the subsequent altercation. We agree that altercations stemming from Employee's private life that are not exacerbated by employment are not compensable. *See Padilla v. Twin City Fire Ins. Co.*, 324 S.W.3d 507, 508 (Tenn. 2010). However, Employee and Mr. McCabe testified that they had no relationship outside of work.

The Supreme Court considered injuries resulting from workplace assaults at length in *Woods v. Harry B. Woods Plumbing Co.*, 967 S.W.2d 768, 771 (Tenn. 1998):

> We believe that issues of whether assaults upon employees arise out of the scope of employment can best be divided into three general classifications: (1) assaults with an "inherent connection" to employment such as disputes over performance, pay or termination; (2) assaults stemming from "inherently private" disputes imported into the employment setting from the claimant's domestic or private life and not exacerbated by the employment; and (3) assaults resulting from a "neutral force"

> such as random assaults on employees by individuals outside the employment relationship.

967 S.W.2d at 771. *See also Padilla*, 324 S.W.3d at 511-12 (Tenn. 2010).

Tennessee Code Annotated defines a compensable injury as "an injury by accident, arising out of and in the course of employment, that causes either disablement or death of the employee." Tenn. Code Ann. § 50-6-102(12)(A) (2014) (applicable to injuries occurring prior to July 1, 2014). "An injury occurs in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto." *Blankenship v. Am. Ordnance Sys., LLS*, 164 S.W.3d 350, 354 (Tenn. 2005). There is no question that the incident at issue occurred in the course of the employment. Both men were on Employer's premises, and they were performing tasks rationally related to employment.

We find no evidence in the record to support Employer's contention that Employee's injury was not compensable. There is no evidence that Employee and Mr. McCabe had any contact away from the workplace. Employee testified that his dislike toward Mr. McCabe arose from his unfavorable impression of Mr. McCabe's work performance and from his displeasure at comments made by Mr. McCabe. Similarly, Mr. McCabe's dislike of Employee arose from his perception that Employee was bullying him in the workplace. It does not matter which, if either, of these beliefs were correct. The inescapable fact is that the bad feelings between Employee and Mr. McCabe arose directly from the workplace. We therefore conclude that the evidence does not preponderate against the trial court's finding of compensability and affirm the trial court's finding on the issue of compensability.

Permanent Total Disability

Employer next contends that the trial court erred by finding that Employee was permanently and totally disabled, rather than assigning his disability to a scheduled member, the left leg. In support of this position,

Employer points out that Dr. McHugh assigned an impairment rating to the leg and converted it to the body as a whole; that Dr. McHugh's restrictions were issued several months prior to maximum medical improvement; and that Employee was able to drive a car. Employer suggests that factors such as these support limiting the award to the left leg.

The Supreme Court set out the method for analyzing claims of permanent total disability in *Davis v. Reagan,* 951 S.W.2d 766 (Tenn. 1997):

> We find the statutory provisions of the Workers' Compensation Act set forth the following procedures for assessing work-related permanent disabilities. The initial inquiry is:
>
> (1) Whether the disability is to a scheduled member (i.e., enumerated)?
>
> An affirmative answer to question one mandates that the employee's award be as enumerated. If, however, the disability is non-enumerated, the pertinent question becomes:
>
> (2) Whether the employee is totally incapacitated from working at an occupation that generates an income?

951 S.W.2d at 769.

As Dr. McHugh testified, the injury sustained by Employee is commonly referred to as a hip fracture. The hip joint consists of two main parts: the femoral head, a ball-shaped piece of bone located at the top of the thigh bone, or femur; and the acetabulum, a socket in the pelvis into which the femoral head fits. Arthritis Foundation, *Anatomy of the Hip,* http://www.arthritis.org/about-arthritis/where-it-hurts/hip-pain/hip-anatomy.php (last accessed on April 30, 2017). Employee's injury resulted in the replacement of the femoral head with an artificial prosthesis; it damaged the hip joint, not merely the leg. As a result of the injury and surgery, Employee walks with a limp, is required to use a cane most of the time, and sometimes finds it necessary to use a walker. Under these circumstances, the trial court appropriately found that the injury was not

limited to the leg. *See Ratledge v. Langley Enterprises,* No. E2014-02089-SC-R3-WC, 2015 WL 5677184, at *5 (Tenn. Workers Comp. Panel Sept. 28, 2015).

Having concluded that Employee's injury was properly assigned to the body as a whole, we turn to the issue of disability. The workers' compensation law states that permanent total disability occurs when a work injury "totally incapacitates the employee from working at an occupation that brings the employee an income[.]" Tenn. Code Ann. § 50-6-207(4)(B) (2014) (applicable to injuries occurring prior to July 1, 2014). "The determination of permanent total disability is to be based on a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court." *Hubble v. Dyer Nursing Home,* 188 S.W.3d 525, 535 (Tenn. 2006) (citing *Vinson v. United Parcel Service,* 92 S.W.3d 380, 386 (Tenn. 2002) and *Cleek v. Wal–Mart Stores, Inc.,* 19 S.W.3d 770, 774 (Tenn. 2000)). "The assessment of permanent total disability is based upon numerous factors, including the employee's skills and training, education, age, local job opportunities, and his capacity to work at the kinds of employment available in his disabled condition." *Roberson v. Loretto Casket Co.,* 722 S.W.2d 380, 384 (Tenn. 1986).

In the present case, Employee is eighty-four years old. He did not complete high school. Prior to being hired by Employer, his primary work experience was in the construction industry. As a result of his injury, he uses a cane, and sometimes a walker, to move about. The activity restrictions placed on Employee by Dr. McHugh limit his ability to lift, carry, and push. He is able to drive a vehicle, but with difficulty. Before his injury, Employee was able to live independently and perform all of the usual self-care tasks. Since his release from the hospital, Employee lives with his daughter and performs only a few daily chores. Considering this evidence, and the totality of the record, we have no difficulty agreeing with the trial court's conclusion that Employee is no longer able to work at an occupation that brings him an income. We affirm the finding that Employee is permanently and totally disabled.

This conclusion moots Employer's argument that the trial court should have capped Employee's award pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). *See Davis*, 951 S.W.2d at 768.

Lump Sum

Employer also contends that the trial court erred by commuting Employee's award to a lump sum. Our examination of the record reveals that Employer did not raise this issue in the trial court. It is a cardinal principle of appellate practice that matters not raised in the trial court are waived. *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009). Because Employer raises the lump sum issue for the first time on appeal, we conclude that the issue is waived. *Dye v. Witco Corp.*, 216 S.W.3d 317, 321 (Tenn. 2007).

Medical Expenses

Finally, Employer contends that the trial court erred by directing it to pay for medical expenses associated with the treatment of Employee's injury. It supports that position by pointing out that Employee did not consult with Employer before seeking treatment through the VA. In general, Employers should designate a group of physicians that Employee can visit for work-related injuries. *See generally* Tenn. Code Ann. § 50-6-204(4) (2014) (applicable to injuries occurring prior to July 1, 2014). However, Employer denied Employee's workers' compensation claim and did not offer a panel of at least three physicians as required by Tennessee Code Annotated section 50-6-204(a)(4) (2014) (applicable to injuries occurring prior to July 1, 2014). "Where the employer fails to give the employee the opportunity to choose the ultimate treating physician from a panel of at least three physicians, the employer runs the risk of having to pay the reasonable cost for treatment of the employee's injuries by a physician of the employee's choice." *Lindsey v. Strohs Companies, Inc.*, 830 S.W.2d 899, 902–03 (Tenn. 1992) (citing *U.S. Fidelity & Guaranty Co. v. Morgan*, 795 S.W.2d 653, 655 (Tenn.1990)). Since Employer failed to designate physicians, Employee was justified in seeking medical treatment elsewhere. *Id.* at 903 (citing *Simpson v. Frontier Community Credit Union*, 810 S.W.2d 147, 151 (Tenn.1991)). Employer knew about the Employee's injury, and Employee's other co-workers called

the ambulance for Employee. Employer has presented no evidence that the charges for Employee's treatment were unreasonable. Thus, we conclude that the trial court properly awarded medical expenses in this case, and we affirm the trial court's order that medical expenses should be paid by Employer.

Conclusion

The judgment is affirmed. Costs are taxed to Crown Automotive Group, Inc., Penn National Insurance Company, and their surety, for which execution may issue if necessary.

WILLIAM B. ACREE, JR., SENIOR JUDGE

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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No. M2016-01319-SC-R3-WC

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 are assessed to Crown Automotive Group, Inc., Penn National Insurance Company, and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM