

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

February 28, 2011 Session

DARRYL J. MAYTON v. WACKENHUT SERVICES, INC.

**Appeal from the Chancery Court for Roane County
No. 16,288 Frank V. Williams, III, Chancellor**

No. E2010-00907-WC-R3-WC - Filed July 18, 2011

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. The issue presented in this case is whether the employee's request for a benefit review conference was filed more than one year after the employee had knowledge that his occupational disease was caused by his employment. The trial court ruled that the employee's request was not timely and dismissed the case. After careful review, we hold that the evidence does not preponderate against the trial court's finding that Employee had knowledge that his illness was related to his employment more than one year before the filing of his request for a benefit review conference. We affirm the judgment of the trial court.

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

SHARON G. LEE, J., delivered the opinion of the Court, in which JON KERRY BLACKWOOD, SR. J., and E. RILEY ANDERSON, SP. J., joined.

Christopher H. Hayes, Oak Ridge, Tennessee, for the appellant, Darryl J. Mayton.

James Wallace Speed and James Allen Callison, Lawrenceville, Georgia, for the appellee, Wackenhut Services, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

Darryl Mayton (“Employee”) worked as a security officer at the United States Department of Energy reservation in Oak Ridge from 1988 until 2005. During that time and in that capacity, Employee worked for several different contractors, and from 2000 until 2005, he worked for Wackenhut Services, Inc. (“Employer”). Employee alleges that he developed chronic obstructive pulmonary disease (“COPD”) and related pulmonary problems as a result of his exposure to various toxic substances in the course of his work.

Employee testified that his job required that he work both indoors and outdoors at his workplace and that his presence was required in areas where he was frequently exposed to various airborne toxins, including asbestos, silica, exhaust fumes from diesel and gasoline engines, fluorine gas, welding fumes, nickel powder, coal dust, and ammonia. In August of 2004, after completing a half-mile run as part of an annual fitness certification test, Employee experienced shortness of breath and was taken to a local hospital where he was evaluated and received breathing treatments. The next day, Employee consulted his primary care physician, Dr. Rodney McMillin, who diagnosed him with COPD. As of the time of this diagnosis, in addition to having been exposed to various toxins at his job site, Employee had smoked cigarettes daily for more than twenty-five years.

Employee’s breathing difficulties gradually worsened during the months following his diagnosis and resulted in his hospitalization in February of 2005. Although Employee was subsequently able to return to his job for a few months, Dr. McMillin removed him from work in July of 2005, and he did not return to work after that date.

After his initial diagnosis by Dr. McMillin, Employee was treated by Dr. Charles Bruton, a pulmonary specialist, and was also examined by several other pulmonary specialists. The testimony of these doctors did not show complete agreement as to the severity of Employee’s COPD or as to the relationship between Employee’s exposure to toxins at work and his smoking and his pulmonary disease. However, there was agreement among the medical witnesses that the capacity of Employee’s lungs to transfer oxygen to and remove carbon dioxide from his blood was significantly diminished and that this problem was related to the COPD.

On August 14, 2006, Employee filed a “Claim for Benefits Under the Energy Employees Occupational Illness Compensation Program Act” with the U. S. Department of Labor Office of Workers’ Compensation Programs. The claim form was filled out by a Department of Labor representative using information provided by Employee, and Employee

signed the completed form under declaration that the information contained therein was true. In response to part 8 of the form, entitled “Identify the Diagnosed Condition(s) Being Claimed as Work-Related,” the words “COPD” and “pulmonary embolism”¹ are written.

Employee testified that after making the application for federal benefits, he made an appointment with Dr. McMillin and asked him, “[A]re there possibilities that some of this could be work-related[?] And [Dr. McMillin] said yeah.” A few days later, Employee met with Dr. Bruton, who, according to Employee, “pretty much said the same thing.” The records of the doctors indicate that Employee actually saw Dr. Bruton on August 18, 2006; Dr. McMillin on September 8, 2006; and returned to Dr. Bruton on September 15, 2006. Dr. McMillin’s notes regarding the September 8 visit reflects that he and Employee discussed a possible connection between Employee’s work and his lung disease on that date. While Dr. Bruton’s notes make no reference to such a connection, by letter dated September 15, 2006, Dr. Bruton wrote a representative of the U.S. Department of Labor that, “It is my professional opinion that [Employee’s lung disease] is related to his work environment and as a result of his employment with [Employer] at K-25 in Oak Ridge, TN.”² Dr. McMillin’s September 8 notes and Dr. Bruton’s September 15 letter are the first references in any of the medical records in evidence indicating a causal relationship between Employee’s lung disease and his employment.

Employee filed his Request for Benefit Review Conference (“BRC”) with the Tennessee Department of Labor on September 4, 2007. A BRC was held on January 7, 2009, an impasse was declared, and suit was filed later that day. At the time he filed his request, he had not been paid any worker’s compensation benefits.

The trial court found that Employee’s lung disease was caused by his employment and that he was permanently and totally disabled as a result of the condition. However, the trial court also found that the statute of limitations began to run on August 14, 2006, the day that Employee filed his claim with the U. S. Department of Labor. Because Employee did not file his Request for Benefit Review Conference within one year of that date, the trial court ruled that his claim for Tennessee workers’ compensation benefits was barred by the one-year statute of limitations and dismissed the claim. Employee appeals that ruling.

¹ Employee suffered a pulmonary embolism in September 2005.

² Dr. McMillin wrote a similar letter on September 18, 2006, addressed “To Whom It May Concern,” stating “I think there is also an element of industrial toxics [sic] that is worsening [Employee’s] problems.”

Analysis

In cases where an employer has not paid workers' compensation benefits to an employee, the employee's right to compensation is barred unless the employee gives notice to the employer pursuant to Tennessee Code Annotated section 50-6-202 and files a request for a BRC within one year after the accident resulting in the injury. Tenn. Code Ann. § 50-6-203(b)(1) (2008). For occupational diseases such as COPD, the statutory period for the filing of the BRC request begins to run "as of the date of the beginning of the incapacity for work." Tenn. Code Ann. § 50-6-306(a) (2008).

The commencement of the statutory limitation period is triggered by the occurrence of two events: 1) when the employee is incapacitated from work as a result of the occupational disease, and 2) when the employee knows or should know that he or she has an occupational disease which is the cause of the incapacity to work. Brown v. Erachem Comilog, Inc., 231 S.W.3d 918, 922-23 (Tenn. 2007); Tenn. Prod. & Chem. Corp. v. Reeves, 415 S.W.2d 118, 119 (Tenn.1967); Adams v. Am. Zinc Co., 326 S.W.2d 425, 428 (Tenn. 1959).

Employee became incapacitated from work because of his lung disease in July of 2005 when Dr. McMillin first placed him on medical leave of absence. The issue in dispute is the date on which Employee had actual or constructive knowledge that his lung disease was related to his employment. Employee maintains that he did not have this knowledge until at least September 8, 2006, when he discussed the subject with Dr. McMillin. The Employer argues that the Employee had the requisite knowledge when he filled out his claim for federal benefits on August 14, 2006.

The trial judge, who saw and heard the witnesses, ruled that Employee had actual or constructive knowledge that his lung disease was work-related on August 14, 2006, when he filed his claim with the U.S. Department of Labor wherein he asserted that he suffered from COPD caused by conditions at his work.

The time at which Employee had actual or constructive knowledge that his condition was work-related is a question of fact. See Banks v. United Parcel Serv., Inc., 170 S.W.3d 556, 562 (Tenn. 2005); Jacks v. E. Tenn. Mech. Contractors, Inc., No. E2008-02501-WC-R3-WC, 2009 WL 2589093, at *6 (Tenn. Workers' Comp. Panel Aug. 24, 2009). 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 to 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., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). Therefore, applying our standard of review, we must presume that the trial court's ruling on the question of fact is correct and we must affirm it unless the evidence preponderates against it. White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992).

Employee argues that his August 14, 2006, application for benefits under the Energy Employees Occupational Illness Compensation Program Act (the "EEOICP Act"), codified at 42 United States Code, Sections 7384 and 7385 (2006 & Supp. 2010), was not a sufficient basis for the trial court to find that he had constructive knowledge that his lung disease was work-related.

Congress enacted the EEOICP Act upon findings that workers involved in nuclear weapons production since the Second World War had been exposed to various toxic substances without their knowledge or consent, and had been impeded from seeking or receiving compensation for resulting occupational illnesses. Id. § 7384(a). Through the EEOICP Act, Congress established a program with the purpose of "provid[ing] for timely, uniform, and adequate compensation of covered employees and, where applicable, survivors of such employees, suffering from illnesses incurred by such employees in the performance of duty for the Department of Energy and certain of its contractors and subcontractors." 42 U.S.C. § 7384d(b).

Employee observes that his application for federal benefits merely began a process, and did not amount to a finding that his condition was work-related. He notes his testimony that the meeting with the Department of Labor representative was "just an application, basically," and that he was prompted to apply for the federal benefits by K-25 union representatives. "I worked with [the union representatives] and they pretty much informed me that I probably need to get over there [to the U. S. Department of Labor] and see if I could get some kind of health assistance." He testified that he had not previously applied for these benefits because "nobody had ever mentioned" that his breathing problems could have been related to his employment. Employee emphasizes that when he applied for benefits under the Act, the Department of Labor representative advised him that he would need to discuss the possibility that his illness was work-related with his physicians. Employee asserts that federal regulations pertaining to the Act provided that at the time of the application, he still had the burden of proving by a preponderance of evidence that he was eligible for benefits under the Act by, among other things, submission of supporting medical documentation and that the Department of Labor did not actually determine that his condition was related to his job until December of 2007.

Employee contends that his application for federal benefits does not show that he had actual or constructive knowledge that his illness was work-related, but only that he was

required to present his illness as work-related in order to qualify for such benefits. Employee argues that he did not have the medical expertise to make the causal connection between his work place exposure and his lung disease. While it is true that expert medical testimony is required to prove causation, the issue before us is when Employee knew or should have known that he suffered from an occupational disease caused by his workplace. The inescapable fact is that on August 14, 2006, Employee signed a claim form declaring that the information contained therein was true that he suffered from work-related COPD. On its face, the signed claim form constitutes an acknowledgment by Employee that as of August 14, 2006, he had knowledge that his illness was work-related. It is immaterial when the Department of Labor determined to its satisfaction that the condition was work-related.

In further support of his argument that the trial court erred in finding that he had knowledge that his condition was work-related until he received medical information to that effect, Employee cites Ferrell v. Cigna Prop. & Cas. Ins. Co., 33 S.W.3d 731 (Tenn. 2000), which involved a workers' compensation cause of action by an employee who allegedly sustained hearing loss as a result of his employment. Addressing the question of whether the employee had filed suit within the statute of limitations, the Tennessee Supreme Court ruled that the employee did not have actual or constructive knowledge that his condition was work-related until he saw a medical report on the day before the trial of his workers' compensation lawsuit. Id. at 735. Employee notes that in Ferrell, although the employee had been treated by his doctor for his hearing problem for a number of years, the employee's doctor had never discussed the possibility that there was a connection between the employee's hearing problem and his job. The Court found that the employee did not have actual knowledge of the connection between his job and his malady until the day before trial when he saw a medical form signed by the doctor stating that his condition was probably work related. However, Ferrell is clearly distinguishable from the matter now before us.

In Ferrell, the Court stated that it concluded that the employee had no actual knowledge that his hearing loss was work-related until he read such medical form, "since there [was] no evidence to the contrary." Id. In the instant matter, there *is* evidence contradicting Employee's assertion that he had no knowledge that his illness was work-related until he was so advised by his doctors in September of 2006. The trial court had before it a document, signed by Employee, that stated on its face that it was an application for federal workers' compensation benefits. The document, provided by Employee, claimed that his COPD and pulmonary embolism were work-related and were caused by exposure to various listed substances during the course of his employment. By his signature on the document, he certified that he believed those allegations to be true. That evidence provided a reasonable basis for the trial court to conclude that Employee knew or should have known that his lung disease was work-related as of August 14, 2006.

Although Employee argues that he cannot be found to have had knowledge that his illness was work-related until he received information from a doctor to that effect, he presents no authority providing that a doctor's diagnosis is required to establish that an employee has knowledge that his or her condition is work-related where evidence is presented showing that the employee has specifically stated that the condition is work-related. In sum, we do not find that the evidence preponderates against the trial court's finding that Employee had knowledge that his illness was related to his employment when he filed his claim for federal benefits on August 14, 2006, and accordingly, his request for BRC was not timely filed.

Conclusion

For the reasons stated herein, the judgment of the trial court is affirmed. Costs are taxed to Darryl Mayton and his surety for which execution may issue if necessary.

SHARON G. LEE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
February 28, 2011 Session

DARRYL J. MAYTON v. WACKENHUT SERVICES, INC.

**Chancery Court for Roane County
No. 16,288**

No. E2010-00907-SC-WCM-WC

JUDGMENT

This case is before the Court upon the motion for review filed by Darryl J. Mayton 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.

Costs are assessed to Darryl J. Mayton, for which execution may issue if necessary.

Lee, J., Not Participating