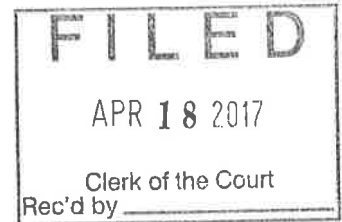


IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

TRACY PAYNE v. D & D ELECTRIC, ET AL.

**Appeal from the Court of Workers' Compensation Claims
No. 2014-01-0023**

No. E2016-01177-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 Tracy Payne, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

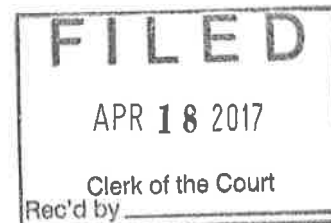
IN THE SUPREME COURT OF TENNESSEE
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AT KNOXVILLE

Assigned on Briefs February 13, 2017

TRACY PAYNE v. D & D ELECTRIC ET AL.

**Appeal from the Court of Workers' Compensation Claims
No. 2014-01-0023 Thomas L. Wyatt, Judge**

No. E2016-01177-SC-R3-WC – MAILED 3/9/2017



The issue in this workers' compensation appeal is whether the employer is entitled to summary judgment. The employee filed a claim for workers' compensation benefits, alleging he injured his foot in the course and scope of his employment. His employer denied the claim, citing a lack of medical proof that the injury was job-related. The Court of Workers' Compensation Claims denied a motion for summary judgment filed by the employer, finding there was a genuine issue of material fact as to whether the work injury contributed more than fifty percent in causing the injury. The Workers' Compensation Appeals Board reversed and dismissed the case, holding that the employee failed to produce sufficient evidence that his foot condition arose primarily out of and in the course and scope of his employment. After careful review, we affirm the decision of the Workers' Compensation Appeals Board.

**Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right;
Judgment of the Court of Workers' Compensation Claims Reversed**

SHARON G. LEE, J., delivered the opinion of the court, in which JOHN W. MCCLARTY, J., and ROBERT E. LEE DAVIES, SR.J., joined.

Tracy Payne, Ringgold, Georgia, appellant, pro se.

L. Blair Bennington Cannon, Atlanta, Georgia, for the appellees, D & D Electric and Hartford Insurance Company.

OPINION

I.

Tracy Payne filed a claim for workers' compensation benefits, alleging that on August 1, 2014, in the course and scope of his employment with D & D Electric, he broke his left foot when he slipped on a flight of stairs. On August 3, Mr. Payne was treated in the emergency room at Memorial Hospital in Chattanooga and given an orthopedic boot and crutches. Three days later, Mr. Payne was admitted to Hamilton Medical Center in Dalton, Georgia, with left ankle pain, fever, and nausea. Dr. Dale Reed determined that Mr. Payne had a severely infected left foot and was a "diabetic poorly controlled" who did "not take great care of himself." Medical tests showed Mr. Payne's left foot had "gross destruction with possible abscess formation" and had the appearance of Charcot foot.¹ Dr. Reed surgically irrigated, drained, and debrided Mr. Payne's left foot. The postoperative diagnosis was "infected diabetic foot with underlying osteomyelitis with extensive destruction of the midfoot, bony structures." X-rays taken at the hospital of Mr. Payne's left foot showed fragmentation, sclerosis, and disruption of the bones in the midfoot; a widened plane between the calcaneus, talus, navicular, and tarsal bones; a collapsed arch; soft tissue swelling; and evidence of a secondary infection. Mr. Payne was hospitalized for eight days.

Mr. Payne, who has type 2 diabetes, had previously been treated for diabetes-related problems with both of his feet. In October 2013, Dr. Clair Bello, a podiatrist with Advanced Foot Care, amputated a toe on Mr. Payne's right foot because of an infected lesion that would not heal. In November 2013, Dr. Bello began treating Mr. Payne for an ulcer on his left foot. During office visits in December 2013, January 2014, and April 2014, Mr. Payne reported swelling and discomfort in his left foot.

On August 12, 2014, Mr. Payne's employer denied his claim for benefits due to the lack of medical records confirming Mr. Payne's work-related injury. Mr. Payne filed a Petition for Benefit Determination against his employer and its insurer and a Request for Expedited Hearing in the Court of Workers' Compensation Claims. Following a hearing, the Court of Workers' Compensation Claims required the employer to provide medical benefits. Both parties appealed to the Workers' Compensation Appeals Board, which affirmed the order. Mr. Payne's employer provided him with a panel of physicians from which he selected the Center for Sports Medicine and Orthopaedics in Chattanooga.

¹ "Charcot foot" is "a syndrome in patients who have neuropathy or loss of sensation. It includes fractures and dislocations of bones and joints that occur with minimal or no known trauma." Am. Orthopaedic Foot & Ankle Soc'y, *Charcot Arthropathy*, FootCareMD, <http://www.aofas.org/footcaremd/conditions/diabetic-foot/Pages/Charcot-Arthropathy.aspx> (last visited Mar. 7, 2017).

On January 22, 2015, Dr. John Chrostowski at the Center examined Mr. Payne and observed that he had “a Charcot foot, neuropathic foot, that is in the collapsed phase of Charcot” and had a “complete collapse through the midfoot.” Dr. Chrostowski noted that it was “likely that this was a pre-existing condition that was aggravated by the patient’s work injury. It is not likely that the work injury created the whole problem.”

Mr. Payne filed a second Petition for Benefit Determination and Request for Expedited Hearing, seeking additional medical benefits and temporary disability benefits. After hearing Mr. Payne’s testimony (not included in the appellate record) and reviewing his medical records, the Court of Workers’ Compensation Claims denied Mr. Payne’s request for additional benefits. The basis for the denial was Mr. Payne’s failure to present an expert medical opinion showing by a preponderance of the evidence that his left-foot injury was work-related.

On January 26, 2016, D & D Electric moved for summary judgment, contending that Mr. Payne could not meet his burden of proof of showing that his foot condition arose primarily in the course and scope of his employment. The employer’s motion was supported by Mr. Payne’s interrogatory responses indicating he had been diagnosed with diabetes in 1997. The employer also relied on Dr. Chrostowski’s medical report of January 22, 2015, which noted that Mr. Payne admitted to a history of diabetes and neuropathy and that Mr. Payne’s foot condition was likely a “pre-existing condition that was aggravated by the patient’s work injury. It is not likely that the work injury created the whole problem.” Mr. Payne responded by filing several hundred pages of documents, including articles from medical publications and medical records of Hamilton Medical Center, Dr. Bello, and Dr. Richard Alvarez of OrthoSouth.

The Court of Workers’ Compensation Claims found that the medical records Mr. Payne submitted contained no expert medical opinion that his left-foot injury arose primarily out of and in the course and scope of his employment. However, the Court of Workers’ Compensation Claims also found that Dr. Chrostowski’s statement that it was “not likely that the work injury created the whole problem” did not foreclose the possibility that Dr. Chrostowski would assign more than fifty percent of the cause of Mr. Payne’s condition to the work injury. The Court of Workers’ Compensation Claims denied summary judgment because Dr. Chrostowski’s opinion created a genuine issue of material fact and did not negate an essential element of Mr. Payne’s claim.

D & D Electric appealed to the Workers’ Compensation Appeals Board, which concluded that Mr. Payne had not satisfied his burden to provide medical evidence sufficient to support his claim.² The Appeals Board reversed the decision of the Court of Workers’ Compensation Claims and remanded for entry of an order dismissing the claim.

² Appeals as of right of non-final orders may be heard by the Workers’ Compensation Appeals Board under Tennessee Code Annotated section 50-6-217(a)(2), which provides: “Any party aggrieved by

Mr. Payne appealed.³ The appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law under Tennessee Supreme Court Rule 51.

II.

The standard of review for a court's ruling on a motion for summary judgment is *de novo* without a presumption of correctness. *Martin v. Powers*, 505 S.W.3d 512, 517 (Tenn. 2016). This review requires "a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452 (2016). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.

A party who moves for summary judgment, but who does not bear the burden of proof at trial, may satisfy its burden of production under Rule 56 either by "affirmatively negating an essential element of the nonmoving party's claim" or by showing "that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Rye*, 477 S.W.3d at 264. A party who pursues summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. *Id.* Rule 56.03 requires the moving party to support its motion with "a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. The moving party must set forth each fact in a separate, numbered paragraph supported by a specific citation to the record. *Id.*

When a motion for summary judgment is made and supported, the party opposing summary judgment must file a response to each fact set forth by the moving party. *Id.* The nonmoving party may not rely upon the allegations in the pleadings; to survive summary judgment, the nonmoving party must set forth specific facts showing a genuine issue for trial. Tenn. R. Civ. P. 56.06. The nonmoving party's response "must do more than simply show that there is some metaphysical doubt as to the material facts." *Rye*, 477 S.W.3d at 265 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

an order issued by a workers' compensation judge may appeal the order to the workers' compensation appeals board by filing a notice of appeal on a form prescribed by the administrator."

³ After filing the appeal, Mr. Payne filed a Motion for Consideration of Post-Judgment Facts, which included post-trial medical records. The Supreme Court denied the motion because the post-judgment facts did not fall within Tennessee Rule of Appellate Procedure 14(a). We cannot consider the medical records Mr. Payne attached to his brief because the records are not included in the appellate record.

574, 586 (1986)). The nonmoving party must demonstrate the existence of specific facts in the record that could lead a rational trier of fact to find in favor of the nonmoving party. *Id.*

The employer's motion for summary judgment asserted that Mr. Payne's evidence was insufficient to establish his claim and included a statement of undisputed material facts in accordance with Rule 56.03. Mr. Payne was required to respond to his employer's motion for summary judgment by demonstrating the existence of specific facts in the record to support his claim. Although he filed no formal response to the employer's Rule 56.03 statement of material facts, Mr. Payne filed various medical records and documents to support his claim.

We have carefully reviewed the records submitted and conclude that Mr. Payne failed to produce sufficient evidence to show that his left-foot condition arose primarily out of and in the course and scope of his employment. Mr. Payne had significant diabetes-related problems with his left foot before he slipped on stairs at his job on August 1, 2014. He had previously been treated for problems with his left foot. X-rays taken shortly after Mr. Payne's injury indicated that he had fragmentation, sclerosis, and disruption of the left midfoot bones; a widened plane between the calcaneus, talus, navicular, and tarsal bones; a collapsed arch; soft tissue swelling; and evidence of a secondary infection. His post-accident surgery was due to an infected left foot that required drainage and debridement.

To succeed on his workers' compensation claim, Mr. Payne had to show to a reasonable degree of medical certainty that the aggravation of his pre-existing left-foot condition arose primarily out of and in the course and scope of his employment. Tenn. Code Ann. § 50-6-102(14)(A). This required a showing by a preponderance of the evidence that his "employment contributed more than fifty percent (50%) in causing the injury, considering all causes." *Id.* § 50-6-102(14)(B). "Shown to a reasonable degree of medical certainty" means that, in the opinion of the physician, it is more likely than not considering all causes, as opposed to speculation or possibility." *Id.* § 50-6-102(14)(D). "The opinion of the treating physician, selected by the employee from the employer's designated panel of physicians pursuant to [section] 50-6-204(a)(3), shall be presumed correct on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence." *Id.* § 50-6-102(14)(E).

Applying these statutory requirements, we conclude that Mr. Payne failed to produce sufficient evidence to support his claim. Although he filed medical records documenting treatment he received for his left foot, he submitted no medical evidence showing that it was more likely than not that his employment contributed more than fifty percent to his injury. Dr. Chrostowski, the treating physician, stated only that Mr. Payne's August 1, 2014, workplace accident was at least part of the cause of his foot problems. This statement does not establish by a preponderance of the evidence that Mr. Payne's

employment contributed more than fifty percent in causing the injury. *See id.* § 50-6-102(14)(A)–(B). Therefore, Mr. Payne has failed to demonstrate the existence of specific facts in the record that could lead a rational trier of fact to find in his favor.

III.

The judgment of the Court of Workers' Compensation Claims is reversed, and the decision of the Workers' Compensation Appeals Board is affirmed. Costs of this appeal are taxed to Tracy Payne for which execution may issue if necessary.


SHARON G. LEE, JUSTICE