IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
November 3, 2000 Session

LINDA EK v. FLUOR DANIEL, INC.

Direct Appeal from the Chancery Court for Madison County
No. 55520 Joe C. Morris, Chancellor

No. W2000-00045-SC-WCM-CV - Mailed January 8, 2001; Filed April 9, 2001

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. In this appeal, the employee or claimant, Linda Ek, contends (1) the evidence preponderates against the trial court's findings that the contract of hire was made in Mississippi and that she willingly and knowingly elected to receive benefits under Mississippi law; and (2) the conditional award of permanent partial disability benefits is inadequate. As discussed below, the panel has concluded that the contract of hire was made in Tennessee, that the employee did not voluntarily, deliberately and with full knowledge of her options, accept benefits under Mississippi law, and that the conditional award of permanent partial disability benefits should be affirmed.

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

JOE C. LOSER, JR. SP. J., delivered the opinion of the court, in which JANICE HOLDER, J., and JOE H. WALKER, III, SP. J., joined.

Jason C. Scott, Flippin, Collins & Huey, Milan, Tennessee, for the appellant, Linda Ek.

Catherine B. Clayton, Lisa A. Houston, Spragins, Barnett, Cobb & Butler, Jackson, Tennessee, for the appellee, Fluor Daniel, Inc.

MEMORANDUM OPINION

In July of 1998, there was a telephone conversation between the claimant and Fran Test, a representative of Fluor. Ms. Test testified that she offered the claimant a job in Mississippi, conditioned upon the claimant completing the application process. The testimony of the claimant, whom the chancellor expressly found to be credible, included the following questions and answers:

Q. Okay, then what happened?

A. Fran called me and asked me to get down to Mississippi.
Q. Who's Fran? Fran Test?
A. I don't know her last name.
Q. Well, we took the deposition of a lady.
A. She even promised me an update of pay.
Q. Let's go slow.
A. Okay.
Q. We took a deposition of a Fran Test.
A. Okay. Yes. She's a real nice lady.
....
Q. Where was Fran Test when she called you?
A. Waveland Plastic Plant in Mississippi.
Q. Where were you when you received the call?
A. Jackson, Tennessee, at my house.
Q. Okay. What did she tell you?
A. She told me she needed people down there right away, and she wanted me to fit pipe. And I said I didn't have the experience yet. She said, 'You've got the schooling, but I want you to fit.' And she promised me $14 an hour. And I said, ' It sounds good, but, you know, we're going to have problems,' being as I was the only lady making $14 per hour. And she said, 'Well, I want you to come, anyway.' I said, 'Okay.'
So I packed my bags and went. I was behind two car payments, out of work, so I went.
Q. Did she tell you anything about any conditions of employment?
A. No. As a matter of fact, she said she would have me a motel room waiting for me when I got there.

The claimant knew from experience that she would be required to complete the application process, including passing a drug test, but she also knew that she would pass the drug test and begin working as soon as she could get to Mississippi and get settled. She did. On August 15, 1998, she became entangled with a hook on the end of a pipe and fell, injuring her left knee and right shoulder. She received medical care, including surgery, in Mississippi and under Mississippi law, but brought action to recover Tennessee benefits because she was dissatisfied with the amount offered her under Mississippi law.

Upon the above summarized evidence, the chancellor, by letter to counsel, found, inter alia, as follows:

> "It is the decision of the Court in this cause that Tennessee does not have jurisdiction. The Plaintiff received a call from the Defendant in Tennessee. The Plaintiff was offered a job by telephone from the State of Mississippi to come to work in Mississippi at $14 an hour, and they would have a room waiting for her. She worked in Mississippi, fell and hurt her right knee in Mississippi, and she was paid Mississippi benefits."

The claimant has appealed, contending that, while the above findings are correct, they do not justify the conclusion that the court lacks jurisdiction. Conclusions of law are reviewed de novo. Ivey v. Trans-Global Gas & Oil, 970 S.W.2d 941 (Tenn. 1999). The employer's objection to jurisdiction is grounded on the notion, as reflected by its answer, that the contract of employment was made in Mississippi. The proof reflects, as the trial court found, that an offer of employment was made in Tennessee and, as the claimant testified, that the offer of employment was accepted in Tennessee. Where an acceptance of an offer is given by telephone, it is generally held that the place of contracting is where the acceptor speaks his acceptance. Tolley v. General Accident Fire and Life Ins. Corp. Ltd., 584 S.W.2d 647 (Tenn. 1979). Moreover, since the present action is one seeking benefits under Tennessee law, the chancery court has jurisdiction by virtue of Tenn. Code Ann. § 50-6-225(a)(1).

A worker who is injured outside the territorial limits of Tennessee is covered under the Workers' Compensation Act of this state if, and only if, she would have been covered if the injury had occurred within the state and (1) the employment was principally localized within Tennessee or (2) the contract of hire was made in Tennessee. Tenn. Code Ann. § 50-6-115. The fact that the injury occurred in another state does not deprive Tennessee of jurisdiction to administer its own laws. The trial court's conclusion that Tennessee does not have jurisdiction in this cause is accordingly reversed.

In addition, the fact that benefits may be recoverable under the laws of another state will not defeat coverage under the Tennessee Act unless the injured employee renounces such coverage by pursuing his claim in the other state. It is the employee, not the employer, who may renounce the right to recover benefits under the extra-territorial provisions of the Tennessee Act; and if the employer can show that an injured employee has voluntarily, deliberately and with full knowledge of her options, accepted benefits under the law of another state, the employee may be precluded from proceeding in Tennessee on the ground that he has made a binding election. Bradshaw v. Old Republic Insurance Co., 922 S.W.2d 503 (Tenn. 1996). We are guided by the following excerpt from Bradshaw:

> The doctrine of election of remedies in inter-jurisdictional workers' compensation cases was established in **Tidwell v. Chattanooga Boiler and Tank Company**, 163 Tenn. 420, 43 S.W.2d 221 (Tenn. 1931). Tidwell, the employee, was killed in an on-the-job accident in Ohio. His widow applied for and received death benefits under Ohio workers' compensation law. She later sought benefits under Tennessee law. In affirming the trial court's dismissal of the complaint, we held that the rights and remedies granted under Tennessee workers' compensation laws are exclusive and that this exclusivity provision is a part of the employment contract. We found that Tidwell's institution of proceedings in Ohio was a clear renunciation or disaffirmance of the Tennessee contract and constituted an irrevocable election of remedies. The Court stated 'the

obligations of the contract cannot be repudiated in one suit and benefits of that contract be claimed in a subsequent suit.' (Citation omitted.).

We clarified the **Tidwell** holding in **Thomas v. Transport Insurance Company**, 532 S.W.2d 263 (Tenn. 1976). Thomas, the employee, was injured while working in Memphis for an Arkansas employer. The employer began paying temporary total disability benefits under the Arkansas workers' compensation law. These payments were, however, terminated at the employee's request.

Thomas pursued benefits under Tennessee workers' compensation law and, in an apparent effort to avoid the thrust of **Tidwell**, alleged that the employer had 'wrongfully' commenced payment of benefits under Arkansas law. The employer sought dismissal of the action based upon the doctrine of election of remedies as established in **Tidwell**; the trial court granted the motion and dismissed the cause.

We reversed, holding that the circumstances of Thomas's receipt of Arkansas benefits were in dispute. Until the factual issue was resolved, the Court could not accurately determine whether Thomas has made a 'binding' election to accept Arkansas benefits.

Although **Thomas** was not decided on the merits, it is particularly significant because of its holding that the question whether an employee has made a binding election must be determined from a careful examination of the facts. Justice Harbison, writing for the Court, 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 the 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.

The **Tidwell-Thomas** rationale was expressly reaffirmed in **True v. Amerail Corporation**, 584 S.W.2d 794 (Tenn. 1979). In **True**, the employee was a Tennessee resident whose contract required him to work in Virginia. The injury occurred in Virginia, and True applied for and received benefits under Virginia's workers' compensation law. True subsequently pursued Tennessee benefits, and we found that he had made a binding election to proceed under Virginia law. We held, accordingly, that he was barred from proceeding in Tennessee; by affirmative action, knowingly taken, True had clearly

renunciated (sic) Tennessee benefits.

Of special interest here is the 'invitation' extended to the Court by True's counsel to retreat from the **Tidwell** holding. Not only did the Court decline the invitation, it also seized the opportunity to express its continued adherence to the **Tidwell-Thomas** doctrine. The Court stated:

> These authorities are appealing; however we are not persuaded to sanction a course of conduct that would result in what is essentially a single cause of action being made the subject of lawsuits in two states, absent compelling considerations such as those enumerated in **Thomas**. We are persuaded that the **Tidwell** rule represents a fair approach in those cases wherein the injured workman has made a binding election as indicated by affirmatively seeking and accepting benefits in another state. (Citation omitted).

The **Tidwell** rationale was again affirmed in **Perkins v. BE & K, Incorporated**, 802 S.W.2d 215 (Tenn. 1990). Perkins, a Tennessee resident, sustained an on-the-job injury in Virginia. He executed an 'Agreement for Compensation' with the insurance carrier, and the state of Virginia paid disability benefits and medical expenses to Perkins. Subsequently, Perkins sought benefits under the Tennessee workers' compensation law. We held that Perkins, by executing the agreement and accepting benefits, had made a binding election to be compensated under Virginia law and was, thereby, precluded from claiming benefits under Tennessee law. In **Perkins** we said:

> The circumstances of each case must be considered in determining whether the employee has made a binding election. The mere acceptance of benefits from another state does not constitute an election, but affirmative action to obtain benefits or knowing and voluntary acceptance of benefits from another state will be sufficient to establish a binding election. (Citation omitted).

Although continuing to adhere to the **Tidwell-Thomas** holdings, the Court has signaled a readiness to mitigate the somewhat harsh effect of **Tidwell-Thomas** when the facts warrant it. Illustrative of this "readiness" is this Court's reasoning in **Gray v. Holloway Construction Company**, 834 S.W.2d 277 (Tenn. 1992).

In **Gray**, the employee suffered a work-related injury at the employer's Texas work-site. He received temporary disability benefits from the employer's insurance carrier, National Union Fire Insurance Company. Gray subsequently filed a notice of claim with the Texas Industrial Accident Board. National Union paid his medical bills and temporary disability benefits.

After Gray returned to work, his employer sent him to a Tennessee work-site. While in Tennessee, the employee suffered a second work-related injury; he notified his employer and began receiving temporary disability benefits from National Union. National Union continued making payments until the employee filed a second claim with the Texas board. National Union then discovered that the second injury had actually occurred in Tennessee. Because it did not cover the Tennessee work-site, National Union stopped making payments.

Gray's Texas attorney began negotiating a settlement of the claim on the first injury; but because the second claim was improperly filed against National Union, she referred it to a Tennessee law firm, which filed the claim in Tennessee. After the trial of the Tennessee case, the trial court awarded disability benefits and medical expenses.

On appeal, we rejected the employer's argument that the employee had made a binding election. The filing of the second claim with the Texas board was 'legally baseless' because it was filed against the wrong party; thus, no election of remedies occurred. We emphasized that 'in affirming this judgment, we do not retreat from the sound principles recognized in . . . **Perkins v. BE & K, Inc.**' **Gray**, 834 S.W.2d 279 (citation omitted). In reviewing the election of remedies cases, we stated:

> The common thread in **Perkins** and **Tidwell** – cases in which recovery in Tennessee was held to be precluded – is the fact that workers injured in other jurisdictions had both filed out-of-state claims and received awards in those states. The common thread in **Thomas** and **Hale** – opinions in which we held that recovery was not precluded – is the fact that the workers in those cases had done no more than accept benefits tendered by their employers' insurance carriers upon notice of injury, at a time when they had too little knowledge to make an informed choice about which of two remedies they wished to pursue, and in what forum. **Gray**, 834 S.W.2d at 280

(citation omitted) (footnote omitted). The Court concluded:

> We adhere to our admonition in **Thomas** and **Perkins**: Under certain circumstances, the pursuit of a compensation claim in another jurisdiction may preclude the filing of the same claim in the courts of Tennessee, especially where it results in an award or an approved settlement. Despite the tendency of the Tennessee cases to resort to the election of remedies doctrine, . . . the more defensible policy basis for this rule is the prevention of vexations [sic] litigation, of forum shopping, and of double recoveries for the same injury. In this case, however, the record shows that the plaintiff's initial claim was mistakenly filed against the wrong party, National Union, in the wrong jurisdiction, Texas. It is thus wholly unlike the situation in **Perkins**, where the initial claim was deliberately filed against an appropriate party, BE & K, Inc., in the 'right' jurisdiction, Virginia.
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> * * * *
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> We conclude with this final observation: The palpable if unspoken principle underlying our decision in **Perkins** was a perceived need to guard against unfair manipulation of the Tennessee legal system and a possible double recovery by an injured worker who has already secured an adequate compensation award in another jurisdiction. That concern remains a valid one. Nevertheless, to invoke the rule applied in **Perkins** to Walter Gray's case would produce just the opposite result – instead of a double recovery, there would be no recovery at all. Clearly, that result would constitute a perversion of the otherwise sound policy developed in the line of cases culminating in **Perkins.**

Quoting the Iowa Supreme Court, our Court then said, 'This doctrine is not intended either as a trap or as a penalty for a mere mistake. If a litigant, without adequate knowledge of the facts affecting his rights, mistakenly selects a remedy to his disadvantage he may rely upon timely discovery to abandon it and pursue another,' citing **Sackett v. Farmers' State Bank**, 209 Iowa 487, 228 N.W. 51, 54 (1929).

The determinative issue here, then, is not whether Tennessee has jurisdiction, but whether Ms. Ek has voluntarily, deliberately and with full knowledge of her options, renounced Tennessee law and affirmatively pursued compensation benefits under Mississippi law. The preponderance of the evidence is that she accepted, under economic pressure, medical and temporary disability benefits

under Mississippi law, without knowledge of the facts affecting her rights, and that she did not take any affirmative action seeking permanent disability benefits under Mississippi law. Despite her acceptance, she may elect to be covered by Tennessee law. The panel concludes therefore not only that Tennessee has jurisdiction but that the injured worker is entitled to permanent disability benefits under Tennessee law if she is permanently disabled. We next review the trial court's conditional award of permanent partial disability benefits based on 35% to the right leg.

The extent of an injured worker's permanent vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450 (Tenn. 1999). Review of findings of fact by the trial court is de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires the panel to examine in depth a trial court's factual findings and conclusions. The panel is not bound by a trial court's factual findings but instead conducts an independent examination to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584 (Tenn. 1991).

On August 15, 1998, the claimant was working for Fluor Daniel when she fell and injured her left knee and right shoulder. After conservative treatment, her left knee was operated on by Dr. Ronald A. Graham at the Orange Grove Bone and Joint Clinic in Gulfport, Mississippi. Because she wanted to return to Jackson, she asked that her treatment be transferred to Tennessee. Once in Tennessee, she was treated by two different doctors, including Dr. Keith Nord of Jackson. Dr. Nord diagnosed left knee chondromalacia with a history of meniscal tear. He estimated her permanent impairment at 5 percent to the left lower extremity.

Dr. Joseph C. Boals, III, performed an independent medical evaluation on Ms. Ek on March 2, 1999. He estimated her permanent impairment from the knee injury at 14 percent to the left lower extremity from her accident and resulting surgery.

Once the cause and permanency of an injury have been established by expert testimony, the trial court may consider many pertinent factors, including age, job skills, education, training, duration of disability and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Pittman v Lasco Ind., Inc., 908 S.W.2d 932 (Tenn. 1995).

At the time of the trial, the claimant was 55 years old. She has a college degree in nursing and experience as a truck driver, salesperson, cashier, forklift operator and blueprint reader. Additionally, she has six years of electrical training, experience as a welder and speaks four languages to some extent. From a consideration of all the facts and circumstances, the panel concludes that the evidence fails to preponderate against the trial court's conditional award, which is affirmed.

The trial court's order dismissing the claim is reversed and the cause is remanded to the Chancery Court for Madison County for entry of a judgment consistent herewith and such further proceedings, if any, as may be necessary. Costs are taxed to the defendant-appellee.

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JOE C. LOSER, JR., SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

LINDA EK v. FLUOR DANIEL, INC.

No. W2000-00045-SC-WCM-CV - Filed April 9, 2001

ORDER

This case is before the Court upon 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 on appeal are taxed to the appellee.

IT IS SO ORDERED this 9th day of April, 2001.

PER CURIAM

Holder, J. - Not participating.