IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
FEBRUARY 28, 2002 Session

LEWIS KENNETH YUNKER, JR. VS. TRAVELERS INSURANCE COMPANY

Direct Appeal from the Circuit Court for Blount County
No. L-12483 D. Kelly Thomas, Judge

Filed July 18, 2002

No. E2001-02089-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The employer's carrier appeals awards of temporary total disability benefits, 50 percent permanent partial disability to the body as a whole, and medical expenses. We affirm.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Blount County Circuit Court is Affirmed.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, SR. J., joined.

Ricky L. Apperson, Spicer, Flynn & Rudstrom, Knoxville, Tennessee, for the Appellant, Travelers Insurance Company.

Eugene B. Dixon, Koella & Dixon, Knoxville, Tennessee, for the Appellee, Lewis Kenneth Yunker, Jr.

MEMORANDUM OPINION

Facts

Kenneth Yunker, a 39 year-old high school graduate, was an employee of Creative Marble Company, which was owned by his mother, Barbara Yunker. Even though Mr. Yunker's title was general manager/vice president, ninety percent of his work was manual labor. Mr. Yunker had experienced previous episodes of back pain, which had resolved, and he had never missed work or filed a claim for workers' compensation benefits. Mr. Yunker testified that he was lifting a tub weighing approximately 220 pounds on October 8, 1999, and felt pain across his lower back, across his left buttock into his tailbone, and down his left leg. He casually mentioned to his mother that he had hurt his back lifting the tub. Ms. Yunker testified that she observed Mr. Yunker holding his back and pain on his face. He did not ask his mother to fill out any paperwork, and did not seek medical treatment at that time. The following Monday, Mr. Yunker voluntarily entered Cornerstone for a twenty day alcohol rehabilitation program. While in the program, he engaged in activities such as baseball, bowling, and laser tag, and walking through a maze, during which he experienced episodes of back pain. He saw Dr. William Kenneth Bell at the Maryville Orthopedic Clinic on November 2, 1999 and reported that he had hurt his back playing laser tag the previous Saturday. He had gone to the emergency room at Fort Sanders Hospital after the laser tag incident. Mr. Yunker testified that he "possibly could have" told his family physician that he hurt his back while he was at Cornerstone.

Dr. William Reid, a neurosurgeon, began treating Mr. Yunker on March 21, 2000. On his first visit, he mentioned nothing about any accident or incident that may have caused back pain. He completed a form on which he circled "No" as the response to a question whether the injury was work related. Mr. Yunker also saw a chiropractor, identified in the record only as Dr. Sunshine, and completed a questionnaire by responding "No" to an inquiry whether the injuries were due to an accident.

Dr. Reid ordered an MRI, which showed degenerative changes at L4-5 and L5-S1, but as of April 4, 2000, no further treatment was scheduled. Mr. Yunker returned to Dr. Reid on August 16, 2000 complaining of more pain in the left leg, more numbness in the left foot, and intermittent pain in the right leg. A myleogram and a CT scan revealed a small disc herniation at L-4. It also showed degenerative changes at L5-S1, which Dr. Reid felt was the cause of the leg pain. Dr. Reid testified that the lifting of a marble tub, weighing in excess of 200 pounds, could be a cause of Mr. Yunker's sciatic pain, and that the disc herniation was consistent with heavy lifting work. Surgery was discussed, but treatment was by periodic epidural injections.

After the injury, Mr. Yunker briefly worked for a friend supervising a remodeling job and for his brother-in-law supervising construction of a house, but quit in June 2000 when he was asked to do more "hands-on" work. He did not work again until mid December 2000, when he went to work for Castone, supervising brick and man-made stone crews. Mr. Yunker experienced back pain in September 2000 while sliding a chair across the floor. As of September 18, 2000, Dr. Reid imposed restrictions of no heavy lifting, frequent bending and strenuous activities, and assigned a permanent impairment rating of 10 percent to the body as a whole. Dr. Reid also testified that Mr. Yunker was temporarily disabled from September 18,

2000 to February 6, 2001. Dr. Reid last saw Mr. Yunker on November 14, 2000 at which time Mr. Yunker told Dr. Reid that he had injured his back in October 1999.

On July 18, 2000, Ms. Yunker completed a First Report of Work Injury, which was forwarded to Travelers Insurance Company. Prior to that, Mr. Yunker had not asked his mother to turn his claim in under workers' compensation, nor had he asked for medical treatment.

The trial court found that the back injury was caused by lifting the bathtub, and not by playing laser tag, walking in a cornfield maze, or sliding a chair on the floor. The trial court also found that the employer did not have an opportunity to provide work hardening before July 18, 2000, but Mr. Yunker's permanent back condition would never allow him to go back to the work he did for Creative Marble. Since light duty work was not available, the award was not limited to two and one-half times the impairment rating. The trial court awarded Mr. Yunker temporary total disability benefits from September 18, 2000 to December 18, 2000, when he began work for another employer, Castone. The trial court indicated that the employer probably owed medical expenses incurred after July 18, 2000, but "any disputes about that, that can be settled with a hearing."

Standard of Review

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452 456 (Tenn. 1988). Conclusions of law are subject to *de novo* review with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997). Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994).

Issues

Travelers Insurance Company presents the following issues for review:

1. Whether plaintiff failed to carry the burden of proving that he suffered an injury in the course and scope of his employment?

2. Whether the trial court erred in finding that plaintiff complied with the notice provisions of Tenn. Code Ann. § 50-6-201 and 202?

3. Whether the trial court erred in awarding five times the impairment rating without making the specific findings of fact and conclusions of law required by Tenn. Code Ann. § 50-6-241(a)(1)?

4. Whether the trial court erred in not limiting the award to two and one half times the impairment rating?

5. Whether the trial court erred in awarding temporary total disability benefits for the period from September 18, 2000 through December 18, 2000?

6. Whether the trial court erred in awarding past medical expenses where there was no evidence as to the reasonableness and necessity of any medical expenses?

Discussion

I.

Because the first two questions concern solely issues of fact, we will discuss them together. To be entitled to workers' compensation benefits, an employee must establish that an injury occurred while the employee was performing a duty he or she was employed to perform. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 70-71 (Tenn. 2001). Mr. Yunker testified that he injured his back on October 8, 1999 lifting a bathtub weighing approximately 200 pounds for his employer. According to the undisputed testimony of Mr. Yunker and his mother, Barbara Yunker (owner of Creative Marble), Mr. Yunker reported his injury on October 8, 1999 and Barbara Yunker saw him "holding his back and pain on his face." He testified that he did not inform his doctors that he was injured at work because he did not want to cause his employer's workers' compensation insurance to be affected. The carrier contends that the back injury did not occur at work on October 8, 1999. The trial judge stated: "The proof I think has established beyond any question that Mr. Yunker sustained an injury to his back on the 8th day of October. And that actual notice of that injury was given to his employer on that same day." The findings of fact of the trial judge must be given considerable deference with regard to oral, in-court testimony. *Houser*, 36 S.W.3d at 71; *Humphrey v David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

Travelers Insurance Company also contends that the medical evidence failed to establish that the injury occurred in the course and scope of employment at Creative Marble. In all but the most obvious cases, expert medical testimony is required to establish causation. *Thomas v. Aetna Life & Casualty Co.*, 812 S.W.2d 278 (Tenn. 1991). However, an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). In this case, Dr. Reid testified that lifting a tub weighing over

200 pounds could be the cause of the sciatic pain, and that Mr. Yunker's disc herniation was consistent with heavy lifting. This expert testimony coupled with Mr. Yunker's testimony establishes causation. Based upon our review, the evidence does not preponderate against the findings of the trial court that Mr. Yunker was injured in the course and scope of his employment of October 8, 1999, and that he complied with the notice provisions of the Workers' Compensation Law.

II.

The third and fourth questions concern the application of the caps found in Tenn. Code Ann. § 50-6-241 and we will discuss them together. The carrier contends that the award should not exceed two and one-half times the ten percent impairment rating because Mr. Yunker never made an attempt to return to work at Creative Marble Company. The uncontradicted evidence was that the only light duty job available at the company was held by Barbara Yunker, the owner, and that all other jobs involved heavy lifting, which Mr. Yunker could no longer do after the back injury. The trial court did not err in refusing to limit the award to two and one-half times the impairment rating.

The carrier also complains that the trial court erred in failing to make specific findings of fact detailing the reasons for awarding five times the impairment rating as required by Tenn. Code Ann. § 50-6-241(c). No expert vocational evidence was introduced. The trial judge noted that Mr. Yunker had experience in the business of manufacturing bathtubs and related products, and that he had experience in construction in general, but that he is

> "prohibited from any heavy lifting the rest of his life.
>
> The medical impairment rating was 10 percent to the body as a whole. I think a vocational industrial disability given his knowledge, his intelligence, and the restrictions, I think his disability at 50 percent to the body as a whole is justified from the proof that I heard."

It appears that the trial court properly considered the pertinent factors set out in the statute. We find no error.

III.

The carrier next asserts that the trial court erred in awarding temporary total disability benefits for the period from September 18, 2000 through December 18, 2000. There is no evidence that Mr. Yunker worked, and no medical testimony that he was able to work, during that period of time. While Mr. Yunker did return to work as a construction supervisor for a time after his injury, he testified that he was unable to continue working when he was required to do "hands-on" work. Benefits for temporary total disability are payable until the injured employee returns to work or until he attains maximum recovery from his injury. *Simpson v. Satterfield*, 564 S.W.2d 953, 955 (Tenn. 1978). Temporary total disability benefits that have terminated because of a return to work may be revived when the employee (1) is no longer capable of

performing work because of the injury, and (2) has not yet reached maximum medical improvement from the original injury. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 778 (Tenn. 2000). The evidence does not preponderate against the finding of the trial court.

IV.

Finally, Travelers Insurance Company asserts that it was error to award past medical expenses because there was no evidence as to reasonableness and necessity of the expenses. The trial judge in his bench opinion declined to award any medical treatment expenses incurred before the notice of injury and claim for medical expenses was provided to the workers' compensation carrier on July 18, 2000, but the trial court found that expenses after that date would be covered. He said: "If there's any disputes about that, that can be settled with a hearing." The Judgment entered by the court provided, in part:

> "The Defendant shall assume responsibility for payment of all reasonable and necessary medical expenses incurred by the Plaintiff after July 18, 2000, which are related to the October 9, 1999 (sic) injury, and in the future shall pay all authorized, reasonable and necessary medical care and benefits directly related to the aforementioned work-related injury pursuant to the Tennessee Workers' Compensation Act."

The judgment clearly permits Travelers Insurance Company to request a hearing on the issue of whether the medical expenses incurred after July 18, 2000 were reasonable and necessary, and related to the October 8, 1999 injury. We will, therefore, affirm the judgment and remand the case to the trial court for any necessary proceedings.

Disposition

The judgment of the trial court is affirmed, and the case is remanded to the trial court for any necessary proceedings. Costs of the appeal are taxed against the Appellant.

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Howell N. Peoples, Special Judge

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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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the Appellant, Travelers Insurance Company and its surety, for which execution may issue if necessary.