

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 22, 2010 Session

MICHAEL HALL v. AM COMP ASSURANCE CORPORATION

**Appeal from the Chancery Court for Madison County
No. 65552 James F. Butler, Chancellor**

No. W2009-01461-WC-R3-WC - Mailed May 28, 2010; Filed June 28, 2010

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. Michael Hall ("Employee") alleged that he sustained compensable injuries as a result of repetitive use of his hands and arms in the course of his employment as a butcher for Latham's Meat Company ("Employer"). Employer denied that he had sustained a compensable injury. In the alternative, it alleged that Employee's injuries had been caused by his part-time work for a second employer. The trial court found that Employee had sustained compensable injuries to his arms and that Employer was liable for workers' compensation benefits arising from those injuries. It awarded 22.5% permanent partial disability ("PPD") to both arms. On appeal, Employer contends that the trial court erred by finding that a compensable injury occurred and by finding that Employee sustained permanent disability as a result. We affirm the judgment.

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

D. J. ALISSANDRATOS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, C. J., and ALLEN W. WALLACE, SR. J., joined.

William F. Kendall, III and Hailey H. David, Jackson, Tennessee, for the appellant, Am Comp Assurance Corporation.

David Hardee, Jackson, Tennessee, for the appellee, Michael Hall.

MEMORANDUM OPINION

Factual and Procedural Background

Employee is a butcher. He began working for Employer in 2003. His work consisted of butchering cows, hogs, and deer. He testified that he began experiencing pain in his hands in the latter part of 2006. He associated the onset of symptoms with processing an unusually large number of deer during the fall hunting season. He reported his symptoms to Paul Latham, owner of Employer, in January 2007. He was directed to a primary care clinic where a nurse practitioner prescribed splints and anti-inflammatory medication. These measures did not provide any relief. He communicated that information to Mr. Latham. As a result, he was eventually provided a list of physicians from which he selected Dr. Frederick Torstrick, an orthopaedic surgeon.

Dr. Torstrick had previously treated Employee for right carpal tunnel syndrome in 1993 by performing a carpal tunnel release. Employee testified that the procedure had completely resolved his problems at that time. He did not seek or receive medical treatment for carpal tunnel syndrome or any other problem related to his hands from the time he was released by Dr. Torstrick in approximately 1994 until January 2007. Dr. Torstrick testified that his physical examination of Employee was generally normal. In particular, testing for carpal tunnel syndrome was negative. X-rays of the right wrist showed “some spurring of the radial styloid with some deformity of the scaphoid bone.” Dr. Torstick stated that these findings were suggestive of a traumatic injury and were not likely the result of repetitive use of the wrist. Employee gave no history of such an injury to Dr. Torstrick and, in his trial testimony, denied that any such injury had occurred.

Dr. Torstrick further testified that the “joint space between the lunate [a bone in the wrist] and the radius on each wrist appears to be slightly narrowed.” He was not asked to explain the significance or potential cause of that finding. His plan at that time was to order additional testing, specifically a CT scan of the wrist and an “arthritis panel,” to further evaluate Employee’s condition. He also prescribed wrist splints to Employee. The tests did not occur, as Employer’s insurer denied the claim at that point in time.

The denial was apparently based on correspondence between a representative of the insurer and Dr. Torstrick in August 2007 concerning Employee’s work for a second employer. The evidence showed that since May 2006 Employee had worked for a second employer, Fireline, in addition to working for Employer. Employee’s work for Fireline involved cleaning commercial kitchen equipment. Specifically, Employee and a co-worker, his brother, removed fans and filters from ventilation hoods, poured a grease-removing chemical on them, and then rinsed the equipment with a pressure washer. Employee, as well as a representative of Fireline, testified that Employee worked an average of eight hours per

week at that job. Employer's insurer sent video recordings of Employee performing work at Fireline to Dr. Torstrick. Dr. Torstrick responded by letter that "any type of activities that would require repetitive flexion and extension of the wrist could potentially aggravate [Employee's] symptoms." In the same letter, Dr. Torstrick reiterated his opinion that a CT Scan and arthritis panel should be performed.

Employee received no further medical care. He continued to work for Employer and for Fireline as of the time of the trial. At the request of Employee's attorney, Dr. Samuel Chung, a physiatrist, conducted an IME on April 2, 2008. Dr. Chung's diagnosis was "residual from bilateral wrist injury with ongoing symptomatology." He opined that the "more probable cause" of Employee's condition was "[f]rom the mainly cutting meat, gripping meat, and packing meat." He assigned 20% impairment to the right arm and 10% impairment to the left arm based upon loss of grip strength. Dr. Chung testified that he was aware of the nature of Employee's work for Employer because he sometimes shopped there. On cross-examination, he testified that he was not aware of Employee's second job. He also stated that he had taken additional measurements during his examination of Employee for the purpose of determining whether Employee was giving a consistent effort. He did not record those measurements, however.

Employer introduced several video recordings, including some footage of Employee performing his work for Fireline, through the testimony of two private investigators.

Employee testified that he was fifty years old. He had attended school through the eighth grade and had no additional education or specialized training. He had worked primarily as a butcher but had also been a construction laborer and tractor driver. In his job for Employer, he cut meat five or six hours per day. He used a steak knife or boning knife in his right hand while holding the meat with his left hand. He stated that the work involved constant motion of his right hand and wrist. During deer season, the job also required him to skin the animal before butchering it. He estimated that he had processed six hundred deer in the fall of 2006, including fifty-five in one day.

He continued to work for Employer and for Fireline. He taped his hands and took Alleve while at work. He had asked for and received assistance in lifting heavier objects. He considered his work for Fireline to be less strenuous than his work for Employer.

The trial court found that Employee had sustained compensable injuries to both arms. The parties had stipulated that any award of benefits would be capped at one and one-half times the impairment. The court concluded that Employee's impairment, applied to both arms, was 15%. It awarded 22.5% PPD. Employer appealed contending that the trial court erred by finding that Employee sustained a compensable injury and also by finding that he sustained permanent disability.

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 Group 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 contends that the evidence preponderates against the trial court's conclusion that Employee sustained a compensable injury. To be eligible for workers' compensation benefits, an employee must show causation by a preponderance of the evidence or, more specifically, that his injury occurred in the course of and arose out of the employment. Tenn. Code. Ann. § 50-6-102(12). An injury is considered to have occurred "during the course of" employment if it occurs while performing a duty the employee is employed to perform. The requirement is a question of "time, place and circumstance." Forman, 272 S.W.3d at 571. An injury "arises out of" employment when there is a causal connection between the injury and a hazard or condition associated with the employment. Id. Generally, a plaintiff must establish causation with expert medical evidence. Long v. Tri-Con Indus., 996 S.W.2d 173, 177 (Tenn. 1999). Although the evidence cannot be "speculative or conjectural," a court may find causation when a medical expert opines that employment conditions "could be" the cause of the injury where other evidence supports that notion. Id. All reasonable doubts should be resolved in favor of the employee. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008).

In support of its contention that Employee has not suffered a compensable injury, Employer notes that Dr. Torstrick testified that the bony deformities shown on the x-rays were not caused by repetitive activity and that Dr. Torstrick did not testify that Employee's condition was caused or advanced by his work. Employer also contends that the testimony of Dr. Chung cannot be relied on because Dr. Chung was unaware of Employee's work for Fireline, that he saw Employee on only one occasion, and that he is an osteopathic physiatrist while Dr. Torstrick is an orthopaedic surgeon.

From those premises, Employer asserts that Employee's activities at Fireline were an equally likely cause of his symptoms. However, neither doctor testified to that effect. Dr. Chung and Dr. Torstrick both indicated that the potential effect of Employee's second job upon his hands and arms would depend upon several factors, including the actual amount of repetitive gripping involved and the amount of time spent in that activity. In that regard, we conclude that the evidence presented to the trial court supports the conclusion that his job for Employer was substantially more strenuous than his work for Fireline. Moreover, it is not disputed that Employee worked full-time for Employer but only part-time for Fireline. Based upon those considerations, we conclude that the evidence does not preponderate against the trial court's finding that Employee sustained a compensable injury.

Employer also contends that Dr. Chung's testimony is insufficient to establish that Employee has sustained a permanent disability as a result of his work activities for Employer. In particular, Employer argues that Dr. Chung incorrectly applied the AMA Guides by basing his impairment rating upon loss of grip strength. Dr. Chung explained and defended his methods under cross-examination from counsel for Employer. Dr. Torstrick did not testify on the subject of permanency, and Employer did not introduce any other evidence to support its position that Dr. Chung improperly applied the Guides. Furthermore, "in demanding that a medical expert follow the AMA Guides when assessing anatomical disability, the statute does not somehow elevate the AMA Guides themselves to the status of law. Rather, the AMA Guides themselves are nothing more than tools for effectuating in a fair and predictable way the paramount goals and requirements of the workers' compensation statutory scheme." Dotson v. Rice Chrysler-Plymouth-Dodge, Inc., 160 S.W.3d 495, 501 (Tenn. 2005).

Our examination of the record leads us to the conclusion that the evidence does not preponderate against the trial court's conclusion that Employee sustained permanent disability as a result of his compensable injury.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Am Comp Assurance Corporation and its surety, for which execution may issue if necessary.

D. J. ALISSANDRATOS, SPECIAL JUDGE

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ORDER

This case is before the Court upon 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 Memorandum Opinion of the Panel should be accepted and approved; 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 on appeal are taxed to the Appellant, Am Comp Assurance Corporation, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM