

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

**KATHY GEORGE v.
CARRIER CORPORATION, et. al.**

**Direct Appeal from the Cannon County Circuit Court
No. 3170, Robert E. Corlew, III, Judge**

**No. M1999-02577-WC-R3-CV - Mailed - September 26, 2000
Filed - October 27, 2000**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. The issue on appeal presented by the employer/appellant is whether the Court erroneously awarded a 25% penalty on temporary total disability benefits in the absence of a finding of bad faith. The employee also appeals and presents a separate issue, whether the employer is entitled to an offset for disability insurance benefits received by the employee for the period of disability. The panel has concluded that the judgment of the trial court should be affirmed.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Circuit Court Affirmed.

Frank G. Clement, Jr., Sp.J., delivered the opinion of the court, in which Frank F. Drowota, III, J., and John A. Turnbull, Sp.J., joined.

B. Timothy Pirtle, McMinnville, TN for the appellant/employer Carrier Corporation, et. al.

Frank Buck and Lena Ann Buck, Smithville, TN, for the appellee Kathy George.

OPINION

Kathy George (George), the employee, worked for Carrier Corporation for seventeen (17) years. She injured her left arm at work on April 10, 1995 when she was using an air gun to repair large air-conditioning units. Use of the air gun would jerk the operators arm. Numerous employees of Carrier reported similar arm injuries resulting from the use of the air gun.

George went to the company nurse to complain of the pain. The nurse treated George with hot wax dips, which did not abate her pain. George continued to complain of pain so in July of 1995, Carrier provided a panel of three general practice physicians, from which panel George chose Dr. Bryan Chastain. After several visits to Dr. Chastain did not relieve the pain, George requested

an arm specialist. She was then referred to another panel of three doctors and she chose Dr. John Moore from that panel.

Dr. Moore treated George from August 10, 1995 until September 6, 1996. Dr. Moore diagnosed George as having overuse syndrome and carpal tunnel symptoms caused by her work. He recommended several lifting restrictions. While under the care of Dr. Moore, George continued to experience pain. Dr. Moore subsequently concluded that he had nothing further to offer George. He recommended that she see either Dr. Frank Jones, Dr. Michael Milek, or Dr. David Schmidt, all orthopaedic surgeons, for a surgical evaluation.

George selected Dr. Milek, however, Carrier would only approve Dr. Jones. George obliged and elected to be seen by Dr. Jones, who determined that George should continue with the same treatment she had been using in the past. Since this treatment was not effective and she was still experiencing pain, George elected to see Dr. Milek without the approval of Carrier. Dr. Milek, an orthopaedic surgeon, recommended surgery. Carrier refused to pay for the surgery. Since Carrier would not pay for the surgery, George had to make private arrangements to pay for the surgery. Dr. Milek performed surgery on George's arm on January 12, 1998. George reported that she felt 90% better as a result of the surgery.

George filed a complaint on January 21, 1997, seeking workers' compensation benefits. Ten days later, Carrier filed a separate complaint to declare that it had no further obligations to George under the Workers' Compensation Act.

George did not work from June 25, 1997 until March 30, 1998. Though numerous Carrier employees had experienced similar arm injuries, Carrier claimed that George's injury did not arise in the course and scope of her employment. After Carrier denied her temporary total disability benefits, claiming her condition was not work related, George applied for and received benefits under her personal disability insurance. She received \$3,144.30 from her disability carrier for the period of temporary total disability at issue.

On May 30, 1997, George filed a motion to compel Carrier to provide medical treatment by Dr. Milek. Thereafter the trial court ordered Carrier to pay for treatment by Dr. Milek. The court reasoned that George had a compensable injury, needed further medical treatment, and was entitled to select the treating physician from the panel notwithstanding any other panels with which she was provided. Though Carrier refused to pay for Dr. Milek's services after being ordered to do so by the trial court,¹ Dr. Milek performed the surgery on George's arm on January 12, 1998, after George's health insurance company agreed to pay 60% of the bill. Thus, George used her personal assets to pay the balance of the medical expenses for the surgery while this litigation was pending.

The Trial Court found that George's injury arose in the course and scope of her employment and awarded workers' compensation benefits. With reference to the specific issues on appeal, the

¹Carrier's refusal to pay Dr. Milek was not an affront to the trial court for Carrier respectfully advised the trial court that it intended to appeal the order requiring it pay Dr. Milek.

Trial Court awarded temporary total disability benefits from September 25, 1997 through March 30, 1998, and a 25% penalty against Carrier pursuant to T.C.A. 50-6-225(j) for refusing to pay temporary total benefits. The Trial Court further ruled that Carrier is entitled to a “set off” for the funds George received from her disability insurer, being \$3,114.30.

Our review is de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. Code Ann. 50-6-225(e)(2).

Carrier asserts that the Trial court cannot award a penalty unless there is an affirmative finding of bad faith. Carrier correctly states that the Trial Court declined to make a specific finding of bad faith; however, the applicable statute does not require an affirmative finding of bad faith. Tenn. Code Ann. 50-6-225(j) provides:

If an employer wrongfully fails to pay an employee’s claim for temporary total disability payments, the employer shall be liable, in the discretion of the court, to pay the employee, in addition to the amount due for temporary total disability payments, a sum not exceeding twenty-five percent (25%) of such temporary total disability claim; provided, that it is made to appear to the court that the refusal to pay such claim was *not in good faith* (emphasis added).

While other statutes require a finding of “bad faith”, we find Tenn. Code Ann. 50-6-225(j) to be the applicable statute and it does not require a finding of bad faith. This statute merely requires that the court determine whether the refusal to pay temporary total benefits was not in good faith.

The evidence showed that numerous Carrier employees reported experiencing similar arm injuries as a result of the air gun which caused George’s injury. The evidence further showed that George worked for Carrier for 17 years, and that Dr. Moore, Dr. Talmage, and Dr. Milek found her pain to be job related. Moreover, the Trial Court specifically found “there is *no question* but that the Plaintiff was, in fact, temporarily totally disabled for the period in question.” (emphasis added). The Trial Court also found that “the evidence shows that reasonably the employer should not deny the compensability of the Plaintiff’s injury.” The Trial Court’s finding that Carrier could *not reasonably deny* compensability is but one of several ways of stating that Carrier *acted unreasonably* in denying the compensation. We interpret the Trial Court’s use of the word *unreasonably* to mean the same as *not acting in good faith*. Accordingly, Carrier’s denial of temporary total disability benefits in the face of this evidence was not in good faith. We further find that the evidence does not preponderate against the Trial Court’s finding that George incurred additional expense as a result of this denial of benefits and that the award of a 25% penalty is appropriate considering the expenses and damages George incurred as a result of the denial of these benefits.

As a separate issue on appeal, George asserts that the trial court erroneously granted Carrier a “set off” for disability benefits paid to her in the amount of \$3,114.30. George argues that

Carrier's failure to pay medical bills and temporary total benefits pursuant to Tenn. Code Ann. 50-6-225(j) and 50-6-128 justifies denial of the set off. For the employer to be barred from receiving an offset for benefits paid to the employee, Tenn. Code Ann. 50-6-128 requires that an employer "knowingly, willfully, and intentionally" cause a loss claim to be paid under sickness or accident insurance. While we agree with the Trial Court that Carrier did not act in good faith in denying temporary total benefits, that finding does not necessarily require a finding that Carrier knowingly, willfully and intentionally caused a claim to be filed for under a disability insurance policy. Indeed, the denial of benefits by Carrier is the reason George filed a claim under her disability policy, but that is different from Carrier "knowingly, willfully, and intentionally" causing it to be filed. Moreover, the evidence in the record does not preponderate in favor of finding that Carrier "knowingly, willfully and intentionally" caused the claim to be filed by George under her personal disability insurance carrier. The evidence does not preponderate against the trial court's finding as to this issue; accordingly, we affirm the Trial Court's decision that Carrier is entitled to the set off in the amount of the payments received by the employee from her disability insurer.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Carrier Corporation.

Frank G. Clement, Jr., Special Judge

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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 will be paid by the appellant, Carrier Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM