IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 25, 2008 Session

WILLIAM J. PARKER v. HAPS HEATING, AIR CONDITIONING, PLUMBING AND ELECTRICAL SERVICES, LLC

Direct Appeal from the Circuit Court for Shelby County
No. CT-006643-05 Kay S. Robilio, Circuit Court Judge

No. W2007-01023-SC-WCM-WC - Mailed October 16, 2008; Filed January 16, 2009

Employee sought workers' compensation benefits and medical expenses for a shoulder injury he allegedly suffered while working for Employer. The trial court bifurcated the trial with regard to (1) whether the injury was compensable, and (2) if so, the extent of compensation benefits to which Employee is entitled. At the close of Employee's proof as to compensability, the trial court dismissed Employee's claim, finding that the issue of causation was not established. Employee has appealed this judgment. Employee contends that the evidence does not support the trial court's ruling that he had failed to sustain his burden of proof as to compensability. We reverse the judgment dismissing the claim and remand the case to the trial court for proceedings consistent with this opinion.[1]

**Tenn. Code Ann. § 50-6-225(e)(3) (Supp. 2007) Appeal as of Right;
Judgment of the Circuit Court Reversed and Remanded**

DAVID G. HAYES, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, C.J., and DONALD P. HARRIS, SR. J., joined.

Stephen F. Libby, Memphis, Tennessee, for the appellant, William J. Parker.

Thomas D. Yeaglin, Memphis, Tennessee, for the appellee, HAPS Heating, Air Conditioning, Plumbing and Electrical Services, LLC.

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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 section 50-6-225(e)(3) (Supp. 2007).

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

William J. Parker ("Employee") filed a complaint against HAPS Heating, Air Conditioning, Plumbing and Electrical Services, LLC ("Employer"), on December 19, 2005, seeking workers' compensation benefits. Employee alleged that he suffered an injury which occurred on or about February 19, 2005. Employee alleged that Employer initially made payments for his medical treatment, but that Employer later denied his claim for workers' compensation benefits and medical expenses. Employer filed a response denying liability for such benefits. The trial court bifurcated the trial, and proceeded to hear proof with regard to compensability.

Mr. Jerry Jones testified that he was the owner of HAPS Heating, Air Conditioning, Plumbing and Electrical Services, LLC and that he hired Employee approximately five weeks prior to the incident which gave rise to Employee's complaint. Employee's duties involved performing electrical and plumbing work, as well as general repairs. Mr. Jones testified that on the date of the incident he, Employee, and two other employees were attempting to place a 75-gallon water heater, which weighed between 200 and 225 pounds, into a customer's attic. Because the house was not equipped with attic stairs, the four men cut a hole in the ceiling and secured ropes around the water heater. They then attempted to hoist the water heater up to the attic level, with Mr. Jones and Employee underneath and the two other employees pulling from above. Jones testified that, unexpectedly, "[o]ne of [the ropes] slipped around without the water heater, and [the water heater] tilt[ed] outward on it." Mr. Jones recalled that the force of the water heater slipping caused him to step back and lose his balance. He also stated that he saw that Employee "had [the water heater] on his hands; and he had his knees down where the water heater was leaning up against his hands and his knees." After the men stabilized the water heater, Mr. Jones asked Employee if he was "okay," and Employee responded that he was. According to Mr. Jones, Employee continued to work for several days after the incident until reporting a shoulder injury on February 24th. Mr. Jones reported the shoulder injury to Employer's insurance company after an accident report had been filed.

Employee testified that he was twenty-eight years old at the time of trial and that he had an eleventh grade education. He further testified that he had experienced problems with his shoulder since the age of twelve and that Dr. Dlabach performed surgery on his shoulder in 2002 after he fell from a ladder while working for a different employer. Employee was released from Dr. Dlabach's care in December of 2002, and he testified that he did not receive further treatment on his shoulder until February of 2005. Employee performed heavy lifting while working for a maintenance company in 2003 and 2004 and testified that he had no problems with his shoulder throughout this period.

Employee's account of the water heater incident on February 19, 2005, during which he claimed to have been injured, was similar to that given by Mr. Jones. One of the ropes slipped as the men were lifting the water heater, Mr. Jones lost his balance and released the water heater, and the water heater rested solely upon Employee's hands, pinning him against a wall in a fully squatted

position. Mr. Jones helped lift the water heater off Employee, and the men resumed lifting the water heater into the attic. Employee testified that his shoulder bothered him after the incident but that he did not think anything about it and continued to work. He testified that he experienced pain in his shoulder, however, several days later when he and another employee were attempting to pull a different water heater up a flight of stairs. Employee reported this pain to Mr. Jones who recommended that he visit Baptist Minor Medical, which he did.

Employee subsequently began seeing Dr. Harold Knight, an orthopaedic surgeon, for treatment of shoulder pain and periodic dislocations and subluxations. Employee was prescribed pain medication and received physical therapy. Employee was excused from work during this time. He testified that Dr. Knight released him to light duty at work approximately two or three weeks into the treatment, but that Mr. Jones informed him that there was no light duty available and further advised him to continue physical therapy. Employee testified that Dr. Knight later released him to regular duty. Employee claimed that he did not believe he could have worked full duty but that he wanted to try to go back to work because he needed the money. When Employee reported back to work for Employer on April 13, 2005, Mr. Jones told him that he had been expected to return to work on April 11. Employer discharged Employee on April 14, 2005. The separation notice completed by Employer stated the circumstances of separation as "misconduct connected with work – ran up phone bill and did side job in our truck [and] our tools while out on leave." Employee obtained subsequent employment with an electrical company, which required no heavy lifting.

The deposition of Dr. Knight was admitted as an exhibit, thus concluding Employee's proof. Employer's counsel then called Employer's first witness. However, Employee's counsel objected to the witness before testimony was given. At this point, the parties' attorneys and the trial court engaged in a lengthy discourse as to whether the witness would be allowed to testify based on lack of notice. Without resolution of the issue, the trial court broke for a brief recess to read Dr. Knight's deposition testimony.

Dr. Knight testified that he first treated Employee on February 25, 2005 at which time Employee complained of shoulder pain after lifting water heaters the previous week. Employee informed Dr. Knight that he had previous problems with his shoulder, having undergone labral repair surgery performed by Dr. Dlabach three or four years prior. Dr. Knight first diagnosed Employee with "acute shoulder tendonitis, possible rotator cuff tear or labral tear[.]" Dr. Knight recommended that Employee wear a sling and that Employee return to "light duty" at work. He also prescribed medication and physical therapy. On March 1, 2005, Employee saw Dr. Knight again and stated that his shoulder was still bothering him. Dr. Knight recalled that Employee reported feeling a "sense of dislocation when he put his arm up" and that he "abducted [the shoulder] while he was sleeping," although Dr. Knight noted that x-rays of the shoulder revealed no dislocation. Dr. Knight characterized the symptoms as acute dislocation and ordered that Employee be placed in a shoulder immobilizer for two weeks. He also recommended that Employee continue light duty at work and continue taking pain medication.

Employee returned to Dr. Knight two weeks later, reporting the same symptoms. Dr. Knight referred Employee for an MRI. Dr. Knight testified that the results demonstrated the following: "postoperative changes from previous shoulder. [Employee] had some tendonitis. Doesn't look like he has torn the labrum. He's got some fluid in his shoulder joints." The results indicated to Dr. Knight that there had been "an injury but no fracture, no major injuries." Three days later, Employee saw Dr. Knight again. They reviewed Dr. Knight's findings as to the MRI and discussed physical therapy and the plan to "wean" Employee from the shoulder immobilizer. Dr. Knight again recommended light duty and ordered Employee not use his arm for one week, at which point Employee would return for an evaluation.

According to Dr. Knight's deposition testimony, Employee saw Dr. Knight one week later and reported to him that he had experienced two episodes of subluxation or dislocation while sleeping. Dr. Knight defined subluxation as occurring when the "ball [of the shoulder] slips out of the socket about halfway . . . [and] pops back in." Dr. Knight opined that such episodes were not unusual after injuries such as the one Employee described experiencing during the water heater incident. Dr. Knight testified that he had hoped to be able to resolve Employee's shoulder injury without surgery. Dr. Knight described the applicable surgical procedure as "open Bankart repair" during which one of two options would be pursued after he made an interoperative determination as to the specific injury. If it was discovered that Employee's labrum was torn, Dr. Knight would repair it surgically. Conversely, if it was discovered that the labrum was intact but that Employee's "capsule" or "lining of the shoulder joint" was "stretched out," he would repair or "tighten up" the capsule surgically. Dr. Knight again noted that the MRI results indicated that the injury was not to Employee's previously surgically repaired labrum. Dr. Knight therefore believed that Employee's capsule had been stretched, torn, or was loose. Dr. Knight further explained that this injury could only be detected during surgery, not from examining the MRI.

Dr. Knight further testified that one week later, on April 8, 2005, Employee returned to see him, reporting that he had dislocated his shoulder again while acting as a pallbearer at his grandfather's funeral the previous weekend, and that he had to "manually reduce his shoulder[.]" Employee told Dr. Knight that he wanted to work, and Dr. Knight released him to return to regular duty. At that time, Dr. Knight opined that Employee "may ultimately need a stabilization procedure if he continues to have the . . . subluxations." On April 19, 2005 Dr. Knight saw Employee again and noted that Employee's "shoulder continues to [dislocate] . . . , and he wants to go ahead and get it fixed [surgically]." Dr. Knight opined at this time that Employee had reached maximum medical benefit, and he released Employee to light duty, recommending that Employee not continuously lift more than five pounds. Dr. Knight testified that the surgery he recommended for Employee was, to a reasonable degree of medical certainty, related to the injuries Employee sustained at work during the week of February 19, 2005. On cross-examination, defense counsel questioned Dr. Knight regarding Employee's health history and previous treatment of his shoulder in 2002 by Drs. Perez and Dlabach. Dr. Knight testified that, based upon the history presented to him by Employee, it was his understanding that Employee "had surgery [to repair his labrum in August of 2002] . . . and then after surgery, he had no more episodes of shoulder subluxation or dislocation" until after his injury in February of 2005.

Following the trial court's reading of the deposition, and without introduction of Employer's proof, the court ruled, *sua sponte*, that it was "not inclined to find in favor of the Plaintiff." The court explained its dismissal of the cause as follows:

> Rather than going forward with all this stuff that doesn't have to do with anything, I'm ready to rule. I've read the deposition, the Plaintiff has rested, we've been here for two days on what you assure the Court would be a brief hearing, so let me explain my ruling. And that is, the Plaintiff's responses, his exhibition of the poorest memory of any witness I've ever had on the witness stand[,] all these hours that he testified, he just can't remember. He has [de minimus] memory. He seems evasive. He seems terribly confused. That hurt his credibility. And plus the fact of his agreeing to be a pallbearer . . . that simply flies in the face of good common sense. And I believe that Dr. Knight, like many doctors, was trying to protect his patient and wants his patient to get help that he thinks his patient needs, but the Court is not convinced by a preponderance of the evidence giving the Plaintiff the benefit of the doubt that the incident that occurred – and I realize Plaintiff objects and will appeal this, but I am not so sure that – I'm not assured by a preponderance of the evidence that the incident that occurred with the water heater was the pivotal event. I think there's plenty of evidence that there were other incidents where Plaintiff had problems with his shoulders and it was in and it was out and complications. And so the Court is simply not convinced that this particular incident was the cause of his problems. And I found his willingness to be a pallbearer persuasive.

The trial court entered an order dismissing the complaint, and Employee timely filed a notice of appeal.

STANDARD OF REVIEW

The trial court's ruling in this case, which occurred following the close of Employee's proof, was, in effect, an involuntary dismissal of Employee's claim as provided by Rule 41.02 of the Tennessee Rules of Civil Procedure, notwithstanding the fact that no such motion was made by Employer at trial. In a non-jury case, when a motion to dismiss is made at the close of a plaintiff's case under Rule 41.02, "the trial judge must impartially weigh and evaluate the evidence in the same manner as though he were making findings of fact at the conclusion of all of the evidence for both parties, determine the facts of the case, apply the law to those facts, and, if the plaintiff's case has not been made out by a preponderance of the evidence, a judgment may be rendered against the plaintiff on the merits." *City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734, 740 (Tenn. 1997). In sum, the trial court must deny the motion if the plaintiff has made out a prima facie case. *Smith v. Inman Realty Co.*, 846 S.W.2d 819, 822 (Tenn. Ct. App. 1992).

The standard of review of a trial court's decision to grant a Rule 41.02 involuntary dismissal is governed by Rule 13(d) of the Tennessee Rules of Appellate Procedure. *Atkins v. Kirkpatrick*, 823 S.W.2d 547, 552 (Tenn. Ct. App. 1991). Our review of findings of fact by the trial court, therefore,

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. R. App. P. 13(d). Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

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).

ANALYSIS

Employee appeals the trial court's ruling that he "did not prove by a preponderance of the evidence that his purported job related accidental event had caused his purported injury . . . or caused the aggravation of a pre-existing condition" which resulted in the dismissal of Employee's complaint as to compensability. Employee relies heavily upon the deposition testimony of Dr. Knight, the only physician whose testimony was offered at trial. He further cites to his own testimony and that of Mr. Jones, regarding the circumstances surrounding the incident to corroborate Dr. Knight's testimony. Moreover, Employee argues that the trial court's focus on Employee's participation in his grandfather's funeral as a pallbearer and the resulting dislocation or subluxation, was misplaced because Dr. Knight testified that Employee's need for surgery preceded this event.

To determine whether an injury has arisen out of one's employment, this Court must consider all the circumstances and determine whether there is "a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993). That injury "occurs in the course of one's employment if it occurs while an employee is performing a duty he or she was employed to do." *Id.* Any reasonable doubt as to whether such an injury arises out of the employment should be resolved in favor of the employee. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. *Thomas v. Aetna Life and Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991).

"The causation requirement is satisfied if the injury has a rational, causal connection to the work." *Reeser*, 938 S.W.2d at 692. Additionally, *Reeser* provides:

> Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when there is also lay testimony from

> which it reasonably may be inferred that the incident was in fact the cause of the injury.

Id. (citations omitted). *See also Fritts v. Safety Nat. Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005).

"The existence of a prior disabling condition does not preclude a workers' compensation award where a work-related injury aggravates that pre-existing condition." *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992). An employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998).

Notwithstanding our extension of considerable deference to the trial court's determination that Employee was evasive and forgetful while testifying and thus was not a credible witness, we conclude that the evidence preponderates against this determination regarding the only issue litigated below, compensability. The factual circumstances surrounding the incident occurring on February 19, 2005, were largely undisputed, and those circumstances were corroborated by both Employee and Mr. Jones. Those circumstances were also consistent with Dr. Knight's characterization of a "distraction" type injury or an aggravation of Employee's pre-existing condition, which he opined resulted in acute dislocations and subluxations of the shoulder that required surgery.

Additionally, we conclude that the trial court placed undue emphasis on Employee's willingness to serve as a pallbearer at his grandfather's funeral and the resulting shoulder dislocation or subluxation. At the time of this incident, Dr. Knight had already been treating Employee for several weeks for shoulder pain and acute dislocations or subluxations, and Dr. Knight testified that these problems preceded the complaint which stemmed from Employee's serving as a pallbearer.

Moreover, in our independent review of Dr. Knight's deposition testimony, which was uncontroverted at the time of involuntary dismissal, we find that Dr. Knight offered credible testimony that the surgery he recommended for Employee was related to the shoulder injury that Employee sustained at work during the week of February 19, 2002. Therefore, we conclude that Employee offered sufficient evidence to establish a prima facie showing that his shoulder injury arose out of and in the course of, his work for Employer, and was thus compensable under the workers' compensation laws. Accordingly, the trial court erred in its grant of a Rule 41.02 involuntary dismissal of Employee's cause of action, and we remand for further proceedings.[2]

[2] As we have stated on many occasions, workers' compensation cases are afforded priority on the trial and appellate court dockets pursuant to Tennessee Code Annotated 50-6-225(f) (Supp. 2006) to avoid prolonging an injured employee's economic adversity. E.g., Bldg. Materials Corp. v. Britt, 211 S.W.3d 706, 714 (Tenn.2007). When trial courts dismiss cases after the plaintiff's proof and without making alternative findings, we are often left with no other remedy than a remand to the trial court. We therefore encourage judges to rule on all issues in workers' compensation cases.

CONCLUSION

We reverse the judgment of the trial court granting involuntary dismissal of this case and remand to the trial court for further proceedings. Costs are taxed to HAPS Heating, Air Conditioning, Plumbing, and Electrical Services, LLC, and its surety, for which execution may issue if necessary.

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DAVID G. HAYES, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

WILLIAM J. PARKER v. HAPS HEATING, AIR CONDITIONING, PLUMBING & ELECTRICAL SERVICES, LLC

Circuit Court for Shelby County
No. CT006643-05

No. W2007-01023-SC-WCM-WC- Filed January 16, 2009

ORDER

This case is before the Court upon the motion for review filed by HAPS Heating, Air Conditioning, Plumbing & Electrical Services, LLC 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 froth 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 are assessed to HAPS Heating, Air Conditioning, Plumbing & Electrical Services, LLC, for which execution may issue if necessary.

PER CURIAM

JANICE M. HOLDER, C.J., not participating