IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 17, 2006 Session

ROY RUSSELL v. THYSSEN KRUPP ELEVATOR MANUFACTURING, INC.

Direct Appeal from the Chancery Court for Hardeman County
No. 14954 Dewey C. Whitenton, Chancellor

No. W2005-02226-WC-R3-CV - Mailed July 3, 2006; Filed August 3, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer insists the trial court erred in finding that the claimant gave proper notice of his injury, in finding the claimant suffered an injury by accident arising out of and in the course of his employment with the defendant and in awarding permanent partial disability benefits based on thirty percent to the body as a whole. The Panel has concluded the judgment of the trial court should be affirmed.

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

JOE C. LOSER, JR. SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and J. S. DANIEL, SR. J., joined.

Gregory D. Jordan, Rainey, Kizer, Reviere, & Bell, Jackson, Tennessee, for the appellant, Thyssen Krupp Elevator Manufacturing, Inc.

Steve Taylor, Memphis, Tennessee, for the appellee, Roy Russell

MEMORANDUM OPINION

The employee or claimant, Roy Russell, initiated this civil action to recover workers' compensation benefits for an accidental back injury allegedly occurring at work on April 16, 2003. The employer, Thyssen Krupp Elevator Manufacturing, Inc., denied the occurrence of an accidental work related injury on that date. After considering the evidence, the trial court awarded the employee, among other things, permanent partial disability benefits based on thirty percent to the

body as a whole. The employer has appealed contending (1) the evidence preponderates against the trial court's finding that the employee gave the statutorily required notice of his injury, (2) the evidence preponderates against the trial court's finding that the employee suffered an injury by accident arising out of and in the course of his employment, and (3) the evidence preponderates against an award of permanent partial disability benefits.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Gov't of Sumner County, 908 S.W.2d 921, 922 (Tenn.Workers' Comp. Panel 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Hill v. Wilson Sporting Goods Co., 104 S.W.3d 844, 846 (Tenn. Workers' Comp Panel 2002). Issues of statutory construction are solely questions of law. Id. Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. Workers' Comp. Panel 1995), because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57 (Tenn. 2001). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Id at 61. Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn Workers' Comp. Panel 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Bridges v. Liberty Ins. Co. of Hartford, 101 S.W.3d 64, 67 (Tenn. Workers' Comp Panel 2000). Our independent examination of the record, giving due deference to the findings of the trial court, is as follows.

The claimant is an approximately forty-six-year-old resident of Middleton with a high school education. He began his career as a forklift operator in 1983. On April 24, 1995, while working for Harman Automotive, he injured his lower back when the forklift he was operating struck an estimated six inch pothole He subsequently received workers' compensation benefits and was unable to return to the workforce for three or four years. He began working for the present employer in 1999 and eventually began operating a forklift. He had a minor injury in 2002 and received short term disability benefits from January 21, 2002 until March 18, 2002 provided by the employer, but no workers' compensation benefits. He returned to his job as a forklift operator and, on April 16, 2003, injured his back when his forklift struck another pothole. He finished his shift that night but was unable to work the next day. He testified that the 2003 injury was about four inches lower in his back than his original 1995 injury. The April 16, 2003 accident is the subject of this litigation.

Following the accident in question, the claimant immediately notified his supervisor, Chris

Austin, that he thought he had injured his back. Six days later, he saw Dr. William Andrew Eason, a family practitioner, but does not remember whether he told Dr. Eason about his injury at work. He does remember complaining of back pain and depression. Dr. Eason did not examine the claimant's back but treated him for other maladies, including anxiety, depression and bronchitis. The next day, he visited Dr. Rock A. Wooster, a chiropractor, complaining of intermittent back pain since 1995 and leg pain. Dr. Wooster treated the claimant three times a week from April 23, 2003 to June 12, 2003 and from September 3, 2003 to September 23, 2003. The treatments provided some temporary relief. Dr. Wooster recommended the claimant obtain a "second opinion" from another doctor. Dr. King, an anesthesiologist and pain management specialist in the office with Dr. Wooster, saw the claimant on April 24, 2003, but did not testify at the trial.

His attorney referred the claimant to Dr. Tewfik E. Rizk, a physiatrist. Dr. Rizk first saw Mr. Russell on April 13, 2004 and obtained a history which included the April 2003 accident. Diagnostic tests ordered by Dr. Rizk reflected radiculopathy or nerve impingement in Mr. Russell's low back and radiating into his left leg. Dr. Rizk opined, based on a reasonable degree of medical certainty, that the injury was caused by the April 16, 2003 accident at work and estimated the claimant's permanent vocational impairment to be twelve percent to the whole body, using statutorily required guidelines. After reading Dr. Rizk's report, Dr. Wooster agreed. Dr. Mark Harriman, who examined the claimant and viewed his medical records at the request and expense of the employer, testified he found no evidence of any permanent impairment resulting from the "alleged" accident of April 16, 2003.

The employer contends the written notice of an accidental injury is an absolute prerequisite to recovery in a workers' compensation case and that the trial court erred in finding such notice was given in this case. Immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, an injured employee must, unless the employer has actual knowledge of the accident, give written notice of the injury to his employer. Tenn. Code Ann. § 50-6-201(a). Benefits are not recoverable from the date of the accident to the giving of such notice, and no benefits are recoverable unless such written notice is given within thirty days after the injurious occurrence, unless the injured worker has a reasonable excuse for the failure to give the required notice. Id. The notice may be given by the employee or his representative. Id. In determining whether an employee has shown a reasonable excuse for failure to give such notice, courts will consider the following criteria in light of the above reasons for the rule: (1) the employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusing of the notice requirement, and (3) the excuse or inability of the employee to timely notify the employer. McCaleb 910 S.W.2d at 415. It is significant that written notice is unnecessary in those situations where the employer has actual knowledge of the injury. Raines v. Shelby Williams Indus, Inc., 814 S.W.2d 346, 348 (Tenn. 1991).

The record reflects that the employee's immediate supervisor, Mr. Austin, was present when the accident occurred and that Mr. Russell told Mr. Austin he thought he was injured. The record also reflects that, approximately one week after the accident, the employee gave a written notice to the employer's personnel manager, Ms. Gunn, who commented the injury might be treated as a

workers' compensation matter. Neither Mr. Austin nor Ms. Gunn testified at trial and no explanation was given for their absence. Under such circumstances, the trial court did not err in finding notice timely given and the evidence fails to preponderate against such finding.

The employer further contends the trial court erred in finding the claimant suffered an injury by accident arising out of and in the course of his employment with the employer. Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. § 50-6-103(a); McCurry v. Container Corp. of Am., 982 S.W.2d 841, 843 (Tenn. 1998). An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. Workers' Comp. Panel 1993). It is the resulting injury which must be unexpected in order for the injury to qualify as one by accident. Id. "Injury" has been defined as including "whatever lesion or change to any part of the system that produces harm or pain or a lessened facility of the natural use of any bodily activity or capability." Id. The claimant's own undisputed testimony that the forklift he was driving struck a pothole causing immediate pain provides proof the employee suffered an injury by accident. The trial court found the claimant to be credible.

As a general rule, an injury arises out of and in the course of employment if it has a rational causal connection to the employee's work and occurs while the employee is engaged in the duties of employment, and any reasonable doubt as to whether an injury arose out of the employment or not is to be resolved in favor of the employee. White v. Werthan Indust., 824 S.W.2d 158, 159 (Tenn. 1992). The evidence is undisputed that the employee was engaged in the duties of his employment when the accident occurred.

Although Dr. Harriman testified otherwise, the trial court found the employee to be credible and accepted the testimony of Dr. Rizk, corroborated by Dr. Wooster, over that of Dr. Harriman. When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Story v. Legion Ins., Co., 3 S.W.3d 450 (Tenn. Workers' Comp Panel 1999). Dr. Rizk is a clinical assistant professor in medicine at the University of Tennessee, Memphis, as well as director of rehabilitation at the Rehabilitation Hospital of Memphis and has vast experience in rheumatology and physiatrics. He is on the medical staffs of two Memphis based hospitals and on the consulting staff of another. He is a physician adviser for Travelers Insurance Company and Republic Insurance Company. Dr. Wooster relied on Dr. Rizk's opinion in forming his own opinion. Although Dr. Harriman also carries impressive credentials, the trial court did not err in accepting Dr. Rizk's opinion or accrediting the testimony of the claimant that the claimant suffered a new injury as defined by the above authorities and that the injury was causally related to the claimant's work. Thus, we affirm the trial court's conclusion that the claimant suffered an injury by accident arising

out of and in the course of his employment.

The final issue raised by the employer questions the award of permanent disability benefits. In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). The employer argues that the testimony of Dr. Rizk is suspect and that, even if that proof is acceptable, he only noted a slight anatomical change in the claimant's back. The Panel has concluded that the trial court did not err in accepting the opinions of Dr. Rizk, concurred in by Dr. Wooster, and the employee's own testimony that his capacity for working has been diminished. Even the slightest anatomical change will justify a finding of permanency if there is credible proof that the change has permanently affected the employee's ability to work and earn an income. From our independent examination of the evidence, we cannot say the evidence preponderates against an award based on thirty percent to the body as a whole, giving due deference to the finding of the trial court. The issue is without merit.

The judgment of the trial court is therefore affirmed. Costs on appeal are taxed to the appellant and its sureties in which execution may issue if necessary.

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JOE C. LOSER, JR., SPECIAL 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 on appeal are taxed to the Appellant, Thyssen Krupp Elevator Manufacturing, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM