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

SHEREE SAPP v. COVENANT TRANSPORT, INC., ET AL.

Direct Appeal from the Criminal Court for Smith County
No. 99-93 J. O. Bond, Judge

No. M2000-00681-WC-R3-CV - Mailed - March 29, 2001
Filed - June 11, 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 employer and its insurer contend: (1) the trial court erred in finding the employee's carpal tunnel syndrome to be work-related; (2) the trial judge's comments concerning a potential expert and matters not in evidence demonstrated bias and lack of impartiality; (3) the trial court erred in not finding the employee's unilateral initiation and selection of medical treatment and refusal to report for light duty barred any claim for temporary total, permanent partial and/or medical benefits; (4) the trial court erred in finding that adequate and proper notice of a workers' compensation claim was provided; (5) the trial court erred in assessing bad faith penalties on outstanding medical expenses, temporary total disability benefits and accrued permanent partial disability benefits; (6) the trial court erred in finding that it was appropriate that the employee's attorney put in the record counsel's attendance at the employer's medical examination, and thus attempting to bolster the testimony of the employee; and (7) the trial court's award of permanent partial disability benefits was excessive. As discussed below, the panel has concluded the trial court erred in assessing a 25 percent penalty on accrued permanent partial disability benefits and in assessing a penalty on unpaid medical benefits, but that the judgment should otherwise be affirmed.

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

LOSER, SP. J, delivered the opinion of the court, in which BIRCH, J. and PEOPLES, SP. J., joined.

Robert J. Uhorchuk, Spicer, Flynn & Rudstrom, Chattanooga, Tennessee, for the appellants, Covenant Transport, Inc. and Travelers Insurance Companies.

William Joseph Butler, Debbie C. Holliman, Farrar & Holliman, Lafayette, Tennessee, for the appellee, Sheree Sapp.

MEMORANDUM OPINION

At the time of the trial on February 1, 2000, the employee or claimant, Sheree Sapp, was 43 years old and a high school graduate with experience as a convenience store worker and truck driver. After previously working for Covenant, she returned to work there in late May 1977. At the time, she was having general aches and pains in her hands, but had never experienced any tingling and numbness. She passed a physical examination before returning. Her duties required her to drive a truck and to help load, unload and drop trailers and refuel the tractor. By January of 1998, she was having pain, tingling and numbness in both hands. She reported the problems to her dispatcher at Covenant.

She was eventually referred to Dr. Paul Abbey, whom she visited on June 12, 1998. On the same day, she notified her employer that she believed the condition was work related. The employer filed a First Report of Work Injury with the workers' compensation division of Tennessee on the same day. The employer told the claimant that she would be required to go to Chattanooga to be evaluated by a workers' compensation insurance company physician, stay in a motel and work in Covenant's offices in Chattanooga to have any chance of collecting workers' compensation benefits. The claimant lives in Smith County, a drive of more than 150 miles from Chattanooga. She refused to drive to Chattanooga for an examination and evaluation. She received a letter from John Orum, a claims representative representing Covenant, denying workers' compensation benefits because, he said, ". . . After a careful review of your claim for Workers' Compensation benefits, we have determined that your carpal tunnel syndrome did not arise out of your employment with Covenant Transport, Inc." The letter was dated July 13, 1998. It is undisputed in the record that the claimant told Sheila Simpson-Murray, workers' compensation manager for Covenant, on June 12, 1998, that she had a work-related injury. At trial, Mr. Orum admitted that he actually made no investigation of the claim and that normally he would call the employee, the employer and the physician. He did not call Ms. Sapp or Dr. Abbey before denying this claim.

The record contains conflicting evidence as to whether Ms. Murray offered the claimant a panel of three physicians from which to choose a treating one. The claimant says she did not; Ms. Murray says she did, but concedes all three were in Chattanooga, and admits she never offered the name of a treating physician as close to Smith County as Nashville, all on the advice of Orum. Additionally, the only light duty offered to the claimant was in Chattanooga. The claimant did not wish to drive all the way to Chattanooga for light duty work or medical care.

Dr. Abbey continued to treat the claimant and eventually performed carpal tunnel surgery on both arms. She continued to have problems after surgery. The doctor's testimony regarding causation, though equivocal, was that the claimant's condition could have been work-related. Our independent examination of the record reveals no evidence that the injury resulted from an occurrence that was not work-related.

Dr. Cornelius J. Mance, a neurologist, examined the claimant and found no evidence of carpal tunnel syndrome, but said he regularly saw truck drivers with the condition and would defer

to a surgeon the decision as to whether or not to operate. He expressed no opinion as to the cause of the claimant's condition or the extent of her permanent medical impairment.

Dr. Robert Landsberg, an orthopedic surgeon, reviewed the claimant's medical records and took an extensive and detailed history from her. He diagnosed "residual bilateral carpal tunnel syndrome with hand weakness" causally related to her work with Covenant. The doctor estimated her permanent medical impairment at 20 percent to each upper extremity and opined that she may need additional surgery. He permanently restricted her from repetitive gripping or squeezing, pounding with her palms, repetitive flexing or extension of the wrists and the use of vibrating or shaking tools.

Dr. Thomas J. O'Brien examined the claimant for the employer and testified by deposition, though he was unable to find his office notes. He opined that her injury was not work-related, but estimated her permanent medical impairment at 2 percent to each arm. Dr. O'Brien testified that his examination lasted 30 minutes, but the claimant, who timed the exam, testified that it only lasted 14 minutes.

The claimant was not working at the time of the trial, although she had attempted to find work, according to her testimony. She also testified that she has had to cut 28 inches off of her hair length because she was unable to brush it, that she is unable to lift and grip a pot of hot water, unable to twist ice cubes out of an ice tray, unable to frequently scrub or wipe down the kitchen without hand problems, unable to clean house with a vacuum cleaner, broom or mop, unable to use a computer and unable to hook her bra without help. She said she was no longer able to drive, work in the garden, quilt or ride horses as well or often as she had before the injury.

At the time of the trial, she was using splints, ice packs and Asper cream and was taking ibuprofen and Tylenol for her symptoms. Her testimony was corroborated by her daughter and by a former co-worker.

Upon the above summarized evidence, the trial court found the injury to be compensable and that timely notice was given. The trial court awarded permanent partial disability benefits based on 70 percent to the right arm and 60 percent to the left arm, payable in a lump sum of $81,918.00, medical expenses of $15,614.16 plus future medical expenses, discretionary costs of $2,028.90 and temporary total disability benefits in the sum of $8,167.20. In addition, the court assessed a bad faith penalty of 25 percent each on the permanent partial and temporary total disability benefits and 6 percent on medical benefits. Appellate 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 findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court 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). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Ivey v. Trans Global Gas & Oil, 3 S.W.3d 441 (Tenn. 1999).

Workers' compensation benefits are payable according to a well defined scheme or schedule and without regard to fault of the employer or care exercised by the employee. Lincoln Memorial University v. Sutton, 43 S.W.2d 195, 163 Tenn. 298 (1931); Morrison v. Tennessee Consolidated Coal Co., 39 S.W.2d 272, 162 Tenn. 523 (1931). Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. § 50-6-103(a); McCurry v. Container Corp. of America, 982 S.W.2d 841, 843 (Tenn. 1998); Reeser v. Yellow Freight Systems, Inc., 938 S.W.2d 690 (Tenn. 1997). 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. 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; and 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. Thomas v. Aetna Life and Cas. Co., 812 S.W.2d 278 (1991).

The appellant first contends that the evidence preponderates against the trial court's finding of medical causation. The record contains conflicting expert medical evidence. The treating physician was equivocal as to causation; an expert retained by the claimant testified unequivocally that there is a causal connection; and an expert retained by the employer testified that there is not a causal connection. The trial judge accepted the opinions of the claimant's expert, Dr. Landsberg. When the medical testimony differs, the trial judge must choose which view 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. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Story v. Legion Ins. Co., 3 S.W.3d 450 (Tenn. 1999).

The trial court did not abuse its discretion by accrediting the testimony of Dr. Landsberg and the evidence fails to preponderate against the trial court's finding that the claimant's injuries were causally connected to her work. The first issue is resolved in favor of the appellee.

The appellant next contends that certain of the trial judge's comments indicated bias or prejudgment on his part, in violation of Tenn. S. Ct. R.10, Code of Judicial Conduct, Canon No. 3, which, among other things, prohibits a judge from saying or doing anything which manifests bias or prejudice. In particular, the appellant points to the following words spoken by Judge Bond during oral arguments at a pre-trial motion hearing in which the appellant sought an order requiring the employee to submit to an examination by Dr. O'Brien: "Well, I'm familiar with the doctor. I'm familiar with the name. And I think so are the Court of Appeals or anyone else familiar with it. People hire certain doctors just for certain evaluations . . . ." The appellant also complains of other

unspecified statements made by the trial judge during trial.

We have read the record and are not persuaded that the words spoken by the trial judge, though better not said, constitute reversible error. The second issue is resolved in favor of the appellee.

Next, the appellant argues that the injured employee should be denied workers' compensation benefits because she refused to accept light work offered her in Chattanooga and because she refused to go to Chattanooga for medical care. When a covered employee suffers an injury by accident arising out of and in the course of his employment, her employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Such care includes medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members and other apparatus, nursing services or psychological services as ordered by the attending physician, dental care, and hospitalization. The only limitation as to the amount of the employer's liability for such care is such charges as prevail for similar treatment in the community where the injured employee resides. Tenn. Code Ann. § 50-6-204(a)(1). The employer is required to designate a group of three or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee has the privilege of selecting the treating physician or operating surgeon. Tenn. Code Ann. § 50-6-204(a)(4). Where the employer fails or refuses to provide such a list, the employee may be justified in selecting his or her own treating physician and once an employee justifiably engages a doctor on his own initiative, any belated attempt by the employer to offer a doctor chosen by the employer will not cut off the right of the employee to continue with the employee's own doctor. Lambert v. Famous Hospitality, Inc., 947 S.W.2d 852, 854 (Tenn. 1997) [citing Goodman v. Oliver Springs Mining Co., Inc., 595 S.W.2d 805, 808 (Tenn. 1980)].

The injured employee is required to accept the medical benefits provided by the employer, Tenn. Code Ann. § 50-6-204, and must consult with the employer before choosing a treating physician or operating surgeon, State Auto Mut. Ins. Co. v. Cupples, 567 S.W.2d 164 (Tenn. 1978). Unless the injured employee has a reasonable excuse for the failure to consult with the employer first, the injured employee may be responsible for his own medical expenses. Emerson Electric Co. v. Forrest, 536 S.W.2d 343 (Tenn. 1976). However, an employer who denies liability for an injury claimed by an employee is in no position to insist upon the statutory provisions respecting the choosing of physicians. CNA Ins. Co. v. Transou, 614 S.W.2d 335 (Tenn. 1981). We conclude that the denial of liability without an adequate investigation provided a reasonable excuse for the claimant for choosing her own treating physician.

The appellant has pointed to no authority which would deprive the claimant of benefits because she refused an offer of light duty work. Her right to temporary total disability benefits terminated when she reached maximum medical recovery or returned to work. We are unable to find, from our independent examination of the record, evidence which would justify the employer's refusal to pay temporary total disability benefits. The third issue is accordingly resolved in favor of the appellee.

The appellant next contends benefits should be denied because the employee failed to give the
required timely written notice. 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 the employer. Tenn. Code Ann. § 50-6-201. Where the employer denies that a claimant has given the required written notice, the claimant has the burden of showing that the employer had actual notice, or that the employee has either complied with the requirement or has a reasonable excuse for his failure to do so, for notice is an essential element of his claim. Masters v. Industrial Garments Mfg. Co., Inc., 595 S.W.2d 811 (Tenn. 1980).

It is undisputed in this record that the employer had actual notice of the injury on June 12, 1998, within one day of the employee's discovery that her injury could be work-related. Written notice was therefore unnecessary. The fourth issue is resolved in favor of the appellee.

The employer and its insurer next insist the trial court erred in assessing bad faith penalties. An employer or its insurer who fails to pay compensation benefits for temporary total disability as required by the Act may be required to pay a penalty of six percent on any unpaid installments, Tenn. Code Ann. § 50-6-205(b)(3), but only if such failure to pay results from bad faith on the part of such employer or insurer, Mayes v. Genesco, Inc., 510 S.W.2d 882 (Tenn. 1974), in which case the penalty is mandatory. Woodall v. Hamlett, 872 S.W.2d 677 (Tenn. 1994).

Additionally, 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 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 and that such failure to pay inflicted additional expense, loss or injury upon the employee; and provided further, that such additional liability shall be measured by the additional expense thus entailed. Tenn. Code Ann. § 50-6-225(j).

By Chapter 678 of the Public Acts of 2000, the workers' compensation law was amended to allow the assessment of a 25 percent penalty on unpaid medical expenses in certain situations. That amendment became effective July 1, 2000. Under the Act, the right of an employee who suffers a work-related injury to recover compensation benefits from his employer is governed by the statutes in effect at the time of the injury, for statutes are presumed to operate prospectively unless the legislature clearly indicates otherwise. See Nutt v. Champion Intern. Corp., 980 S.W.2d 354, 368 (Tenn. 1998), and authorities cited therein, including Tenn. Const. Art, 1, § 20. The 2000 amendment does not include a provision for retroactive application.

As the claimant concedes, there is no statutory authority for assessing a penalty of 25 percent on unpaid permanent partial disability benefits. However, the conduct of the claim representative in denying the claim without investigating it does reflect an absence of good faith, as the trial judge implicitly found. Accordingly, the award of a penalty on unpaid permanent partial disability benefits

and on medical benefits is reversed, but the award of a 25 percent penalty on unpaid temporary total disability benefits is affirmed.

The appellant next argues that the judgment of the trial court should be reversed because trial counsel for the appellee violated Tenn. S. Ct. R 8, Code of Professional Responsibility, DR 5-102(A)(B) and EC 5-10, which prohibit a lawyer from being both an advocate and a witness concerning a disputed factual issue. During the trial, the claimant testified that Dr. O'Brien's testimony took only fourteen minutes rather than 30 minutes as the doctor had said in his deposition, and that, contrary to Dr. O'Brien's testimony that no one else was present during the examination, the claimant's attorney was present. It appears that the only purpose for the inquiry was to point out that the doctor, who had lost his notes, did not have a clear memory of the examination. We find no reversible error in it and no violation of the Code of Professional Responsibility by trial counsel. The sixth issue is resolved in favor of the appellee.

Finally, the appellant argues that the award of permanent partial disability benefits is excessive in light of the above summarized medical evidence. The doctors testified that the claimant is probably able to work despite her medical impairment. Trial courts are not bound to accept physicians' opinions regarding the extent of a claimant's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). An injured employee is competent to testify as to her own assessment of her physical condition and such testimony should not be disregarded. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179 (Tenn. 1999). Such testimony should be considered. Collins v. Howmet Corp., 970 S.W.2d 941 (Tenn. 1998). The trial judge gave great weight to the testimony of the claimant. 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's demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173 (Tenn. 1999). From our examination of the record and consideration of the above principles, we cannot say the evidence preponderates against the trial court's finding as to the extent of the claimant's permanent partial disability. However, because an injury to both arms is a scheduled injury, we modify the award to one based on 65 percent to both arms. The modification should not affect the amount of the award.

The awards of a 25 percent penalty on permanent partial disability benefits and a 6 percent penalty on unpaid medical benefits are reversed, but in all other respects the judgment of the trial court is affirmed as modified. Costs on appeal are taxed one-half to the appellants and one-half to the appellee.

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JOE C. LOSER, JR., SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
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SHEREE SAPP v. COVENANT TRANSPORT, INC., ET AL.

Circuit Court for Smith County
No. 99-93

No. M2000-00681-SC-WCM-CV - Filed - June 11, 2001

JUDGMENT

This case is before the Court upon the motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B) of Covenant Transport, Inc., 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;

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 taxed one-half to appellants and one-half to appellee, for which execution may issue if necessary.

IT IS SO ORDERED.

BIRCH, J., NOT PARTICIPATING