IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(January 27, 2000 Session)

# CHRISTINE GRIFFIN v. FIREMAN'S FUND INSURANCE COMPANY, CHRISTINE GRIFFIN V. COUNTRY HOME HEALTH

**Direct Appeal from the Chancery Court for Dyer County**
**Nos. 97 C-368 and 97 C-642 J. Steven Stafford, Chancellor**

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**No. W1999-02150-WC-R3-CV- Mailed June 12, 2000; Filed July 25, 2000**

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This worker's 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 of findings of fact and conclusions of law. The employer's insurance company, Fireman's Fund Insurance Company, appeals the judgment of the Chancery Court of Dyer County where the trial court held that future medical treatment would remain open in the two workers' compensation cases filed by the plaintiff, Ms.Griffin; and if the plaintiff required future medical care, a determination of responsibility would be made based upon the facts presented at that time. For the reasons stated in this opinion, we affirm the judgment of the trial court.

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

WEATHERFORD, SR. J., delivered the opinion of the court, in which HOLDER, J., and MALOAN, SP.J,, joined.

P. Allen Phillips and B. Duane Willis, Jackson, Tennessee, for the appellant, Fireman's Fund Insurance Company

Thomas P. Cassidy, Jr., Memphis, Tennessee for the appellee, Country Home Health

Nathan J. Dearing, III, Dyersburg, Tennessee for the appellee, Christine Griffin

## MEMORANDUM OPINION

Plaintiff, Christine Griffin, sustained an injury to her left lower extremity while employed by Country Home Health on June 24, 1996 and filed a complaint seeking worker's compensation

benefits on July 10, 1997.

Plaintiff suffered another injury to her left lower extremity on October 8, 1997, and filed a complaint for workers' compensation benefits concerning this injury on December 16, 1997.

At the time of the first injury, appellant, Fireman's Fund Insurance Company, was the employer's workers' compensation insurance company; and at the time of the second injury, Colonial Casualty Insurance Company, was the employer's workers' compensation insurance company.

The two cases were consolidated, and on January 20, 1999, the trial court approved a settlement between the plaintiff, Christine Griffin, and both insurance companies. On the same day, the trial court heard argument from all parties concerning the responsibility of the insurance companies for any future medical expenses of plaintiffs.

The trial court found that both insurance companies would be responsible for future medical expenses, with the extent of that responsibility to be determined by the trial court at the appropriate time.

Plaintiff was 52 years of age at the time of the hearing. At the time of the hearing, the extent of permanent partial disability had been settled, so the facts of the injuries were not addressed in detail. However, the medical proof of Dr. David St. Clair does expound on both injuries to some extent. On June 24, 1996, plaintiff was at a patient's home when she fell through a stair and struck her leg against a concrete block. Dr. St. Clair diagnosed a medial meniscus tear. Plaintiff subsequently underwent an arthroscopy on July 23, 1996. The plaintiff was later diagnosed as having reflex sympathetic dystrophy. She continued to be treated by Dr. St. Clair, and eventually reached maximum medical improvement on June 24, 1997. Dr. St. Clair gave the plaintiff a rating of six percent (6%) to the lower extremity, with two percent (2%) due to the injury, and four percent (4%) due to the reflex sympathetic dystrophy.

Subsequently, on October 8, 1997, plaintiff turned her body while taking care of a patient, experienced severe knee pain, and was unable to extend her knee. Plaintiff returned to Dr. St. Clair, who ran several tests, including x-rays, which demonstrated a joint space narrowing. On November 12, 1997, surgery was again performed on the left knee. She continued to see Dr. St. Clair, and reached maximum medical improvement on or about March 25, 1998. Dr. St. Clair opined that plaintiff had a twenty-two percent (22%) impairment to the lower extremity based upon the second injury, which broke down into component parts of twenty percent (20%) for the joint space loss, and two percent (2%) for the discoid meniscus tear which was repaired. However, the Order signed by the Court states that the rating for the second injury was only twenty percent (20%) to the lower extremity. Notwithstanding, a settlement was reached regarding permanent partial impairment, awarding plaintiff twenty percent (20%) to the lower extremity for the first injury (paid by Fireman's Fund), and fifty five (55%) to the lower extremity for the second injury (paid by Colonial Casualty).

Dr. St. Clair stated that the two meniscus tears were on"completely separate structures." He

opined that a total knee replacement was not recommended after the first surgery. He also stated that there was no way to a reasonable degree of medical certainty to state when or if plaintiff would require a total knee replacement in the future. Most importantly, however, is the Doctor's conclusions that he could not state to a reasonable degree of medical certainty which one of plaintiff's injuries has brought her closer to a total knee replacement, and that he did not "know exactly how to proportion between the two of them [the knee injuries]. Dr. St. Clair also concluded that the two knee injuries accelerated the problem along with the condition of pre-existing osteoarthritis, but "exactly how much belongs to each one of them, [he did not] have any way of gauging precisely." Finally, Dr. St. Clair stated that, regarding the osteoarthritis, it would be "impossible to differentiate how much" each injury contributed to the arthritic condition.

As aforementioned, the permanent partial disability issues were resolved by settlement, leaving only the issue of future medical expenses before the trial court.

The appellant, Fireman's Fund Insurance Company, the carrier at the time of the first injury, argues that the rule in *Baxter v. Smith*, 211 Tenn 347, 364 S.W.2d 936 (Tenn. 1962), should apply in this case. No apportionment of any kind is permitted by Tennessee law:

> Where incapacity results from the combined effect of several distinct personal injuries, received during the successive periods of coverage of different insurers, the result is not an apportionment of responsibility nor responsibility on the part of either or any insurer at the election of the employee. The implication of the act is that only one of successive insurers is to make compensation for one and the same incapacity.....Where there have been several compensable injuries, received during the successive periods of coverage of different insurers, the subsequent incapacity must be compensated by the one which was the insurer at the time of the most recent injury that bore causal relation to the incapacity.

Tennessee law does not provide for the apportionment of liability between successive employers or their insurance companies. *Bennett v. Howard Johnson's Motor Lodge*, 714 S.W.2d 273, (Tenn. 1986); *McCormick v. Snappy Car Rentals, Inc.*, 806 S.W.2d 527 (Tenn. 1991).

The Court, in *McCormick* held, "to avoid last injurious rule, separate workers' compensation suit must be filed for each injury against each employer for successive injuries.

The appellee, the employer and the carrier at the time of the second injury, argues that the rule in *Riley v. INA/Aetna Ins. Co.*, 825 S.W.2d 80 (Tenn. 1986), should apply in this case. The Court in *Riley* held that the last injurious injury rule is not applicable where separate suits are filed for each injury and where, prior to second injury, there has been assessment of permanent disability properly attributable to the first injury.

It would appear that the case at bar would squarely fall within the rule in ***Riley***.

Dr. David St.Clair, an orthopedic surgeon, treated plaintiff, Christine Griffin, for both of the injuries in question.

He gave the following testimony:

> Q. The injury she had both in '96 and '97 though, was to the knee area itself, is that correct?
>
> A. Right. And, to my knowledge, confined to the knee.

Dr. St. Clair further testified:

> Q. After the first surgery, you didn't recommend to her that she have a total knee replacement done?
>
> A. Not after the first procedure, no.
>
> Q. At that point in time.....
>
> A. I think I told her that she might have to have one done. I think I told her in terms of a possibility of that because she had arthritic changes, and if they progressed over time, then she might have to. I didn't tell her that it was highly likely or very probable.

Dr. St. Clair, when asked if Ms. Griffin would require a total knee replacement in the future testified as follows:

> Q. There's no way to a reasonable degree of medical certainty, Dr. St. Clair, to state when or if this lady will require a total knee replacement in the future; is that true?
>
> A. That's correct. What I told her was that I thought that sooner or later, she would probably require it. That could be ten years, that could be two years. So, I really don't know exactly when...

When asked if Ms. Griffin had been brought closer to a total knee replacement by either of her injuries, Dr. St. Clair testified:

> Q. Has Ms. Griffin been brought closer to a total knee

replacement by either of her injuries in your opinion?

A. Yes, I think so.

Q. Can you state to a reasonable degree of medical certainty which one of those has brought her closer to a total knee replacement [sic]?

A. No, I can't. I don't really know exactly how to proportion between the two of them. Because I saw her arthritis advance more rapidly than I would have expected from just the development of osteoarthritis, and both of her injuries are relatively low energy injuries.

One was a fall on a step. And it certainly could damage the surface in some degree, but, it usually doesn't. Usually, that sort of injury either break the bone or doesn't do very much to the joint.

And the other one was a relatively minor twisting injury that I would expect mostly to produce the meniscus tear. So, I don't really have any information in which to be able to proportion between the two of them.

On cross-examination, Dr. St. Clair testified as follows:

Q. And it's impossible to differentiate how much one versus how much the other was as far as the injuries go?

A. Right. I have no way of doing it. Because, for example, the changes that occurred from the first injury had continued to produce effects throughout the whole period of time. But, I don't know.

Considering the fact that separate suits were filed for each injury and where, prior to the second injury, there had been an assessment of permanent disability properly attributable to the first injury, we feel that this case would be within the rule in *Riley*.

In consideration of the foregoing, and all the facts and circumstances of this case, the Panel concludes that the evidence does not preponderate against the trial court's finding that if the employee required medical treatment in the future, that a determination of responsibility between the two successive insurance companies would be based upon the evidence presented at that time.

The judgment of the trial court is affirmed.

Costs of appeal are adjudged against the Appellant.

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**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 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 Appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM