IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 25, 2001 Session

CHERYL ELLIS v. SMITH CO. COATINGS, ET AL.

Direct Appeal from the Circuit Court for Smith County
No. 4204 John Wooten, Judge

No. M1999-02336-WC-R3-CV - Mailed - March 2, 2001
Filed - April 4, 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 insists the trial court erred in dismissing her claim for failure to give written notice of her claimed injury and for insufficient proof of compensability. As discussed below, the panel has concluded the judgment should be affirmed.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J., and JOHN K. BYERS, SR. J., joined.

B. Keith Williams, Taylor, Taylor, Lannom & Williams, Lebanon, Tennessee, for the appellant, Cheryl Ellis.

Mark C. Travis and Frederick J. Bissinger, Wimberly, Lawson & Seale, Cookeville, Tennessee for the appellees, Smith County Coatings, Inc. and Clarendon Insurance Company.

MEMORANDUM OPINION

The employee or claimant, Ellis, was employed by the employer, Smith County Coatings, to remove excess paint from parts. There is conflicting evidence as to the weight of drive shafts she was required to handle. After two or three weeks of work, she says she developed pain in her right hand. She testified at trial that she notified her supervisor. The supervisor denied it.

On or about November 14, 1997, the employee called the production supervisor, Wayne Burton, and advised him she had swelled all over her body, unrelated to work. She talked to various

supervisors of the employer following this event and a visit to a doctor, but never mentioned her hand problem.

On December 5, 1997, she was terminated. She met with supervisors in an effort to be returned to work, but never mentioned her claimed repetitive trauma injury. On December 15, 1997, a lawyer wrote a letter to the employer giving notice of the employee's repetitive use injury claim. An owner responded denying the claim.

The employee saw Dr. Chernowitz, who referred her to Dr. Paul A. Abbey, who performed carpal tunnel release surgery on January 19, 1998. Dr. Abbey opined that he doubted that carpal tunnel syndrome could have been caused by the employee's work for the employer. A chiropractor, Frank Etlinger, opined at trial that her injury was work related and assessed a 10 percent impairment rating, based on the history provided by the employee. However, the trial judge found the employee, who admitted to seven theft convictions, to be less than credible and dismissed the claim for insufficient proof of causation.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173 (Tenn. 1999).

Immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, an injured employee must, unless the employer has actual knowledge of the accident, give written notice of the injury to his employer. Tenn. Code Ann. § 50-6-201. Generally the beginning date for computing notice is the date on which the effects of the injury manifest themselves to the employee or could have been discovered by the employee in the exercise of reasonable care and diligence. Hawkins v. Consolidated Aluminum Corp., 742 S.W.2d 253 (Tenn. 1987). It is undisputed that the letter written by the claimant's attorney was received by the employer. It appears to be timely and sufficient if indeed the claimant suffered a compensable injury.

Unless admitted by the employer, the employee or claimant has the burden of proving, by competent evidence, every essential element of his claim. Oster v. Yates, 845 S.W.2d 215 (Tenn. 1992). The claimant must prove that she is an employee, that she suffered an injury by accident, and that such injury by accident arose out of and in the course of his employment by the employer. Anderson v. Save-A-Lot, Ltd., 989 S.W.2d 277, 279 (Tenn. 1999). Where a condition develops gradually over a period of time resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d

65 (1961). To be "work-connected" the condition must be one arising out of and in the course of employment.

An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and occurs in the course of one's employment if it occurs while an employee is performing a duty she was employed to do. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). In order to establish that an injury was one arising out of the employment, the cause of the death or injury must be proved. If the claim is for permanent disability benefits, permanency must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873 (Tenn. 1996). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Tom Still Transfer Co., Inc. v. Way, 482 S.W.2d 775 (Tenn. 1972).

The only expert medical testimony that this claimant's injury is causally connected is that of Dr. Etlinger, whose opinion was based on the history he obtained from the claimant. The trial court, however, found the claimant to be less than credible. The preponderance of the expert medical testimony is, therefore, that the claimed injury is not work-connected. Under such circumstances, we cannot say that the evidence preponderates against the finding of the trial court and the claim must fail for lack of evidence of causation.

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

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JOE C. LOSER, JR.

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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, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM