IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 1, 2005 Session

GARY R. SLONE v. WOODCRAFT MANUFACTURING, INC., ET AL.

Direct Appeal from the Circuit Court for Greene County
No. 01CV869 Ben K. Wexler, Circuit Judge

Filed October 30, 2006

No. E2005-01575-WC-R3-CV - Mailed August 9, 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. The trial court awarded Plaintiff 100 percent permanent disability. On appeal, Defendants contend the trial court erred in (1) finding Plaintiff's stroke was work-related, (2) in awarding Plaintiff 100 percent disability, and (3) in allowing medical expenses for treatment at the VA Hospital. We affirm the judgment of the trial court.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which RILEY E. ANDERSON, J., and SHARON G. LEE, SP. J., joined.

G. P. Gaby, Greeneville, Tennessee, attorney for Appellants, Woodcraft Manufacturing, Inc., and Caddell Construction Company, Inc.

Tony G. Lee, Jr., Greeneville, Tennessee, attorney for Appellee, Gary R. Slone.

MEMORANDUM OPINION

Defendants, Woodcraft Manufacturing, Inc., and Caddell Construction Company, Inc., have appealed the trial court's award of 100 percent permanent disability to Plaintiff, Gary R. Slone. Defendant Woodcraft was a subcontractor who employed Plaintiff and after it was determined there was no workers' compensation insurance, an amended complaint was filed against the general or principal contractor, Caddell.

Facts

Gary R. Slone, a sixty-year-old college graduate with a degree in economics, began working as a finish carpenter with Woodcraft during April 2001 at the construction of the new federal courthouse in Greeneville. On August 8, 2001, which was several days prior to his sixtieth birthday, he suffered a stroke and collapsed around 3:00 p.m. at work. Slone and a co-worker were working on the fourth floor of the building in the area of the judges' chambers where there was no ventilation and no air conditioning. It was stipulated that the outside temperature was 92 degrees. Prior to his collapse, the two workers had been carrying building materials from the ground floor up to the fourth floor. The materials weighed about 100 pounds and could not be transported in the building elevator because of its length. Due to the length of the materials and the design of the stair-steps, at times they had to hold the bundles up over their heads in order to make the turn. After the second trip of bringing the materials up, Slone collapsed.

Slone testified that it was very hot on the day in question and they were sweating so much that their hats kept sliding off of their heads. Co-worker Terry L. Laws testified the temperature was "[b]listering. It was like being inside a glass aquarium. The sun was going down, coming right through the glass windows in that corner of the building; no ventilation, no air conditioning, very hot." Laws also said it was very noisy during most of the day as fire alarms were being tested and they had been given ear plugs.

After being taken to a local hospital, Plaintiff was transferred to the Johnson City Medical Center where he had surgery and remained for about eight days. He was then admitted to the Quillen Rehab Center in Johnson City on August 16, 2001 and was discharged on September 4, 2001. He returned home and later was admitted to the VA Center in Johnson City where he had further therapy for a period of several months.

Prior to the stroke, Plaintiff testified he had been in very good health and was very active. He had been operated on for a blood clot in his head back in the 1970's but recovered completely. There was also evidence a brother died of a cerebral hemorrhage at the age of twenty-eight.

After the last surgical procedure, Plaintiff was in a wheelchair for a while; then to using a walker; then to a forearm crutch; and finally to using a cane, which was his walking aid at the time of the trial below. He stated that his entire left side was affected by the stroke and he had no motor function in his left arm; that he walked very slowly, had short term memory loss, bad shoulder pain and a rectal dysfunction all due to the stroke. When asked if he could do any work, he stated he was trying to operate a cash register two to three hours a week at the Habitat for Humanity house, which was volunteer work.

Plaintiff's wife, Alice Slone, testified that prior to the stroke, her husband was in excellent health and was very active. She said that since the event, he has a great deal of difficulty in maintaining his balance.

All of the medical evidence was presented by deposition.

Dr. Steven C. Hamel, a board-certified neurosurgeon, admitted Plaintiff to the hospital in Johnson City and stated that the CT scan revealed an intracerebral hemorrhage; that he performed surgery and removed the blood clot; and that during surgery, he saw abnormality of the blood vessels which the hospital pathologist found was consistent with what is called AVM or intracranial arteriovenous malformations. He said by history, this seemed to be what Plaintiff was operated on for during the 1970's.

Dr. Hamel was told of the conditions at work on the day in question and was asked if that activity could have caused the rupture or bleeding which in turn caused the stroke. He was of the opinion that such events at work could have caused the stroke and said that strenuous activity can lead to wide swings in blood pressure and that can cause an arterial venous malfunction to hemorrhage. The doctor said Slone was paralyzed on his left side and that he had made some improvement. He was also of the opinion that he was unable to return to work and was totally disabled.

The Defendants presented the testimony of two doctors both of whom had never seen or examined the employee but had reviewed various hospital records, doctors' notes and a statement of the conditions at work on the day in question.

Dr. Steven W. Morgan, a neurologist practicing in Bristol, Tennessee, testified that the blood vessel abnormality was congenital and that he was not willing to say the work caused the hemorrhage. He said such a condition always presented a risk of hemorrhage without any activity and it would be speculative to say Plaintiff's work caused the stroke. During his testimony, he referred to an article in the *Journal of Neurosurgery*, March 1988 issue, indicating a study revealed that elevated blood pressure did not have any correlation with the risk of a rupture of a malformation. However, on cross-examination, he admitted the article did not appear to determine if there was any relationship between strenuous activity or stress and the occurrence of intracranial hemorrhage. At another point of questioning, he testified he also could not say that the events at work could not cause the hemorrhage.

Dr. Stephen M. Kimbrough, a neurologist practicing in Johnson City, examined the same medical records, etc. and concluded that the Plaintiff's "excess work" did not cause the hemorrhage but did admit that such work conditions could elevate his blood pressure. He said it would be speculative to say the stroke was due to his work activity.

Standard of Review

The standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Analysis-Causation Issue

It is insisted that the trial court erred in weighing the expert medical testimony and that the greater weight of the evidence supported the opinions of Drs. Morgan and Kimbrough that the stroke could have occurred at any time and was not caused by the employee's work conditions.

Although causation cannot be based upon speculation or conjectural proof, absolute certainty is not required and reasonable doubt is to be construed in favor of the employee. *Hill v. Eagle Bend Mfg.*, 942 S.W.2d 483 (Tenn. 1997); *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992). An employer is responsible for workers' compensation benefits even though the claimant may have been suffering from a serious pre-existing condition or disability if the employment causes an actual progression or aggravation of the prior condition or disease. *Hill v. Eagle Bend Mfg., Id.* So an employer takes an employee as he or she is and assumes the responsibility of having a pre-existing condition aggravated by a work-related injury which might not affect a normal person and an injury is compensable if a work-related event can be fairly said to be a contributing cause of the injury. *Fink v. Caudle,* 856 S.W.2d 952 (Tenn. 1993).

It is entirely appropriate for a trial judge to predicate an award on medical testimony to the effect that a given incident "could be" the cause of the employee's injury when the court also has heard lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight System, Inc.*, 938 S.W.2d 690 (Tenn. 1997); *Hill, supra*.

In the present case, the court accepted the medical evidence of the treating doctor over the evidence of the other two doctors. Dr. Hamel was of the opinion that the conditions at work could have caused the employee's stroke. Dr. Kimbrough opined that such conditions could not have done so. Dr. Morgan testified he could not say the work conditions could or could not have caused the stroke. The trial judge has the primary responsibility of resolving conflicting evidence. On appeal, the court's finding will not be overturned unless it is found that the evidence preponderates against the court's conclusion. The evidence does not preponderate against the court's conclusion on the issue of causation.

Analysis-Total Permanent Disability

It is argued that the evidence does not support a finding of total disability and that any award should not exceed 50 percent disability.

In order to award total disability benefits, the evidence must establish the disability totally incapacitates the employee from working at an occupation which brings the employee an income. Tenn. Code Ann. § 50-6-207(B). In determining this question, many factors must be taken into consideration in deciding whether an employee is totally disabled, such as the employee's age, education, work experience, local job opportunities, etc. and this is to be examined in relation to the open labor market. *Orman v. Williams Sonoma Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991); *Clark v.*

National Union Fire Ins. Co., 774 S.W.2d 586, 588 (Tenn. 1989). The statutory definition of total disability focuses on an employee's ability to return to gainful employment. *Davis v. Reagan,* 951 S.W.2d 766 (Tenn. 1997).

In the case at bar, the evidence indicated that after Plaintiff graduated from college, he and his father operated a rather large grocery store for a period of sixteen years; that he worked as a deputy sheriff for about twelve years; was an office manager of a 400-unit condominium; and served in the United States Marines for about ten years of which seven years was on active duty. Sometime after leaving the service, he decided to work as a finish carpenter as he always loved working with wood. Prior to his stroke during April 2001, he had been working as a carpenter for a number of years.

We find that the nature of Slone's permanent disability would prevent him from resuming any of these prior occupations and when his disability is viewed in relation to the open labor market, we concur with the trial court that he is totally disabled.

Analysis-VA Hospital Medical Expense

After Slone was discharged from the Quillen Rehabilitation Hospital, he had outpatient therapy two days a week for one hour each day. He was then admitted to the Veterans Affairs Medical Center in Johnson City on November 27, 2001 where he remained until his discharge on March 1, 2002. The trial court held the Defendants were responsible for payment of treatment at the VA Center which was in the total sum of $157,000. Defendants contend the treatment was not medically necessary and this portion of the judgment should be disallowed.[1]

Generally, the employee does not have the burden of proof to establish the necessity of medical treatment or the reasonableness of medical charges when the employer has designated the physician to treat the employee. *Russell v. Genesco, Inc.*, 651 S.W.2d 206 (Tenn. 1983). However, the employee has the burden of establishing "necessity and reasonableness" of charges incurred for treatment by providers not designated or otherwise approved by the employer. *Baggett v. Jay Garment Co.*, 826 S.W.2d 437 (Tenn. 1992).

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[1] Although employee Slone is not liable for the medical bills since he was a veteran and qualified for hospital admission, a federal statute, 38 U.S.C. section 1729 provides:

> 38 U.S.C. § 1729(a)(1):
> Subject to the provisions of this section, in any case in which a veteran is furnished care or services under this chapter for a non-service-connected disability described in paragraph (2) of this subsection, the United States has the right to recover or collect reasonable charges for such care or services (as determined by the Secretary) from a third party to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from such third party if the care or services had not been furnished by a department or agency of the United States.

On the issue of necessity of medical treatment, the trial court was presented with the deposition testimony of two doctors.

Dr. Mark T. McQuain, a physical medical rehabilitation specialist at a private orthopaedic group, testified he was formerly an associate director at what is now known as the Quillen Rehab Center and that he had been furnished and had examined various medical records pertaining to Slone's hospitalization. He said he did not see why inpatient admission to the VA Center was necessary and also that the records did not seem to show substantial improvement in his functional results.

The doctor later admitted that in this type of injury, it is best to establish a rigid protocol, both physically and mentally, to save or reteach the body to be able to move and recapture part of what was lost from the stroke; that inpatient admission subjects one to "a very demanding, physical regime, often under [the direction of] a therapist four and five hours a day doing various activities" and after which nurses picked up on that type of care; and that the benefit of inpatient care would be the intensity of treatment which would include not only physical therapy but occupational therapy, speech therapy, and nursing treatment. Another factor or benefit was that if something was not working well, it could be changed quickly since the patient was under full monitoring. The doctor stated the total charges seemed to be "in the ballpark."

Dr. Kaggal V. Umakantha, chief of physical medicine at the VA Center in Johnson City, testified he had practiced orthopaedic surgery in India ten years before coming to the United States but was not presently engaged in seeing orthopaedic patients at the VA. He never saw Slone during his period of hospitalization but did examine the various medical records of the hospital and stated that at the time of admission, he was having problems with depression, cognitive deficits, urinary incontinence and speech deficit. He said Slone and his family felt he was not making significant progress with the limited therapy he was getting on an outpatient basis and they wanted to see if he could benefit from a more intensive therapy. The doctor said prior medical records indicated he was falling frequently after discharge from the Quillen Rehab Center and that his long-term stay at the VA Center would have been medically justified for this reason. He stated their program included what is known as kinesitherapy and it is usually only found at VA Centers and not in the private sector. Kinesitherapy is unique to VA Centers, and includes gait training and strengthening exercises in addition to basic physical therapy, occupational therapy, speech therapy. As to the progress of the patient, the doctor stated his tendency to fall had improved during his stay and there was also improvement in his depression and/or stress. The doctor was of the opinion that he had benefited in all respects from their intensive therapy.

The trial court found the employee's hospitalization at the VA Center was medically necessary and held Defendants were liable under the federal statute for payment of these services. The Defendants never recognized the employee's condition as resulting from a work-related event and the employee was left to choose his own medical providers. From our examination of the record, we cannot say the evidence preponderates against the ruling of the trial court on this issue.

Conclusion

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the Defendants and their sureties.

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ROGER E. THAYER, SPECIAL JUDGE

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JUDGMENT

This case is before the Court upon the motion for review filed by Woodcraft Manufacturing, Inc. and Caddell Construction Company, Inc., pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Woodcraft Manufacturing, Inc. and Caddell Construction Company, Inc., and their sureties, for which execution may issue if necessary.

ANDERSON, J., NOT PARTICIPATING