IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 28, 2010 Session

CALVIN D. ERVIN v. JONES BROS., INC., ET AL.

Appeal from the Chancery Court for Montgomery County
No. MC-CH-CV-WC-05-14
Laurence M. McMillan, Chancellor

No. M2008-02755-WC-R3-WC - Mailed - September 21, 2010
Filed - October 22, 2010

AND

KEVIN D. ERVIN v. JONES BROS., INC., ET AL.

Appeal from the Chancery Court for Montgomery County
No. MC-CH-CV-WC-05-15
Laurence M. McMillan, Chancellor

No. M2008-02753-WC-R3-WC - Mailed - September 21, 2010
Filed - October 22, 2010

This consolidated appeal involves two employees who were injured while traveling in a personal vehicle during lunchtime while going from one job site to another. The trial court held that the injuries were compensable and awarded permanent partial disability benefits. The employer has appealed. We affirm the trial court's holding on the issue of compensability. However, we modify the trial court's ruling on the extent of disability.[1]

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

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[1] Pursuant to Tennessee Supreme Court Rule 51, these consolidated workers' compensation appeals have been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J., and JON KERRY BLACKWOOD, SR. J., joined.

Gordon C. Aulgur, Nashville, Tennessee, for the appellant, Jones Bros., Inc.

Mark R. Olson, Clarksville, Tennessee, for the appellees, Calvin Ervin and Kevin Ervin.

MEMORANDUM OPINION

Factual and Procedural Background

The employees, Calvin and Kevin Ervin ("Employees" or "Employee Calvin" or "Employee Kevin") are brothers.[2] They were both employed as construction workers for Jones Brothers ("Employer") and were both twenty-six-years-old at the time of the accident at issue. Employee Calvin was a high school graduate. Before being hired by Employer, he had worked at a fast-food restaurant, cut grass, and worked on an assembly line. At the time of the trial, he worked for Electrolux as a repairman. Employee Kevin had also graduated from high school. He had previously worked various jobs that involved installing cook tops, making car mats, and stocking magazines and books. At the time of the trial, he also worked for Electrolux, using a screw gun on the assembly line. Employees had returned to work for Employer for an unspecified period of time after the accident at issue in this case, but were terminated as a result of reporting late to work.

Employee Kevin and Employee Calvin often traveled together to work in Employee Kevin's automobile. On the morning of August 1, 2002, Employees dropped Employee Kevin's car off at AutoZone in Clarksville. Jason Lizotte, their supervisor, picked them up in Employer's van to take them to a job site in Nashville. After completing the job in Nashville, Mr. Lizotte drove Employees back to the AutoZone in Clarksville and informed them that he was going to pick up their paychecks before heading to a new job site across town near Austin Peay State University. Mr. Lizotte told Employees that they could take a lunch break, if they wanted to do so, and then directed them to the new job site. Employees both testified that they skipped lunch and headed to the new job site because they would have risked losing their jobs if they did not arrive there on time and have the site

[2] This Court ordered the appeals consolidated as the injuries arise from a single event, and the cases were heard jointly in the trial court.

prepared for the arrival of the asphalt truck.[3] On the way to the new job site, Employee Kevin, who was driving his automobile, and Employee Calvin, who was a passenger, were involved in an automobile accident.

It is undisputed that Employer provided an unpaid, 30-minute lunch break to its employees and that the employees would not be paid for working until Mr. Lizotte arrived at the job site. Further, Employer did not pay their employees for mileage or for maintenance of their personal vehicles, because its employees were not considered to be on the clock when driving to and from job sites.

Employees were taken to the emergency room of Gateway Medical Center by ambulance. The emergency room records indicate that Employee Calvin complained of pain in his right abdomen and both knees. CT scans of his abdomen, pelvis, and head were performed. The results were normal. He was provided medication and released. He had two follow-up appointments with Dr. Fritz Lemoine on August 6, 2002 and August 13, 2002. Dr. Lemoine's records indicate that Employee Calvin complained of abdominal pain on both occasions, and right shoulder pain on the second. Dr. Lemoine prescribed medication and excused him from work until August 18, 2002. There is no evidence in the record of any subsequent medical treatment. Employee Calvin testified that he sustained injuries to his kidney, shoulder, and knee as a result of the accident. He also testified that he still had problems with his shoulder and that it popped when he moved it back and forth.

Dr. Lloyd Walwyn, an orthopaedic surgeon, performed an evaluation of Employee Calvin on November 19, 2007, more than five years after the injury at issue. He testified by deposition. His diagnoses were lumbar strain, right shoulder strain, and right knee strain. Dr. Walwyn opined that Employee Calvin had permanent impairments of 5% to the body as a whole for the lumbar strain, 5% to the body as a whole for the right shoulder strain, and 1% to the body as a whole for the right knee strain, for a combined impairment of 11% to the body as a whole.

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[3] Mr. Lizotte testified that ". . . we take a lunch when we can get it. Sometimes it is 2:00 in the afternoon, sometimes it is 10:00 in the morning." Mr. Lizotte stated to Employees when they parted at AutoZone that they should go ahead and eat while on the way to the next job site. Employee Kevin testified that they did not go to lunch, had packed their lunch but didn't eat, and left quickly for the job site: "We didn't want nothing to eat. Because we were going to get down there, if the asphalt truck was there, we are still going to have - - had to work no matter what."

Dr. Robert Dimick, also an orthopaedic surgeon, performed an evaluation of Employee Calvin on March 6, 2008, almost six years after the accident. He also testified by deposition. He opined that Employee Calvin did not sustain any permanent impairment to his lower back or right knee. He recommended that an MRI of the right shoulder be performed, and he was unwilling to express an opinion concerning permanent impairment in the absence of that test.

Emergency room records for Employee Kevin on the date of the accident indicate that he complained of neck stiffness and right shoulder pain. X-rays were taken of his neck and shoulder that did not reveal any damage. He was referred to Dr. Steven Salyers, an orthopaedic surgeon, for further treatment. Dr. Salyers did not testify, but his clinical notes were placed into evidence. He first saw Employee Kevin on August 5, 2002. Initially, Employee Kevin's symptoms were stiffness and pain in his neck, lower back and right shoulder. However, his lower back became his primary symptom. Dr. Salyers provided conservative treatment. An MRI was ordered in October 2002, and the result was normal. Dr. Salyers followed Kevin until December 2, 2002, and released him to return to full duty work as of January 1, 2003.

Employee Kevin was involved in another automobile accident in February 2005. Emergency medical service records pertaining to that accident were placed into evidence which indicate that he had injuries to his neck and left arm. Employee Kevin testified that he sustained a punctured lung, fractured ribs, and injuries to the left side of his body as a result of the accident. There is no evidence in the record of any subsequent medical treatment.

Dr. Walwyn performed an evaluation of Employee Kevin on November 19, 2007, the day he examined his brother. His diagnoses were lumbar strain and left shoulder strain. He opined that Employee Kevin had permanent anatomical impairments of 5% to the body as a whole for the lumbar strain and an additional 2% to the body as whole for the left shoulder strain, for a combined impairment of 7% to the body as a whole. Dr. Walwyn was unaware of the February 2005 motor vehicle accident.

Dr. Dimick also performed an evaluation of Employee Kevin on March 6, 2008, the same date he examined Employee Calvin. Dr. Dimick found that Employee Kevin had no objective evidence of any permanent injury, and he testified that

Employee Kevin did not sustain any permanent impairment as a result of the left shoulder injury, left knee injury, and back injury.

The trial court found that the injuries caused by the motor vehicle accident were compensable. It awarded 16.5% permanent partial disability("PPD") to the body as a whole to Employee Calvin, and 10.5% PPD to Employee Kevin.

Employer has appealed, contending that the trial court erred in finding that the automobile accident arose out of and occurred within the course of employment. In the alternative, Employer contends that the awards of permanent partial disability were excessive.

Standard of Review

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). 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). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Compensability

In order for an injury to be compensable, it must be "an injury by accident arising out of and in the course of employment." Tenn. Code Ann. § 50-6-102(12)(2008). "Arising out of" refers to the origin of the injury in terms of causation, and "in the course of" relates to time, place and circumstance. *McCormick v. Aabakus, Inc.*, 101 S.W.3d 60, 62 (Tenn. 2000).

Injuries that occur while an employee is furthering his or her employer's business are usually determined to have been incurred in the course of the employment, *see* 1 Larson, Workmen's Compensation Law § 14, 15.50 (1978), but injuries that occur while an employee is on a meal break and off the premises are not compensable, *see, e.g.*, *Greenfield v. Mfr. Cas. Co.*, 281 S.W.2d 47 (1955).

Employer contends that Employees' injuries did not arise out of and occur in the course of their employment and are not compensable. Employer points out that driving to work falls into a group of all those things a worker must do in preparation for a work day, and that travel to and from work is primarily for the benefit of the employee. It asserts that Employees were instructed to go to a new job site, but they were not required to take any direct course to the job site and were provided sufficient time to deviate from the direct line to the job site and obtain lunch or take a break. Employer also notes that Employees were not on the clock and were not being compensated for their travel at the time of the accident. On the basis of these facts, it asserts that the trial court incorrectly found that the injuries resulting from the August 1, 2002 motor vehicle accident were compensable.

Employees argue that the incident did arise out of and occur within the scope of their employment because they had to travel from one job site to another to arrive at the new job site on time before the hot asphalt arrived, and they had to prepare the job site for the arrival of the asphalt or they would risk losing their jobs.

Employer relies on *Howard v. Cornerstone Med. Assoc.*, 54 S.W.3d 238, 240 (Tenn. 2001). In *Howard*, the employee was a physician who used his own personal vehicle to travel between his employer's office, nursing homes, and various hospitals as part of his employment contract. *Id.* at 239. One morning, while traveling from his home to the nursing home, the employee was involved in an automobile accident. *Id.* The Supreme Court held that travel to and from work is not ordinarily a risk of employment, and, therefore, the employee's injuries were not compensable. *Id.* at 240.

We believe this case is distinguishable from *Howard, supra.* In this case, Employees had begun their work day in Nashville and were dropped off by their employer at their personal vehicle in Clarksville to travel to a new job site at Austin Peay State University. Employees were not on their way to work at the onset of their

workday, nor were they leaving work at the end of their work day. They had commenced work and were traveling to a new job site. Although Employer argues that Employees had the option to take an unpaid lunch break, Employees were given a limited amount of time to travel to the new job site and began traveling there after Employer dropped them off at their personal vehicle. Time was clearly of the essence.

Howard, supra, recognizes that when the journey is part of the services rendered, then an injury occurring during the journey is to be compensated. As the Court explained:

> The reason for this exception is that "the employment imposes the duty upon the employee to go from place to place at the will of the employer in the performance of duty and the risks of travel are directly incident to the employment." *Smith [v. Royal Globe Ins. Co, Inc.*, 551 S.W.2d 679, 681 (Tenn. 1977)] (quoting *Cent. Sur. & Ins. Corp. v. Court*, 162 Tenn. 477, 480, 36 S.W.2d 907, 908 (1931)).

Howard, 54 S.W.3d at 241. Here, Employees were expected to travel from one site to another during the day. They could stop for lunch, but they were required to arrive and prepare the site, and time was imperative. The Courts have recognized that travel to and from work is not usually compensable, as it is primarily for the benefit of the employees; on the other hand, traveling "for work" is compensable. *Id.* at 241 (citing *Sharp v. Northwestern Nat'l. Ins. Co.*, 654 S.W.2d 391, 391-92 (Tenn. 1983)).

Employer required Employees to travel in their personal vehicle from the AutoZone to the second job site in the middle of their work day. We note that Employer did not have a "premises" where the employees reported to work. Employer's "premises" was the locations of the many different job sites. In *Sharp v. Northwestern Nat'l Ins. Co*, 654 S.W.2d 391, 392 (Tenn. 1983), the Supreme Court held that an employee who was on call at all times and traveled to different job sites could not receive workers' compensation benefits for an automobile accident that occurred while driving home from a job site. *Id.* at 391. However, the Supreme Court recognized that where the work boundaries were amorphous, injuries could be compensable:

> These cases have in common the element of an undefinable boundary for the beginning and ending of the claimant's work environment. The very nature of the employments rendered that environment amorphous. And yet, it is certain the claimants were placed in circumstances which were directly related to their employment. And, therefore, injuries were compensable.

Id. at 392.

We find this language to be instructive in this case. Unlike the employee in *Sharp*, Employee Calvin and Employee Kevin were not traveling home from a job site; instead, they were between job sites and traveling to the second job site of their work day, as directed by their supervisor. Thus, Employees were placed in a circumstance that was directly related to their employment because they were in the process of traveling between job sites and had a relatively limited amount of time in which to do so.[4] This Court finds that this case is a close call, but the conclusions drawn by the trial court do not preponderate against the evidence. Accordingly, we affirm the judgment of the trial court that Employees did incur injuries arising from and in the course and scope of employment which are compensable.

Size of Award

The second issue before the Appeals Panel is whether Employee Calvin's and Employee Kevin's awards of 16.5% PPD and 10.5% PPD, respectively, were excessive. We hold that they are excessive.

There is no record of Employee Calvin being examined or receiving any medical treatment for his injuries between his last appointment with Dr. Lemoine on August 13, 2002, and Dr. Walwyn's evaluation in November 2007. Although Dr. Walwyn found that Employee Calvin had sustained a lumbar strain as a result of the accident, there is no mention of any lower back symptoms in either the emergency room records or Dr. Lemoine's notes.

[4] This is closely akin to the street risk doctrine. If the employer requires the employee's use of the street, and it is for the benefit of the employer, then compensation is available. *Hudson v. Thurston Motor Lines, Inc.* 583 S.W.2d 597, 602 (Tenn. 1979).

Regarding Employee Kevin, we note that the emergency room records and Dr. Salyers' notes reflect that he reported symptoms in his right shoulder. However, Dr. Walwyn assigned permanent impairment, which he attributed to the August 2002 accident, to the left shoulder. Dr. Walwyn was unaware of the 2005 motor vehicle accident in which Employee Kevin injured his left arm. Dr. Salyers treated Employee Kevin for low back pain as of January 1, 2003, and there is no evidence of him being examined or receiving treatment for this problem from that date until Dr. Walwyn's examination in November 2007.

Based upon these factors, we conclude that the evidence preponderates against the trial court's finding that Dr. Walwyn's impairment ratings were correct. Viewing the record as a whole, we conclude that the evidence supports awards of 5% PPD each to Employee Kevin Ervin and Employee Calvin Ervin.

Conclusion

The judgments are modified to award 5% PPD to Kevin Ervin, and 5% PPD to Calvin Ervin. They are affirmed in all other respects. Costs are taxed 75% to Jones Brothers, Inc., and Zurich American Insurance Companies, and their sureties, 12.5% to Calvin Ervin, and 12.5% to Kevin Ervin, for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE