IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 26, 2007 Session

GERALD AMOS v. ATLAS VAN LINES, INC., ET AL.

Direct Appeal from the Chancery Court for Perry County
No. 4255 Jeffrey Bivens, Chancellor

No. M2006-01360-WC-R3-WC - Mailed - July 2, 2007
Filed - September 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. In this case, the employee, Gerald Amos, suffered a heart attack following a theft from his person while waiting at a truck stop for a scheduled pick-up. The trial court found the employee's heart attack to be compensable and awarded benefits for permanent total disability. The trial court refused, however, to set off a portion of his social security benefits as provided in Tennessee Code Annotated section 50-6-207(4)(A)(i). The employer contends that the heart attack did not arise from or occur in the course of the employment. The employer also contends that the trial court erred by not setting off a portion of the employee's social security old age benefits against the award. We affirm the trial court's ruling on causation, but modify as to the set-off.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Trial Court Affirmed as Modified

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and JERRY SCOTT, SR. J., joined.

D. Randall Mantooth, Nashville, Tennessee, for the Appellants, Atlas Van Lines, Inc., and Legion Insurance Company.

James F. Conley, Tullahoma, Tennessee for the Appellee, Gerald Amos.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Plaintiff, Gerald Amos, worked as a truck driver for his brother, who leased his truck to Atlas Van Lines. As a part of the lease agreement, Atlas provided workers' compensation insurance for

the driver of the truck and, therefore, acknowledged responsibility for Mr. Amos' claim for benefits. At the time of trial, Mr. Amos was sixty-seven years of age. He had retired in 2000 and began receiving social security benefits but re-entered the workforce in 2001 in order to earn an additional income.

Mr. Amos testified that drivers who drove for Atlas were expected to be on the road for periods of six to eight weeks at a time. The practice was for Atlas to dispatch a driver to pick up a load of freight at a certain time and location for delivery to a second location. From that location they were dispatched to the next and so on. Occasionally, a driver would be contacted at the pick-up site and redirected to another site. According to Mr. Amos, Atlas preferred for their drivers to be near the next pick-up point between runs so that Atlas would know where they were and could more easily redirect them if it became necessary.

On October 19, 2001, Mr. Amos made a delivery in Atlanta, Georgia. Atlas then dispatched him to pick up a load of freight in Charlotte, North Carolina, on the morning of October 22. In part, because of the expense involved in driving the truck back to Tennessee, Mr. Amos drove directly to Charlotte to wait there to make the pick-up rather than returning to his home in Linden. He arrived in Charlotte on the morning of October 20 and stopped at a truck stop. Mr. Amos was parked at the truck stop and was napping in the cab of his truck when he was awakened by an unknown person, who offered to sell him some cigarettes for $5.00 per carton. Mr. Amos agreed to make a purchase. During the transaction, the unknown person picked his pocket, taking his wallet containing his cash, credit cards and commercial driver's license. Mr. Amos spent the next several hours being questioned by the police, attempting to get some form of written verification that the had a commercial driver's license and advising Atlas of what had transpired in order to obtain emergency cash. The next morning, he went to emergency room at the Presbyterian Hospital in Charlotte where he was diagnosed as having sustained a heart attack.

It was not disputed at the trial of this case that the stress caused by the theft and the events that followed precipitated the heart attack. In addition, the parties stipulated that, if the heart attack was found to be compensable, Mr. Amos was permanently and totally disabled. Plaintiff testified that, on the date of injury, he was receiving social security benefits in the amount of $1092.00 per month. At the time of trial, the amount had been reduced to $1043.00 per month because of a deduction for Medicare benefits.

Karen Vandiver, the Atlas representative, testified that Atlas had no rule or policy that required Mr. Amos to be at any specific place between the time he had made his delivery in Atlanta and the time he was to pick up his next load of freight in Charlotte. On cross-examination, she admitted that it was not unusual for a driver to wait at a truck stop for a day or two between trips. She also acknowledged that drivers had occasionally been robbed at truck stops in the past.

Toriarno Roddey, a Charlotte police officer, testified by deposition. Officer Roddey described the truck stop where the events occurred as a known crime area, and opined, based upon his experience, that cigarettes being sold for $5.00 per carton probably had been stolen.

Prior to trial, Atlas filed a motion for summary judgment based upon its argument that the heart attack did not arise out of or occur during the course of Mr. Amos' employment. The motion was denied and the case proceeded to trial. Following a trial, the trial court found the heart attack was compensable and that Mr. Amos was permanently and totally disabled. The trial court declined, however, to reduce the benefit awarded by a portion of the social security benefits being received by Mr. Amos. Atlas has appealed alleging the trial court erred in denying its motion for summary judgment, in finding Mr. Amos' heart attack arose from and occurred during the course of his employment with Atlas and in refusing to reduce Mr. Amos' award by a portion of the social security benefits he was receiving.[1]

II. 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). See also, Layman v. Vanguard Contractors, Inc., 183 S.W.3d 310, 314 (Tenn. 2006). 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 to determine where the preponderance of the evidence lies. Vinson v. United Parcel Service, 92 S.W.3d 380, 383-84 (Tenn. 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 v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). This Court, however, 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). Questions of law are reviewed *de novo* without a presumption of correctness. Perrin v. Gaylord Entertainment Co., 120 S.W.3d 823, 826 (Tenn. 2003).

III. ANALYSIS

Atlas has raised as separate issues the denial of its motion for summary judgment and the trial court's ultimate ruling on compensability. Initially, we note that "summary judgment is almost never an option in a contested workers' compensation action." Berry v. Consolidated Systems, Inc., 804 S.W2d 445, 446 (Tenn. 1991); See also, Byrd v. Hall, 847 S.W.2d 208, 210, n.1 (Tenn. 1993). The facts presented by Atlas in support of its motion did not differ in any material way from the evidence presented by the parties at trial. The same analysis that applies to this issue as to Atlas' second issue in which it alleges the evidence preponderates against the trial court's finding that Mr. Amos' heart attack was compensable. Accordingly, we will discuss these issues as one.

[1] Atlas also raised the issue of whether the trial court properly awarded Mr. Amos discretionary costs on the ground that if the trial court was in error in determining the heart attack was a compensable injury, it also was in error in awarding discretionary costs. This issue is pretermitted by our holding as to compensability.

Atlas contends that the heart attack did not arise out of the employment because the black market cigarette transaction, and the risk attendant thereto, was a voluntary act unrelated to Mr. Amos' work, rather than a hazard associated with his employment. Atlas also contends that the heart attack did not occur in the course of the employment because Mr. Amos chose to arrive in Charlotte early and wait to make the pick-up rather than going home, and he was, therefore, off duty or "on his own time" during the wait.

"Arising out of" the employment pertains to the cause of an injury, while "in the course of" pertains to the time, place and circumstances of the injury. Alder v. Mid-South Beverages, Inc., 783 S.W.2d 544, 546 (Tenn. 1990). In this case, the arguments and analysis applying to each are similar. Atlas argues that Mr. Amos' heart attack was precipitated by stresses resulting from the theft. The theft, in turn, occurred as a result of his participation in a black market cigarette purchase and such a purchase was not a hazard associated with his employment as a truck driver, but his personal business. Therefore, according to the employer, the heart attack did not arise from the employment.

In Hudson v. Thurston Motor Lines, Inc., 583 S.W.2d 597 (Tenn. 1979), the employee was also a truck driver. He was shot by an unknown assailant in the parking lot of a fast food restaurant. He was at the restaurant getting lunch, waiting to make a pick up at a nearby location. Employer contended, as here, that the injury did not arise from the employment. In holding that the injury did arise from the employment, the Supreme Court adopted the "street risk rule" that "the risks of the street are the risks of the employment, if the employment requires the employee's use of the street." Id. at 602. In this case, the employer's representative testified that drivers sometimes waited at truck stops for a day or two between trips. She also testified that drivers had been robbed in such places. The police officer testified that the truck stop at which these events occurred was known to be a "crime area." At the time of the theft involved in this case, Mr. Amos was in route to the pick-up point to drop off the trailer belonging to Atlas for which he was responsible. Along the way, he stopped at a truck stop intending to get something to eat, but discovering the truck stop had no restaurant, he decided to take a nap. While napping, he was approached by an individual who offered to sell him cigarettes. He never left the cab of the truck but turned to retrieve a pillow case in which to put the cigarettes he was purchasing. In our view, the reasoning applied in Hudson also applies to the facts in this case. The evidence presented in this case supports the view that being the victim of a theft while parked or waiting at a truck stop is a risk of employment as an over-the-road truck driver. Therefore, we conclude the evidence does not preponderate against the trial court's finding that Mr. Amos' heart attack arose out of his employment.

In holding the injury in this case occurred during the course of Mr. Amos' employment, the trial court relied upon McCann v. Hatchett, 19 S.W.3d 218 (Tenn. 2000). In that case, the employee was sent by a Memphis, Tennessee, carpet service firm to Rutland, Vermont, to lay carpet in a motel. While off-duty, the employee drowned in the swimming pool of another motel where they were lodged. The Tennessee Supreme Court held:

> "a traveling employee is generally considered to be in the course of his or her employment continuously during the duration of the entire trip, except when there is

> a distinct departure on a personal errand. Thus, under the rule we today adopt, the injury or death of a traveling employee occurring while reasonably engaged in a reasonable recreational or social activity arises out of and in the course of the employment."

Id. at 221-22. Based upon this reasoning, the trial court held Mr. Amos' conduct did not constitute a "distinct departure on a personal errand" and, therefore the injury was compensable.

Atlas contends that the heart attack did not occur "in the course of" the employment, because Mr. Amos was not required to be in Charlotte at the time of the incident, and was not performing any functions related to his employment at the time. That is to say, because he could have gone home first, rather than directly to Charlotte, he was no more connected to his employment than if he had gone home. The practice of drivers waiting at truck stops for a day or two between trips was acknowledged by the employer. Mr. Amos described being dispatched from Chicago to Seattle, from Seattle to San Diego and from San Diego to Montana. Certainly, drivers would not be expected to return home between such runs. Moreover, as previously stated, Mr. Amos testified Atlas preferred for their drivers to be near the next pick-up point so they could be redirected if needed. The evidence does not preponderate against the finding of the trial court that at the time of the injury, Mr. Amos was a traveling employee within the meaning of McCann. Thus, Mr. Amos was continuously in the course of his employment unless there was a "distinct departure on a personal errand." Again, at the time of the theft, Mr. Amos was in his truck; the truck was in a location the trial could have found was not only expected but actually preferred by Atlas; and that location was connected to his employer's business. Mr. Amos was in the process of attempting to purchase a common personal product, and, while the circumstances of the proposed transaction were suspicious, we are unable to find the evidence preponderates against the trial court's finding that the attempted purchase did not constitute a "distinct departure on a personal errand." Therefore, as a traveling employee, Mr. Amos was in the course of his employment when the incident which precipitated his heart attack occurred. Based upon the foregoing, we conclude the trial court correctly denied the motion for summary judgment and correctly found the heart attack suffered by Mr. Amos to be a compensable injury.[2]

In light of our finding on compensability, we turn to the set-off issue. This issue, as presented, involves a question of law and is reviewed by this court *de novo* without a presumption of correctness. It is undisputed that Mr. Amos was and is collecting old age social security benefits. Atlas contends that it is entitled to a set-off of fifty percent of those benefits, based upon Tennessee Code Annotated section 50-6-207(4)(A)(i) which provides, in pertinent part:

> with respect to disabilities resulting from injuries that occur after 60 years of age, regardless of the age of the employee, permanent total

---

1. Defendant does not contest that the theft was a sudden, acute event, sufficient to cause the resulting heart attack to constitute an accident under the workers' compensation law. See Bacon v. Sevier County, 808 S.W.2d 46 (Tenn. 1991).

> disability benefits are payable for a period of two hundred sixty (260) weeks. Such compensation payments shall be reduced by the amount of any old age insurance benefit payments attributable to employer contributions that the employee may receive under title II of chapter 7, title 42 of the Social Security Act.

The trial court noted that there was no proof that this employer had made any social security contributions on this employee's behalf. In fact, the employee was receiving those benefits before this employment commenced. The trial court relied on Scales v. City of Oak Ridge, 53 S.W3d 649 (Tenn. 2001), and held that the social security set-off did not apply here. In Scales, the Supreme Court held that the set-off did not apply to an employee who was collecting social security benefits based upon her husband's social security contributions, rather than her own.

In our view, McCoy v. T.T.C. Illinois, Inc., 14 S.W.3d 734 (Tenn. 2000) is more directly applicable to this case. In McCoy, the employee argued, as here, that the set-off should be calculated based solely upon the social security contributions made by the employer liable for the injury. The Supreme Court rejected that argument, holding that, where the set-off applied, it should be calculated on the basis of the employee's total social security benefit, rather than the portion attributable to the particular employer. 14 S.W.3d at 738. There was no suggestion that the benefits being received by Mr. Amos in this case are based upon the earnings and employment of another person, as in Scales.

Mr. Amos testified that he has, since age twenty-five, worked in jobs as an over-the-road truck driver similar to the one in which he worked for his brother at the time of his injury. Prior to that time, he worked in the construction trade. Applying McCoy, Atlas would be entitled to a set-off for the portion of Mr. Amos' social security benefits attributable to the contributions of all his previous employers. In the typical case, the set-off would amount to fifty percent of the social security benefit.[3] See, McCoy at 738. We remand the case to the trial court for determination of the amount of the set-off in this case.

---

[3]Currently, for employed persons, both the employee and the employer pay 6.2% of wages up to $97,500 for social security taxes. Self-employed persons pay 12.4% of their earnings up to $97,500. The set-off for a person employed by others his or her entire working life is one-half the social security benefit. For persons who have been self-employed a portion or all their working life, the formula for the set-off is the percentage of working life employed by others multiplied by one-half the social security benefit. (i.e. for an employee who worked for an employer 60% of his working career and was self-employed 40%, it would be .6 times ½ of a $1000 benefit or $300.)

IV. CONCLUSION

The judgment as to compensability is affirmed. The case is remanded to the trial court for determination of the correct amount of the set-off for Mr. Amos' social security benefits. Costs of this cause shall be taxed one-half to Atlas Van Lines, Inc., and one-half to Gerald Amos.

_____

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

GERALD AMOS v. ATLAS VAN LINES, INC., ET AL.

Chancery Court for Perry County
No. 4255

No. M2006-01360-SC-WCM-WC - Filed - September 19, 2007

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Atlas Van Lines, 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 shall be taxed one-half to Atlas Van Lines, Inc., and one-half to Gerald Amos, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating