IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 28, 2016 Session

BILLY JOE BREWER v. DILLINGHAM TRUCKING, INC., ET AL.

Appeal from the Circuit Court for Lawrence County
No. 2919-15 Russell Parkes, Judge

No. M2016-00611-SC-R3-WC – Filed April 11, 2017
MAILED MARCH 9, 2017

Employee, a truck driver, fell while climbing into the cab of Employer's truck, which was parked at Employee's home. Employer initially accepted the claim as compensable, but later denied it, asserting that Employee was not in the course of his employment when the injury occurred. The trial court found the injury to be compensable and awarded benefits. The trial court also granted a post-trial motion ordering Employer to pay for Employee's independent medical evaluation (IME). Employer has appealed. The 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 pursuant to Tennessee Supreme Court Rule 51. The order requiring Employer to pay the cost of the IME is reversed. The remainder of the judgment is affirmed.

Tenn. Code Ann. § 50-6-225(e)(1) (2014) (applicable to injuries arising before July 1, 2014) Appeal as of Right;
Judgment of the Circuit Court Affirmed

ROBERT E. LEE DAVIES, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK. J. and DON R. ASH, SR. J., joined.

J. Allen Brown, Nashville, Tennessee, for the appellants, Dillingham Trucking, Inc., and Protective Insurance Company.

Richard T. Matthews, Columbia, Tennessee, for the appellee, Billy Joe Brewer.

OPINION

Procedural Background

This is an appeal from the Circuit Court of Lawrence County by the Employer from a trial held on September 25 and October 30, 2015. The trial judge took the matter under advisement and issued his findings and conclusions pursuant to a written judgment on February 8, 2016. The court found that Employee's injury arose from and in the course of his employment; that the Employee had established causation by a combination of both medical and lay testimony; that the "coming and going" rule was not applicable in this case; that Employer did not sustain its burden of proof that the injury arose from willful misconduct; that Employee did not have a meaningful return to work; and that the Employee was entitled to a forty percent (40%) permanent partial disability to the left leg. The trial court also granted a post-trial motion requiring Employer to pay the cost of the independent medical evaluation. Employer properly perfected its appeal in this case on March 23, 2016.

Facts

Billy Joe Brewer ("Employee") grew up in Lawrence County and graduated from Lawrence County High School in 1981. At the time of trial, Mr. Brewer was fifty-three years of age, married, with three grown children. He is dyslexic.

Mr. Brewer began working at the Pepsi Cola Plant in Lawrenceburg while in high school and continued working there for a couple of years after graduating. After a few years, he went to work for Maury Ohio in the press room doing manual labor. He then left Maury and began hanging sheetrock for multiple different contractors. In 1987, Mr. Brewer started driving a tractor trailer truck for Sharp Transport in Lawrenceburg. Since 1987, Mr. Brewer has worked as a truck driver for different employers. Over the last several years, Mr. Brewer worked for four different contractors who had exclusive contracts with Federal Express ("FedEx"). At the time of his injury, Mr. Brewer was employed by Dillingham Trucking, Inc. ("Employer"), owned by Kelly Dillingham. It is not clear from the record exactly when Mr. Brewer began working for Employer; however he began to receive wages in December 2012.[1]

[1]The first date entry on the wage statement to which the parties agreed is December 30, 2013, but the ensuing dates begin on January 1, 2013 and continue through September 29, 2013, clearly demonstrating that the first date entry should have read December 30, 2012, not 2013.

Mr. Brewer drove a dedicated route, Monday through Friday. He would leave his house in Lawrenceburg, Tennessee, drive to the FedEx terminal in Lawrenceburg and pick up his trailer; drive to Nashville, pick up another trailer; drive to Cookeville and bring a trailer back to Nashville; and then return to his home in Lawrenceburg with Employer's truck. His day would begin at 6:00 p.m., and he would return to his home in Lawrenceburg around 6:00 a.m. In addition to driving, Mr. Brewer was responsible for unhooking and hooking the trailers he was hauling. To accomplish this task, Mr. Brewer used a 1300 pound dolly to move the trailers.

Mr. Brewer kept the truck he drove parked at his house between work days. Both Mr. and Mrs. Brewer testified that he had been parking the truck at his home since he started working for Employer and throughout the entire eight or nine months of his employment. Although Ms. Dillingham testified that Mr. Brewer was not allowed to park the truck at his home, Mr. Brewer testified that Ms. Dillingham was aware that he was driving the truck to his home. He claimed he had talked to Ms. Dillingham once or twice about the issue, and she had never told him at any time he could not take the truck home.

As part of his daily routine, Mr. Brewer was required by Employer to complete a pre-trip inspection of his truck prior to beginning his route. This pre-trip inspection included checking the oil, air lines, tires, and making sure the windows on his truck were clean. On September 16, 2013, Mr. Brewer was at home getting ready to go to work around 6:00 p.m. He went outside and performed his required pre-trip inspection. As he was climbing into the truck to leave for the terminal, he slipped on the top step and fell four feet to the ground, landing on his left leg.

Mr. Brewer contacted Ms. Dillingham the next morning to inform her of his injury. Mr. Brewer's left leg continued to swell, and the bruising continued to extend down his leg. On September 26, 2013, Mr. Brewer went to a walk-in clinic, where he was treated for almost three weeks. He then went to see Dr. William Fontenot, an orthopedic surgeon in Lawrenceburg, who was one of the three physicians on the panel provided by Employer. Mr. Brewer first presented to Dr. Fontenot on October 10, 2013. Dr. Fontenot's office records from that visit indicate:

> NEW-Lt thigh injury 9/16/2013, needs x[-]rays. (REF by WC). Patient fell out of the truck and fell into a cooler with his thigh landing on the cooler. Bruising and swelling was present. Now it is just very sore. Pain scale about [five] or [six] . . . .

Dr. Fontenot diagnosed Mr. Brewer with an ACL (anterior cruciate ligament) tear. Dr. Fontenot recommended surgery, which he performed on December 9, 2013. Dr. Fontenot's surgical notes provide:

> Mr. Brewer is a fifty-two year old male who sustained a worker's [sic] comp injury with the above diagnosis. He has failed conservative management and wishes to undergo surgery.

Dr. Fontenot cleared Mr. Brewer to return to work on June 3, 2014. On that same day, after meeting with Dr. Fontenot, Mr. Brewer contacted Ms. Dillingham and told her he had been cleared to return to work. Ms. Dillingham explained she no longer had a "dedicated route" available for him at that time. However, she offered Mr. Brewer a position at her husband's trucking company, NuMatix. This position would require Mr. Brewer to "run out of the window." Drivers in "window slots" travel to different places every day, within a maximum radius of 560 miles. Mr. Brewer declined the offer because there was no fixed route and no guarantee that a run would be available every day. However, Ms. Dillingham testified that NuMatix would have guaranteed Mr. Brewer pay for 2000 miles per week.

Mr. Brewer and Ms. Dillingham earlier had discussed team driving assignments for her company before he was released by Dr. Fontenot. These assignments included longer trips, shared with another driver. Ms. Dillingham and Mr. Brewer agreed that he was not interested in a team driving position.

A day or two later, Mr. Brewer travelled to Pulaski, Tennessee and found a job working as a truck driver hauling scrap to local yards. Unfortunately, Mr. Brewer was not able to pass the required physical as his blood pressure was above the permissible limit established by the United States Department of Transportation (DOT). Several days later, Mr. Brewer applied for social security disability benefits, listing his left knee injury and several conditions that arose after the injury, including high blood pressure, a right knee injury, and several mini strokes.

Mr. Brewer attained maximum medical improvement on December 4, 2014. There is no evidence in the record that Mr. Brewer either sought or obtained work after June 2014. He testified his left leg remains stiff, but not all the time.

Dana Brewer testified that her husband continued to have pain, stiffness, and weakness in his left leg even after Dr. Fontenot released him for work. He was unable to ride in an automobile for an extended period and required frequent stops to stretch his leg. Mrs. Brewer testified that, as a result of his mini strokes, her husband has memory problems, and that she must administer all of her husband's medications. She also

testified that she had filled out most of the paperwork at the December 2013 DOT examination. She said Mr. Brewer was diagnosed with diabetes in September 2014, and she attributed his inconsistent testimony to the effects of his strokes.

James Wiesman, Jr., M.D. performed an independent medical evaluation on January 19, 2015. Dr. Wiesman was provided with all of Dr. Fontenot's office and surgery notes and the records from the walk-in clinic. In addition, Dr. Wiesman performed a physical examination. Dr. Wiesman's diagnosis was left knee pain as a result of post-ACL reconstruction. Using the AMA Guidelines, 6th Edition, Dr. Wiesman assigned Mr. Brewer a ten percent (10%) impairment to the lower extremity, and opined that Mr. Brewer's continuing symptoms of pain, stiffness, and difficulty walking were a result of his work-related knee injury.

Issues

On appeal, Employer raises four issues: (1) whether the trial court erred in finding Employee was performing an act in the course of employment when the injury occurred; (2) whether the trial court erred in finding Employee had proved the cause of his injury was work-related; (3) whether the trial court erred in finding Employee had no meaningful return to work; and (4) whether the trial court erred in awarding a consultation fee as a reasonable and necessary medical expense.

Analysis

Standard of Review

In workers' compensation cases, appellate courts "review the trial court's findings of fact de novo accompanied by a presumption of correctness unless the evidence preponderates otherwise." Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). While the reviewing court must conduct an in depth examination of the trial court's factual findings and conclusions, id. (citing Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)), considerable deference must be afforded to the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be accorded to the trial court's findings based on documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc. /Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Likewise, there is no presumption of correctness afforded to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Compensability of the Injury

Employer contends this injury is not compensable because an employee is not considered to be in the course of his employment until he has actually arrived at the place of employment. In support of its position, Employer relies upon the "coming and going" rule. "The general rule is that an injury received by an employee on his way to or from his place of employment does not arise out of his employment and is not compensable, unless the journey itself is a substantial part of the services for which the workman was employed and compensated." Smith v. Royal Globe Ins. Co., 551 S.W.2d 679 (Tenn. 1977) (citations omitted).

Tennessee has recognized certain exceptions to the "coming and going" rule. One exception applies to injuries sustained by employees traveling in a vehicle furnished by the company while going to or from work. Eslinger v. F & B Frontier Constr. Co., 618 S.W.2d 742, 744 (Tenn. 1981) ("It is well settled law in this State that where transportation is furnished by an employer as an incident of the employment, an injury suffered by the employee while going to or returning from his work in the vehicle furnished arises out of and is within the course of the employment"). "In general, we have allowed coverage where the journey itself 'is a substantial part of the services for which the workman was employed and compensated.'" Pool v. Metric Constructors, Inc., 681 S.W.2d 543, 544 (citing Smith, 551 S.W.2d, at 681).

In this case, Employee was getting an Employer-furnished truck ready for work. While Ms. Dillingham stated that FedEx had a rule requiring its contractors' trucks to be parked at its terminal when not in use, this rule was never enforced as to Employee. Employee testified he had more than one conversation with Ms. Dillingham about this issue, and she never told him he could not keep the truck at his home. Although it was disputed as to whether Employee had actual or constructive notice of Employer's policy not to take work vehicles to his home, the trial court specifically found in Employee's favor on this issue and also found a complete absence of enforcement of any policy prohibiting any driver from taking his work vehicle home.

The weight, faith, and credit to be given to a witness's testimony lies with the trial judge in a non-jury case because the trial judge had an opportunity to observe the manner and demeanor of the witness during the witness's testimony. Roberts v. Roberts, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991). Thus, credibility findings by the trial court are binding on a reviewing court unless the evidence in the record preponderates against them. Kendrick v. State, 454 S.W.3d 450, 457 (Tenn. 2015).

The evidence in this case makes clear that Employee's injury occurred while he was attempting to climb up into a truck owned by Employer. Employee had completed the pre-trip check of his vehicle, which was required by Employer. His purpose for entering the truck was to travel to the Lawrenceburg terminal, one of the locations where he performed his regular duties. In order to determine whether an employee was in the course of employment, the court is required to focus on the time, place, and circumstances of the injury. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004). As our Supreme Court has stated, "An injury occurs in the course of employment 'when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.'" Wait v. Travelers Indem. Co. of Ill., 240 S.W.3d 220, 226 (Tenn. 2007) (citations omitted). Clearly, Employee already had commenced work by completing the mandatory pre-check of Employer's vehicle and was preparing to travel in that vehicle to the FedEx terminal to pick up his first load of the evening. Based on these findings, we conclude that the evidence does not preponderate against the trial court's findings that the injury occurred in the course of the employment.

Causation

Employer contends that Employee did not sustain his burden of proof as to causation. Employer correctly points out that, during his deposition, Dr. Wiesman was not asked directly if Employee's torn ACL was the result of Employee's September 16, 2013 fall from the truck. Dr. Wiesman did touch on the subject as is evidenced by the following exchange:

> QUESTION: Dr., I notice in your report notes that Mr. Brewer complained that he still had joint pain, stiffness, difficulty walking, and with the knee occasionally giving away. Are those limitations something that you can relate to the work related knee injury?
> ANSWER: Yes.

If that were the only evidence on the issue of causation, we would agree with Employer that the evidence was not sufficient to satisfy the burden of proof as to causation. However, an inference of causation may be drawn by the trial court where equivocal medical proof is combined with other evidence which supports a finding of causation. Glisson, 185 S.W.3d at 354. "[B]enefits may be properly awarded to an employee who presents medical evidence showing that the employment could or might have been the cause of his or her injury when lay testimony reasonably suggests causation." Id.; see also Clark, 129 S.W.3d at 47.

On October 10, 2013, the treating physician, Dr. Fontenot, ordered an MRI of Employee's left knee. On November 7, 2013, Dr. Fontenot recorded that Employee had a possible ACL tear and recommended arthroscopic surgery to observe the ligament and repair it if necessary. Dr. Fontenot performed surgery on December 9, 2013, and his operative note states that Employee's ACL was completely torn. Dr. Fontenot repaired the injured knee, and his report states that the post-operative diagnosis was "left knee ACL tear." All subsequent office notes contain the same diagnosis. Dr. Fontenot's records are consistent with the conclusion that the September 16, 2013 fall from the truck caused the injury to the left ACL. There is no other evidence in the record to suggest any other cause for Employee's injury. It is undisputed Employee fell from the truck and struck his left leg on September 16, 2013. Both Mr. and Mrs. Brewer denied that Mr. Brewer had any left leg problems before the fall, and there was no evidence to the contrary. Within hours of the incident, Employee had pain, discoloration, and swelling in the leg. Mr. Brewer immediately called Ms. Dillingham and reported his injury. In addition, Mr. Brewer photographed his leg and sent those pictures to Ms. Dillingham. During cross-examination, Ms. Dillingham stated there was no question in her mind that Mr. Brewer injured his leg after falling while climbing up into his truck. We conclude that the evidence supports the trial court's finding that the ACL tear arose from Employee's September 16, 2013 fall from the truck.

Meaningful Return to Work

Employer asserts that the trial court erred by failing to apply the one-and-one-half times impairment cap to the award of permanent partial disability benefits. Tennessee Code Annotated section 50-6-241(d)(1)(A)[2] provides that an award of permanent disability benefits shall be limited to one-and-one-half times the medical impairment rating if the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury. Employer asserts that its offer to return Employee to work "out of the window" for NuMatix (the company owned and operated by Ms. Dillingham's husband) amounted to a reasonable offer of reemployment, and that Employee's refusal to accept this offer was unreasonable. An unreasonable refusal to accept an offer of reemployment limits an employee's potential recovery under section 50-6-241(d)(1)(A). The assessment of the reasonableness of the actions of the employee and employer is highly fact-intensive and depends upon the facts of each case. Howell v. Nissan N. Am., Inc., 346 S.W.3d 467, 472 (Tenn. 2011). Here, the offer was for Employee to go to work for a new employer, NuMatix, and Employer has cited no authority to support the proposition that an offer of employment by a separate employer can limit an injured employee's recovery to one-and-

[2] Applicable to injuries occurring after July 1, 2004 but prior to July 1, 2014.

one-half times the medical impairment cap. We decline to extend the law any further.

Employer also argues that Employee's refusal to accept the team driving position from Employer was unreasonable. Employer cites other medical factors such as high blood pressure, post-injury strokes, and an injury to Employee's right knee as being the primary factors for Employee's refusal. The facts pertaining to this issue were disputed. Both Mr. and Mrs. Brewer testified regarding Mr. Brewer's ongoing problems with his left leg. Both stated Mr. Brewer was unable to drive or ride in a vehicle from Lawrenceburg to Nashville without stopping to stretch his left leg one or more times. Mr. Brewer stated he did not believe he could complete the long runs required for the position which Ms. Dillingham was offering. He stated he still had difficulty walking. Mrs. Brewer testified her husband was still having pain, stiffness, and weakness in his left leg. An employee's own assessment of his physical condition and resulting disability is competent testimony that should be considered. Cleek v. Wal-mart Stores, 19 S.W.3d 770, 774 (Tenn. 2000) (citing McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999)). Here, the trial court made a specific finding that Employee was a credible witness as to this disputed issue. We accord that finding great deference and therefore conclude that the evidence does not preponderate against the trial court's finding that Employee did not have a meaningful return to work.

Reimbursement for Examination Fee

The last issue raised by Employer concerns the trial court's order requiring it to reimburse Employee for the cost of Dr. Wiesman's examination fee. Tennessee Code Annotated section 50-6-226(c)(1)[3] provides that the fee charged to the employee by the treating physician or a specialist to whom the employee was referred for giving testimony by oral deposition shall be charged against the employer, when the employee is the prevailing party. The workers' compensation law also contemplates that the injured employee's medical expenses will be paid by the employer. Tenn. Code Ann. § 50-6-204(a)(1).[4] Employee argues, and the trial court held, that Dr. Fontenot's apparent refusal to make himself available for a deposition places the responsibility for the independent medical examination upon Employer. This situation is really no different than if Employee disagreed with Dr. Fontenot's opinion and hired his own expert witness. Tennessee Code Annotated section 50-6-204 has no such provision for reimbursement by the employer. Likewise, Rule 54.04(2) of the Tennessee Rules of Civil Procedure does not list an examination fee as a recoverable discretionary cost, and our Supreme Court has held that the portion of the fee charged by an expert witness for

[3] For injuries occurring prior to July 1, 2014.

[4] For injuries occurring prior to July 1, 2014.

evaluation of the employee is not recoverable under this rule. Miles v. Marshall C. Voss Health Care Ctr., 896 S.W.2d 773, 776 (Tenn. 1995). We conclude that the trial court erred by ordering Employer to pay the cost of Dr. Wiesman's examination of Employee to determine his impairment.

Conclusion

The order requiring Employer to pay the cost of Dr. Wiesman's examination is reversed. The remainder of the judgment of the trial court is affirmed. Costs are taxed to Dillingham Trucking, Inc., and Protective Insurance Company, and their surety, for which execution may issue if necessary.

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ROBERT E. LEE DAVIES, SR. JUDGE

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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 Dillingham Trucking, Inc., and Protective Insurance Company, and their Surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM