IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 26, 2007 Session

TROY SEPULVEDA v. WESTERN EXPRESS, INC. and SUE ANN HEAD, Administrator of the Division of Workers' Compensation for the State of Tennessee

Direct Appeal from the Chancery Court for Marion County
No. 7051 Jeffrey F. Stewart, Chancellor

No. M2007-00121-WC-R3-WC - Mailed - February 27, 2008
Filed - March 31, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and a report of findings of fact and conclusions of law. Troy Sepulveda ("Employee") sustained an injury to his lower back while sleeping in the cab of his truck while waiting to make a delivery. The trial court found that he was a "traveling employee," found the injury to be compensable and awarded permanent partial disability benefits. Western Express, Inc. ("Employer") has appealed, contending that the injury did not arise from the employment. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Affirmed

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J. and JERRY SCOTT, SR. J., joined.

Richard C. Mangelsdorf, Jr., Nashville, Tennessee, for the appellant, Western Express, Inc.

John L. Lowery, Nashville, Tennessee, for the appellee, Troy Sepulveda.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Lauren S. Lamberth, Assistant Attorney General, Nashville, Tennessee, for the appellee, Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

The dispositive facts are not disputed. Employee was an over-the-road truck driver for Employer. He had two previous workers' compensation claims for low back injuries. Each of these resulted in a settlement or award. In January 2005, he saw his authorized physician, Dr. Arthur Cushman, for low back pain. Dr. Cushman is a neurosurgeon, who had preformed surgery on Employee in connection with one of the prior injuries. Dr. Cushman ordered an MRI, which showed significant degenerative changes, and perhaps a ruptured disk, at the L4-5 level. The prior surgery had been at the L5-S1 level. Dr. Cushman ordered physical therapy.

On February 24, 2005, Employee was making a delivery or pick up at a Wal-Mart distribution center in Opelieka, Alabama. He arrived some time before the center opened. It was necessary for him to park his truck nearby and wait, along with a number of other trucks, for the center to open. His truck had a sleeper compartment. He went to sleep. He awakened with a sharp pain in his lower back. Shortly thereafter, he developed symptoms in his legs.

The incident was duly reported. Employee was placed on light duty for a short time. After an investigation by Employer's insurer, the claim was denied. Company policy did not provide light duty work for injuries on conditions not related to work. He was taken off work and placed on Family and Medical ("FMLA") leave. When that leave was exhausted, he was terminated.

Employee continued to be treated by Dr. Cushman, who performed surgery to repair a ruptured disk at L4-5 on April 5, 2005. Dr. Cushman found Employee to be at maximum medical improvement on November 14, 2005. He testified that he considered Employee's injury to be related to his job. Specifically, he stated "[Employee] didn't report any real convincing injury other than he said that it got much worse when he turned over in bed, my opinion would be that it already was injured and when he turned over, it just - fragmented disk came out and pushed on the nerve." In addition to this Dr. Cushman also testified that "with the type of work that [Employee] did with driving and continual pounding of his low back area [was] aggravated. Probably extruded a disc fragment when he turned over in bed."

Dr. Cushman did not testify about specific restrictions, however he did state that Employee could not return to over-the-road driving, but was able to work. One of the doctor's notes does refer to a twenty pound lifting restriction. Also, Dr. Cushman did not express an opinion concerning impairment. He stated that he had estimated an impairment, but that estimate was not based upon the AMA Guides. He was asked about a report from Dr. David Gaw (who had performed an independent medical evaluation ("IME") but did not testify) which assigned 20% total impairment, of which one-half was the result of the injury at issue. Dr. Cushman had assigned 13% impairment in 2002, as a result of the prior injury and surgery.

Dr. Robert Dimmick performed an IME at the request of counsel for Employer. Based upon his review of the available records, and a physical examination of Employee, Dr. Dimmick opined that Employee had sustained a disk herniation as a result of rolling over in bed, and that this injury was not related to his employment. He considered the cause of the injury to be Employee's pre-existing and ongoing degenerative disk disease. Dr. Dimmick was also asked about Dr. Cushman's

comment concerning the effect of " the pounding of [Employee's] lower back from operating a tractor-trailer unit." He stated "There has been some laboratory testing that vibration contributes to the degeneration of the spine. Specifically, the vibration that is sustained in a motor vehicle, five hertz vibration, is associated with accelerated degeneration. It's not been associated with disk herniations, per se." Regarding impairment, Dr. Dimmick opined that Employee had a total impairment of 13% to the body as a whole, of which one-third (4 1/3%) was attributable to the February 2005 event.

On the date of trial, Employee was forty years old. He had attended school into, but had not completed, the ninth grade. He later obtained a GED. His work history included auto body repair, parts clerk, janitor, tire builder, assembly line worker, machine operator and truck driver. He had been a truck driver for approximately seven years prior to his injury. He had not worked, or looked for work, since being released by Dr. Cushman.

The trial court found that Employee was a "traveling employee," and that the injury of February 2005 was compensable. The court awarded permanent partial disability ("PPD") benefits of 60% to the body as a whole, and apportioned the award between Employer and the Second Injury Fund in accordance with Tennessee Code Annotated section 50-6-208(b). Employer has appealed, raising two issues:

(1) Did the trial court err by finding that Employee's back injury, which (apparently) occurred when he turned over while sleeping in the cab of his truck, was compensable?

(2) If not, did the trial court err in basing its award of PPD benefits upon a 10% anatomical impairment?

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) (Supp. 2007). This standard requires the Panel to examine in depth a trial court's findings and conclusions. The reviewing Court is not bound by a trial court's factual findings but instead conducts an independent examination to determine where the preponderance lies. *GAF Bldg. Materials v. George*, 47 S.W.3d 430, 432 (Tenn. 2001). However, when credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge has the opportunity to observe the witness' demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

1. Causation

It is undisputed that Employee was "in the course of" his employment at the time the injury occurred. The parties differ on the issue of whether his injury "arose from" his employment. The trial court relied upon *McCann v. Hatchett*, 19 S.W.3d 218 (Tenn. 2000), concluded that the traveling employee rule applied, and found the injury to be compensable. In *McCann*, the employee had been sent by his employer to Vermont to install carpet. He drowned in a swimming pool at the motel where he was staying. The trial court entered summary judgment for the employer. On appeal, the Supreme Court reversed the grant of summary judgment, and remanded for additional proceedings. The Court adopted the majority rule that:

> a traveling employee is generally considered to be in the course of his or her employment continuously during the duration of the entire trip, except when there is a distinct departure on a personal errand. Thus, . . . the injury or death of a traveling employee occurring while reasonably engaged in a reasonable recreational or social activity arises out of and in the course of the employment.

Id. at 221-2.

Employer and the Second Injury Fund argue that *McCann* does not mandate that all injuries sustained by a traveling employee "arise from" the employment, but only those injuries which occur while the employee is "reasonably engaged in a reasonable social or recreational activity." In this case, Employer notes that Employee was not engaged in a social or recreational activity at the time of his injury, but was sleeping. Because sleep is an activity Employee would have engaged in whether or not he was working, Employer contends that the hazard of causing a ruptured disk by changing position while sleeping was not any greater as a result of Employee's status as a traveling employee or his use of the sleeping compartment of his truck.

Employer relies upon the long-established rule that "The mere presence of the employee at the place of injury because of the employment is not enough, as the injury must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work." *Thornton v. RCA Serv. Co.*, 188 Tenn. 644, 221 S.W.2d 954, 955 (1949); *Blankenship v. American Ordnance Systems, LLS*, 164 S.W.3d 350, 354 (Tenn. 2005). In *Blankenship*, the Supreme Court affirmed a trial court's finding that an injury which occurred as a result of a pre-employment physical examination did not arise from the employment. Employer also cites *Conner v. Chester County Sportswear Co.*, No. W2001-02114-WC-R3-CV, 2002 WL 31348662 (Tenn. Workers' Comp. Panel Oct. 18, 2002) in support of its position. A similar result is reached in *Jones v. Sonoco Products, Inc.*, 1992 WL 33269 (Tenn. 1992) (death due to asphyxiation, when a piece of chewing gum lodged in the employee's throat, did not arise out of the employment).

In addition to *McCann*, Employee relies upon *Carter v. Hodges*, 175 Tenn. 96, 132 S.W.2d

211 (Tenn. 1939). In that case, the employee was killed in a hotel fire. He was spending the night in Atlanta while making sales calls in several states. In affirming the trial court's award of benefits, the Court stated "Deceased had to eat and sleep. He was away from home and, so, was under the necessity of putting up at a hotel or boarding house." The Court then cited with approval the following language from *Whiting Mead Commercial Co. v. Indus. Accident Comm'n of Cal.*, 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518:

> Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. *** That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment.

132 S.W.2d at 214. A like result occurred in *McConkey v. Vonore Police Dept.*, No. E2005-01342-WC-R3-CV, 2006 WL 709042 (Tenn. Workers' Comp. Panel March 21, 2006) in which a previous Workers' Compensation Appeals Panel affirmed an award of compensation to an employee who rose from swivel-type chair, turned, and upon standing experienced immediate excruciating pain in the knee.

Employee was admittedly a "traveling employee." The nature of his job as a driver was such that the activity of sleeping in the cab of his truck was a regular incident of his employment. Although it is not crucial to our decision, we also note the testimony of both Dr. Cushman and Dr. Dimmick regarding the likelihood that the vibration inherent in the work of driving contributed to Employee's condition. Viewing the record as a whole, we find that the evidence does not preponderate against the trial court's finding on the issue of causation.

2. Impairment

The trial court found that Employee retained an anatomical impairment of 10% to the body as a whole, and applied a multiplier of six to arrive at its award of 60% PPD. Employer contends that the trial court erred in its finding concerning impairment. The trial court's finding was based upon an impairment rating contained in a written report by Dr. Gaw. That report came before the Court as follows: During direct examination in his deposition, Dr. Cushman testified that a 10% impairment "would be reasonable in my opinion, but it would not be based on the [AMA] guidelines." Dr. Cushman was subsequently shown a copy of Dr. Gaw's report, which contained an opinion that Employee has a 10% impairment as a result of the injury at issue. Dr. Cushman stated that he had "no reason to disagree with what [Dr. Gaw] has written." Dr. Gaw's report was made an exhibit to Dr. Cushman's deposition. That deposition was placed into evidence at trial. Employer

did not express an objection to Dr. Gaw's report during the deposition, or at the time the deposition was offered into evidence at trial. However, counsel did state during closing argument that "[W]e think it's improper for Dr. Cushman to just look at a hearsay report from Dr. Gaw and adopt it."

A timely objection would have provided an appropriate basis to exclude the report under the hearsay rule. Employer suggests in its brief that counsel's remark constituted an objection to the admission of Dr. Gaw's report. However, Dr. Cushman's deposition had been offered and accepted into evidence at the close of Employee's proof, while counsel's statement was not made until Employer's proof and rebuttal evidence from Employee had been presented to the Court. If intended to express an objection, the remark was clearly not timely. Further, the remark could be fairly understood to address the weight, rather than the admissibility, of the report.

In that regard, Employer also takes the position that the opinion of Dr. Dimmick should be given greater weight than that of Dr. Gaw, because his opinion was given under oath and subject to cross-examination. These factors are appropriate considerations for the Panel in conducting its independent review of the evidence. However, on balance we cannot say that Dr. Dimmick's opinion is so compelling, nor that the opinions of Dr. Cushman and Dr. Gaw so baseless, that the trial court was obligated to accept the former and dismiss the latter. When expert medical testimony conflicts, the trial judge has discretion to determine which to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996). While reasonable minds could have reached a different conclusion than the trial court, we are unable to say that the evidence in this record preponderates against the trial court's conclusion.

Conclusion

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

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ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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NOVEMBER 26, 2007 SESSION

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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 are taxed to Western Express, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM