

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

JOHN PATTERSON v. THE PHELAN COMPANY, INC.

**Direct Appeal from the Chancery Court (Trenton) for Gibson County
No. 13,321 George R. Ellis, Chancellor**

No. W1998-00598-SC-WCM-CV - Mailed March 28, 2001; Filed July 13, 2001

The 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 found the plaintiff sustained a twenty-two and one-half percent permanent partial disability to the body as a whole as a result of an on-the-job injury to his neck. The defendant claims the evidence does not support the finding. We affirm the judgment of the trial court.

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

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

Jeffery P. Boyd, Jackson, TN, for the appellant, The Phelan Company, Inc.

T.J. Emison, Jr., Alamo, TN, for the appellee, John Patterson.

MEMORANDUM OPINION

History

_____The trial of this worker's compensation claim was held on January 28, 1998. At the conclusion of proof the trial judge found that the plaintiff, John Patterson ("Patterson"), suffered a compensable injury to his neck while employed by the defendant, The Phelan Company, Inc. ("Phelan"). The trial court awarded Patterson a permanent partial disability of twenty-two and one-half percent to the body as a whole based on a six to nine percent permanent physical impairment rating by Dr. Rowland. Phelan appeals the decision of the trial court. For the reasons discussed below, we affirm.

Facts

Patterson is a 50-year-old man, who completed a part of the tenth grade and has no GED. His work history includes farming, working as a tow motor operator, construction laborer, and track-hoe operator.

In October of 1995, Patterson experienced stiffness and burning in his neck and left shoulder and some numbness in his fingers. Dr. Williams examined Patterson and referred him to Dr. Bingham for a nerve conduction study of his left arm. Later, Dr. Rowland examined Patterson for the same condition. Dr. Rowland recommended that Patterson treat his condition with hot showers, heat, massage, and an exercise program. Patterson's condition improved, and he returned to work after the winter holidays.

On March 17, 1997, Patterson returned to Dr. Williams complaining of left shoulder pain that had been worsening for three weeks. Dr. Williams testified that Patterson's symptoms were exactly the same as in October of 1995. The only change was an increase in the amount of pain Patterson was experiencing. Subsequently, Dr. Williams referred Patterson to Dr. Rowland.

Patterson stated to Dr. Rowland that the 1995 injury had gotten better for over a year, until three weeks prior when at work he developed pain in his neck and left arm and numbness in his index finger. Dr. Rowland diagnosed Patterson with C-7 radiculopathy. On April 19, 1997, an MRI was performed which revealed that Patterson had a herniated disc at C-6. Subsequently, Dr. Rowland referred Patterson to Dr. Franzen to determine whether surgery should be performed. On April 24, 1997, Dr. Franzen performed a cervical discectomy at C6-7 and fused the vertebrae.

Medical Evidence

Dr. Rowland testified in his deposition that the symptoms Patterson exhibited in 1995 and 1997 were the same. Further, Dr. Rowland opined Patterson had a herniated C-6 disc in 1995. Subsequently, Dr. Rowland testified the 1997 increase in pain did not increase the severity of Patterson's condition nor result in any anatomic changes to the cervical disc other than the increase in the amount of pain.

Discussion

Patterson raises the issue of the lack of a verbatim transcript in this case. Tennessee Rules of Appellate Procedure Rule 24(c) requires that when there is no verbatim transcript the statement of evidence must "convey a fair, accurate and complete account of what transpired with respect to those issues that are the basis of the appeal." A statement of the evidence was filed by Phelan and was approved by the trial judge. This statement filed with the court specifically states there is a summary only and not a complete transcript. The absence of a transcript or a statement of evidence has a significant effect upon the scope of this court's review of a jury verdict. In normal circumstances, Tennessee Rule of Appellate Procedure 13(d) directs the court to review the record

to determine whether there is material evidence to support the verdict. Without a transcript or a statement of proceedings, this court must presume that every fact admissible under the pleadings was found or should have been found in the appellee's favor. Gotten v. Gotten, 748 S.W.2d 430 (Tenn. Ct. App. 1987); McDonald v. Onoh, 772 S.W.2d 913 (Tenn. Ct. App. 1989).

The Tennessee Rules of Appellate Procedure Rule 24 places the responsibility for the appropriation of a transcript or a statement of evidence squarely on the shoulders of the parties. The appellant has the primary burden of seeing that the proper record is prepared on appeal and filed in this court. After review, we find the statement of evidence submitted by Phelan is sufficient for the appellate court to review this matter.

This case involves a situation where Patterson was injured in 1995. He properly notified Phelan and received medical treatment for the injury. Patterson was diagnosed with a herniated C-6 disc; however, an MRI was never conducted nor was surgery ever offered as a possible treatment. Accordingly, Patterson followed the treatment prescribed by the doctors and his condition improved. In 1997 Patterson was injured at work again. At this point, an MRI was conducted revealing a herniated disc at C-6. Again, Patterson followed the doctors' recommendations and had his vertebrae fused at C6-7. Now, Phelan contends the 1997 injury was not a new injury but merely an increase in pain for which compensation should be barred. Further, Phelan argues the 1997 surgery is from the 1995 injury and should be time barred. We find this contention contrary to the evidence and the interest of justice; therefore, we affirm the trial court's ruling.

First, the evidence supports the trial court's finding that Patterson suffered a compensable injury to his neck while employed with Phelan. The disability from the neck injury first manifested itself in March of 1997. In 1995, Patterson was treated conservatively for stiffness in his neck and returned to work shortly thereafter. An MRI was not conducted and no diagnosis of a herniated disc was made. Then in 1997 Patterson was diagnosed with a herniated disc at C-6. This diagnosis is completely different than the one made in 1995. Phelan's best argument is that Patterson's injury is an aggravation of the 1995 injury. Conversely, it is well settled law that the employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the pre-existing conditions. Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991).

As a general rule, aggravation of a pre-existing condition may be compensable under the workers' compensation laws of Tennessee, but it is not compensable if it results only in increased pain or other symptoms caused by the underlying condition. Cunningham v. Goodyear, 811 S.W.2d 888, 890 (Tenn. 1991); Smith v. Smith's Transfer Corp., 735 S.W.2d 221, 225-226 (Tenn. 1987); Boling v. Raytheon Co., 223 Tenn. 528, 448 S.W.2d 405, 408 (Tenn. 1969). It has been otherwise stated that, to be compensable, the pre-existing condition must be "advanced," Sweat v. Superior Indus. Inc., 966 S.W.2d 31 (Tenn. 1998), or there must be an "anatomical change" in the pre-existing condition. Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989).

In the instant case, there is no question that the condition advanced and Patterson suffered

an anatomical change. In 1995, he had a stiff neck that was properly treated. Subsequently, in 1997 Patterson had a herniated disc and needed his vertebrae fused. Clearly, this is an aggravation of a pre-existing condition for which compensation is due. Therefore, we affirm the trial court's finding of a compensable injury.

Since we affirm the trial court's finding of a new injury in 1997, Phelan's contention that Patterson's claim should be time barred is without merit. For the above stated reasons, we affirm the trial court's holding. Costs are taxed to Phelan.

DON R. ASH, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon motion for review filed by the appellant, The Phelan Company, Inc., 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.

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 are taxed to the appellant, The Phelan Company, Inc., and its surety for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating