

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, NOVEMBER 1999 SESSION**

KOMATSU AMERICA)	HAMILTON COUNTY
INTERNATIONAL COMPANY and)	
TRAVELERS PROPERTY CASUALTY)	
)	
Plaintiffs/Appellees,)	
)	
vs.)	Hon. L. Marie Williams,
)	Circuit Judge
MARK A. CASH,)	
)	
Defendant/Appellant)	No. 03S01-9905-CV-00051

Decided May 9, 2000

For the Appellant:

Graham Swafford
P. O. Box 457
Jasper, TN 37347

For the Appellees:

David C. Nagle
600 Georgia Avenue
Chattanooga, TN 37402

MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Chief Justice
Roger E. Thayer, Special Judge
H. David Cate, Special Judge

AFFIRMED.

CATE, Special Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The defendant employee, Mark A. Cash, appeals the judgment of the trial court and asserts as error the following: (1) the failure to award any permanent disability, (2) the assessment of court costs against the defendant, (3) the failure to award the defendant his costs to prosecute the action, (4) the granting of the motion *in limine*, (5) the failure to give the defendant the presumption of T.C.A. § 50-6-116 and (6) the plaintiff's defense should be disallowed because of the provision of T.C.A. § 50-6-205(d)(1). We conclude that all of the foregoing are without merit and affirm the judgment of the trial court.

The defendant was born March 26, 1964. He graduated from high school and completed a welding class. His work history consists of working for the Marion County Sheriff's Department; Tennol, a gasohol plant; Concrete Emporium; Chattanooga Corporation; and the plaintiff employer, Komatsu America International Company where he went to work on a regular, rather than a temporary, basis in November 1989. His work over the years has been primarily as a welder.

The defendant began to have problems with his left shoulder area in 1992 or 1993. Prior to March 15, 1998, the date of the incident at work, the defendant had been examined and treated for his left shoulder problems by several doctors.

On August 18, 1997, he had left shoulder surgery, consisting of an anterior inferior acromioplasty, which was a decompression of the AC joint resection and an inspection of his rotator cuff. His post operative diagnosis was stage II impingement, AC joint arthrosis.

He continued to have left shoulder area problem and underwent another surgical procedure on December 10, 1997, which released his levator scapula and curetted the medial border of the scapula. His postoperative diagnosis was chronic levator scapulae syndrome.

None of the defendant's shoulder problems at this point were work related.

He was back at work at his regular job by March 1998, although he was experiencing pain and discomfort and having a hard time with the grinding and holding the welding torch.

On March 15, 1998, he climbed on a piece of metal to tilt the fan and hurt his left shoulder. He continued to work and finished his shift. Later he went to Erlanger North Hospital, and the x-ray report indicated his left shoulder was normal. This surprised Dr. Lynn A. Crosby because of the previous decompression in his AC joint.

Subsequently, on March 26, 1998, he went to see Dr. Crosby, an orthopedic surgeon, who was involved in his two previous surgeries. Other than a muscle spasm in his left shoulder his range of motion and neurological exams were normal. Dr. Crosby diagnosed the defendant as having a muscle spasm from cervical strain and aggravation of his levator scapulae.

According to Dr. Crosby's medical records, the defendant called the office on April 11, 1998, "and said he had pulled something in his neck and it was swollen up the side of his neck." The medical record for April 13, 1998, further revealed; "He had been getting along quite well and tried to lift up a garbage bag and re-injured his left shoulder region." This incident was not work related. Prior to this incident he had been back at work on light duty.

It should be noted that this defendant has had addiction problems with pain medication and had treatment for this condition.

After the April 1998 garbage bag incident he continued to work light duty until May 1998, when he took off work to have a functional capacity test. He has not worked since that time, although he has indicated a willingness to do so. At the time of trial he was attending Chattanooga State Technical Community College on a full-time basis.

1. Permanent Disability

It was Dr. Crosby's opinion that prior to March 15, 1998, the defendant had a permanent impairment rating of 40% to the shoulder and 24% to the whole body. After March 15, 1998, it was the same, i.e., had not increased. The permanent impairment was not increased because there was no anatomical change in the defendant's left shoulder area from his before March 15, 1998 condition.

As a result of the functional capacity test Dr. Crosby did not feel the plaintiff could return to his pre-injury position as a welder, and that he was merely able to function in the light/medium level of physical demand. In this classification his maximum allowable weight was 35 pounds, occasionally, and 30 pounds, frequently.

“The general rule is that aggravation of a pre-existing condition may be compensable under the Workers’ Compensation Laws of Tennessee, but it is not compensable if it results only in increased pain or other symptoms caused by the underlying condition. See Cunningham v. Goodyear, 811 S.W.2d 888, 890 (Tenn. 1991); Smith v Smith’s Transfer Corp., 735 S.W.2d 221, 225-226 (Tenn. 1987); Boling v. Raytheon Co., 223 Tenn. 528, 448 S. W. 2d 405, 408 (1969); Conner v. Rite Aid, 1996 WL 274486, 1995 Lexis 220 (W. Comp. Appeals Panel). It has been otherwise stated that to be compensable, the pre-existing condition must be ‘advanced’, (Springfield v. Eden, 1995 WL 595602), 1995 Lexis 67 (W. Comp. Appeals Panel) or there must be an ‘anatomical change’ in the pre-existing conditions, (Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989)), or the employment must cause ‘an actual progression . . . of the underlying disease.’ Cunningham, supra, at 890.” Sweat v. Superior Industries, Inc., 966 S.W.2d 31,32-33 (Tenn. 1998).

There was no increase in the medical impairment as a result of the March 15, 1998 incident, nor was there any anatomical change. The defendant is now unable to perform the job he was doing prior to the March 15, 1998 incident, and he also has limitations and restrictions he did not previously have.

These limitations and restrictions would probably dictate compensability for permanent disability under the holdings in Walker v. Saturn Corp., 986 S.W.2d 204 (Tenn. 1998); Scott v. Kenny Pipe and Supply, Inc., et al., 1997 Lexis 225 (W. Comp. Appeals Panel). But in order to establish that an injury was one arising out of the employment, the cause of the injury must be proved. Hill v. Royal Inc. Co., 937 S.W.2d 873 (Tenn. 1996). In all but the most obvious cases, causation may only be established through expert testimony. Thomas v. Aetna Life and Cas. Ins. Co., 812 S.W.2d 278 (Tenn. 1991).

The proof is lacking that the current limitations and restrictions were causally related to the March 15, 1998 incident. Therefore, the failure to prove that the

current limitations and restrictions were caused by or related to the March 15, 1998 incident, especially in light of the non work related April 1998 garbage bag incident, justified the trial court in denying benefits for permanent disability.

2. Trial Court Costs

The defendant complains about the trial court assessing court cost against him.

Rule 54.04 of the Tennessee Rules of Civil Procedure provides:

Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . .

In this case the defendant sought permanent disability benefits and was denied. This was the main area of contention, since there was no defense advanced relative to the plaintiffs' general workers' compensation liability for the March 15, 1998 incident, including their obligation for medical expenses.

Thus the trial court properly assessed the court cost against the defendant and in favor of the plaintiffs who were the prevailing parties.

3. Discretionary Costs

The defendant asserts that the trial court should have granted him his litigation expenses in prosecuting the case.

Reasonable and necessary costs, in the preparation and trial of a case, could be assessed as discretionary costs by the trial court. Lock v. Nation Union Fire Insurance Company of PA, 809 S.W.2d 483 (Tenn. 1991)

The assessment of these costs is discretionary with the trial court. In this case we conclude that the trial court did not abuse its discretion when it failed to award these costs to the non-prevailing party.

4. Motion *in limine*

The defendant contends that the trial court wrongly granted the plaintiffs' motion *in limine*, which sustained leading question objections and struck them from the record. These questions are quoted:

Q. This spasm is an objective finding that you could readily see and feel; wouldn't that be an accurate statement?

. . .

Q. And he was doing that. After March 15, 1998, your opinion to a reasonable degree of medical certainty is that he could not do the work; wouldn't that be an accurate statement?

A leading question has been defined as one which "suggests a specific answer desired." Cohen, Sheppard, Paine, Tennessee Law of Evidence, § 611.6.

Certainly these questions do suggest the desired answer and the objections were properly sustained.¹

5. T.C.A. § 50-6-116

The defendant says the trial court was in error because it failed to give the defendant the presumption of T.C.A. § 50-6-116.

T.C.A. § 50-6-116 provides:

The rule of common law requiring strict construction of statutes in derogation of common law shall not be applicable to the provisions of the Workers' Compensation Law, but the same is declared to be a remedial statute which shall be given an equitable construction by the courts, to the end that the objects and purposes of this chapter may be realized and attained.

The statute does not use the word presumption and the defendant has cited no cases in this regard.

We must presume that he is referring to the "reasonable doubt rule", which provides on the issue of causation reasonable doubt is to be construed in favor of the employee. This rule however does not do away with the requirement of the proof of causation by the preponderance of the evidence. Walker v. Royal Insurance, 1995 WL 643898 (W. Comp. Appeals Panel).

This issue is found to be without merit.

6. T.C.A. § 50-6-205(d)(1)

The defendant contends that the plaintiff's defense should be barred or disallowed pursuant to T.C.A. § 50-6-205(d)(1) which says:

If payments have been made without an award, and the employer subsequently elects to controvert such employer's liability, notice of controversy shall be filed with the

¹Notably in properly introduced evidence there is proof about the spasms and the defendant's ability to do the work.

administrator within fifteen (15) days of the due date of the first omitted payment.

Failure of the employer to show compliance with subsection (d) precludes it from contending that the accident and the resulting injury to the employee were not within the coverage of the workers' compensation statutes. Goins v. Kayser-Roth Hosiery, Inc., 751 S.W.2D 423 (Tenn. 1988).

The plaintiffs commenced this litigation to determine the defendant-employee's rights under the workers' compensation law. They did not deny coverage per se, just his entitlement to permanent disability benefits.

Secondly, there is no proof of any temporary benefits ever being paid or omitted.

T.C.A. § 50-6-205(d)(1) has been held to only apply to payments of workers' compensation benefits, such as temporary benefits, and not medical expenses. Foster v. Liberty Mutual Ins. Co., 1990 WL 168191 (Tenn. 1990).

Thus, this contention is found in favor of the plaintiffs.

For the forgoing reasons the judgment of the trial court is affirmed. Costs of the appeal are taxed to the defendant-employee.

H. David Cate, Special Judge

CONCUR:

E. Riley Anderson, Chief Justice

Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

KOMATSU AMERICA INTERNATIONAL, ET AL. v. MARK A. CASH

**Circuit Court for Hamilton County
No. 98-C-1507**

No. E1999-02201-WC-R3-CV - Decided May 9, 2000

JUDGMENT

This case is before the Court upon the motion for review of Mark A. Cash 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 Mark A. Cash, for which execution may issue if necessary.

It is so ordered.

PER CURIAM

