IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
April 2000 Session

CLAYTON D. ELLER v. LORAM MAINTENANCE OF WAY, INC., ET AL.

Direct Appeal from the Circuit Court for Cumberland County
No. CV002752 John Maddux, Judge

No. E1999-00874-SC-R3-CV - Mailed - August 3, 2000

Filed: September 12, 2000

This workers' compensation appeal from the Cumberland County Circuit Court 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 Cumberland County Circuit Court dismissed the plaintiff's claim for Tennessee workers' compensation benefits on the basis that the plaintiff affirmatively elected to seek workers' compensation benefits in the states of Maryland and Pennsylvania. After a review of the entire record, briefs of the parties and applicable law, we affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed.

L. TERRY LAFFERTY, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and HOWELL N. PEOPLES, SP. J., joined.

Philip D. Burnett, Crossville, Tennessee, for the appellant, Clayton D. Eller.

Joe M. Looney, Crossville, Tennessee, for the appellees, Loram Maintenance of Way, et al.

MEMORANDUM OPINION

PART A.
Trial Testimony

The plaintiff, age 43, a twelve year veteran of the U.S. Marine Corps., testified that he has lived in Crossville, Tennessee since his birth. In March 1994, the plaintiff filed an application of employment with the defendant, Loram Maintenance of Way, Inc. The plaintiff was hired in either April or May of 1994. Loram Maintenance of Way, Inc. is a Minnesota corporation that specializes in railroad track maintenance throughout the United States. The plaintiff stated that he was a

machine operator that grinds and reshapes rails. The defendant paid the plaintiff an hourly wage, hotel expenses, food supplement and transportation costs while he worked in the field. In November 1994 in Pennsylvania, the plaintiff testified that he injured his back while moving gear into a hotel. Although the plaintiff did not know the source of any benefits, Liberty Mutual Insurance Company paid medical and indemnity benefits to the plaintiff for his injury through the defendant. The plaintiff stated that he did not file a workers' compensation claim in Pennsylvania.

In March 1995, in Maryland, the plaintiff stated that he injured his back while on the job. He was referred to Dr. Jerry Reese. The plaintiff underwent back surgery for this injury on April 28, 1995. After a recuperation period, the plaintiff returned to work on light duty in the company office. Although his back pain persisted, the plaintiff was assigned to work in the electrical shop and later he was moved to the hydraulics section. The plaintiff had reached his maximum medical improvement in December of 1995 and was returned to work as an operator only. Due to his continuing back problems, the plaintiff was sent to Minnesota for another medical examination by Dr. John Sherman in June 1996. The defendant offered the plaintiff a job at an hourly wage in Minnesota which would require him to move to Minnesota. The plaintiff hired an attorney, James Ventura of Minnesota, to represent him. The plaintiff testified that he did not file any claims for benefits in either Maryland or Pennsylvania. The plaintiff acknowledged that he received a document from Ralph Weber of Pennsylvania, but refused to sign the document, which he then gave to his attorney. Also, the plaintiff stated that he received additional paperwork from Pennsylvania which he gave to his attorney. At the time of trial, the plaintiff was a part-time truck driver. In cross-examination, the plaintiff acknowledged that he hired an attorney to help with the claims in Maryland and Pennsylvania, and that the attorney helped him to obtain some benefits. As to the paperwork he received from Pennsylvania, the plaintiff stated that he expected his attorney to handle the claim. Any decisions made were that of the plaintiff's. The plaintiff's last day of work for Loram was November 1, 1996.

Steve Eller, brother of the plaintiff, testified that the plaintiff continued to have back problems and could no longer do construction work, or hunt.

PART B.
Deposition Testimony

James M. Ventura, attorney, testified that he has practiced law in Minnesota since 1983. He stated that at one time his practice consisted of approximately two-thirds of workers' compensation cases, but at the time of trial, it was 25 percent. Mr. Ventura stated that he met the plaintiff in May of 1995, and that the plaintiff signed a retainer agreement. Mr. Ventura filed a Notice of Appearance of Attorney for Employee with the Minnesota Department of Labor & Industry. It was Mr. Ventura's understanding that the plaintiff was hired in Minnesota and returned to Minnesota for treatment. Ventura later learned that the plaintiff's injuries occurred out of state and he obtained the names of the adjustors and their telephone numbers. Ventura identified a letter he sent to Sherry Mitchum, Liberty Mutual Insurance Company, Rockville, Maryland, dated May 5, 1995, requesting verification of benefits and enclosing a notice of appearance. Ventura identified a letter he wrote to Steve

Schmitt, Liberty Mutual Insurance Company, Rockville, Maryland, dated September 1, 1995, in which Ventura wrote, "My client and I have discussed the facts surrounding his injury, Minnesota statute and case law pertaining to jurisdiction. At this time, we concede that Maryland has jurisdiction over this workers' compensation claim . . . . If you believe that Maryland does not require payment of the partial wage loss benefit, please send me copies of the case or Workers' Compensation Act that supports your position."

On June 6, 1995, Steve Schmitt, of Liberty Mutual Insurance Company in Rockville, Maryland, wrote to Ventura in reference to Ventura's letter of May 24, 1995. Schmitt advised Ventura that Liberty Mutual was handling the claim under Maryland jurisdiction since the plaintiff was injured in Maryland and that the plaintiff did not work in Minnesota except for light duty. In this letter, Schmitt stated, "I note that Mr. Eller lives and was hired in Tennessee."

Ventura explained that he was not trying to get benefits in any other state since he was licensed only in Minnesota. Ventura attempted to find out that if they claimed this was a workers' compensation claim in another state, what state laws applied, what benefits were available, and what they had paid. In essence, this was a letter of discovery. Ventura stated that he made no demands or instituted negotiations with Liberty Mutual on behalf of the plaintiff, nor did he file any petition in Maryland for benefits.

As to the plaintiff's Pennsylvania injury, Ventura identified a letter written to Marianne Toner, Liberty Mutual Insurance Group, Bala Cynwyd, Pennsylvania. Ventura testified that he was seeking information on the plaintiff's claim since the plaintiff had some problems with past due medical bills. Also, Ventura was inquiring of any wage loss Liberty Mutual was paying under Pennsylvania law. In this letter Ventura stated, "If you believe that Pennsylvania law does not require you to compensate Mr. Eller for his wage loss, please provide a copy of the case law or copies of the pertinent sections of the Workers' Compensation Act which supports that position." Ventura acknowledged that the plaintiff had given him a supplemental agreement from Pennsylvania and since he and the plaintiff could not determine if this agreement was fair, the agreement was not signed, nor was it returned to Pennsylvania. Likewise, Ventura acknowledged that he received notice of termination of benefits against the plaintiff that was filed in Pennsylvania. The record reflects that this petition was sent to the plaintiff at his home in Crossville, Tennessee. After a discussion with the plaintiff, they elected not to pursue a claim in Pennsylvania. Ventura acknowledged that he wrote a letter dated July 31, 1996, to Judge Thomas G. Devlin, administrative law judge, in which he requested a continuance of the hearing of August 16, 1996, in regards to the petition to terminate workers' compensation benefits. Ventura explained that this letter was sent due to a lack of response from Liberty Mutual and that he could not physically appear in court.

Ventura testified that he decided to file a claim with the state of Minnesota. At the conclusion of an evidentiary hearing, the Minnesota judge did not find that the plaintiff was a Minnesota employee and that Minnesota did not have jurisdiction of the Maryland or Pennsylvania claims. The record of the hearing in Minnesota established that the judge found the plaintiff's contract of hire was in Tennessee.

In cross-examination, Ventura stated that notwithstanding the letter of Steve Schmitt of June 5, 1995, the plaintiff told him otherwise as to his place of residency. Ventura acknowledged that the benefits were being paid to the plaintiff under Pennsylvania law. Also, Ventura testified that in his correspondence with Liberty Mutual Insurance Company or Loram, and the defendant, he had no intention to file a workers' compensation claim in Tennessee. Ventura stated that he discussed with the plaintiff that Liberty Mutual said they hired him in Tennessee and that he did not advise the plaintiff that he may have a claim in Tennessee. Ventura testified that he was not familiar with the principles of contract for hire as it applies to Maryland, Pennsylvania, or Tennessee.

Jennifer Bradley, a claims adjustor for Liberty Mutual Insurance Company in Minneapolis, Minnesota, testified that she handled the plaintiff's workers' compensation claim for an injury which occurred on November 8, 1994, in Pennsylvania. Liberty Mutual paid the plaintiff partial disability wages for the period of November 9, 1994, through December 15, 1994, in the amount of one thousand eight hundred eighty-two dollars and fifty-two cents ($1,882.52). Also, Liberty Mutual paid one thousand thirty-three dollars and ninety-one cents ($1,033.91) in medical expenses for the plaintiff. Her records indicate that the plaintiff was on light duty between November 9 and December 15, 1994. Ms. Bradley stated that she talked to the plaintiff on April 20, 1995, when he inquired about some unpaid medical bills and lost wages. She next heard from Mr. Ventura, an attorney. Ms. Bradley identified copies of a number of letters in her file from James Ventura to Liberty Mutual adjustors, Liberty Mutual's attorneys in Philadelphia, and to Judge Thomas G. Devlin. Ms. Bradley stated that Liberty Mutual, through their attorneys, filed a petition to terminate benefits in Pennsylvania. She testified that the release form had been sent to the plaintiff but he would not sign it, so Liberty Mutual had the petition filed. Ms. Bradley stated that she was aware of the plaintiff's Maryland claim because a dispute came up about the payment of medical expenses. Ms. Bradley acknowledged that the plaintiff had a compensable claim in Pennsylvania and it was her understanding that Ventura was pursuing a benefit claim in Pennsylvania. In cross-examination, Ms. Bradley testified that Ventura made no specific demand for any payment of a claim. Also, the release request was sent to the plaintiff in Crossville, Tennessee and a copy was sent to the defendant, Loram.

Charles F. Minnis, Senior Claims Manager for Liberty Mutual Insurance Company of Rockville, Maryland, testified that he participated in the plaintiff's claim for workers' compensation benefits. He stated that Liberty Mutual paid to the plaintiff two thousand four hundred seventeen dollars and six cents ($2,417.06) in indemnity payments and thirteen thousand three hundred eighty dollars and sixty-one cents ($13,380.61) for medical expenses for an injury the plaintiff sustained in Maryland. At the time of determination as to whether the injury was compensable, there was no attorney representing the plaintiff. Later, Mr. Minnis dealt with attorney, James Ventura, on the plaintiff's behalf. Minnis identified a number of correspondence between he and Ventura dated between May 1995 and May 1996, and copies of letters between other Liberty Mutual personnel. Minnis stated that he learned Ventura was going to file a claim in Minnesota for workers' compensation benefits in August 1996. In cross-examination, Minnis stated that it was actually May 1996, that he learned Ventura was going to file a claim in Minnesota.

Dr. Manuel Eugene Turner, Jr., an anesthesiologist, testified that he saw the plaintiff in October of 1998. The plaintiff related a work-related back injury in March 1995. After a review of the medical records, Dr. Turner determined that the plaintiff sustained a large disc herniation. Dr. Turner opined that the plaintiff sustained a 15 percent physical impairment to the body as a whole, using the AMA Guides.

ANALYSIS

The plaintiff asserts that the trial court erred in finding that the plaintiff took affirmative action in seeking workers' compensation benefits in the states of Maryland and Pennsylvania, and accepting workers' compensation benefits in these two states thus, denying the plaintiff's claim for Tennessee workers' compensation benefits. Further, the plaintiff contends that the actions of attorney James Ventura, were discovery in nature in that the letters written to the adjustors in these states were an attempt to obtain information. Naturally, the defendant contends that the trial court properly found that the plaintiff sought workers' compensation benefits in other states and that the evidence supports the trial court's decision.

The standard of review in workers' compensation cases is *de novo* upon the record of the trial court accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988). However, considerable deference must be given to the trial court who has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved. *Jones v. Hartford Acc. & Indem. Co.*, 811 S.W.2d 516, 521 (Tenn. 1991).

After considering many of the authorities cited in both parties' briefs, the trial court gave detailed findings of fact in setting out the chronological history of the case and the representation of the attorney, James Ventura. We quote:

> Well, as I indicated to you earlier, it appears to me that this is a close question. I am looking at the case -- or the facts that we have here. It appears from the facts that we have here that the employee, through his attorney Mr. Ventura, did affirmatively act to obtain benefits in another state. And not just one other state, but two other states, Pennsylvania and Maryland.
>
> And it's also this Court's opinion that the employee knew and voluntarily accepted the benefits under the law of another state; and that he was receiving these benefits at the -- he was receiving these benefits and his attorney, Mr. Ventura, either did or should have explained to him why he was receiving these benefits. And it wasn't as if the Plaintiff was representing himself. And it wasn't as if the Plaintiff was so seriously injured and disabled that he couldn't understand what was going on by

receiving these benefits. And it wasn't as if these benefits were just paid to the employee with no information as to the nature of the benefits.

We assume our in-depth review of the record is to determine if the preponderance of the evidence supports the trial court's judgment.

Tennessee Code Annotated § 50-6-115 provides that a Tennessee resident, while working outside this state, who is injured shall be entitled to workers compensation provided:

(1) The employer was principally localized in this state; or

(2) The contract of hire was made in this state.

An employee who sustains an injury in another state may be barred from Tennessee benefits through operation of the doctrine of election of remedies. An employee may be barred from receiving Tennessee benefits, if prior to filing a Tennessee claim, he or she (a) affirmatively acts to obtain benefits from another state; or (b) knowingly and voluntarily accepts benefits under the worker's compensation law of another state. *Bradshaw v. Old Republic Ins. Co.*, 922 S.W.2d 503, 507 (Tenn. 1996). Thus, the facts in each case determines if the plaintiff in a workers' compensation claim falls within (a) or (b) or a combination of both categories.

As to the determination of affirmative acts, the plaintiff asserts that the Supreme Court has established a bright line to determine that the plaintiff had filed a formal action or executed an agreement for compensation. Citing *Gray v. Holloway Const. Co.*, 834 S.W.2d 277, 278 (Tenn. 1992). Also, the plaintiff contends that the facts in this case are similar to the holding in *Gray v. Holloway Const. Co.* In *Gray*, the plaintiff was injured in Texas in 1986, and received benefits under Texas workers' compensation law. He was transferred to Tennessee and injured on the job in October 1996. National Union Insurance Company, in Texas, began paying benefits under a claim with the Texas Industrial Accident Board. Gray had a Texas attorney. National Union, upon finding the injury occurred in Tennessee, ceased payment of benefits. The Texas attorney promptly turned the matter over to an attorney in Columbia, Tennessee. It was the position of Royal Insurance Company, the employer's carrier in Tennessee, that Gray had elected to accept benefits in Texas. The trial court found no binding election and the Supreme Court affirmed, holding that the receipt of benefits in Texas did not amount to an affirmative action or knowing election so as to defeat Gray from receiving Tennessee benefits. We disagree that the facts in the present case are similar.

In *Bradshaw v. Old Republic Ins. Co*, 922 S.W.2d at 504, our Supreme Court set forth the chronological history of Tennessee jurisprudence in inter-jurisdictional workers' compensation cases beginning with *Tidwell v. Chattanooga Boiler and Tank Co.*, 163 Tenn. 420, 43 S.W.2d 221 (1931) (Tidwell's widow applied for and received Ohio workers' compensation benefits for the death of her husband thus, her Tennessee claim for benefits were denied on the basis of an irrevocable election of remedies.). In *Thomas v. Transport Insurance Co.*, 532 S.W.2d 263 (Tenn. 1976), the Supreme Court, speaking through Justice Harbison, reversed the trial court which denied Tennessee benefits

to Thomas, was injured in Memphis while working for an Arkansas employer. Thomas received Arkansas benefits, but the circumstances were in dispute thus, the Court could not determine whether Thomas made a "binding" election. Justice Harbison used the phrase "affirmative action" to define the effort an employee must exert to support the conclusion that the election is "binding." Also, if an employee voluntarily, deliberately, and with full knowledge of options accepts benefits under the laws of another state, he may be precluded by his election and may not be entitled to proceed in Tennessee for workers' compensation benefits.

In *True v. Amerail Corp.*, 584 S.W.2d 794 (Tenn. 1979), the Supreme Court re-affirmed the holdings in *Tidwell* and *Thomas.* True, a Tennessee resident whose contract required him to work in Virginia, was injured. True applied for and received benefits under Virginia workers' compensation law. True was barred from receiving Tennessee benefits when he took affirmative action to proceed under Virginia law. True had made a binding election to receive these benefits.

In *Perkins v. BE & K, Inc*., 802 S.W.2d 215 (Tenn. 1990), Perkins, a Tennessee resident, sustained an injury in Virginia. He executed an "Agreement for Compensation" with the insurance carrier, and Virginia paid disability benefits and medical expenses. Perkins' claim in Tennessee for workers' benefits was denied in that Perkins executed an agreement and accepted benefits, which constituted a binding election.

In another Virginia case, *Hale v. Fraley's, Inc.*, 825 S.W.2d 690 (Tenn. 1990), the plaintiff was hired in Tennessee. He subsequently began working in Virginia and sustained a work-related injury. Hale was paid workers' compensation benefits under Virginia workers' compensation law and upon receipt of his first check, he signed a "Memorandum of Agreement" form required by Virginia. However, the proof established that the form was not explained to him by the employer's manager. Other checks were mailed directly to the plaintiff's home in Tennessee. The plaintiff was unaware that he was paid under Virginia workers' compensation law. The Supreme Court found that there was no binding election and commented on the fact that the plaintiff was not represented by an attorney.

From our analysis of the facts in this record, we agree with the trial court that the plaintiff sought, through affirmative action, benefits in the states of Maryland and Pennsylvania. Although the plaintiff's attorney was put on notice that the contract of hire was in Tennessee in June 1995, per the letter of Steve Schmitt, a claims representative for Liberty Mutual Insurance Company in Maryland, the plaintiff's attorney acknowledged, after discussion with his client, that jurisdiction was in the state of Maryland. Likewise, the plaintiff's attorney was advised that he could submit any authorities as to why any claim should be in Minnesota rather than Maryland. In his letter to Steve Schmitt of September 1, 1995, concerning partial wage loss benefits, Mr. Ventura wrote, "If you believe that Maryland does not require payment of the partial wage loss benefit, please send me copies of the case or Worker's Compensation Act that support your position."

As to the Pennsylvania claim for benefits, Mr. Ventura wrote a letter, dated September 1, 1995, to Marianne Toner, Liberty Mutual Group in Pennsylvania, advising that he had been retained by the plaintiff to assist him with regard to a workers' compensation injury. Apparently, Mr. Ventura

believed that there was a dispute over the plaintiff's pre-injury average weekly wage and the weekly average wage upon the plaintiff's return to work. In conclusion, Mr. Ventura wrote, "If you believe that Pennsylvania law does not require you to compensate Mr. Eller for his wage loss, please provide a copy of case law or copies of the pertinent sections of the Workers' Compensation Act which support that position."

On November 2, 1995, Mr. Ventura wrote a letter to Ms. Jennifer Bradley of Liberty Mutual Insurance Company, Minneapolis, Minnesota. However, the deposition of Ms. Bradley indicates that she was an adjustor for Liberty Mutual in Bala Cynwyd, Pennsylvania. Mr. Ventura was seeking information concerning loss wages and unpaid medical expenses. Again, Mr. Ventura wrote, "If you believe that Pennsylvania law does not require you to compensate Mr. Eller for his wage loss, I again ask that you provide me with a copy of the case law or copies of the pertinent sections of the Workers' Compensation Act which support your position."

On March 12, 1996, Liberty Mutual Insurance Company, through their attorneys in Pennsylvania, filed a Petition for Termination/Suspension with the Pennsylvania Workers' Compensation Bureau. The petition reflected that the employee was Clayton Eller of Crossville, Tennessee. The petition alleged that the plaintiff had returned to work at his prior earnings on December 16, 1995, and suffered no loss of earning power. On July 31, 1996, Mr. Ventura wrote a letter to the Honorable Thomas G. Devlin, advising Judge Devlin that he was aware of the hearing of August 16, 1996, concerning the petition for termination. Due to not receiving wage records from Jennifer Bradley and Loram Maintenance of Way, Inc., and that his client had returned to Minnesota for further medical treatment, Mr. Ventura requested that the hearing be continued to a later date. On January 23, 1997, Judge Devlin entered an order granting Liberty Mutual's petition for termination finding that the plaintiff did not appear nor did his representative, Mr. Ventura.

Twenty five (25) days after Ventura's letter to Judge Devlin, Ventura filed a petition for workers' compensation benefits in the state of Minnesota on August 26, 1996, on behalf of the plaintiff. On June 2, 1997, Judge Bonnie Peterson, Compensation Judge, entered an order dismissing the petition on the grounds; (a) the plaintiff is a resident of Tennessee; (b) the plaintiff was hired in Tennessee; (c) the plaintiff was hired to do work outside the state of Minnesota; (d) the plaintiff was injured outside Minnesota; and (e) Minnesota does not have jurisdiction to determine issues that arise from the workers' compensation claims in the states of Maryland and Pennsylvania.

We must respectfully disagree with the plaintiff that the total thrust of Ventura's correspondence was discovery and informational in nature. The trial court was correct in finding that the plaintiff affirmatively sought benefits in both Maryland and Pennsylvania, thus, we affirm its judgment.

Since the trial court, also found that the plaintiff had knowingly and voluntarily accepted workers' compensation benefits from other states, we must determine from the record the correctness of the trial court's findings. The plaintiff asserts that the defendant has failed to meet its burden of proof in establishing medical benefits and temporary disability benefits from Maryland had been paid

to the plaintiff thus, the plaintiff was unable to knowingly and voluntarily make a binding election. The defendant contends that the plaintiff continued to receive benefits well after his representation by Mr. Ventura.

Mr. Ventura was hired by the plaintiff on May 5, 1995, and Ventura filed an Employee's Claim Petition with the Minnesota Department of Labor and Industry on August 23, 1996. In this petition, the plaintiff is alleged to have sustained a herniated L5-S1 disc. The plaintiff received temporary total benefits from April 28, 1995, to June 5, 1995, and temporary partial benefits from June 5, 1995, through October 19, 1995, from presumably Liberty Mutual in Maryland. Thus, payments continued to the plaintiff after he was put on notice that the claims for benefits were being paid pursuant to Maryland law in June 1995. This acceptance is coupled with Ventura's letter of September 1, 1995, acknowledging that Maryland had jurisdiction to pay workers' compensation benefits.

As to the Pennsylvania claim for benefits, the plaintiff contends that he was unaware of where the benefits came from and that he believed the benefits for the injury of November 1995, were being paid through Minnesota. The deposition of Jennifer Bradley, a claims adjustor for Liberty Mutual Insurance Company in Pennsylvania, established that Liberty Mutual paid partial disability loss wage and medical expenses for the plaintiff's injury of November 1994. However, the record is unclear as to when these payments were made. The record does reflect that Bradley was contacted by the plaintiff in April 1995, about some unpaid medical expenses. Whether these expenses were incurred in Pennsylvania or Maryland is unclear. In March 1996, Liberty Mutual filed a petition to terminate workers' compensation benefits on the basis that the plaintiff had returned to work in December 1995, with no loss earnings. We cannot determine from the record that the plaintiff received any benefits after hiring Mr. Ventura. However, from the letters written to adjustors and attorneys in Pennsylvania, Ventura was questioning these authorities as to why the plaintiff should not receive additional workers' compensation benefits. Also, this problem is compounded by the fact that Ventura sought a continuance in a legal proceeding, which was to determine if the plaintiff's workers' compensation benefits should be terminated. Although the plaintiff raises Mr. Ventura's lack of experience in Pennsylvania and Maryland as a reason for certain actions, we agree with the defendant that the plaintiff is bound by the actions of his duly-employed attorney. *See Simmons v. O'Charley's, Inc.*, 914 S.W.2d 895 (Tenn. Ct. App. 1995), *perm. app. denied*, (Tenn. 1995); *Bellar v. Baptist Hospital, Inc.*, 559 S.W.2d 788, 789 (Tenn. 1978). The record supports the trial court's ruling and we see no reason to disagree.

The trial court's judgment is affirmed and the costs are taxed against the plaintiff.

_____

L. TERRY LAFFERTY, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

CLAYTON D. ELLER v. LORAM MAINTENANCE OF WAY, INC.
Circuit Court for Cumberland County
No. CV002752

No. E1999-00874-WC-R3-CV -Filed September 12, 2000

JUDGMENT

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgement of the Court.

Costs on appeal are taxed to the appellant, Clayton Eller and Philip D. Burnett, surety, for which execution may issue if necessary.

09/12/00