IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 17, 2014 Session

TIMOTHY RICHARD PLOTNER v. METAL PREP

Appeal from the Chancery Court for Shelby County
No. CH-11-0540-I Walter L. Evans, Chancellor

No. W2012-02595-SC-WCM-WC - Mailed June 23, 2014; Filed September 29, 2014

An employee contracted a lung condition while working as a forklift operator for his employer. After the employee's treating physician informed him that the condition was caused by exposure to grain dust produced by a grain facility adjacent to the employer's workplace, the employee filed a claim for workers' compensation benefits. The employer denied his claim, contending that it was not liable for the conditions that led to the injury. The trial court concluded that the employee's condition rendered him permanently and totally disabled, and the employer appealed. We affirm the judgment of the trial court.

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

DONALD P. HARRIS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and J. S. "STEVE" DANIEL, SP. J., joined.

Robert B. C. Hale, Memphis, Tennessee, for the appellant, Metal Prep.

Mark A. Lambert, Memphis, Tennessee, for the appellee, Timothy Richard Plotner.

OPINION

Factual and Procedural Background

Timothy Plotner, age fifty-one, worked for Metal Prep from 1995 until 2010. For the first three years of his employment, he was a crane operator and thereafter operated a 50,000-pound forklift. His job operating the forklift consisted of unloading rolls and coils of steel from trucks, railcars, and barges and transporting them into Metal Prep's facility where they were processed and coated. The forklift had an enclosed cab with an air filtration system.

It was often necessary for him to leave the cab, however, to check on the material being loaded, sign paperwork for the shipper, and carry that paperwork in and out of the plant.

In approximately 2004, Mr. Plotner began to experience breathing problems at work. His symptoms included choking, coughing, and shortness of breath. He told his supervisor at the time that he thought his symptoms were caused by grain dust. He requested and received a respirator to use while on the job. He received medical treatment from his primary care physician, Dr. Jeff May. Mr. Plotner's symptoms worsened over time. Eventually, Dr. Daniel Scott became his primary care physician. Dr. Scott sent Mr. Plotner to Dr. Joe Levy, an allergist, for an evaluation in February 2010. Dr. Scott testified that Dr. Levy's diagnosis was farmer's lung, which is an allergic reaction to environmental exposure to grain dust. He described this as a chronic condition in which exposure to the allergen causes restriction of the airways. Mr. Plotner made a claim for workers' compensation benefits. Metal Prep denied the claim, arguing that it was not liable because the source of the grain dust that caused his condition was from the neighboring Archer Daniels Midland's ("ADM") facility and the condition therefore did not arise from his employment. According to statements made to the trial court, Mr. Plotner filed a request for assistance with the Department of Labor, and the Department denied relief, thus exhausting the benefit review process. Mr. Plotner then filed this action in the Chancery Court for Shelby County, Tennessee, on March 28, 2011, and the case proceeded to trial on April 30, 2012.

Mr. Plotner testified that ADM operates the grain transfer facility across the street from Metal Prep. The facility receives grain from trucks, empties it into silos or elevators, then loads it onto barges. The process of loading the barges creates clouds of grain dust in the area outside Metal Prep's plant. The dust is very thick, covering vehicles in Metal Prep's parking lot and Mr. Plotner's clothes. Mr. Plotner also testified that the dust hung in the air and was so thick at times that he had to wait for it to dissipate before he could unload steel from trucks and barges.

Dr. Scott testified that Mr. Plotner's lungs had been deteriorating for a long period of time. At the time of his deposition in September 2011, he had recently started Mr. Plotner on supplementary oxygen twenty-four hours per day, seven days per week. He stated that without oxygen therapy, Mr. Plotner would become short of breath and ill. He added that the damage to Mr. Plotner's lungs could not be repaired and that he would likely continue to use oxygen, bronchodialators, and inhaled steroids for the rest of his life. Dr. Scott testified that Mr. Plotner was not capable of operating a forklift and was unable to do anything other than sedentary work. He testified that, in his opinion, Mr. Plotner's condition would worsen over time.

Mr. Plotner is a high school graduate. He served in the Navy from 1978 until 1992 where his assignments included operating small boats, cranes, and forklifts. He had not worked since leaving Metal Prep in 2010 and did not believe he was capable of returning to his job there. He does not use oxygen while showering and dressing, a period of about thirty minutes per day, but does uses oxygen at all other times, carrying portable bottles when he is away from home and using an oxygen generator at home. He testified that walking to his mailbox or garage causes shortness of breath. He is unable to exercise at all and believes his condition is worsening. On cross-examination, he testified that he considers himself to be "reasonably intelligent" and confirmed that he had received some computer training while working for Metal Prep.

The trial court took the case under advisement and issued written findings of fact and conclusions of law. It found that Mr. Plotner's lung condition was causally related to his work for Metal Prep and that he was permanently and totally disabled as a result of that condition. Metal Prep has appealed from that decision, asserting that the evidence preponderates against both of those findings.[1] This case was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law in accordance with Tennessee Supreme Court Rule 51.

Analysis

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides that appellate courts must "[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." As the Supreme Court has observed many times, reviewing courts 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 the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Such deference need not be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc., 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

[1] In its brief, Metal Prep also raised issues concerning the trial court's award of medical expenses. By order dated May 22, 2013, the case was remanded to the trial court for additional proceedings and findings. Following these proceedings, the trial court entered an amended order addressing Mr. Plotner's medical expenses. Metal Prep has not raised any issues concerning the trial courts findings.

Causation

Tennessee Code Annotated section 50-6-102(12)(2008) 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."

> The phrase "in the course of" refers to time, place, and circumstances, and "arising out of" refers to cause or origin. "An 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." Generally, an injury arises out of and is in the course and scope of employment if it has a rational connection to the work and occurs while the employee is engaged in the duties of his employment.

Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991) (citations omitted).

It is undisputed that Mr. Plotner's farmer's lung was caused by exposure to grain dust while working for Metal Prep. It is also undisputed that ADM, not Metal Prep, was the source of that dust. Accordingly, Metal Prep concedes that Mr. Plotner's condition occurred in the course of his employment but denies that it arose from his employment. In support of its position, Metal Prep cites Hill v. St. Paul Fire & Marine Ins. Co., 512 S.W.2d 560, 562 (Tenn. 1974), in which our Supreme Court held that the death of an employee resulting from a collapsed roof caused by a tornado was not compensable because it was the result of an act of God and the danger of the tornado was common to the general public. Metal Prep further contends that imposing liability under these circumstances amounts to adoption of the "positional risk doctrine," which was rejected by our Supreme Court in Dixon v. Travelers Indem., 336 S.W.3d 532, 539 n.2 (Tenn. 2011). We disagree.

In our view, Metal Prep's reliance on Hill is misplaced because Mr. Plotner suffers from an occupational disease. Tennessee Code Annotated section 50-6-301(6) (2008) provides that "[d]iseases of the heart, lung, and hypertension arising out of and in the course of any type of employment shall be deemed to be occupational diseases." Section 50-6-301 further provides:

> A disease shall be deemed to arise out of the employment only if:
>
> (1) It can be determined to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;

(2) It can be fairly traced to the employment as a proximate cause;

(3) It has not originated from a hazard to which workers would have been equally exposed outside of the employment;

(4) It is incidental to the character of the employment and not independent of the relation of employer and employee;

(5) It originated from a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected prior to its contraction; and

(6) There is a direct causal connection between the conditions under which the work is performed and the occupational disease.

It appears from the evidence and Metal Prep acknowledges that Mr. Plotner's farmer's lung can be determined to have followed as a natural incident of his work occasioned by his exposure to grain dust. It further appears and Metal Prep does not dispute that Mr. Plotner's condition originated from a risk connected with Mr. Plotner's employment and can be fairly traced to his employment as a proximate cause. Similarly, it appears from the evidence and Metal Prep does not deny that there is a direct causal connection between the conditions under which Mr. Plotner's work was performed and his occupational disease. Dr. Scott testified that Mr. Plotner's condition could not come from exposure to small farms or personal gardens, that it could only come from large-scale exposure to grain dust, and that living near a farm would not cause this condition unless the farm was large enough to have grain elevators. Thus, it did not originate from a hazard to which a worker would have been equally exposed outside his employment.

After reviewing the evidence, we are convinced that all the requirements of Tennessee Code Annotated section 50-6-301 have been satisfied. Notably, the statute does not require that the exposure or risk be related to a substance that emanates from the employer. It does require the exposure or risk be "connected to" the employment. We are satisfied that Mr. Plotner's exposure to grain dust causing his farmer's lung was "connected to" his employment.

In Stratton-Warren Hardware v. Parker, 557 S.W.2d 494 (Tenn. 1977), the employee worked on the third floor of Stratton-Warren's warehouse, an old brick building without air conditioning. The air on the floor where he worked was contaminated with a black dust, the origin of which was unclear but was suggested to have come from railway locomotives on a nearby railroad track. The air was also contaminated by gas and exhaust fumes, which

drifted up from lower floors of the warehouse where forklifts were operated. Id. at 495. There was testimony by the employee's physician that the dust and other work factors were causally related to plaintiff's condition. Id. at 497. The trial court found that the employee was suffering from a compensable occupational disease occasioned by his workplace exposure. The Tennessee Supreme Court held that although no sensitivity tests had been made to determine what type of dust irritated the employee, the physician was still able to state that he believed that the diseases in question were caused by the "particular hazards" of the employee's workplace. Id. Obviously, the likelihood that the dust came from an external source did not prevent the employee's recovery.

Similar reasoning has been applied to accidental injuries. In Electro-Voice, Inc. v. O'Dell, 519 S.W.2d 395 (Tenn. 1975), the Supreme Court affirmed a finding that an employee's injuries from an allergic reaction to a bee sting arose from her employment because "bees in the plant were part of the environment of working on the assembly line and, consequently, were a risk or hazard of appellee's employment." Id. at 396. Earlier, in Globe Co. v. Hughes, 442 S.W.2d 253, 256 (1969), the Court held that a frostbite injury caused by exposure to cold weather was compensable. The Court stated, "[W]hen an employee's work exposes him to an elemental force and requires him to continue to work under the risk of the hazard which the elemental force creates, the employee is to be compensated for injuries which result therefrom." Id.

We find the reasoning of these cases to be directly applicable here. Although the dust that caused Mr. Plotner to contract farmer's lung was not created by his employer, it was undeniably and pervasively part of his work environment. Therefore, the consequences of his exposure to that dust arose from his employment. We conclude that the evidence preponderates in favor of the trial court's finding on this issue.

Permanent Total Disability

"The test as to whether an employee is permanently and totally disabled requires us to determine if the employee is totally incapacitated from working at an occupation that brings the employee an income." Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535 (Tenn. 2006) (internal quotations, citations, and alterations omitted). Metal Prep argues that Mr. Plotner's testimony indicates that he is reasonably intelligent and that his [limited] experience with computers and his experience supervising other persons in the Navy, considered together, preclude a finding that he is unable to work for a living. The remainder of the evidence, however, strongly supports that conclusion. His entire work history consists of relatively strenuous work such as operating boats, cranes, or forklift trucks. Both Mr. Plotner's and Dr. Scott's testimony are very clear that he will never be able to perform such jobs again. He must use oxygen therapy at all times and even with such therapy, becomes

tired from the simple act of checking his mail. He has a high school diploma, but his additional education was brief and limited to subjects relevant to his service in the Navy. He performed some tasks on a computer in connection with his employment at Metal Prep, but nothing in the record suggests that he acquired any transferrable skills from those tasks. Dr. Scott testified that he has sustained significant damage to his lungs and that his condition is likely to worsen in the future. We conclude that the evidence, viewed as a whole, does not preponderate against the trial court's finding that Mr. Plotner is permanently and totally disabled.

Conclusion

The judgment is affirmed. Costs are taxed to Metal Prep and its surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

TIMOTHY RICHARD PLOTNER v. METAL PREP

Chancery Court for Shelby County
No. CH1105401

No. W2012-02595-SC-WCM-WC - Filed September 29, 2014

Judgment Order

This case is before the Court upon the motion for review filed by Metal Prep 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 Metal Prep and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM