

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

LISA HOLT v. MAXIM HEALTHCARE SERVICES, INC. ET AL.

**Direct Appeal from the Chancery Court for Madison County
No. 63595 James F. Butler, Chancellor**

No. W2007-01677-WC-R3-WC - Mailed February 17, 2009; Filed March 30, 2009

In this workers' compensation action, the trial court found that the employee, Lisa Holt, had sustained a compensable injury and awarded 50% permanent partial disability to the body as a whole. The employer, Maxim Healthcare Services, Inc., has appealed, contending that the evidence preponderates against the trial court's finding of a compensable injury. We affirm the judgment of the trial court.¹

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

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

Stephen W. Elliott and Alison Deshae Hunley, Nashville, Tennessee, for the appellants, Maxim Healthcare Services, Inc. and Hartford Underwriters Insurance Company.

Jay E. DeGroot, Jackson, Tennessee, for the appellee, Lisa Holt.

MEMORANDUM OPINION

Factual Background & Procedural History

Lisa Holt is a licensed practical nurse and worked for Maxim Healthcare Services, Inc., ("Maxim") as a visiting home nurse until her injury. She alleged that she sustained an injury to her left shoulder on August 27, 2005, while lifting a patient to engage a Hoyer lift in the course of her employment. Ms. Holt testified that the injury occurred on a Saturday and that she notified her

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 § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law.

supervisor the following Monday. The supervisor advised her to see her personal doctor and report back.

Ms. Holt went to Dr. Michael Brueggeman, a neurologist who had previously treated her for a neck injury unrelated to her employment. Her initial appointment with him was on August 31, 2005. Dr. Brueggeman's office notes did not indicate Ms. Holt advised him of any acute injury at work or elsewhere. She reported that during the month prior to the visit she was having more trouble with pain in the left side of her neck, her left shoulder, and her left arm. Dr. Brueggeman's initial diagnosis was "recurrent disk herniation versus bursitis of the left shoulder." He prescribed a muscle relaxer and pain medication, and asked Ms. Holt to return in three weeks.

Ms. Holt testified that she reported the results of her visit to Dr. Brueggeman to her supervisor shortly thereafter. When she returned to the doctor one month later, she had not significantly improved. Dr. Brueggeman referred her to Dr. Kelly Pucek, an orthopaedic surgeon, for further evaluation. Ms. Holt first saw Dr. Pucek on October 3, 2005. Dr. Pucek testified that according to his records, she did not advise him at that time of any acute injury to the shoulder, either at or away from her employment. Based on his examination, Dr. Pucek suspected that Ms. Holt had impingement syndrome of the left shoulder. He ordered an MRI, which revealed a torn rotator cuff. He recommended surgery to repair this condition. Dr. Pucek testified that Ms. Holt indicated, at that time, that she was going to pursue a workers' compensation claim. She eventually called back after her claim was denied and scheduled the surgery under her private medical insurance.

The surgery occurred on December 30, 2005. Dr. Pucek performed an open rotator cuff repair and excised or removed the end of her clavicle where a number of bone spurs had formed. He followed Ms. Holt until March 31, 2006, when he released her to return to work. Dr. Pucek placed Ms. Holt's date of maximum medical recovery at May 31, 2006. He placed no permanent restrictions on her activities and did not assign a permanent impairment because she was not being treated as a workers' compensation patient. Dr. Pucek testified, however, that, if he had been asked to do so, he would have assigned a 6% impairment to the body as a whole for the injury and surgery.

Dr. Pucek testified that the cause of Ms. Holt's rotator cuff tear was "multi-factorial." He testified that her pre-existing diabetes could cause deterioration of the tendons. Because of this deterioration, less trauma would be required to result in a rotator cuff tear. According to Dr. Pucek, Ms. Holt's cervical spine problems with disk removal and the bone spurring he observed often result in rotator cuff problems. Dr. Pucek agreed that a lifting incident, such as that described by Ms. Holt, could be a "contributing factor" in her rotator cuff tear.

Dr. Samuel Chung conducted an independent medical examination at the request of Ms. Holt's attorney. Dr. Chung is an osteopathic physician, certified by the American Board of Physical Medicine and Rehabilitation and the National Board of Osteopathic Medical Examiners. Dr. Chung opined that Ms. Holt retained an impairment of 30% to the upper left extremity as a result of the injury and surgery, which equates to 18% to the body as a whole. Dr. Chung testified that the surgical procedures themselves resulted in permanent anatomical changes that, in turn, caused a loss

of use of Ms. Holt's left arm. Because this type of impairment is not covered in the AMA Guides, Dr. Chung assigned an impairment for these changes based on the loss of use he observed Ms. Holt to have.

Dr. Chung further testified that the history given to him by Ms. Holt was consistent with the type of injury she suffered. He did not place any specific restrictions on her activities, but he did suggest that she limit overhead work, working with her arms away from the body, and repetitive movement of the shoulder if those activities caused discomfort. On cross-examination, Dr. Chung admitted that he had been convicted of Medicare fraud in 2004 and had been disciplined by the medical licensing board as a result. He also stated that approximately 50% of his income was from performing independent medical examinations.

Ms. Holt was forty-five years old at the time of trial. She had attended school through the tenth grade and later obtained a GED diploma. Thereafter, she completed a licensed practical nurse training course and had obtained a nursing license about ten years prior to the trial. Her nursing experience included hospital, nursing home, and home healthcare positions. After being released by Dr. Pucek, Ms. Holt contacted Maxim about returning to work but was told "they weren't going to have anymore nursing hours . . . in Jackson." She was able to obtain employment with another agency as a home healthcare nurse.

Ms. Holt testified that she had residual weakness in her left arm, was unable to lift anything above waist level with that arm, and could not reach that arm over her head. She described being forced to use her right hand, exclusively, while driving and when carrying a bag, which placed stress on her right arm and neck. Ms. Holt estimated she had lost 50% of the strength in her left shoulder. She experienced difficulty fixing her hair and performing housework. She was unable to lift her grandchildren and was limited in her ability to engage in the outdoor activities she had participated in prior to her injury. She continues to experience pain in the left shoulder on a daily basis which she treats with Tylenol and heating pads.

In a written letter opinion, the trial court found that Ms. Holt had sustained a compensable injury which resulted in an 18% whole body impairment. The trial court found that Ms. Holt had sustained a 50% permanent partial disability to the body as a whole, and awarded 23 3/7 weeks of temporary total disability benefits and \$27,312.35 in medical expenses. Maxim has appealed, contending that the evidence preponderates against the trial court's finding that Ms. Holt's injury was compensable.

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) (Supp. 2007). 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. Whirlpool Corp.

v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where factual issues are dependent on 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. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992).

Analysis

In order to be eligible for workers' compensation benefits, an employee must suffer an "injury by accident arising out of and in the course of employment which causes either disablement or death . . ." Tenn. Code Ann. § 50-6-102(12) (2005). The term "arising out of" refers to causation. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). "An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004) (citing Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993)). The injury must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work. Thornton v. RCA Serv. Co., 188 Tenn. 644, 221 S.W.2d 954, 955 (Tenn. 1949).

"Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain, and any reasonable doubt in this regard is to be construed in favor of the employee." Clark, 129 S.W.3d at 47 (citing Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997)). Therefore, an award of benefits may be based on "medical testimony to the effect that the employment could or might have been the cause of the worker's injury when, from other evidence, it can reasonably be inferred that the employment was the cause of the injury." Id. Evidence that the employment could have or might have caused the injury is sufficient to make out a *prima facie* case that the injury arose out of the employment. Id. at 49. If the employer introduces no evidence to the contrary, the preponderance of evidence supports an award of workers' compensation benefits. Id.

Maxim contends that the evidence preponderates against the trial court's finding that Ms. Holt sustained a compensable injury. It bases this argument on her failure to describe a traumatic event to either Drs. Brueggeman or Pucek and also on Dr. Chung's lack of credibility, in light of his criminal record.

Maxim implies that, because Ms. Holt did not mention the lifting incident to either Drs. Brueggeman or Pucek, the incident did not occur. However, Ms. Holt was the only witness who testified during the trial, and no evidence was introduced to contradict her testimony that the event occurred. More importantly, Ms. Holt testified on direct examination that she reported the incident to her supervisor the following Monday. She also reported the results of her visit to Dr. Brueggeman, specifically the fact that he had referred her to Dr. Pucek. She reported to her supervisor that Dr. Pucek had ordered an MRI that revealed a rotator cuff tear. None of her

testimony was contradicted. In fact, when she was asked during the trial about reporting the August 27, 2005 incident, Maxim objected, on the ground that it was conceding that proper notice of the alleged injury had been given. In addition, Dr. Pucek testified that Ms. Holt raised the subject of a potential workers' compensation claim when surgery was recommended in October 2005.

Both Drs. Brueggeman and Pucek testified that Ms. Holt's injury was consistent with a lifting incident, such as that described by Ms. Holt. There is no substantive evidence contradicting Ms. Holt's account, and the uncontradicted evidence that she promptly reported the incident to her supervisor prior to the time she learned she had a rotator cuff tear further supports her testimony. In light of these factors, the trial court's finding on the issue of causation is supported by a preponderance of the evidence. Maxim's arguments regarding Dr. Chung's credibility do not affect that evidence or the conclusion which the trial court reached. That issue might be of consequence if Maxim had raised an issue concerning the extent of Ms. Holt's impairment or disability, but no such issue has been raised on this appeal.

Ms. Holt has requested that this appeal be found to be frivolous and that sanctions be imposed pursuant to Tennessee Code Annotated section 50-6-225(h)(Supp. 2007). We decline to do so.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellants, Maxim Healthcare Services, Inc. and Hartford Underwriters Insurance Company, and their surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

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JUDGMENT 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 Appellants, Maxim Healthcare Services, Inc., and Hartford Underwriters Insurance Company, and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

