IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 30, 2000 Session

MARY ELLA FRANKLIN v. TROLL ASSOCIATES, ET AL.

Direct Appeal from the Chancery Court for Shelby County
No. 107577-3 D.J. Alissandratos, Chancellor

No. W1999-01164-WC-R3-CV - Mailed March 28, 2001; Filed June 26, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court awarded plaintiff twenty percent permanent partial disability to the right upper extremity for a wrist injury and an additional twenty percent permanent partial disability to the right upper extremity for a shoulder injury. Defendant appealed the decision of the trial court. We affirm and modify the judgment of the trial court.

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

DON R. ASH, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOHN K. BYERS, SR. J., joined.

Ralph T. Gibson, Memphis, TN, for the Appellant, Troll Associates, et al.

Matthew S. Russell and John L. McWhorter, Memphis, TN, for the Appellee, Mary Ella Franklin.

MEMORANDUM OPINION

History

Plaintiff, Mary Franklin ("Franklin"), filed a Complaint for workers' compensation benefits on May 30, 1996. The trial was heard on June 23, 1999. At the conclusion of the proof, the trial court awarded Franklin twenty percent permanent partial disability to the right upper extremity for her wrist injury and an additional twenty percent permanent partial disability to the right upper extremity for her shoulder injury. Defendants, Troll Associates and Liberty Mutual Insurance Co.,

appeal the decision of the trial court. For the reasons discussed below, we affirm and modify the decision of the trial court.

Facts

Franklin was employed at Troll Associates, Inc. ("Troll"), from September 1993 until November 1994. During her employment Franklin operated a plastic packaging and sealing machine and did some line work. Franklin would package approximately 20,000 packages on an average workday. Franklin's job also required her to do some repetitive lifting. Franklin began to experience pain in her right arm and shoulder. Subsequently, Franklin reported her injury to her supervisor, who referred her to Dr. Phillip Mintz for treatment. Next, Dr. Mintz referred Franklin to an orthopedic doctor, and she was sent to Dr. Riley Jones.

Dr. Jones saw Franklin concerning her complaints. She was given pain medication and sent back to work. On November 28, 1994 Dr. Jones opined Franklin had reached maximum medical improvement. Later Franklin returned to Dr. Jones with the same complaints. Dr. Jones then conducted an EMG and diagnosed her with carpal tunnel syndrome and recommended surgery. On January 30, 1995, Franklin underwent right endoscopic carpal tunnel release and right DeQuervains release. Before and after the surgery Franklin testified she told Dr. Jones of her concerns about her shoulder. On April 10, 1995, Dr. Jones stated that Franklin was ready to return to work. Dr. Jones found no permanent partial impairment as a result of Franklin's carpal tunnel injury and surgery. Further, Dr. Jones found no permanent partial impairment related to Franklin's shoulder because he never treated her for the injury.

Subsequently, Franklin went to Dr. Wilkinson and complained of pain over the back of her right shoulder. Dr. Wilkinson could not find a relationship between her shoulder pain and her carpal tunnel injury. He gave Franklin a three percent permanent partial impairment to her right upper extremity as a result of the residual from her carpal tunnel syndrome.

Finally, an unauthorized physician, Dr. Aronoff, examined Franklin. Franklin did not seek approval from Troll before she incurred these additional medical costs. Dr. Aronoff diagnosed Franklin with a chronic rotator cuff, tendinitis, impingement syndrome, and an arthritic AC joint. On May 6, 1996, Dr. Aronoff performed successful surgery on Franklin's shoulder. Dr. Aronoff gave Franklin a permanent partial impairment to the right upper extremity of ten percent. Further, Dr. Aronoff gave Franklin a separate ten percent permanent partial impairment rating for the residual from her carpal tunnel syndrome. Dr. Aronoff further opined that Franklin's injuries were consistent with her work history dealing with repetitive overhead lifting.

Medical Evidence

At trial the evidentiary deposition testimony of Dr. Jones, Dr. Wilkinson, and Dr. Aronoff were entered into evidence. Dr. Jones never treated Franklin for the shoulder injury, and Dr. Wilkinson testified there was no relationship between the Franklin's carpal tunnel injury and her

shoulder injury. Further, Franklin stated that she never submitted a written claim regarding her shoulder injury because she believed that when she first reported her injuries to her supervisor it was sufficient notice of all the injuries.

At the conclusion of proof the Chancellor found Franklin sustained injuries to her right wrist, right elbow and right shoulder as a result of an injury by accident arising out of and in the course of her employment. The Court also found the defendant received timely notice of said injuries. The Chancellor awarded a twenty percent permanent partial disability to the right upper extremity for her wrist injury and an additional twenty percent permanent partial disability to the right upper extremity for the injury to her shoulder.

Discussion

Our review is de novo upon the record accompanied by the presumption of correctness unless the preponderance of the evidence is otherwise. Tennessee Code Annotated § 50-6-225(e)(2) (1997 Supp.). All of the medical testimony in this cause was presented either by deposition or by stipulated medical records. None of the doctors testified in court, and the Trial Judge had no opportunity to observe the demeanor of these witnesses while testifying. Thus, as to this evidence, we review without a presumption of correctness upon the theory that we have the same opportunity to consider this evidence which the Trial Court enjoyed, and as we review the record de novo, we apply a presumption of correctness only with regard to testimony of witnesses who testified in person. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

In this appeal, Troll contends (1) the trial court erred in finding that Franklin provided Troll sufficient notice of the injury to her right shoulder; (2) the evidence preponderates against the trial court's award of permanent partial disability benefits for Franklin's right shoulder injury; (3) the court erred in awarding Franklin medical expenses for treatment of the shoulder injury.

The employer contends Franklin failed to give adequate notice that she had suffered a work-related injury within the time prescribed by the statute. In order to receive workers' compensation, T.C.A. § 50-6-201 requires an employee to give notice of an injury to the employer within 30 days after sustaining the injury. An employee must give the required notice before benefits can be collected. Aetna Casualty & Surety Co. v. Long, 569 S.W.2d 444 (Tenn. 1978). Notice must be calculated reasonably to convey the message that the employee has suffered an injury arising out of and in the course of employment. Masters v. Industrial Garments Mfg. Co., Inc., 595 S.W.2d 811 (Tenn. 1980).

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). Further, written notice may be excused if it is shown that the employer had actual notice of the accident. Masters v. Industrial Garments Mfg. Co., 595 S.W.2d 811 (1980); Pentecost v. Anchor Wire Corp., 695 S.W.2d 183 (1985). Notice of the precise nature of an injury within 30

days of the occurrence is frequently excused where the severity of the injury was later manifested. Livingston v. Shelby Williams Ind., 811 S.W.2d 511 (1991).

In the instant case, we agree with the chancellor that Troll was given sufficient notice of all the injuries to Franklin. First, Franklin provided proper notice to Troll regarding her original injury. Franklin initially visited Dr. Jones with complaints of pain in her wrist and shoulder. Accordingly, Dr. Jones diagnosed Franklin with tendinitis. At that time Dr. Jones opined that Franklin had reached maximum medical improvements. Next, Franklin returned to Dr. Jones with the same symptoms concerning her wrist. Additionally, this notice of injury included complaints to her shoulder as well. Subsequently, Dr. Jones diagnosed Franklin with carpal tunnel syndrome and performed surgery on January 30, 1995. Here, the evidence supports the trial court's conclusion that Dr. Jones' initial treatment was conducted with the hope that it would lessen Franklin's pain in her shoulder. Unfortunately the carpal tunnel release did not reduce Franklin's shoulder pain and she needed additional treatment. Therefore, the trial court finding of sufficient notice for both injuries should be affirmed.

Second, the evidence supports the trial court's award of permanent partial disability benefits for Franklin's shoulder injury. It is well established that an injury must both "arise out of" as well as be "in the course of" employment in order to be compensable under workers' compensation. Thornton v. RCA Service Co., 188 Tenn. 644, 221 S.W.2d 954, 955 (Tenn. 1949). The phrase "in the course of" refers to time, place, and circumstances, and "arising out of" refers to cause or origin. Brimhall v. Home Ins. Co., 694 S.W.2d 931, 932 (Tenn. 1985). An injury by accident to an employee is in the course of employment if it occurred while he was performing a duty he was employed to do; and it is an injury arising out of employment if caused by a hazard incident to such employment. Hudson v. Thurston Motor Lines, Inc., 583 S.W.2d 597, 599 (Tenn. 1979). Generally, an injury arises out of and in the course and scope of employment if it has a rational connection to the work and occurs while the employee is engaged in the duties of his employment. Hall v. Auburntown Industries, Inc., 684 S.W.2d 614, 617 (Tenn. 1985); Bell v. Kelso Oil Co., 597 S.W.2d 731, 734 (Tenn. 1980).

In the instant case, Dr. Aronoff diagnosed Franklin with a chronic rotator cuff, tendinitis, impingement syndrome and an arthritic AC joint. After the surgery, he gave Franklin an impairment rating of ten percent to the upper right extremity and a ten percent impairment rating for residual disability from carpal tunnel syndrome. Conversely, Dr. Wilkinson gave Franklin a three percent impairment rating of the upper right extremity and did not find a relationship between the shoulder pain and her carpal tunnel. When the medical testimony differs, the trial judge must obviously choose which opinion to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts.

Here, the trial judge chose to give greater weight to Dr. Aronoff's testimony over that of Dr. Wilkinson. We find the evidence supports the trial court's position. Further, since the plaintiff provided proper notice of both injuries it is irrelevant that Dr. Wilkinson found the injuries to have

no relation to each other. Therefore, we affirm the trial court's award of permanent partial disability for the right shoulder.[1]

Finally, the award of medical expenses for unauthorized treatment of the shoulder injury should be modified. The employee has a duty to accept medical services from the employer's designated physicians under T.C.A. § 50-6-204(a)(4) and Buchanan v. Mission Insurance Company, 713 S.W.2d 654, 656 (Tenn. 1986). This applies to even when an employer has failed to furnish a panel of physicians. The employee has the burden of proving that she was justified in obtaining further medical services without consulting the employer. In this case, neither Franklin, nor her attorney, requested an additional panel, nor was there proof in the record that the employer denied further benefits.

Accordingly, the award of physician fees in regard to services provided by Dr. Aronoff is denied. We affirm and modify the trial court's ruling. Costs of the appeal are taxed to defendant Troll.

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DON R. ASH, SPECIAL JUDGE

[1] The trial court awarded 20% permanent partial disability to the right upper extremity for the shoulder injury and another 20% permanent partial disability to the right upper extremity for the wrist injury. Although not a scheduled member under the workers' compensation statute, the right upper extremity is commonly used descriptively by physicians. The arm is a scheduled member. Shoulder injuries have typically been compensated as injuries to the body as a whole. Advo, Inc. v. Phillips, 989 S.W.2d 693, 695-96 (Tenn. 1998). Neither party to this action raised this issue on appeal.

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No. W1999-01164-SC-WCM-CV - Filed June 26, 2001

JUDGMENT

This case is before the Court upon motions for review filed by each party 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 motions for review are 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 will be paid by defendant Troll Associates, for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating.