IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 28, 2010 Session

SANDRA JANE GARDNER v. RANDSTAD NORTH AMERICA, L.P.

Appeal from the Circuit Court for Lincoln County
No. C0500153 Lee Russell, Judge

No. M2009-01214-WC-R3-WC - Mailed - September 29, 2010
Filed - November 1, 2010

Employee alleged that she injured her left arm in the course of her employment. Employer denied liability, contending employee's injuries were not causally related to or arising from her employment. The trial court found that employee injured her left wrist, left elbow, and left shoulder in the course and scope of her employment, and it awarded 39% permanent partial disability to the body as a whole. The trial court ordered employer to pay the treating physician the entire cost of surgery and treatment, and it ordered physician to reimburse TennCare. Employer has appealed. We affirm as to the arm injury but conclude that the evidence preponderates against the trial court's finding that employee's shoulder injury was related to her employment. We also conclude that the trial court erred regarding the payment of medical expenses to the physician. Accordingly, we remand the case to the trial court for a determination of permanent partial disability to the arm and entry of an order regarding reimbursement of medical expenses.[1]

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Modified

WALTER KURTZ, SR. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J., and JOHN KERRY BLACKWOOD, SR. J., joined.

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[1] Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

Kent E. Krause, Nashville, Tennessee, for the appellant, Randstad North America, L.P.

Raymond W. Fraley, Fayetteville, Tennessee, for the appellee, Sandra Jane Gardner.

MEMORANDUM OPINION

Factual and Procedural Background

Randstad North America ("Employer") placed Sandra Jane Gardner ("Employee") as a temporary employee at C&S Plastics. Employee alleged that she injured her shoulder, elbow, and wrist on December 28, 2004. She testified that her injury occurred when she tried to lift a box she had filled with parts onto a skid. She stated that she almost dropped the box, and when she tried to catch it, pain shot up her left arm. She could not remember the specific date of her accident at the time of her May 2006 deposition. However, she testified at trial that she had been injured on December 28, 2004, and that she had always known the date. Employee testified that she informed her C&S Plastics supervisor, Ricky Floyd, of the accident when it happened on December 28, 2004, and he denied her request to go home. She did not formally report the injury to Employer on that date.

Employee testified that on January 4, 2005, after Employer's holiday break, she went to her personal physician, Dr. Karen Williams. Dr. Williams sent her to the emergency room and referred her to Dr. Laurence Schwartz, an orthopedic surgeon. Employee stated that she told Dr. Schwartz on January 6, 2005, that her arm (including her shoulder) was injured in an accident at work. Employee testified that she first formally reported a work injury to Jacqueline Harry, Employer's contact person for injury reports, on January 4, 2005 and January 6, 2005. She said that she called Employer just about every day but was never provided with a panel of doctors. She testified that she went to Employer's office in Tullahoma and gave a written statement in February 2005.

On cross-examination, Employee conceded that she fell on her left wrist in the bathtub in February 2005. She also admitted that between February 2005 and January

2006, she was involved in two incidents related to her left arm. In an altercation, Employee fought with another woman, who pushed her to the ground and bit her left finger, which resulted in an emergency room visit by Employee and an MRI of her left arm. In a second altercation, she held two people apart. Discrepancies exist between Employee's trial testimony and her 2007 deposition as to whether her left arm was injured in these incidents.

Dr. Schwartz testified at the trial. He recalled Employee's visit on January 6, 2005, and specifically remembered that Employee included her shoulder among her complaints at that time. He did not, however, note that complaint in his clinical note concerning that visit. The earliest mention of a problem with her shoulder was in a note concerning an August 3, 2005 appointment. He had seen Employee on eleven occasions between January 6, 2005 and August 3, 2005. During the January 2005 visit, Dr. Schwartz ordered an EMG study. The results showed that her ulnar nerve had been injured near her elbow, leading to a condition known as cubital tunnel syndrome. Dr. Schwartz opined that Employee's involvement in the two altercations did not aggravate any of the work-related injuries which he had previously diagnosed. After treating Employee conservatively, Dr. Schwartz performed an arthroscopy on March 31, 2005, and shoulder surgery on February 21, 2006. Dr. Schwartz testified that Employee's left wrist, elbow, and shoulder were injured as a result of the December 2004 injury.

Dr. Schwartz assigned a total impairment of 22% to the upper extremity, translating to 13% impairment to the body as a whole. His testimony is not entirely clear as to what degree of his total impairment rating was assigned specifically to Employee's shoulder injury. Employee was restricted from using vibratory machines or lifting twenty pound objects in front of her or above her head. Dr. Schwartz stated that she might have difficulty handling small parts due to an alteration in her sense of touch.

Dr. Schwartz's total charges were $28,642.00. He testified that his treatment of Employee was necessary and that his charges were reasonable. TennCare paid $4,042.00 toward Employee's medical treatment. Though his billing system shows that Employee owes nothing, Dr. Schwartz stated that he believed that TennCare or the workers' compensation insurance carrier owed the balance and that his office could not charge the patient for workers' compensation injuries.

Dr. Joseph Wieck, an orthopedist, performed an examination of Employee at the request of Employer. He testified by deposition. Dr. Wieck opined that Employee's work at C&S Plastics did not cause the cubital tunnel syndrome or her left shoulder injuries. Dr. Wieck stated that he saw no permanent impairment due to Employee's cubital tunnel problems. He assigned a 10% anatomical impairment to the upper left extremity for her shoulder problems (translating to 6% of the body as a whole), with no restrictions.

Jacqueline Harry, a former employee of Employer, testified at the trial. In late 2004 and early 2005, Ms. Harry was Employer's contact person for those injured on the job. She testified that her workers' compensation responsibilities included drug screening and providing panels of doctors to injured employees. She stated that she did not remember talking to Employee in 2005 until she was shown a copy of the injury report and notes in Employer's records the day of trial. Ms. Harry's notes from January 4, 2005, and January 6, 2005, indicate that she had conversations with Employee about a hand injury, although she did not remember nor did her notes show, that Employee reported the injury as work-related.[2] Ms. Harry testified that she did not give Employee a panel of doctors. Ms. Harry further testified that she was also responsible for completing information for the First Reports of Work Injury or Illness to send to the corporate office, which were then typed and filed with the Tennessee Department of Labor and Workforce Development. She stated that she had no knowledge before trial of Employee's specific First Report of Work Injury or Illness,[3] but that she had no reason to dispute it.

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[2] Employer's "Employee data" personnel file for Employee contains an "Accident and Injury Report" with the following entries made by Ms. Harry:

> 1-04-05 [Employee] called to report she would be out a few days due to illness.
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> 1-06-05 [Employee] called again. She was sent to an orthopaedic doctor about her hand. He diagnosed her and said she could return on 1/11/05. We discussed it being a workers' comp. and she said it was not.

[3] The First Report of Work Injury or Illness lists the date of injury as December 28, 2004, and the date Employer was notified of the injury as December 28, 2004. It further reports that the body part affected is the "hand," in the nature of a "strain," caused by "repetitive motion _ carpal t[unnel]". In the "how the injury or illness occurred" response, there is written "left hand feels numb_ left hand," and the claim of the injury on February 4, 2005.

Debbie Gifford, an employee of Employer at the time of the trial, also testified regarding Employer's records of Employee's injuries and communications. She identified an in-house Accident and Injury Report[4] completed by Employer on February 4, 2005, as a record that Employer ordinarily maintained.

Ricky Floyd, Employee's supervisor at C&S Plastics at the time of her alleged injury, testified at the trial. Mr. Floyd did not remember Employee or any conversations with her. He identified a note that he had handwritten on February 10, 2005, that stated Employee had been absent from work for two days because of a non-work-related arm injury.

Raymond W. Fraley, Jr., Employee's attorney, testified at the trial.[5] Mr. Fraley wrote a letter in March 2005 to Employer's insurance company and received a response indicating that Employee had reported a work-related injury on December 28, 2004. Both letters were admitted into evidence. While testifying, Mr. Fraley also identified the Employer's First Report of Work Injury or Illness from the Department of Labor and Workplace Development. The report was subsequently admitted into evidence, this time over Employer's objection that it was hearsay.

Employee was thirty-two years old at the time of her alleged injury. She completed the sixth grade and has a GED. She has worked primarily in factories or fast-food restaurants. Employee testified that she did not return to work with Employer after her injury because she had been told that she was being replaced and

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[4] Employer's in-house report lists December 28, 2004 as the injury date, and January 28, 2004 as the reported date. The report includes the following:

> Accident Description: Sandra originally stated at the time she provided her personal doctor's notes that it was not work related. She is now coming forward and stating that she [sic] the injury is work related. I instructed Sandra that this would be reviewed prior to scheduling any doctor's appointment. Please note: there has not been a treatment date scheduled with our panel.

This report was completed by supervisor Katherine Langham, who did not testify at trial.

[5] We are not called upon to rule how RPC 3.7 might have effected the appropriateness of the lawyer testifying.

believed she had been fired. Employee testified that she had daily pain and had trouble lifting and gripping heavy objects. She also had trouble sleeping. Employee stated that she could no longer perform the requirements of many of her previous jobs due to the heavy lifting required.

The trial court found that Employee injured her left wrist, left elbow, and left shoulder on December 28, 2004, in the course and scope of her employment. Further, it found Employee to be "entirely credible in describing how the accident occurred" and that the accident was reported. The court found Dr. Schwartz's medical treatment necessary and his charges reasonable. The trial court awarded a permanent partial disability ("PPD") of 39% to the body as a whole to be paid in a lump sum. The court also ordered Employer to pay the costs of Employee's medical treatment to Dr. Schwartz, "from which Dr. Schwartz will be responsible for reimbursing TennCare for the amounts it paid . . . for the treatment of the plaintiff."

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) (2008). 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. *Madden v. Holland Grp. of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). When 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. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Seiber v. Reeves Logging,* 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Employer raises four issues on appeal:[6]

1. Whether the trial court erred in finding that the shoulder injuries arose out of and in the course and scope of Employee's employment with Employer;
2. Whether the trial court erred in admitting the First Report of Work Injury or Illness and testimony related to it;
3. Whether the trial court erred in ordering Employer to pay Dr. Schwartz $28,642, with Dr. Schwartz to reimburse TennCare; and
4. Whether the trial court erred in awarding the claimant 39% PPD to the body as a whole.

I. Causation

Employee testified that she injured her left shoulder, left elbow, and left wrist while working her shift at C&S Plastics. Employer argues that the trial court erred in finding that those injuries, particularly the shoulder, were work-related.

Under the statutory scheme governing Tennessee workers' compensation claims, injuries by accident "arising out of and in the scope of employment" are compensable. Tenn. Code. Ann. § 50-6-102(12) (2008). *Reeser v. Yellow Freight Sys.*, 938 S.W.2d 690 (Tenn. 1997). The phrase "in the course of" refers to time, place and circumstances, and "arising out of refers to cause or origin." *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997). An accidental injury arises out of and is in the course and scope of employment if it has a rational connection to the work and occurs while the employee is engaged in the duties of employment. *Id. See also Guess v. Sharp Mfg. Co.*, 114 S.W.3d 480, 484 (Tenn. 2003).

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[6] In her response brief, Employee points out that Employer's appellate brief fails to include citations to relevant legal authorities and to the transcript of record within the arguments in support of the four issues above. For this reason, Employee argues, the arguments violate Tennessee Rule of Appellate Procedure 27(a)(7) and should be found to have been waived.

In its reply brief, Employer apologizes for the oversight and provides references to the transcript. Furthermore, Employer's first brief contained citations to the record in the Statement of Facts section. We hold that there has been no violation of Rule 27(a)(7), and we consider Employer's arguments as presented on appeal.

Employee testified at the trial that she injured her arm when a box of parts slipped from her hands and that she informed her supervisor Ricky Floyd at the time. Mr. Floyd testified that Employee told him that her injuries were not work-related. Additionally, Jacqueline Harry, an employee of Employer at the time, also testified that Employee told her that Employee's injuries were not work-related. Dr. Schwartz, however, opined that Employee's injuries to her left hand, left wrist and left shoulder resulted from the accident at work.

We conclude that the evidence does not preponderate against the trial court's finding that Employee's left wrist and left elbow injuries were causally connected to her employment and are compensable.

We are unable to reach the same conclusion concerning the trial court's finding that Employee sustained a compensable injury to her shoulder. There was conflicting evidence presented at trial about whether Employee's shoulder was injured as a result of the December 2004 event which she described. Dr. Schwartz testified that Employee mentioned shoulder symptoms, in addition to her wrist and elbow symptoms, during their first appointment on January 6, 2005. However, he did not document any such symptoms in his note concerning that appointment, or his notes of their next eleven meetings over the following seven months. Further, Employee testified that she fell on her left arm in her bathtub in February 2005. She was also involved in a fight in May 2007. At trial she testified that she did not injure her left arm during that altercation, but she testified to the contrary during her deposition. Dr. Schwartz's note of May 27, 2005 states that she had reported a new injury to her left arm at that time. Taking these facts into account, we conclude that the evidence preponderates against the trial court's finding that Employee sustained a compensable injury to her shoulder, and we reverse this finding.

II. Permanent Partial Disability Determination

As a result of our findings above, it will be necessary to adjust the PPD award. The court is of the opinion that the trial court is the appropriate forum to make this determination on remand.

III. Admissibility of the First Report of Injury

Over Employer's objection, the trial court admitted into evidence the

Department of Labor and Workforce Development's First Report of Work Injury or Illness for Employee. We first observe that trial judges have broad discretion in determining the admissibility of evidence, and their rulings will not be reversed absent an abuse of discretion. *State v. Stinnett*, 958 S.W.2d 329, 331 (Tenn. 1997).

Employer argues that the report is hearsay that does not fall within the public records or reports exception. Employer supports this argument merely with the statement that "there is no information from which the trial court could have determined whether this was a public record or not."

We disagree with this conclusion and agree with Employee that the report was subject to being admitted as a public record or report under TRE 803(8). Ms. Harry testified that, although she did not remember this particular First Report of Work Injury or Illness for Employee, she turns in these reports to the corporate office for typing and filing. Ms. Harry further testified that she had no reason to dispute Employee's report. The testimony of Ms. Harry established that this document was prepared by Employer's corporate office using information supplied to it by the local office. As such, the report filed with the State is a public record or report, *see* TRE 803(8), and the trial court correctly admitted the report.

Employer also now argues that this First Report of Work Injury or Illness was not authenticated as set forth in TRE 901, nor was it self-authenticated pursuant to TRE 902. Employer did not, however, object at trial to the report based on TRE 901 or TRE 902, and he may not now do so on appeal. *See, e.g., State v. Biggs*, 218 S.W.3d 643, 667 (Tenn. Crim. App. 2006); *State v. Adkisson*, 899 S.W.2d 626, 634-635 (Tenn. Crim. App. 1994) (no reversal when precise objection to evidence not raised at trial). Thus, Employer is bound by its objection at trial to the report as hearsay, and this Court will not consider any argument of error predicated upon different grounds. There was no error to admit the report.

IV. Reimbursement to TennCare of Medical Expenses

After finding Dr. Schwartz's treatment to be necessary and his charges to be reasonable, the trial court ordered Employer to pay Dr. Schwartz's full charges directly to him. Dr. Schwartz was in turn ordered to reimburse TennCare for the portion of Employee's bills that it paid, $4,042.00. This order was in error.

The employer is only responsible to provide to employee "free of charge reasonable and necessary medical treatment." *State Auto. Mutual Ins. Co. v. Hurley*, 31 S.W.3d 562, 565 (Tenn. 2000). If the medical payments are discounted because of insurance and/or governmental health care, the employer is only responsible for the discounted amount. *Id.*

Furthermore, if insurance and/or governmental health care pays for the treatment mandated by the workers' compensation law, the employer is to pay the third party provider directly. *Moore v. City of Collierville*, 124 S.W.3d 93, 98-99 (Tenn. 2004). In this case, Employer should have been ordered to reimburse TennCare directly.

Conclusion

The judgment of the trial court is modified to find that Employee's shoulder injury was not compensable. We remand to the trial court for further proceedings to determine the percentage of PPD to the arm. The trial court should also determine the amount of reimbursement for Dr. Schwartz's services consistent with Section IV above. Costs are taxed one-half to Randstad North America, L. P. and its surety, and one-half to Sandra Jane Gardner, for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE