IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
FEBRUARY 1999 SESSION

FILED

September 3, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

JIMMY C. WARDLAW,	)	
	)	
Plaintiff/Appellee,	)	Shelby Circuit No. 87695-5
	)	
v.	)	No. 02S01-9807-CV-00063
	)	
STANDARD COFFEE SERVICE COMPANY and CONTINENTAL CASUALTY COMPANY,	)	Honorable Kay S. Robilio, Judge
	)	
Defendants/Appellants.	)	

For the Appellants:

Carl Wyatt
Glassman, Jeter, Edwards & Wade
26 North Second Street
Memphis, TN 38103

For the Appellee:

John D. Horne
The Winchester Law Firm
6060 Poplar Avenue, Suite 295
Memphis, TN 38119

M E M O R A N D U M O P I N I O N

Members of Panel:

Justice Janice M. Holder
Senior Judge L. T. Lafferty
Special Judge J. Steven Stafford

AFFIRMED

LAFFERTY, Senior Judge

O P I N I O N

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The trial court found that the plaintiff's injury arose out of and in the course and scope of his employment, resulting in a twenty-five percent permanent partial disability to the body as a whole. We affirm.

At the time of trial, the plaintiff was 59 years old with a B.S. degree in marketing and training in sales management. His previous job experience consisted mainly of sales and sales management jobs with large companies. These jobs required no physical skills. Prior to his employment with Standard Coffee Service Company, the plaintiff was an over-the-road independent trucker hauling and delivering computers and accessories to various medical sites. Prior to his injury, the plaintiff had been engaged in a physical exercise program, consisting of lifting weights and long distance walking. The plaintiff testified he began working for the defendant in September of 1995 as a route salesman, after undergoing a pre-employment physical. He had no history of back problems.

At trial, the plaintiff testified that he was in Louisiana in October of 1995, training under the supervision of another route salesman, Bill Toupe. As part of his job training, the plaintiff would service various customer accounts by replacing coffee, taking inventory, and cleaning equipment. This activity involved bending and lifting cases of coffee from the company van.

On October 19, 1995, Mr. Toupe and the plaintiff made thirty to forty calls before returning to Mr. Toupe's home to do job-related paperwork. The plaintiff stated that they carried a computer and other records to the upstairs of Mr. Toupe's home and got on the floor on their hands and knees to do job-related paper work. After an hour or so, the plaintiff felt a numbness in his right leg and a burning sensation in his right heel. He was limping by the time he left Mr. Toupe's house. He testified that he did not notice any problems earlier that day while getting in and out of the van, digging in the van, pulling

boxes of coffee, or carrying items upstairs. The next day, October 20, the plaintiff advised Mr. Toupe that he was in pain and unable to continue working. The plaintiff returned to Memphis that same day. His symptoms worsened in the following three or four days, which he reported to his supervisor in Memphis, Bob Wagaman.

Shortly thereafter, the plaintiff saw Dr. Jack Halford, who referred him to Dr. Rodney Olinger after an MRI and nerve block were performed. Dr. Olinger performed surgery on the plaintiff's back on December 15, 1995, and the plaintiff was off work until January 29, 1996. He attempted to return to work in February, 1996, but was unable to do his job. At the time of trial, the plaintiff had not returned to work nor sought employment. The plaintiff was drawing Social Security benefits, disability benefits, and retirement benefits totaling approximately what he had been making per week with the defendant.

Mrs. Jeanette Wardlaw, the plaintiff's wife who is also a nurse, testified she and the plaintiff have been married for thirty-three years. She corroborated her husband's work history and his denial of previous back problems. Since his injury, Mrs. Wardlaw testified that her husband is very limited in his activities, and, due to his back pain, either stands or lies on the floor most of the time.

Dr. Rodney Olinger, the plaintiff's neurosurgeon, testified by deposition. Dr. Olinger first saw the plaintiff on December 12, 1995, upon referral from Dr. Jack Halford. The plaintiff gave a history of previous back problems and degenerative disk disease but had never had leg pain before. The plaintiff told Dr. Olinger that he developed leg pain after doing a number of work activities on the day of injury. The MRI ordered by Dr. Halford revealed a large disk herniation between the plaintiff's L-4 and L-5, which Dr. Olinger removed on December 15, 1995. The plaintiff progressed well after surgery and was released to return to light duty work on January 29, 1996. The plaintiff returned to Dr. Olinger's office on February 23, complaining of difficulty with bending and reaching. Dr. Olinger prescribed a course of treatment for significant muscle tightness and spasm in the plaintiff's back related to the surgery. When the plaintiff was no better on March 12, Dr. Olinger released him from work for three weeks. A repeat MRI was performed on April 5, 1996. Dr. Olinger testified that no new disk ruptures were seen at that time, but the plaintiff did have advanced degenerative changes in the lumbar spine. On November 22, 1996,

Dr. Olinger determined that plaintiff had sustained a ten percent permanent anatomical disability to the body as a whole as a result of the October 19, 1995, injury, which was caused by excessive activity. Based on plaintiff's medical history and physical condition, Dr. Olinger stated his opinion, based on a reasonable degree of medical certainty, that the plaintiff's back problems started on October 19, 1995. The doctor acknowledged that the plaintiff did not inform him that he had been on all fours on the floor when he noticed the back pain, which Dr. Olinger did not put down as a causative factor.

At the conclusion of the trial, the trial judge found:

1. There was an accident and injury sustained by the plaintiff which arose out of and occurred in the course and scope of the plaintiff's employment.

2. The plaintiff's maximum medical improvement date for the lumbar disc injury was May 28, 1996, and after said date all treatment rendered to plaintiff was for degenerative changes in the lumbar spine.

3. The parties agreed that the plaintiff's compensation rate is $333.33 per week, based on an average weekly rate of $500.00.

4. The plaintiff has sustained a vocational disability of 25% permanent partial disability to the body as a whole.

The defendants have raised one issue on appeal. They contend that the trial judge erred in finding the plaintiff sustained an injury by accident arising out of and occurring in the course and scope of employment on October 19, 1995.

DISCUSSION

The plaintiff in a workers' compensation suit has the burden of proving his case "in all its parts" by a preponderance of the evidence. *Owens Illinois, Inc. v. Lane,* 576 S.W.2d 348, 350 (Tenn. 1978). Thus, it is the burden of the plaintiff to establish, by a preponderance of the evidence, that his injury "arose out of and in the course of employment." Tenn. Code Ann. § 50-6-102(5).

The standard of review to be used by this Court is **de novo,** accompanied by a presumption of the correctness of the findings of the trial court, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires this Court to weigh in depth factual findings and conclusions of trial judges in workers' compensation cases. Where the trial judge has seen and heard witnesses, especially

where issues of credibility and weight of oral testimony are involved, considerable deference must still be accorded to those circumstances on review. *Orman v. Williams Sonoma, Inc.* 803 S.W.2d 672, 675 (Tenn. 1991); *Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315, 315 (Tenn. 1987).

Since the trial judge found the plaintiff's injury was an accident and arose out of and in the course of employment, we must determine if the record supports that conclusion. The defendants contend that the injury was not one which arose out of the plaintiff's employment, due to the fact that the injury was of such nature that it could have been sustained anywhere and was not the result of a hazard peculiar to the employment.

The Tennessee Workers' Compensation Act, Tenn. Code Ann. § 50-6-101, *et seq.,* provides the exclusive remedies for workers sustaining work-related injuries. Tenn. Code Ann. § 50-6-108. An employee's right to recover under the Act requires a finding that the injury arose "out of and in the course of employment." Tenn. Code Ann. § 50-6-102(5). The phrases "arising out of" and "in the course of" employment compromise two separate requirements. An accident "arises out of" employment when there is a causal relationship between the employment and the injury. *Woods v. Harry B. Woods Plumbing Co.,* 967 S.W.2d 768, 771 (Tenn. 1998); *Orman v. Williams Sonoma, Inc.* 803 S.W.2d 672, 676 (Tenn. 1991); *McAdams v. Canale,* 200 Tenn. 655, 294 S.W.2d 696, 699 (Tenn. 1956). The phrase "arising out of" refers to an injury's origin. *Id.* The phrase "in the course of" refers to the time, place, and circumstances under which the injury occurred. The "course of employment" requirement is satisfied when an injury occurs within the time and place limitations of the employment relationship and during an activity that had some connection with the employee's job-related functions. *Woods,* 967 S.W.2d at 771. Generally, an 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 his employment. *Orman,* 803 S.W.2d at 676.

Furthermore, the claimant in a workers' compensation case must establish a causal relationship between the claimed disability and the employment activity by expert testimony. *Id.* Although absolute certainty is not required to prove causation, the medical testimony connecting the injury with the work-related activity must not be so uncertain or

speculative that assigning liability to the employer would be arbitrary or only a mere possibility. *Livingston v. Shelby Williams Indus., Inc.,* 811 S.W.2d 511, 515 (Tenn. 1991) (quoting *Tindall v. Waring Park Ass'n,* 725 S.W.2d 935, 937 (Tenn. 1987)). The plaintiff must use expert medical testimony to establish causation and permanency, but such testimony must be considered in conjunction with the employee's testimony as to how his injury occurred and his subsequent physical condition. *Thomas v. Aetna Life & Casualty Co.,* 812 S.W.2d 278, 283 (Tenn. 1991).

The testimony in this record establishes that the plaintiff was performing job-related activity in servicing the defendant's various coffee customers on October 19, 1995. This activity consisted of getting in and out of a company van, bending and lifting cases of coffee, and servicing and cleaning coffee equipment. The plaintiff acknowledged that he felt no back pain or any symptoms of a back problem during these activities. That evening, while on the upstairs floor of a co-worker's home, both employees were going over company accounts. Suddenly the plaintiff felt a numbness in his right leg and a burning sensation in his right heel. When leaving the home, the plaintiff was noticeably limping. Upon the plaintiff's return to Memphis, he attempted to work, but the pain persisted. He notified the defendant of his injury and was subsequently treated for a herniated disk.

When questioned as to the cause of the plaintiff injuries, Dr. Olinger, the only medical expert to testify in this case, opined, "He didn't have leg pain before. He started that day, and you know, he didn't have one specific injury where he bent down and popped and that was it and you know, you can pinpoint it. But obviously, as he was going through his activity during the day, his leg pain came on. You don't have anything else to attribute it to."

CONCLUSION

The trial court found by a preponderance of the evidence that the plaintiff's injury arose out of and in the course of employment and, thus, was compensable. We agree. The fact remains that the plaintiff was injured on the job, and the compensability of his injury is clear in this record.

The plaintiff attempts to raise an additional issue for the first time on appeal. He contends that the defendants are estopped from appealing the trial court's judgment,

because they failed to file a notice of controversy with the Director of the Workers' Compensation Division as required by Tennessee Code Annotated § 50-6-205(d)(1) and, therefore, cannot now contest liability. This issue should have been raised in the trial court, and there is nothing in the record showing that the plaintiff did so. The issue is waived on appeal. *See, e.g., Duckworth v. Globe Business Furniture, Inc.,* 806 S.W.2d 526 (Tenn. 1991); Tenn. R. Civ. P. 8.03; Tenn. R. App. P. 36(a).

The trial court's judgment is affirmed. Costs are assessed against the defendants/appellants.

_____
L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
J. STEVEN STAFFORD, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JIMMY C. WARDLAW, APPELLEE v. STANDARD COFFEE SERVICE COMPANY and CONTINENTAL CASUALTY COMPANY, APPELLANTS	)	SHELBY COUNTY HON. KAY ROBILIO JUDGE NO. 02S01-9807-CV-00063

FILED

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Cecil Crowson, Jr.
Appellate Court Clerk

JUDGMENT

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well taken and should be denied; 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 will be paid by the appellants, for which execution may issue if necessary.

It is so ordered.

PER CURIAM

HOLDER, J. NOT PARTICIPATING