

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

**KIRBY DIES v. PERMA PIPE, INC.**

Chancery Court for Wilson County  
No. 10214

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No. M1998-00610-WC-R3-CV  
Filed - June 2, 2000

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**JUDGMENT**

This case is before the Court upon defendants' motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be DENIED; 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 will be paid by appellant, for which execution may issue if necessary.

The motion to supplement the record is, hereby, DENIED.

PER CURIAM

Drowota, J., not participating

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
(Thursday, July 15, 1999 Session)

KIRBY DIES, ) WILSON CHANCERY  
 )  
Plaintiff/Appellee ) NO. M1998-00610-WC-R3-CV  
 )  
 )  
vs. ) C. K. SMITH,  
 ) CHANCELLOR  
PERMA PIPE, INC., )  
 )  
Defendant/Appellant )

For Appellants:

Randolph A. Veazey  
Connie Jones  
  
Glasgow & Veazey  
Nashville, Tennessee

For Appellee:

B. Keith Williams  
Taylor, Taylor,  
Lannom, & Williams  
Lebanon, Tennessee

**MEMORANDUM OPINION**

**Mailed:** March 7, 2000

**Filed:** June 2, 2000

Members of Panel:

Frank F. Drowota, III, Associate Justice  
Frank G. Clement, Jr., Special Judge  
Samuel L. Lewis, Special Judge

AFFIRMED

Clement, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Panel of the Supreme Court in accordance with Tenn. Code Ann. 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer alleged eight bases of appeal: 1) whether the injury arose out of and in the course of the claimant's employment, 2) whether notice of the injury was provided to the employer, 3) whether the trial court was within its discretion in accepting the testimony of one expert over that of another, and 4) whether the amount of the award was appropriate. The panel affirms on each issue.

The trial court awarded temporary total disability benefits for two weeks in the sum of \$440.00; permanent partial disability benefits of twenty (20%) percent to the body as a whole, in the sum of \$17,600.00; unauthorized, unpaid medical benefits in the sum of \$1,362.00; discretionary costs for deposition in the sum of \$250.00; and future medical benefits, all in accord with the workers' compensation statute.

Though the injury and/or the extent of the injury is disputed, it is undisputed that Kirby Dies ("Dies") was involved in a work related incident while working for Perma Pipe, Inc. ("Perma Pipe"). It occurred sometime in July or August 1994. The incident occurred while Dies was assisting another Perma Pipe employee, Joey Jones ("Jones"). Jones was operating an articular loader for Perma Pipe. He was moving pipe casings, each of which was estimated to weigh 500 pounds. Jones inadvertently lowered one end of two pipe casings on Dies' back.

Dies experienced pain following the incident. Jones

immediately informed the production supervisor, Bobby Thompson ("Thompson"), of the incident. Thompson then asked Dies whether he was hurt and whether he wished to go to the hospital for medical evaluation. Thompson also informed Dies that company policy required that he be drug tested and evaluated if he were hurt. Dies indicated to Thompson that he was "just a little sore" and declined medical care. No written record was made of the incident. Thereafter, Dies would experience only intermittent back pain, he missed no work due to the pain, and did not seek medical care for the pain.

In August or September of 1994, Dies was assigned to the painting shed. This job required leaning over to dip parts into a vat of paint. Though Dies made no complaint at that time, Dies alleges this activity exacerbated his low back pain.

On May 12, 1995, Dies experienced considerable pain while lifting a pipe. This occurred on a Thursday afternoon at the end of his shift. Dies made no report of this incident either; instead, he went home thinking all he needed to do was to rest his back. Dies was still experiencing back pain the following morning; therefore, he called the office to advise that he would not be able to work. Dies basically rested at home over the weekend sitting in his recliner using a heating pad to relieve the pain. He did not seek medical attention.

Dies returned to work the following Monday at which time he was informed by Thompson that he was being suspended for three days due to excessive tardiness and absences. At this point, May 16, 1995, Dies informed Thompson that his absence

was the result of the injury to his back which occurred as a result of the incident with Jones in July or August 1994.

Dies first sought treatment for this "injury" on May 16, 1995, when he was seen by Dr. Hardin, a chiropractor. This occurred during the three day suspension. Upon Dies' return to work on May 19, 1995, Perma Pipe sent Dies to Dr. R. Johnson, an orthopedist, for an examination and a drug screen. Dr. Johnson's diagnosis, as reported on his Return to Work Recommendation dated May 19, 1995, indicated a lower back strain with a recommendation of sedentary work restrictions pending subsequent reevaluation in one week.

On May 19, 1995, Dies was ordered to provide details of the alleged work injury by May 23, and if he failed to do so he would be terminated. Dies did not provide the requested information and his employment was terminated.

On or about June 1, 1995, Dies' attorney sent a written notice of the injury to Perma Pipe. This occurred within 30 days of the May 16 conversation between Dies and Thompson. The notice was acknowledged as received by the operations manager, Marshall Hooper ("Hooper").

Dies returned to Dr. Johnson for follow up treatment thereafter but was informed that his workers' compensation benefits had been denied. Dies declined to be personally responsible for Dr. Johnson's services and therefore was not treated by Dr. Johnson.

Thereafter, Dies was treated by Dr. Frank Etlinger, a chiropractor, on approximately 19 occasions, from June 19, 1995, to September 15, 1995. He was finally seen by Dr. Etlinger on February 11, 1997. Dr. Etlinger diagnosed a lumbar facet syndrome and assigned a DRE lumbosacral category

II impairment of 5% based upon findings of chronic muscle spasms and loss of range of motion associated with the lumbar spine. Dr. Etlinger also reported that Dies was at maximum medical improvement as of October 11, 1995.

At the request of the workers' compensation carrier, Dr. M. Robert Weiss, a neurosurgeon, performed a medical evaluation of Dies on October 25, 1996. Dr. Weiss found no evidence of permanent partial impairment and assigned an impairment rating of zero (0%) percent.

Dies is 38 years old and his education and employment opportunities are somewhat limited. The record also indicates that he is a hard worker who seldom complains of work related injuries. He left school in the 11th grade and has no other formal education or training. He has held a variety of semi-skilled occupations, including plumber's assistant, pipe-fitter's assistant, duct-worker, furniture assembler, gas station attendant, and meat processor.

His employment history reveals other work related injuries. One involved dismemberment of part of a thumb which was subsequently reattached. Though the associated medical costs were paid by his employer, Dies asserted no claim for the obviously compensable permanent impairment. Dies was also treated on occasion when metal shavings got in his eyes while working in plumbing and air conditioning. Again, Dies asserted no claims other than obtaining routine medical care.

Dies has been employed as a lawn worker since his termination from Perma Pipe. His compensation is approximately half of what he earned from Perma Pipe.

Perma Pipe insists that Dies did not suffer a compensable

injury as a result of the July or August 1994 incident. They further assert that his failure to file a claim or otherwise give notice of the alleged injury prior to May 16, 1995, belies his present complaint.

Perma Pipe contends that oral notice of the July or August 1994 incident did not constitute actual or constructive notice of Dies' injury. Alternately, Perma Pipe asserts that Dies was aware of the alleged July or August 1994 injury prior to evaluation by any physician or chiropractor, as demonstrated by Dies communication to Thompson on May 16, 1995 and argue that this conclusion is contrary to the finding of the trial court that Dies was unaware of the nature of his injury until he was formally evaluated on May 16, 1995. Under either theory, Perma Pipe alleges that Dies failed to provide notice of the injury within the statutory 30-day period.

It is undisputed that pipe casings were lowered onto Dies' back in the course of employment and that both Jones and Dies promptly informed the foreman, Thompson, of the incident and that Dies was "sore" as a consequence. Such notice is regarded as actual notice. Aluminum Co. of America v. Baker, 542 S.W.2d 819, 822 (Tenn. 1976).

Our Supreme Court has held that until an employee was assured of the seriousness of an injury, the employee's failure to give notice was reasonable. See Brown Shoe Co. v. Reed, 350 S.W.2d 65, 70 (Tenn. 1961). Similarly, an employee who immediately informed his supervisor of a sharp pain in his back which subsequently worsened resulting in a diagnosis of a ruptured disk 2 ½ years later followed by a diagnosis of permanent back injury five months later, met the statutory notice requirements when he informed his employer of his

injury almost three years prior to filing his cause of action. Osborne v. Burlington Industries, 672 S.W.2d. 757, 760 (Tenn. 1984).

In the case at issue, the trial court determined that the incident of July or August 1994 was notice of a probable work related injury which should have triggered implementation of Perma Pipe's policy regarding the investigation of such incidents. Alternately, the trial court held that the Dies' delay in giving notice until May 16, 1995, was reasonable in light of his evolving appreciation of the seriousness of his injury. Each determination is within the discretion of the trial court and the evidence does not preponderate against the trial court's findings.

Perma Pipe next asserts that Dr. Weiss, a neurosurgeon, is better qualified and therefore more credible than Dr. Etlinger, a chiropractor. Further, Perma Pipe asserts that Dr. Etlinger relied upon an inadequate and incomplete history in diagnosing Dies and that this diagnosis was made without supplementation through standard diagnostic testing and objective findings (apparently referring to radiographic findings). Perma Pipe further asserts that Dr. Etlinger improperly applied diagnostic criteria in his determination of Dies' impairment rating.

While Dr. Weiss' credentials are substantial, it is also true, as noted by the trial court, that Dr. Weiss spent only about 10-15 minutes in evaluating Dies. Further, although Dr. Weiss was critical of the available radiographic assays of Dies' spine as inadequate for diagnostic purposes, Dr. Weiss did not order new assays. In contrast, Dr. Etlinger provided treatment and ongoing evaluation to Dies over the course of



several months. According to Dies, the treatment provided by Dr. Etlinger was effective in ameliorating Dies' distress. Furthermore, the diagnostic techniques used by the experts were substantially similar.

The trial court has the discretion to accept the opinion of one expert over that of another, see Dorris v. INA Insurance Co., 764 S.W.2d 538, 542 (Tenn. 1989). Furthermore, we may make our own independent assessment of the medical proof so as to determine where the preponderance of the evidence lies, since the expert evidence in this case was presented through depositions, See Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993) and we find no error in the trial court's evaluation of the expert testimony.

Perma Pipe maintains that the trial court erred in the finding of 20% permanent partial disability. Specifically, they contend that Dies' permanent partial disability award, if any, should be limited to no more than 2 ½ times Dies' impairment rating because Dies returned to his regular work following the incident of July or August 1994. Perma Pipe relies on the impairment rating of Dr. Weiss (i.e., zero percent) to contend that Dies should obtain no permanent partial disability award. Alternately, they assert that we should limit the permanent partial disability award to 12 ½% if this Court accepts Dr. Etlinger's impairment rating.

Perma Pipe's position is without foundation for Dies' permanent partial disability did not date from the incident of July or August 1994, but rather from the exacerbation of this injury in May 1995. Following Dies' report at that time to Perma Pipe, Dies was terminated from his work with Perma Pipe. Consequently, the 2 ½ times impairment rating limit does not

apply; rather, Dies might have received up to a maximum of six times his medical impairment rating. Tenn. Code Ann. 50-6-241. Accordingly, the trial court's award of 20% permanent partial disability is within the statutory parameters.

Perma Pipe next asserts that the trial court erred in awarding discretionary costs to Dies for the deposition of Dr. Etlinger. The trial court may allow judgment for reasonable and necessary expert fees for depositions. Tenn. R. Civ. P. 54.04(2). As it is evident that the trial court accepted Dies' expert's testimony over that of the other conflicting expert testimony, we find these costs to be reasonable and necessary to plaintiff's award of disability and recovery of benefits. See Miles v. Marshall C. Voss Health Care Center, 896 S.W.2d 773, 776 (Tenn. 1995).

Perma Pipe also maintains that the trial court erred in awarding Dies medical benefits for unauthorized chiropractic treatment. Whether an employee is justified in seeking additional medical services to be paid for by the employer without consulting the employer depends on the circumstances of each case. Dorris, 764 S.W.2d at 541. It is uncontroverted that Dies' workers' compensation benefits were terminated by Perma Pipe along with the termination of his employment. Since Perma Pipe disavowed responsibility for Dies' treatment, it is reasonable that Dies would seek treatment with an independent provider. Thus, the current facts do not preponderate against the finding of the trial court that Perma Pipe is responsible for Dies' treatment.

The standard of review is de novo upon the record of the trial court, accompanied by a presumption of correctness of

the findings, unless the preponderance of the evidence is otherwise. Tenn. Code. Ann. § 50-6-225(e)(2). In the present case, the trial court's finding regarding the occurrence of a work-related injury, notice causation, impairment and benefits are supported by the record and Perma Pipe has failed to establish that the preponderance of the evidence is otherwise.

Accordingly, the appeal by Perma Pipe is denied on all issues and costs are assessed against Perma Pipe.

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Frank G. Clement Jr., Special Judge

CONCUR:

Frank F. Drowota, III, Associate Justice  
Samuel L. Lewis, Special Judge