IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 19, 2017 Session

JEFF PEVAHOUSE v. GERDAU AMERISTEEL

Appeal from the Chancery Court for Madison County
No. 72111 James F. Butler, Chancellor

No. W2016-01864-SC-WCM-WC – Mailed September 29, 2017;
Filed December 12, 2017

Jeff Pevahouse ("Employee") worked as an industrial bricklayer at Gerdau Ameristeel ("Employer") for thirty-two years. In the fall of 2012, he developed weakness in his arms and legs and balance problems. He sought medical care for these problems and was eventually referred to a neurosurgeon, who determined that Employee had a herniated cervical disc that required immediate surgery. Employee and his wife testified that they provided oral notice of a work injury to officials both before and after the surgery. The neurosurgeon who treated Employee could not state with medical certainty that the injury was work-related. An independent examiner testified that Employee has sustained an acute injury at work. In June 2003, Employee's attorney sent a letter to Employer on June 6, 2013, asserting that Employee had sustained a compensable injury. Employer asserted that this was its first notice that Employee had allegedly sustained a work-related injury. The trial court held that Employee did not give timely notice of his injury and dismissed the claim. It made an alternative ruling that Employee had sustained a compensable injury and he was totally and permanently disabled. Employee has appealed, contending that the trial court's finding regarding notice was contrary to the evidence. The 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Chancery Court Affirmed

JAMES F. RUSSELL, J., delivered the opinion of the court, in which HOLLY KIRBY, J., and RHYNETTE N. HURD, J., joined.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellant, Jeff Pevahouse.

Michael L. Mansfield, Jackson, Tennessee, for the appellee, Gerdau Ameristeel, Inc.

OPINION

Factual and Procedural Background[1]

Employee's job during his entire tenure was "bricklayer." His job consisted of placing, and fixing into place, dolomite bricks that insulated ladles and tundishes, two pieces of equipment in Employer's plant. These vessels held molten steel when in use; they required frequent relining. The job differs significantly from that of the more familiar construction bricklayer. In mid-2012, Employee began to notice numbness and swelling in his arms. He consulted a primary care physician, Dr. Conrad Sioson in May 2012. Dr. Sioson initially believed that Employee's symptoms were related to gout. He prescribed appropriate medication, but Employee's symptoms worsened to include weakness and tingling in all four extremities. Employee mentioned having received several tick bites, and his symptoms were consistent with Lyme disease. Dr. Sioson ordered testing for that condition. The results were negative. Dr. Sioson then referred Employee to Dr. Marcus Desio, a neurologist.

During this time, Employee's supervisor, Tony Klippel, noticed that he appeared to be having difficulty with coordination and balance. Employee was assigned for a time to operate a remote control crane. By November 1, a meeting was arranged with Employee, Mr. Klippel, Dave McAlexander, also a supervisor, and Bill Kipp, the Human Resources Manager. At that time, neither Employee nor anyone associated with Employer knew the cause of Employee's problems. Employee did not suggest that his condition was related to his job. At the conclusion of the meeting, Employee was given information concerning FMLA leave and Employer's short term disability insurance plan. Several days later, Mr. Klippel also called Employee's wife, Wanda Pevahouse, to inquire about Employee's condition. Mr. Klippel denied that Ms. Pevahouse said or suggested that Employee's condition was work-related during that or any other conversation.

[1] Because we are affirming the trial court's ruling on the notice issue, Employer's argument concerning that court's alternative ruling as to compensability is moot. Therefore, our recitation of the facts omits most of the evidence directed to that issue.

Dr. Desio first saw Employee on November 5, 2012. He found Employee's symptoms and physical examination to be consistent with cervical myelopathy, or pressure on the spinal cord at the neck. He ordered an MRI and nerve conduction study. The results of those studies confirmed compression of the spinal cord. Employee was referred to a neurosurgeon, Dr. John Neblett.

Dr. Neblett saw Employee on November 13, 2012. Employee gave a history of gradual development of weakness of his hands at work. He denied any trauma to his neck or any other specific event as a potential cause of his symptoms. The results of Dr. Neblett's exam suggested pressure on the spinal cord. The MRI ordered by Dr. Desio revealed a bone spur at the C5-6 level of the spine and a herniated disc that caused severe compression of the spinal cord. He recommended immediate surgery because there was danger of paralysis. The surgery took place on November 15, 2012. The procedure involved the removal of disc material from the area, removing the bone spur, placing pieces of bone in the gaps created, and fixing the cervical spine with a metal plate. Dr. Neblett continued to follow Employee until October 30, 2013. He declared Employee to be at maximum medical improvement on that date. He placed no specific restrictions on Employee's activities, but recommended and advised Employee to do whatever he was comfortable doing. However, he opined that Employee would not be able to return to his job for Employer. He restated that Employee never suggested to him that the cervical myelopathy was related to his work, and Employee never gave a history concerning the mechanism of injury. Dr. Neblett denied that he ever told Employee that his injury was related to his work. He further opined that, based on the information available to him, he could not relate the injury to Employee's work.

Employee did not return to work for Employer, nor seek other employment. His last day worked was November 1, 2012. Employee reported that his reflexes were slow, that he was able to drive on rural roads, but not in city traffic, due to numbness in his right foot. He added that he was unable to mow his yard. Employee stated that he did not think there was any job he could do.

Dr. Apurva Dalal, an orthpaedic surgeon, conducted an independent medical examination of Employee on March 26, 2014. Employee gave a history of repetitive work, and "He sustained an injury on 11-13 of 2012. [He] was doing [a] repetitive job when he developed problems with the neck and lower back. He ruptured his disc at C5-C6 and developed severe weakness." Dr. Dalal stated that he was personally aware of the type of work bricklayers perform. It is not clear from his testimony if he was referring to construction or industrial bricklayers. Based on his examination of Employee, Dr. Dalal opined:

> With reasonable degree of medical certainty I can state the kind of work this man did as a bricklayer for thirty-two years, that's a long time to do that kind of job, has progressively caused him to have severe degenerative arthritis of the neck and lower back; and then he got this big herniated disc.

Dr. Dalal assigned 21% anatomical impairment to the body as a whole for the cervical injury and an additional 7% for the lumbar spine. He assigned specific activity restrictions. During cross-examination, he stated that Employee's degenerative disc disease was caused by his work as a bricklayer, but he also stated that spinal discs do not rupture gradually. Dr. Dalal conceded that Employee did not report a specific event associated with the onset of his symptoms. He stated that there were many possible causes for degenerative disc disease and aging was one of those potential causes.

The trial court issued its decision in a letter to counsel. It found that Employee had failed to sustain his burden of proof that timely notice was given to Employer. The court also made an alternative ruling that, if timely notice was given, Employee had sustained his burden of proof as to causation. The alternative finding also ruled that Employee was totally and permanently disabled as a result of this injury. Judgment was entered in accordance with those findings. Employee timely appealed to the Supreme Court, which assigned the appeal to this Panel pursuant to Tennessee Supreme Court Rule 51. On appeal, Employer asserted that the evidence preponderates against the trial court's alternative ruling. We affirm the trial court's conclusion on the notice issue. Employer's issue is moot.

Analysis

The standard of review of issues of fact in a workers' compensation case 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) (2014)(applicable to injuries occurring prior to July 1, 2014). 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)

Employee contends that the evidence preponderates against the trial court's finding that Employer did not receive timely notice of the alleged work-related injury. Specifically, he asserts that oral notice was given to Employer by his wife or himself in November 2012. In the alternative, he submits that Employer had actual notice by virtue of information about his medical treatment provided to Employer by his wife.

The notice requirement is set out in Tennessee Code Annotated section 50-6-201(a):

> Every injured employee or the injured employee's representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, and the employee shall not be entitled to physician's fees or to any compensation that may have accrued under this chapter, from the date of the accident to the giving of notice, unless it can be shown that the employer had actual knowledge of the accident. No compensation shall be payable under this chapter, unless the written notice is given the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give the notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.

Tenn. Code Ann. § 50-6-201 (2008).

The statute requiring "notice" is abundantly clear that such notice must be given in written form by the employee or someone on his behalf. The statute is further abundantly clear that such written notice must be given within thirty (30) days of the occurrence. There is nothing in this record to suggest that any sort of the required written notice was given before the transmittal of the letter from the attorney for the Employee dated June 6, 2013. The code section does not provide for "oral notice" as contended by the Employee. This leaves the Employee with the alternative of establishing by a preponderance of the evidence that the Employer had "actual knowledge of the incident."

At trial, during direct examination, Employee testified that Dr. Neblett told him his neck injury "was probably -- it was a work-related --that he thought work-related incident, that it was from years and years of repetition. Hard work caused my body to just crumple up." His wife testified that she heard the same statement from Dr. Neblett at the time of the MRI study. Employee testified that he "believe[d]" that he told Bill Kipp what Dr. Neblett had said during a telephone conversation shortly after surgery. During his discovery deposition, he had testified he couldn't answer any questions about the content of

any conversations with Mr. Kipp or Tony Klippel. He also testified during the same deposition that he did not tell Mr. Klippel, Mr. Kipp or Mr. McAlexander that his condition was caused by his work. Employee explained at trial that he did not recall his conversation with Mr. Kipp at the time of his deposition. Employee agreed that he had stated in responses to interrogatories that he had given notice of his injury to Tony Klippel on November 13, 2012.

Wanda Pevahouse testified that, at the time of the MRI, she asked Dr. Neblett the cause of her husband's condition, and the doctor said he was "just worn down from years of hard work." Shortly thereafter, she exchanged email messages with Mr. Klippel. The primary subject of those messages was the progress of Employee's application for short-term disability benefits. Ms. Pevahouse stated that she completed an application for social security disability benefits for her husband on January 3, 2013. Her responses to the application form stated, inter alia, that Employee had not filed a workers' compensation claim and did not intend to do so. Ms. Pevahouse also agreed that she had a conversation with an adjuster from Hartford Insurance, Employer's short-term disability insurer, on March 29, 2013. During that conversation, she stated that there had been no "specific work-related injury" and that no workers' compensation claim had been filed.

Dr. Neblett denied that he told either Employee or his wife that his condition was work-related. Mr. Klippel denied receiving notice that Employee was claiming a work-related injury until the June 2013 letter from Employee's attorney. He specifically denied receiving oral notice of Employee's claim on November 13, 2012. Mr. Kipp testified that Ms. Pevahouse never mentioned a potential work injury during various emails and conversations with her after November 1, 2012. He added that, if he had received such information, he would have immediately notified Employer's safety manager, Eric Woolsey, to initiate a workers' compensation claim. Mr. Woolsey testified that there were postings throughout the plant advising employees to report on-the-job injuries to him. The postings contained his name and cell phone number. He further stated that he first became aware that Employee was claiming a work injury when he received counsel's June 6, 2013 letter.

The trial court explained its conclusion that Employee did not sustain his burden of proof as follows:

> In this case, the Court observed the Plaintiff's live testimony, and also that of the other witnesses. The Court observes that Plaintiff is a very mild-mannered, likeable person, but that he was not specific in his testimony, and that he contradicted himself from time to time. Further, it is clear that Plaintiff seemed to remember more about his case at trial than he did in his earlier deposition. He was unsure as to who he talked to, when he talked to them, and

> couched his notice statements in terms of "probably" gave notice. On the other hand, the Defendant's representatives were clear in their testimony, were credible, and while concerned with Plaintiffs condition, and his circumstances, were not advised that Plaintiff had incurred some type of injury at work.

After setting out the various internal contradictions of Employee's testimony and the several prior inconsistent statements by Employee and Ms. Pevahouse, the court concluded that Employee had failed to sustain his burden of proof.

The question of whether or not Employee provided notice of his alleged work injury in compliance with Tennessee Code Annotated section 50-6-201(a) is a question of fact. See Hale v. U.S. XPress Enterprises, Inc., No. E2006-00159-SC-WCM-WC, 2007 WL 674328, at *1 (Tenn. Workers Comp. Panel Feb. 27, 2007). We review questions of fact de novo on the record, according a presumption of correctness to the trial court's findings. Tenn. Code Ann. § 50-6-225(e). In this case, the trial court relied particularly on its assessment of the relative credibility of the witnesses at trial. Such findings are entitled to considerable deference by a reviewing court. Madden, 277 S.W.3d at 900.

Our review of the record demonstrates ample support for the trial court's finding that timely notice was not given. Employee's testimony on the subject was vague at best. It also conflicted with statements he made during his discovery deposition and with his interrogatory responses. Ms. Pevahouse was more certain in her testimony, but her testimony conflicted with prior statements she made in an interview with the disability insurer and in the application for Social Security Disability benefits she completed on her husband's behalf. Her testimony also conflicted with that of Employee on the subject of the individual to whom notice was given. Therefore, we have no difficulty concluding that the Court correctly found that notice was not given to Employer.

Employee's alternative argument is that Employer knew, or should have known, that he had sustained a work-related injury. In short, he contends that his supervisor and others were aware that he was having difficulty performing his job, evidenced by the decision to place him on a lighter job before it became necessary for him to take leave and apply for social security benefits. However, Employee and Ms. Pevahouse testified that they did not know the cause of his problems at that time. Employee and Mr. Klippel each testified that they were relieved to learn that Employee's problems were not caused by cancer.

Employee also submits that Employer should have surmised that his spinal problem was work-related based on Ms. Pevahouse's reports to Employer that Employee's symptoms were related to a spinal problem and that surgery was required to treat it, as well as her periodic updates of Employee's medical treatment and condition. We are unable to conclude

that these factors are sufficient to establish that Employer had actual knowledge of a work-related injury. Our Supreme Court stated in McKinney v. Berkline Corp., 503 S.W.2d 912, (Tenn. 1974):"[U]nless it is obvious that a work related injury has occurred, is insufficient to charge the employer with knowledge that the employee sustained a work related injury." 503 S.W.2d at 915 (internal citations omitted); see also Houston v. Conagra Foods Packaged Foods, LLC, No. W2015-01257-SC-WCM-WC, 2016 WL 3660354, at *5 (Tenn. Workers Comp. Panel June 30, 2016). We agree with the trial court's finding that Employer "did not have actual notice that [Employee] had incurred a work related injury, even though they knew [he] was experiencing medical issues."

Having affirmed the trial court's basis for dismissing the claim, we find that the remaining issues raised by the parties are now moot.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Jeff Pevahouse and his surety, for which execution may issue if necessary.

_____

JAMES F. RUSSELL, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JEFF PEVAHOUSE v. GERDAU AMERISTEEL

Chancery Court for Madison County
No. 72111

No. W2016-01864-SC-WCM-WC – Filed December 12, 2017

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Jeff Pevahouse pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's 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 Jeff Pevahouse and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holly Kirby, J., not participating