IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT NASHVILLE

LONA SWINDLE v. UNIPRES U.S.A. and TENNESSEE DEPARTMENT OF LABOR AS CUSTODIAN FOR THE SECOND INJURY FUND OF THE STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Macon County
No. 4792 John D. Wooten, Jr., Judge

No. M2005-02513-WC-R3-CV - Mailed - December 18, 2006
Filed - January 19, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer asserts that the trial court erred in finding the employee's back injury compensable, in finding the employee to be permanently and totally disabled, and in apportioning the permanent total disability award between the employer and the Second Injury Fund. The Second Injury Fund also asserts the trial court erred in finding employee to be permanently and totally disabled and in calculating the award. The employee asserts the trial court erred in allocating a setoff for disability insurance payments. We reverse in part and modify in part.

Tenn. Code. Ann. § 50-6-225(e) (1999) Appeal as of Right, Judgment of the Macon County Circuit Court is reversed in part and modified in part.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and JEFFREY S. BIVINS, SP. J. joined.

M. Clark Spoden, Julie A. Schreiner-Oldham, Brian Neal, Frost Brown Todd, LLC, Nashville, Tennessee, for Appellant, Unipres, U.S.A., Inc.

Paul G. Summers, Attorney General, Lauren S. Lamberth, Assistant Attorney General, Nashville, Tennessee, for Appellant Second Injury Fund.

William Joseph Butler, E. Guy Holliman, Farrar, Holliman & Butler, Lafayette, Tennessee, for Appellee, Lona Swindle.

MEMORANDUM OPINION

Facts

Lona Swindle filed her complaint against Unipres U.S.A., Inc. ("Unipres") for workers' compensation benefits on April 10, 2002 alleging that she sustained "cumulative injuries to both of her hands, elbows and arms." She also alleged that she had received court awarded vocational disability for previous work injuries for which the Second Injury Fund would be responsible. The complaint did not mention any claim that she had sustained a work-related injury to her back. On January 14, 2003, Ms. Swindle amended her complaint to add the assertion that she was permanently and totally disabled as a result of a "combination of the Plaintiff's pre-existing non-work-related injuries and/or conditions and the subject work-related injuries . . ." The amended complaint also did not mention any claim of a work-related back injury.

In January 2002, Ms. Swindle was diagnosed with bilateral carpal tunnel syndrome. She was treated by Dr. Roy Terry, who performed surgeries on both wrists. He released her to return to work without restrictions on June 27, 2002. Ms. Swindle returned to work at Unipres with activities that were less repetitive, but involved heavier lifting and more bending than the job that caused the carpal tunnel syndrome.

On September 13, 2002, Ms. Swindle saw Jennifer Dittes, a certified physician's assistant with complaints of back pain. Ms. Swindle testified that she stopped working at Unipres on October 21, 2002 because of back pain. She did not report a back injury to her employer as being work related. On April 8, 2003, Ms. Swindle filed an application for long-term disability benefits for the back injury and represented her injuries were not work related.

Decision Below

The trial court found that the Ms. Swindle's bilateral carpal tunnel syndrome was work-related, that the back injury resulted from the carpal tunnel syndrome, and that the combination of the injuries and her pre-existing condition caused her to be permanently and totally disabled. The trial court apportioned 70 percent of the award to Unipres and 30 percent to the Second Injury Fund. The trial court also granted Unipres an offset for payments to Ms. Swindle made by a disability insurance policy for long-term disability due to her back injury.

Standard of Review

The standard of review in a workers' compensation case 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); *Houser v. BiLo, Inc.*, 36 S.W.3d 68, 70-71 (Tenn. 2001). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United*

Parcel Service, 92 S.W.3d 380, 383-4 (2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser*, 36 S.W.3d at 71. However, this court is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002).

Issues

1. Did the trial court err in finding that Ms. Swindle sustained a work-related back injury?

2. Did the trial court err in awarding benefits for Ms. Swindle's back injury when the Complaint alleged no such injury?

3. Did Ms. Swindle fail to provide the required notice to her employer that she claimed to have a work-related back injury?

4. Did the trial court err in finding Ms. Swindle to be permanently and totally disabled?

5. Did the trial court err in stating the permanent disability award to Ms. Swindle for her bilateral carpal tunnel syndrome?

6. Did the trial court correctly apportion the permanent and total disability award between Unipres and the Second Injury Fund?

7. Did the trial court err in calculating the offset of disability insurance against the workers' compensation award.

Discussion

A. Carpal Tunnel Syndrome

Ms. Swindle's claim that she sustained work-related bilateral carpal tunnel syndrome is not disputed. In January 2002, she was diagnosed with bilateral carpal tunnel syndrome. Dr. Roy Terry performed surgery on her right wrist on March 18, 2002, and on her left wrist on May 20, 2002. She returned to work without restrictions on June 27, 2002. Ms. Swindle last saw Dr. Terry on August 29, 2002 for an impairment rating. He assigned a two percent impairment to each upper extremity. She subsequently saw Dr. Arthur R. Cushman for evaluation. He assigned a permanent impairment rating of eight percent to the right upper extremity and six percent to the left upper extremity for the bilateral carpal tunnel syndrome. He imposed restrictions of "no repetitive gripping or squeezing with either hand, no pounding with the palm of either hand, and no use of vibratory or pneumatic tools." Ms. Swindle is entitled to workers' compensation benefits for the bilateral carpal tunnel syndrome.

B. Back Injury

Ms. Swindle's claim of a work-related back injury is controverted. Dr. Robert T. Mitchell, an internist, testified that Ms. Swindle suffered from permanent and painful degenerative arthritis when he saw her in 1999. On September 13, 2002, Ms. Swindle saw Jennifer Dittes, a certified physician's assistant with complaints of back pain. She did not tell Ms. Dittes that she had fallen in her bathtub. Ms. Dittes had treated Ms. Swindle for arthritis as early as July 8, 1999. She testified that she felt the most likely cause of Ms. Swindle's disc herniation was her long history of degenerative arthritis. Ms. Swindle testified that she saw Dr. Arthur R. Cushman and that she told him that she fell in bathtub or might have injured her back at work. Dr. Cushman testified that he first saw Ms. Swindle on November 4, 2002, and he subsequently performed two back surgeries on her. He testified she just reported a "kind of gradual onset of pain with doing things. She did not relate the fall in the bathtub to me." Dr. Cushman testified that tests showed longstanding degenerative disc disease.

Ms. Swindle has said at various times that she injured her back at work or when she fell in the bathtub or as "a gradual onset of pain with doing things." There is no reliable testimony as to when or how she injured her back. No witness corroborates any injury to her back at work. In this case, her counsel argues that the back injury that resulted when she slipped in the bathtub at home is work related. To be work-related and compensable, an injury must "arise out of" the employment as well as "in the course" of employment. *Armstrong v. Liles Constr. Co.*, 215 Tenn. 678, 389 S.W.2d 261 (1965). An injury is "in the course of' employment if it occurs while the employee is performing a duty assigned by the employer. The injury 'arises out of" the employment if it results from a hazard incident to the employment. *Williams v. Preferred Dev. Corp.*, 224 Tenn. 174, 452 S.W.2d 344 (1970). If Ms. Swindle fell and hurt her back when she slipped in the bathtub, there is no injury in the course and scope of her employment. She was not engaged in performing a duty assigned by her employer and the fall did not result from a hazard of her employment.

Counsel for Ms. Swindle argues: "Dr. Landsberg essentially stated that weakness in Ms. Swindle's hands and arms following the CTS surgery caused the fall in the bathtub which necessitated two low back surgeries, including the fusion, while Dr. Cushman did not testify to any specific cause." Counsel relies on *McAlister v. Methodist Hospital of Memphis*, 550 S.W.2d 240 (Tenn. 1977) holding that any injury caused by treatment ordered by an authorized treating physician is deemed compensable. The record reflects no testimony from any physician that the back injury was caused by the <u>treatment</u> for carpal tunnel syndrome. In fact, the claimed back injury occurred after treatment for the carpal tunnel syndrome had ceased and Ms. Swindle had returned to work.

Counsel for Ms. Swindle asserts that *McWhirter v. Kimbro*, 742 S.W.2d 255 (Tenn. 1987) and *Riley v. Aetna Cas. & Surety*, 729 S.W.2d 81 (Tenn. 1987) holds that where an injury to one part of the body causes a condition to develop in another part of the body, the entirety of the injury is compensable. *Jones v. Huey*, 210 Tenn. 162, 357 S.W.2d 47 (1962) makes it clear that "when the proof shows that a subsequent injury is a <u>direct</u> and <u>natural</u> <u>consequence</u> of the

compensable injury, the later injury is compensable as well." *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 938 (Tenn. 1987) (emphasis supplied). Under the theory of counsel for Ms. Swindle, the back injury resulted from the fall in the bathtub, not as a natural consequence of the carpal tunnel syndrome. We also find that the chain of causation cannot be established by equivocal evidence. *Id.* at 938. Dr. Landsberg was not present when Ms. Swindle slipped in the bathtub. His testimony as causation is based on the history provided by his patient. Ms. Swindle testified:

> Well, I got these little steps made, you know, where I can go up in the bathtub. I've got a spa for my arthritis. I had that put in there because my arthritis was so bad. Anyway, I started to get in the bathtub like always, and when I started to get in there I put my hand on the bathtub, on the side of the bathtub, and I fell. When I did, I jerked my hand up. I felt that pain running up in my arm. A pain hit me up in my arm.

She testified that when she went to see Dr. Cushman,

> he asked me what caused my back to be like that, and I told him that I fell in the bathtub, but, I said, I might have done it at work. I might have done it in the bathtub. I said, I can't say because if I went back to Unipres and told them it was my back, they would put me back to work the next day, and I can't do nothing. He started me with therapy.

A workers' compensation award may be based on medical testimony to the effect that a given incident "could be" the cause of the claimant's injury when there is lay testimony from which it may be reasonably drawn that the incident was in fact the cause of the injury. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 (Tenn. 1991). Ms. Swindle's testimony concerning how and when she sustained her back injury is equivocal and inconsistent at best. It is not clear whether pain in her arm caused her to slip or whether the pain in her arm occurred after she slipped. She is unable to state the approximate date when she fell in the bathtub. She has even stated that she sustained her back injury at work or as a gradual onset of pain rather than the fall in her bathtub. Dr. Landsberg's testimony as to causation of the back injury is based on an unreliable history and is speculative at best. There is no other medical evidence proving a causal connection between the carpal tunnel syndrome and the back injury. We find the lay evidence too uncertain and speculative to provide the necessary inference of a causal connection between the carpal tunnel syndrome and the back injury. Thus, the evidence preponderates against the finding of the trial court that Ms. Swindle suffered a compensable back injury. The award of permanent and total disability to the body as a whole as a result of the back injury is reversed.

Our finding that the back injury is not work-related renders moot the second and third issues relating to failure to plead the back injury in the Complaint and failure to provide statutory notice of the claim.

C. Permanent Disability

Having determined that the trial court erred in awarding compensation for the back injury, we must determine the proper award for the carpal tunnel syndrome. Dr. Terry assigned a two percent impairment to each upper extremity for the carpal tunnel syndrome, and returned her to work without restrictions. Dr. Landsberg assigned a six percent impairment to the left upper extremity and an eight percent impairment to the right upper extremity for the carpal tunnel syndrome. Dr. Landsberg imposed restrictions of "no repetitive gripping or squeezing with either hand, no pounding with the palm of either hand, no use of vibratory or pneumatic tools." We concur with the trial court that Dr. Landsberg did extensive testing and followed the *A. M. A. Guides to the Evaluation of Permanent Impairment*, and that his opinion is entitled to greater weight.

Dr. Landsberg also assigned a 28 percent impairment to the whole body for arthritis in both hands, hyperthyroidism, gastroensophageal reflux disease, fibromyalgia, and arthritis in both knees, conditions that pre-existed the carpal tunnel syndrome.

Ms. Swindle completed the 8th grade and had no formal vocational training. She has difficulty reading and writing. For 27 years, she has performed only manual factory labor. The trial court found that Ms. Swindle sustained a 48 percent permanent partial disability to her right arm and a 36 percent permanent partial disability to the left arm as a result of the work-related carpal tunnel syndrome. Because an injury to both arms is a scheduled injury, the trial court found that Ms. Swindle sustained a 42 percent vocational disability to both arms.

Dr. Rodney Caldwell, a vocational disability expert testifying for Ms. Swindle, said that there were no jobs in the local or national economies that Ms. Swindle could perform based on the restrictions imposed by Dr. Landsberg. He stated that she had no vocational disability based on Dr. Terry's restrictions. Dana Stoller, vocational expert testifying for Unipres, said that Ms. Swindle had a 23 percent vocational disability based on the restrictions of Dr. Landsberg, and no disability based on the testimony of Dr. Terry.

Counsel for Ms. Swindle argues that, because of Ms. Swindle's pre-existing medical condition, the trial court could have awarded permanent total disability benefits for the bilateral carpal tunnel syndrome. We find that the evidence supports the award of 42 percent disability to both arms.

D. Apportionment and Offset Issues

Tenn. Code Ann. § 50-6-208 imposes liability on the Second Injury Fund when the employer is aware that the employee has previously sustained a permanent disability from any cause and the employee becomes permanently and totally disabled because of a subsequent injury. In this case, because the award of permanent and total disability is reversed, the apportionment of any part of the award to the Second Injury Fund must also be reversed.

The reversal of the award for the back injury also impacts the allowance to the employer of an offset for disability insurance payments made to Ms. Swindle. Tenn. Code Ann. § 50-6-114 provides a set off only when employer-funded disability payments are made for the same injury for which workers' compensation benefits are paid. In this case, the disability insurance payments are for disability based on the back injury. No set-off is allowable for the permanent disability to both arms, a separate injury. The allowance of a set-off to Unipres for disability insurance payments is reversed.

Disposition

The judgment of the trial court is modified to award Ms. Swindle 42 percent vocational disability to both arms. The apportionment of the award to the Second Injury Fund is reversed. The allowance of a set-off for disability insurance payments made to Ms. Swindle for her back injury is reversed. Costs of the appeal are taxed one-half to Appellant, Unipres U.S.A., Inc., and one-half to Appellee, Lona Swindle.

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Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
OCTOBER 27, 2004 SESSION
JULY 25, 2006

LONA SWINDLE v. UNIPRES U.S.A. and TENNESSEE DEPARTMENT OF LABOR AS CUSTODIAN FOR THE SECOND INJURY FUND OF THE STATE OF TENNESSEE

Circuit Court for Macon County
No. 4792

No. M2005-02513-WC-R3-CV - Filed - January 19, 2007

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 appeals 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 of the appeal are taxed one-half to Appellant, Unipres, U.S.A., Inc. and one-half to Appellee, Lona Swindle.

IT IS SO ORDERED.

PER CURIAM