IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 23, 2009 Session

KYLE McDONNELL v. CONTINENTAL MACHINE MOVERS

Direct Appeal from the Circuit Court for Marshall County
No. 16448 Lee Russell, Judge

No. M2008-00968-WC-R3-WC - Mailed - June 15, 2009
Filed - September 23, 2009

In this workers' compensation action, the employee, Kyle McDonnell, was assigned to work at a job site in Kentucky. His employer, Continental Machinery Movers, paid for food and lodging. While waiting in a truck for his co-workers to return from breakfast, he suffered an apparent seizure. Subsequently, his shoulder was painful and he sought and received medical care at a local emergency room. An evaluating physician testified that the seizure had caused a dislocation of his shoulder joint. Mr. McDonnell sought workers' compensation benefits, but the employer denied liability. The trial court found that Mr. McDonnell was a "traveling employee," and that the injury was compensable. Continental Machinery Movers has appealed.[1] We conclude that the injury did not arise from the employment and, therefore, reverse the trial court's decision.

Tenn. Code Ann. § 50-6-225(e) (Supp. 20082007) Appeal as of Right; Judgment of the Circuit Court Reversed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and ALLEN W. WALLACE, SR. J., joined.

James H. Tucker, Jr. and Colin M. McCaffrey, Nashville, Tennessee, for the appellant, Continental Machinery Movers.

Ben Boston, Lawrenceburg, Tennessee, for the appellee, Kyle McDonnell.

MEMORANDUM OPINION

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[1]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 a hearing and a report of findings of fact and conclusions of law.

Factual and Procedural Background

Kyle McDonnell began working for Continental Machinery Movers ("CMM") as a forklift operator in December 2003. In January 2004, he and several other employees were sent to Elizabethtown, Kentucky, to work on a job. CMM paid for lodging and meals. On the morning of January 7, the three other workers went to a Burger King restaurant to purchase breakfast. Mr. McDonnell rode to the Burger King with his supervisor, Marcus Bell, in a company-owned truck. Mr. McDonnell had already eaten, was not feeling well, and decided to remain in the truck while the others were in the restaurant.

When the co-workers returned, they found Mr. McDonnell unconscious in the truck. The vehicle was locked, and Mr. McDonnell was leaning against one of the doors. Bell opened the door of the truck against which he was leaning and, along with another of the co-workers, prevented him from falling from the vehicle. Bell testified that Mr. McDonnell seemed disoriented. His co-employees spoke to him for a brief time. All three of them testified at trial. Each stated that Mr. McDonnell was treated with care to insure he did not fall to the ground even though their testimony differed as to whether he exited the truck at that time. Bell took him back to their motel, and instructed him to call Michael Poole, a manager and co-owner of CMM, when he felt better. Mr. McDonnell testified that he had no recollection of anything that occurred between the time Mr. Bell exited the truck to enter Burger King and Mr. Bell speaking to him at his motel room. He testified that he recalled that his right shoulder was hurting when he was at the motel.

Mr. McDonnell called Mr. Poole, explained what he knew about what happened, and told him he had "done something to [his] shoulder." Mr. McDonnell's recollection of the conversation was limited. Later in the day, he went to a local hospital emergency room. Although the bills associated with that visit are in the record, the medical records are not. His arm was placed in a sling by the physician(s) who saw him at that time. Mr. McDonnell returned to his motel room, and then to the job site. Mr. McDonnell had a second telephone conversation with Mr. Poole shortly after January 7. They discussed the incident but the substance of the conversation is disputed. Mr. McDonnell did not return to work for CMM after that time. He did not receive additional medical attention until Dr. David Gaw, an orthopaedic surgeon, examined him at the request of his attorney in November 2006.

Based upon his examination, Dr. Gaw submitted a C-32. CMM then conducted a cross-examination deposition in accordance with Tennessee Code Annotated section 50-6-235. Dr. Gaw's theory was that Mr. McDonnell had suffered a seizure on January 7, 2004, and that his shoulder had been dislocated as a direct result of the seizure. Specifically, he testified: "[W]hen a person has a seizure, there's tremendous shaking of the muscles, and that is the – causes the muscles itself [sic] to pull the joint out of place." The incident caused Mr. McDonnell's shoulder to become unstable, and he had recurring dislocations thereafter. Dr. Gaw believed the injury was work-related solely because Mr. McDonnell reported to him that he was at work when the incident occurred. Dr. Gaw opined that Mr. McDonnell had 14% permanent impairment to the right upper extremity, 12% due to instability of the shoulder joint and 2% due to loss of range of motion. Mr. McDonnell's permanent impairment converted to 8% of the body as a whole. Dr. Gaw recommended surgery to

increase stability of the joint. He placed no formal restrictions upon Mr. McDonnell's activities, but stated that he would have difficulty with constant overhead pushing, pulling or lifting.

Sections F(1), (2) and (3) of the C-32 form address temporary disability. Section F(1) asks: "As a result of this injury, did the claimant suffer temporary total disability?" Dr. Gaw placed an "xx" next to the "yes" response. The section then asks for the dates of the temporary disability. Dr. Gaw's response was "Off work approx. 1 ½ years." No specific dates are given in response to that question, or to the next two questions, which concern dates of release to return to work and maximum medical improvement. Dr. Gaw's narrative report contains no discussion of the subject of temporary disability, and he was not asked any questions on the subject during his deposition.

Mr. McDonnell was thirty-one years old at the time of the trial. He was high school graduate and had briefly attended a community college and a school for diesel mechanics, but had completed neither program. He had a license to sell real estate, obtained after this injury occurred. Prior to working for CMM, he had worked primarily as a stagehand. He had also loaded and unloaded trucks, owned a landscaping business and sold vacuum cleaners. After leaving CMM, he worked as an assistant superintendent for a home construction company, as a "yard supervisor" for a business that erected bleachers and stages for events such as Bonnaroo and the Nashville Fan Fair, and sold t-shirts and souvenirs at country music concerts.

Mr. McDonnell had injured his right shoulder at a previous job. The injury had been surgically repaired, and the claim was settled based upon 20% permanent partial disability. Mr. McDonnell testified that the shoulder was stable from the time of the surgery until the January 2004 incident. He also had been diagnosed with attention deficit hyperactivity disorder and bipolar disorder. Those conditions were controlled by medications. His co-workers indicated that on the date of the incident, Mr. McDonnell stated that he had forgotten to bring his medication when he traveled to Kentucky. However, there is no evidence of a causal relationship between the seizure and the use or non-use of any medication.

The trial court found that Mr. McDonnell had sustained a compensable injury and that his telephone conversations with Mr. Poole had satisfied the notice requirement. It awarded 24% permanent partial disability to the body as a whole and one and one-half years of temporary total disability benefits. After filing the notice of appeal, Mr. McDonnell filed a motion requesting that CMM be required to provide a panel of physicians for treatment while the appeal was pending. CMM essentially requested that the entire judgment be stayed during the appeal. The trial court granted the motion for medical care, but denied Mr. McDonnell's accompanying motion for associated attorney's fees.

On appeal, CMM contends that the trial court erred by finding that Mr. McDonnell sustained a compensable injury. In the alternative, it argues that trial court erred by finding that Mr. McDonnell provided sufficient notice of his injury to satisfy the requirements of the workers' compensation law, and by awarding temporary total disability benefits. Mr. McDonnell contends that the trial court erred by failing to award attorney's fees associated with his post-trial motion for medical care.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). Conclusions of law are subject to de novo review without any presumption of correctness. Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

The parties agree that Mr. McDonnell was a "traveling employee," as described in McCann v. Hatchett, 19 S.W.3d 218, 221 (Tenn. 2000). In McCann, the Supreme Court adopted the following rule:

> [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 221-2. Mr. McDonnell asserts that he was engaged in the reasonable activity of accompanying his co-workers to breakfast when his seizure occurred, and that McCann therefore conclusively establishes that the injury is compensable. See also Sepulveda v. Western Express, Inc., No. M2007-00121-WC-R3-WC, 2008 WL 887241 (Tenn. Workers' Comp. Panel March 31, 2008).

CMM concedes that the injury occurred in the course of the employment. It takes the position that the injury did not arise out of the employment, but was entirely the result of an idiopathic condition. CMM relies upon Phillips v. A & H Constr. Co., 134 S.W.3d 145 (Tenn. 2004), to support its position. In Phillips, the employee was asked by his employer to pick up and transport some co-workers to a job site in Kentucky. While engaged in that task, he lost consciousness and was involved in a motor vehicle accident, which caused various injuries. The trial court dismissed the claim on the ground that, because the seizure was idiopathic, the resulting injuries were not compensable. The Supreme Court reversed, holding that "an injury which occurs due to an idiopathic condition is compensable if an employment hazard causes or exacerbates the injury." Id. at 150. Mr. Phillips' injuries were substantially worse than they would have been if he had not been operating a motor vehicle as part of his job and were, therefore, compensable.

Mr. McDonnell's interpretation of McCann is overly broad. Initially, we note that the issue presented in that case was whether or not the trial court had erred by granting the employer's motion for summary judgment. The Supreme Court expressly stated that its decision "should not be interpreted as a factual finding that [the employee's death] arose out of and in the course of his employment." 19 S.W.3d at 222, n. 4. In order to be eligible for workers' compensation benefits, an employee must suffer an "injury by accident arising out of and in the course of employment which causes either disablement or death . . . ." Tenn. Code Ann. § 50-6-102(12) (2005). The term "arising out of" employment refers to causation. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004); Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). The injury must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work. Thornton v. RCA Serv. Co., 188 Tenn. 644, 221 S.W.2d 954, 955 (Tenn. 1949).

The causal relationship between an injury sustained by a traveling employee and his employment must be determined based upon the facts of each individual case. A traveling employee must still demonstrate by a preponderance of the evidence that his injury arose from his employment. An injury caused by an idiopathic condition does not become compensable solely because the employee is traveling on his employer's business. Such an injury is compensable to the same extent that an identical injury occurring on the employer's premises would be. In either case, an injury is compensable only if it is caused or exacerbated by a hazard of the employment. Phillips, 134 S.W.3d at 150.

Dr. Gaw, the only medical witness to testify in this case, believed that Mr. McDonnell suffered a seizure on January 7, 2004, which caused "shaking of the muscles," and "pull[ed] the joint out of place." Thereafter, the joint was unstable and subject to recurrent dislocations. The injury was, therefore, a direct consequence of the seizure itself. There is no evidence that the seizure was caused by any factor related to Mr. McDonnell's work. At trial Mr. McDonnell suggested that the changes in temperature between the motel, the outdoors and the cab of the truck may have contributed to causing the seizure. However, there is no medical evidence to support that theory. "Medical causation and permanency of an injury must be established in most cases by expert medical testimony." Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). "Except in an obvious case, such as the amputation of a limb . . . , the employee must establish by expert medical evidence that the injury and disability of which he or she complains was caused by an accident arising out of his or her employment." Masters v. Industrial Garments Mfg. Co., Inc. 595 S.W.2d 811, 812 (Tenn. 1980).

Similarly, there is no evidence that Mr. McDonnell's injury was enhanced or exacerbated by any hazard attributable to his job. Although it was suggested during the trial that his co-workers may have injured him while assisting him in exiting from the truck, there is neither medical nor lay evidence to support that theory. Cf., Phillips, Id.; Tapp v. Tapp, 192 Tenn. 1, 236 S.W.2d 977 (1951); McMillin v. McKenzie Special School District, No. W2000-02165-WC-R3-CV, 2001 WL

34090141 (Tenn. Workers' Comp. Panel May 22, 2001). In our view, the facts of this case are consistent with prior cases in which claims for injuries which arose from idiopathic falls on level ground were denied because no hazard incident to the employment accompanied or contributed to the fall and the resulting injury. See e.g., Sudduth v. Williams, 517 S.W2d 520, 523 (Tenn. 1974); Wilhelm v. Krogers, 235 S.W3d 122, 127-28 (Tenn. 2007); Thornton v. Thyssen Krupp Elevator Mfg., Inc., No. W2006-00254-SC-WCM-WC, 2007 WL 1203586, at *5 (Tenn. Workers' Comp. Panel Apr. 24, 2007). We therefore conclude that the trial court erred by finding that Mr. McDonnell's shoulder injury was compensable under the workers' compensation law.

Conclusion

The judgment of the trial court is reversed. The complaint is dismissed. Costs are taxed to Kyle McDonnell, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

KYLE McDONNELL v. CONTINENTAL MACHINERY MOVERS, INC.

Circuit Court for Marshall County
No. 16448

No. M2008-00968-SC-WCM-WC - Filed - September 23, 2009

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Kyle McDonnell, 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.

Employer asks the Court to declare this a frivolous appeal and to "issue a penalty and assess attorneys' fees" against Employee. In our discretion, we decline to make such a finding.

Costs are assessed to Kyle McDonnell and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Koch, William C., Jr., J., Not Participating