

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

March 22, 2010 Session

RICK BOVEE v. HOME DEPOT, USA, INC.

**Appeal from the Chancery Court for Davidson County
No. 05-1158-I Claudia C. Bonnyman, Chancellor**

**No. M2009-01645-WC-R3-WC - Mailed - July 15, 2010
Filed - August 18, 2010**

In this workers' compensation action, employee sought benefits for injuries to his hips, shoulders, and feet. The trial court awarded benefits for injuries to his shoulders and feet but found that he failed to give timely notice of his bilateral hip injuries to his employer and dismissed those claims. Employee has appealed, contending that the trial court erred in finding that he did not provide timely notice of his hip injuries and that the complaint is barred by the statute of limitations. He requests that temporary disability, medical, and permanent disability benefits be awarded for those claims. Employer argues that the trial court erred in its calculation of the amount to be set off for social security retirement benefits. We conclude that the employee gave sufficient notice of his hip injuries to satisfy the requirements of the workers' compensation statute. However, we find that those claims are barred by the applicable statute of limitations. The judgment is affirmed in all other respects.¹

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

D. J. ALISSANDRATOS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, C. J., and ALLEN W. WALLACE, SR. J., joined.

William M. Billups, Nashville, Tennessee, for the appellant, Rick Bovee.

Lynn Vo Lawyer, Nashville, Tennessee, for the appellee, Home Depot, USA, Inc.

¹ Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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.

MEMORANDUM OPINION

Factual and Procedural Background

Rick Bovee (“Employee”) began working for Home Depot (“Employer”), in the paint department of its Bellevue, Tennessee, store in May 2003. He alleged that he sustained injuries to his shoulders, feet, and hips as a result of his employment. His job in the paint department was to assist customers by retrieving paint base and tint from storage shelves in the department. Paint was stored in quart, gallon, and five-gallon cans or buckets, ranging in weight from one or two pounds to more than fifty pounds. The storage shelves were as high as ten feet, often necessitating the use of a ladder. Many cans were stored in cardboard boxes, and Employee was required to lift them with his arms outstretched. After getting the paint, Employee would take it to a sales desk in the department and mix it according to customer preferences. Employee would then assist the customer in placing the cans or buckets of paint into a shopping cart or onto a dolly. In addition to climbing and lifting, the job required a substantial amount of walking across the store’s concrete floor.

Employee testified that his feet became painful within a few weeks of the time he started working. He asked some of his co-workers if they had similar problems. Those unidentified persons recommended that he try different types of soft-soled shoes to alleviate the problem. Employee testified that he tried several brands of shoes, none of which provided him with significant relief.

Employee testified that he also began to have pain in his shoulders during the course of his employment. There is some confusion in his testimony and in the medical records concerning the date these symptoms began, but the evidence suggests they began between six weeks and four months after he was employed.

Concerning his hip injuries, Employee testified that he twisted his body to allow a customer to pass him in an aisle while carrying a five-gallon bucket of paint on July 4, 2003. He immediately had a “hot pain” in his right hip. He testified that he dropped the bucket and sat down on a nearby ladder because he was no longer able to stand. He remained sitting for approximately ten minutes until his “head started to clear a little bit.” Co-employees who he asked to help him finish his task were unable to do so because there were a large number of customers in the department at the time. Employee eventually finished the order. A co-worker, “Jim,” told him he should report his injury to his supervisor. Employee testified that he did not know who his supervisor was at that time. “Jim” told him it was “Shawn,” later identified as Shawn Craddock, and pointed her out to Employee. Employee testified that he approached Ms. Craddock and told her that he “had hurt [him]self twisting in the aisle.” She asked if he needed to go to a doctor, and he told her he did not think so. Ms. Craddock told

him to tell her if he needed to see a doctor or needed other assistance. Employee took a break, but completed his shift.

Employee testified that his right hip was weak and painful after the July 4 incident but that he continued to work in pain. He testified that he “limp[ed] all the time,” which placed additional stress on his left hip which began to be painful within a few weeks. Employee did not have any additional conversations with Ms. Craddock or with Dewayne Blye, who became his supervisor in September 2003, concerning his hip, shoulders or feet. On June 12, 2004, Employee reported the July 4, 2003 hip injury to Mark Bidstrup, the human resources manager at the Bellevue store. Mr. Bidstrup completed an Employer’s First Report of Injury (“EFR”) and referred Employee to Myet Clinic, a primary-care clinic located near the store.

Employee completed the clinic’s intake questionnaire, stating that his symptoms occurred suddenly, on July 4, 2003, at “midday,” while carrying a five-gallon bucket of paint. The physician who examined him, Dr. Sidberry, made a diagnosis of “severe arthritis which was probably aggravated by his work duties.” Dr. Sidberry prescribed a medrol dosepack and vioxx and placed temporary restrictions on Employee’s activities. Those restrictions were not compatible with his job in the paint department. Employer placed him in a temporary position, soliciting credit card applications from a table at the front of the store. Employee continued in that position for a few weeks. However, he eventually concluded that his pain was too great to continue working. He sought and received an unpaid leave of absence. He did not return to work after that time. On July 10, 2004, Employee reported his bilateral foot pain to Mr. Bidstrup, who completed a second EFR. On July 18, 2004, he reported bilateral shoulder pain, and a third EFR was completed.

Employee’s hip injury claim was denied by Employer at some point in time between July and October 2004. The claims concerning his feet and shoulders were accepted as compensable. Dr. Barry Yarbrough provided conservative treatment for the foot injuries, which were diagnosed as plantar fasciitis. Dr. Yarbrough did not testify, nor were his records placed into evidence. Dr. Paul Rummo provided conservative treatment for Employee’s shoulder injuries. Dr. Rummo did not testify, but his final treatment note, dated December 28, 2005, was placed in the record as an exhibit.

Employee testified that he was diagnosed with coronary artery disease and prostate cancer in 2006. He required surgery, chemotherapy, and radiation treatments over the course of the next year for these conditions. In September 2007, he consulted Dr. Andrew Shinar, an orthopaedic surgeon, concerning his hips. Dr. Shinar testified by deposition. His diagnosis was that Employee had advanced arthritis in both hips. He recommended bilateral hip replacement surgeries. These were carried out in January 2008 (left hip) and April 2008 (right hip). Dr. Shinar testified that the arthritis was present before Employee went to work for Employer. He opined that the arthritis in the right hip was aggravated by the July 2003

event and that the left hip was worsened as a result of Employee favoring the right hip thereafter. He assigned 20% impairment to the body as a whole for each hip replacement

Dr. David Gaw, also an orthopaedic surgeon, performed an IME on December 15, 2008, at the request of Employee's attorney. In summary, Dr. Gaw found that Employee had bilateral shoulder tendinopathy, plantar fasciitis, and bilateral hip replacements caused by osteoarthritis. He opined that the shoulder tendinopathy was caused by the outstretched lifting required by Employee's job for Employer. He assigned 4% permanent anatomical impairment to the body as a whole for the right shoulder condition and 3% to the body as a whole for the left shoulder condition. He opined that the plantar fasciitis was caused by repetitive walking on the concrete floor at Employer's store. He assigned no impairment for that condition because it was no longer symptomatic. However, he opined that the condition would recur if Employee engaged in extensive standing or walking on hard surfaces in the future. Dr. Gaw opined that Employee's bilateral hip arthritis was not caused by his work but that the right hip arthritis had been aggravated and advanced by the July 2003 event. He testified that the left hip arthritis was not aggravated or otherwise worsened by Employee's work. He assigned 20% impairment to the body as a whole for the right hip and 15% impairment for the left hip.

Employee was seventy years old at the time of trial. He was a college graduate. He had worked as an inside loan collector prior to attending college. After graduating, he worked primarily as an insurance agent selling commercial insurance. During that period, he was self-employed at times and employed by others at times. He lost his insurance license in 1987. Thereafter, he started and/or participated in several businesses related to personnel matters and insurance. In these businesses, he was sometimes self-employed and other times not. In some of those businesses, he dealt with workers' compensation insurance. He retired in 2002 and was receiving social security old age retirement benefits at the time he came to work for Employer. He had worked briefly for the Census Bureau in 2000. While there, he sustained an on-the-job injury to his knee and received some type of workers' compensation benefits. He had not worked or sought employment since leaving Employer in 2004. He did not consider himself able to return to work.

The trial court dismissed Employee's claim for his hip injuries based upon failure to provide timely notice, as required by Tennessee Code Annotated section 50-6-201 (2008 & 2009 Supp.). It awarded 12% permanent partial disability ("PPD") to the body as a whole for the right shoulder injury, 9% PPD for the left shoulder injury, and 10% PPD to each leg for the plantar fasciitis.² Applying Tennessee Code Annotated section 50-6-207(4)(A)(I)

² The trial court made separate awards for these injuries. The parties did not raise, and the trial court did not address, the issue of whether the concurrent injury rule, Tennessee Code Annotated section 50-6-207(3)(C), was applicable. Neither party has raised the issue in this appeal, and we express no opinion

(2008 & Supp. 2009), in light of Amos v. Atlas Van Lines, No. M2006-01360-WC-R3-CV, 2007 WL 2713369, *5 (Tenn. Workers' Comp. Panel Sept. 19, 2007), it determined that Employer was entitled to a set-off of \$40.91 per week for social security old age retirement benefits being received by Employee. The trial court did not rule on the employer's claim that the suit was barred by the one year statute of limitations.

Employee has appealed, asserting that the trial court erred in holding that notice of the claim for bilateral hip injuries was not provided pursuant to Tennessee Code Annotated section 50-6-201 and by finding that those injuries were the result of a specific event, rather than gradually-occurring. He also contends that he is entitled to an award of temporary total disability ("TTD") and medical expenses for those injuries and that he is entitled to the statutory maximum PPD recovery (260 weeks). Employer contends that the claims for bilateral hip injuries are barred by the statute of limitations and that the trial court erred in its calculation of the amount to be set off for social security retirement benefits.

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

1. Notice

The trial court found that Employee did not give sufficient notice of his hip injuries to satisfy the requirements of Tennessee Code Annotated section 50-6-201, explaining as follows:

on the subject.

As to injuries to the hip, on July 4, 2003, Mr. Bovee injured his right hip when he twisted around a ladder while carrying one of the 50-pound buckets of paint. At that time, he felt severe pain involving his right hip, pain so severe he almost dropped the paint bucket and he had to sit down to deal with the pain. He stated he had to inquire about the identity of his supervisor so he could tell her about the injury. He was told his supervisor was Shawn and *he reported this injury to her; that is, he told her he had been hurt. . . .* On July 4, 2003, Mr. Bovee told his supervisor he did not want medical care at that time in response to her offer to seek medical care for him.

* * * *

Mr. Bovee did not give timely notice. He was aware on July [4th], 2003 that he had had a noticeable material injury to his right hip and he failed to give the employer the kind of notice that would alert the employer that medical care was needed, requested. The Court notes that Mr. Bovee did not say that he went back to Shawn Craddock at some later time, maybe a week later, a month later, two months, three months, four months later to tell her that he wanted medical care for his right hip and that he, in fact, had an injury and it was getting worse or that it was not getting any better. He did not -- there is no evidence in the record that such a conversation took place. And we know that Mr. Bovee did not go to human resources until a year later, almost a year later. We also know that Mr. Bovee was aware of the sensitivity of claim notices and whether claims are going to be recognized if proper notice is not given. The Court also notes that after all that time went by, the employer was probably prejudiced because if the employer had been able to address the right hip injury early on, it may be, and it probably could be that hip replacements could have been either greatly delayed or permanently avoided.

(Emphasis supplied).

The trial court specifically found that Employee had a conversation with his supervisor on July 4, 2003, and the evidence does not preponderate against that finding. However, the trial court concluded that the contents of that conversation were not sufficient to satisfy section 50-6-201. Employee contends otherwise. The notice requirement in the

workers' compensation statutory scheme "exists so that an employer will have an opportunity to make a timely investigation of the facts while still readily accessible, and to enable the employer to provide timely and proper treatment for the injured employee." Jones v. Sterling Last Corp., 962 S.W.2d 469, 471 (Tenn. 1998). "[A]n employee who relies upon alleged actual knowledge of the employer must prove that the employer had actual knowledge of the time, place, nature, and cause of the injury." Masters v. Indus. Garments Mfg. Co., Inc., 595 S.W.2d 811, 815 (Tenn.1980). Although Employee's conversation with Ms. Craddock was brief, it conveyed the essential information described in Masters. He informed her that the injury had occurred on that date, in the paint department, as a result of twisting his body in an aisle of the store. He was not required to provide any additional information at that time, and Employer, through Ms. Craddock, had actual knowledge of the incident thereafter. We therefore conclude that the trial court erred by finding that Employee's claim for his bilateral hip injuries was barred by section 50-6-201.

2. Statute of Limitations

In addition to its notice defense, the Employer asserted in his answer that employee's claim for bilateral hip injuries was barred by the one-year statute of limitations contained in Tennessee Code Annotated section 50-6-203. Because of its findings on the notice issue, the trial court pretermitted this claim. Both parties have addressed the issue in their briefs and, in light of our conclusion that the statutory notice requirement was satisfied, we must address it.

Employee takes the position that his action was timely filed because his hip injuries were gradual in nature; therefore, the limitation period did not begin to run until July 2004, when he was no longer able to work as a result of his injuries. Lawson v. Lear Seating Corp., 944 S.W.2d 340, 343 (Tenn. 1997). Although the trial court did not rule on the statute of limitation issue, it did make a finding that Employee's hip injury was not gradual: "[The] Court notes that the injuries addressed in the case at hand, that is, [Employee's] injuries, are related to a particular injury in which notice was required within 30 days rather than a gradually-occurring injury."

In his trial testimony, Employee described the July 4, 2003 event as follows: "I don't know how to describe the pain. It's kind of like a white thing in my head. That's all I know. It was that harsh. It was that painful. As I was sitting down, it started to get better, eased up. I did not move for awhile. I didn't feel like I could or should. My body did not allow me to stand up." That testimony was consistent with his statement on the June 14, 2004 intake questionnaire at the Myet Clinic and the histories he gave to all of the physicians who subsequently examined him. All of those statements indicated that he suffered a sudden, intense, disabling pain on July 4, 2003, when he twisted his body and that he continued having significant pain and weakness in his right hip from that time forward. Further, he

testified that his left hip pain began within a few weeks of the right hip injury. His theory at trial, expressed in his own testimony and that of Dr. Shinar, was that the aggravation of pre-existing arthritis in Employee's left hip was a direct result of the July 4, 2003 injury to his right hip.

In light of these facts, we conclude that the evidence does not preponderate against the trial court's finding that the hip injuries were the result of a single, traumatic event. "[In] such situations, the statute of limitations would begin to run when by reasonable care and diligence the compensable injury is discoverable and it is apparent that such injury is work-related." Lawson, 944 S.W.2d at 343 (Citing Livingston v. Shelby Williams Indus., Inc., 811 S.W.2d 511, 515 (Tenn.1991)). The evidence in this record strongly supports the conclusion that Employee knew or believed that he had sustained a significant work-related injury either immediately after it occurred on July 4, 2003, or very shortly thereafter. His condition did not improve appreciably in the following weeks and months. To the contrary, within a short period of time he developed additional symptoms that he believed to be related to the original injury. He was relatively well-educated and had some knowledge of the workers' compensation system through both his work in the insurance industry and as a claimant in his own right during his employment with the Census Bureau. His suit was filed twenty-two months after the injury occurred. We therefore find that Employee's action for bilateral hip injuries was not timely filed. In light of that finding, it is unnecessary for us to address his additional arguments concerning TTD, medical expenses, and the extent of his permanent disability.

3. *Social Security Set-off*

Employer contends that the trial court incorrectly calculated the amount of the applicable social security retirement benefit set-off. Tennessee Code Annotated section 50-6-207(4)(A)(i) provides as follows:

[With] respect to disabilities resulting from injuries that occur after sixty (60) years of age, regardless of the age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks. The compensation payments shall be reduced by the amount of any old age insurance benefit payments attributable to employer contributions that the employee may receive under title 42, chapter 7, title II of the Social Security Act, 42 U.S.C. § 401 et seq.

In McCoy v. T.T.C. Illinois, Inc., 14 S.W.3d 734, 738 (Tenn. 2000), the Supreme Court held that, for the purposes of this section, "employer contributions" included the social

security payments made by all of an employee's previous employers, rather than only those made by the employer on the date of the injury. Subsequently, in Amos v. Atlas Van Lines, No. M2006-01360-WC-R3-WC, 2007 WL 2713369 at *5, n.3, a Special Workers' Compensation Appeals Panel noted that self-employed persons must pay both the "employee" and "employer" share of social security taxes. Because section 207(4)(A)(i) bases the amount of the set-off upon the portion of the retirement benefit "attributable to employer contributions," the Panel held that the actual amount of the set-off for a person who had been self-employed should be adjusted based upon the proportion of time that an employee had been self-employed during his working life. Id.

In this case, the trial court examined Employee's work history in detail to determine the total number of years of his "working life," and the number of years that he had been employed by others, rather than self-employed. With those figures, it calculated the percentage of his working life that he had been employed by others, and then applied that percentage to the maximum set-off, which is 50% of the social security retirement benefit. This is precisely the method set out in Amos. There is no contention that the figures used by the court were incorrect or that any errors in calculation occurred. We find that the trial court's finding as to the amount of the set-off was correct.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed one-half to Rick Bovee and his surety and one-half to Home Depot, U.S.A., Inc., for which execution may issue if necessary.

D. J. ALISSANDRATOS, SPECIAL JUDGE

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

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**Chancery Court for Davidson County
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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 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 will be paid one-half to Rick Bovee and his surety and one-half to Home Depot, USA, Inc., for which execution may issue if necessary.

PER CURIAM