IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 24, 2017 Session

BARBARA JOAN RAINS v. WAL-MART ASSOCIATES INC.

Appeal from the Circuit Court for Hardin County
No. 2014-CV-4707 Charles C. McGinley, Judge

No. W2016-00636-SC-R3-WC – Mailed June 14, 2017; Filed July 18, 2017

Barbara Rains ("Employee") filed this action in the Circuit Court for Hardin County, alleging that she sustained a back injury in the course of her work as a cashier for Wal-Mart ("Employer"). The issues were bifurcated, with compensability to be tried first and any remaining issues to be heard later. After the hearing about compensability, the trial court found that Employee had failed to sustain her burden of proof and dismissed the complaint. Employee has appealed, alleging various errors by the trial court. 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. Because Employee failed to present any expert medical evidence to support her claim, we conclude that the trial court's finding regarding compensability was correct. All other issues raised by Employee are pretermitted. Therefore, we affirm the judgment.

Tenn. Code Ann. § 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Circuit Court Affirmed

ROGER A. PAGE, J., delivered the opinion of the court, in which WILLIAM B. ACREE, and PAUL G. SUMMERS, SR. JJ., joined.

Terry L. Wood, Adamsville, Tennessee, for the appellant, Barbara Joan Rains.

Jay L. Johnson, Henderson, Tennessee, for the appellee, Wal-Mart Associates, Inc.

OPINION

I. Factual and Procedural Background

Employee worked as a cashier at Employer's Savannah, Tennessee store. She alleged that she injured her lower back on February 10, 2013, while lifting packages of bottled drinks from the bottom of a customer's cart. On the incident report she completed later in the day, Employee stated that the injury occurred when she lifted packages containing twenty-four bottles of water and twenty-four bottles of soft drinks. However, Employee testified at trial that the injury occurred when she pulled and turned over a bag of dog food.

A video recording taken from one of Employer's surveillance cameras was placed into evidence. According to Employee, it shows that she began to rub her lower back and favor her right leg shortly after the shift began. However, the trial judge interpreted the video differently, saying that Employee testified of an "immediate onset of pain that she described as being severe, so severe that she has described that she had to favor her leg throughout the rest of the time that she was working. And in all candor, I can't see a display of great favor."

Employee continued to work for an unspecified time after the incident. She then reported the injury to her immediate supervisor, Regena Bullington. Ms. Bullington provided an incident form and Employee completed it. Employee and Ms. Bullington then went to meet with Jeannie Coffman, Employer's Asset Protection Manager. Employee stated on the incident form that she did not want medical care for her injury. However, later that day, she changed her mind. Ms. Coffman presented her with a choice of physician form, which Employee signed and dated on February 10, 2013. Employee selected Dr. Michael Smelser and, subsequently, saw him on two occasions. Dr. Smelser's records were not placed into evidence.

During cross-examination, Employee admitted that her statements on the incident report about the mechanism of her injury were incorrect. She also admitted that video recordings from the store showed her shopping, picking up a twelve-pack of drinks, and purchasing items several hours after the alleged injury.

Ms. Coffman testified as Employer's corporate representative. Ms. Coffman stated that her duties included maintaining business records of the store's activities and processing and maintaining records of workers' compensation claims. Ms. Coffman stated that she had investigated the claim and identified her file of the investigation. The file included a written statement of Ms. Bullington regarding the February 10 incident. Employee objected to the introduction of this document because it was hearsay and because it had not been produced during discovery. The objection was overruled. However, the court offered to recess the trial and resume at a later date if counsel needed additional time to address the document. During that discussion, the following colloquy took place between the court and Employee's counsel:

THE COURT: Gentlemen, let me ask counsel, there were references in the pre-trial briefs that are noted for the record and I don't think they've been filed so I'm kind of relying upon what each side has said, but for sake of completeness of the record, do we have a copy of the medical record?

MR. WOOD: Your Honor, I never contemplated doing -- file the records as did they invite the case -- I don't know that -

THE COURT: Well, the statements of the doctors and, you know, the representations of -- like I know that her back is specifically a mess. I know that from what's -- it made reference, MRIs as a result of those all the way to thoracic through the lumbar. There are other things in her medical records that you folks quoted to me, but they're not actually here.

MR. WOOD: I didn't submit them in my trial brief because I didn't think that it-- that part was blank and so I believe that I indicated the only reason I asked was because I thought they might -- someone had asked me about what she stated on the first visit. I don't think there's going to be a dispute about my client's back. What's disputed is whether or not it was injured.

THE COURT: Whether or not there was a specific incident that had aggravated a pre-existing condition maybe at the time, but also I saw in there where Dr. Smelser made the statement something -- secondary gain.

MR. WOOD: Well -

THE COURT: I mean, that's his observation. That's not a medical diagnosis.

MR. WOOD: Well, the dilemma we have, you know, is a modern -- seeking, Your Honor, is all the communications with the doctor and all these identified employer and their personnel. We don't know what they told him or what -- I just know that they do communicate.

At the conclusion of the hearing, the trial court issued its findings from the bench. The court pointed out that Employee had given conflicting accounts of the mechanism of injury. As recited above, the trial court also found that the video recording was not consistent with Employee's testimony about the immediate effects of the injury. The court found that Employee had failed to sustain her burden of proof and ordered judgment in favor of the Employer. Employee now appeals.

II. Analysis

Employee asserts that the trial court erred by finding that she did not sustain her burden of proof; by admitting Ms. Bullington's statement as a business record; and by being improperly influenced by Employer's trial brief. Employer argues that the trial court correctly determined that Employee had failed to prove her case and asks this Panel to assess a penalty against Employee for filing a frivolous appeal. We conclude that the trial court correctly determined that Employee failed to prove causation of her injury, which pretermits Employee's other issues. However, we will not assess a penalty against Employee for filing a frivolous appeal.

A. Standard of Review

The standard of review of issues of fact in a workers' compensation case 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) (2014) (applicable to injuries occurring prior to July 1, 2014). When the trial judge has had the opportunity to observe a witness's demeanor and to hear in-court testimony, we give considerable deference to factual determinations made by the trial court. *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009) (citing *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008)). When the issues involve expert medical testimony given by deposition, the weight and credibility must be drawn from the contents of the depositions; therefore, as a reviewing court, we may draw our own conclusions with regard to those issues. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008) (citing *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006)). A trial court's conclusions of law are reviewed de novo with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009) (citing *Goodman v. HBD Indus., Inc.*, 208 S.W.3d 373, 376 (Tenn. 2006); *Layman v. Vanguard Contractors, Inc.*, 183 S.W.3d 310, 314 (Tenn. 2006)).

B. Causation

"It is well settled in Tennessee, and in many other jurisdictions, that for an injury to be compensable under the Act, it must both 'arise out of' and occur 'in the course of' employment." *Wait v. Travelers Indem. Co. of Illinois*, 240 S.W.3d 220, 225 (Tenn. 2007) (citing Tenn. Code Ann. § 50-6-103(a) (2005); *Blankenship v. Am. Ordnance Sys., L.L.S.*, 164 S.W.3d 350, 354 (Tenn. 2005); *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 46-47 (Tenn. 2004)). "As such, the 'arising out of' requirement refers to cause or origin; whereas, 'in the course of' denotes the time, place, and circumstances of the injury. *Wait*, 240 S.W.2d at 225 (citing *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997)). "Except in the most obvious, simple and routine cases, the

claimant in a workers' compensation action must establish by expert medical evidence the causal relationship . . . between the claimed injury (and disability) and the employment activity." *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991) (citing *Masters v. Indus. Garments Mfg. Co.*, 595 S.W.2d 811, 812 (Tenn. 1980)).

Employee contends that she injured her lower back on February 10, 2013, while handling products in a customer's cart. There is evidence in the record consistent with that assertion: Employee's own testimony; the testimony of Ms. Coffman that an injury was reported on that date; Employee's incident statement; the choice of physician form signed by Employee on the same date. There is no medical evidence in the record that makes a diagnosis, states that Employee's injury is related to her employment, assigns a permanent impairment, or discusses temporary or permanent disability. The trial court remarked that he had seen medical records attached to trial briefs but that those documents had not been placed into the record. Employee did not take that opportunity to present her medical evidence into the record at that time, or at any time thereafter. Under these circumstances, we are compelled to affirm the trial court's judgment on the merits. The remaining issues raised by Employee are pretermitted.

C. Frivolous Appeal

Employer has asked the Panel to declare this appeal to be frivolous and to assign a penalty pursuant to Tennessee Code Annotated section 50-6-225(i) (2014).[1] While Employee's brief certainly leaves a lot to be desired, we do not find her appeal frivolous. Therefore, we will not assess a penalty against her in this case.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Barbara Joan Raines and her surety, for which execution may issue if necessary.

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ROGER A. PAGE, JUSTICE

[1] Tennessee Code Annotated section 50-6-225(i) states:

> When a reviewing court determines pursuant to motion or sua sponte that the appeal of an employee is frivolous, a penalty may be assessed by the court, without remand, against the appellant for a liquidated amount.

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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 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 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 Barbara Joan Rains, and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM