IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 27, 2001 Session

LORI ANN PROSSER v. BEDFORD COUNTY BOARD OF EDUCATION

Direct Appeal from the Circuit Court for Bedford County
No. 7575 F. Lee Russell, Judge

No. M2000-02424-WC-R3-CV - Mailed - May 23, 2001
Filed - September 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 employer, Bedford County Board of Education, insists (1) the trial court erred in finding the employee provided the employer with proper notice of her injury, (2) the award of permanent partial disability benefits based on 42 percent to the body as a whole is excessive, (3) the trial court erred in awarding temporary total disability benefits for the period of April 4, 1996 through September 4, 1998, for a total of 129 weeks, (4) the trial court erred in ordering the employer to be responsible for the bills of non-approved physicians, and (5) the trial court erred in ordering the employer to reimburse the carriers who already partially paid the medical bills, even though they were not parties to the case. As discussed below, the panel has concluded the award of medical benefits to non-parties should be vacated, the award of temporary total disability benefits modified and the judgment otherwise affirmed.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JAMES WEATHERFORD, SR. J., joined.

Kent E. Krause and Gordon C. Aulgur, Nashville, Tennessee, for the appellant, Bedford County Board of Education.

Andrew C. Rambo, Shelbyville, Tennessee, for the appellee, Lori Ann Prosser.

MEMORANDUM OPINION

The employee or claimant, Lori Ann Prosser, worked for the employer as a school bus driver. On March 14, 1996, she ran her early morning route and had parked her bus at Central High School to drive students on a field trip. She conducted a pre-trip inspection, which included cleaning out the bus and checking the oil, then went outside to have coffee with her co-workers. When she bent over to set her coffee down, she felt immediate pain starting in her back and going down her right leg. She drove her bus on the field trip without notifying the employer of her injury.

After the field trip, she called her supervisor, Tim Fleming, and, according to her testimony, told him she hurt her back while preparing for the field trip and needed to see a doctor. Fleming remembered having the conversation, but testified that the claimant never told him that she had a job related injury. The trial judge believed the claimant.

After continuing to work for two more weeks, then again contacting Fleming, the claimant reported to a Murfreesboro emergency room and was referred to Dr. Robert Weiss. An MRI, ordered by Dr. Weiss, revealed disc herniations at L4-5 and L5-S1. Dr. Weiss performed corrective surgery on April 24, 1996. A second surgical procedure was performed five days later.

When the employer failed to provide medical care and the claimant's disabling pain was not relieved, the claimant sought out Dr. Robert McCombs on October 28, 1996. Dr. McCombs performed a third surgical procedure on April 10, 1997 and provided follow-up care until December 10, 1997, when, the doctor reported, the claimant reached maximum medical improvement. His final diagnosis was chronic lumbar radiculopathy and he estimated her permanent impairment at 13 percent to the whole body. Dr. McCombs also restricted her from lifting more than 20 pounds at all or more than 5 pounds repetitively and from prolonged bending, twisting or stooping.

When the claimant continued to have back problems and an MRI scan revealed a recurrent disc herniation at L5-S1, a fourth surgery was performed on September 24, 1998. She reached maximum medical improvement from that surgery on February 3, 1999 and Dr. McCombs estimated her permanent impairment at 14 percent to the whole body. The claimant continues to take medication and is severely limited in her activities, including driving. She has not returned to work.

The record contains conflicting lay proof. Her husband and a friend support the claimant's testimony, but two other bus drivers testified that the claimant did not appear to be injured on the date of the accident.

Upon the above summarized evidence, the trial court awarded temporary total disability benefits from April 4, 1996 through September 24, 1998, ordered the employer to pay the bills of the named physicians and to reimburse any non-party health insurance carrier that had paid the bills in part, without naming the carrier or the amount of the award, and awarded permanent partial disability benefits based on 42 percent to the body as a whole. 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). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the

record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). 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, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999).

The appellant first contends the claim should fail because of the claimant's failure to give timely written notice of her work related injury. 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 her employer. Tenn. Code Ann. § 50-6-201. Benefits are not recoverable from the date of the accident to the giving of such notice, and no benefits are recoverable unless such written notice is given within 30 days after the injurious occurrence, unless the injured worker has a reasonable excuse for the failure to give the required notice. Id. In determining whether an employee has shown a reasonable excuse for failure to give such notice, courts will consider the following criteria in: (1) the employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusal of the notice requirement, and (3) the excuse or inability of the employee to timely notify the employer. Delay in asserting the compensable claim is reasonable and justified if the employee has limited understanding of her condition and her rights and duties under the workers' compensation law. McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. Sp. Workers' Comp. 1995). It is significant that written notice is unnecessary in those situations where the employer has actual knowledge of the injury. Raines v. Shelby Williams Industries, Inc., 814 S.W.2d 346, 349 (Tenn. 1991).

The trial court expressly found the claimant, who testified in person, to be a credible witness and therefore found that the employer had actual notice of the injury. Written notice was thus excused. From our independent examination of the evidence, we are unable to say the preponderance of the evidence is otherwise. The notice issue is resolved in favor of the employee.

The employer next argues the award of permanent partial disability benefits is excessive because her medical impairment rating is only 14 percent and she offered no expert vocational evidence of her disability. While expert testimony may be used to establish vocational disability, it is not required; vocational disability can be established by lay testimony. Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995). Moreover, 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, 208 (Tenn. 1998).

At trial, the employer insisted the award should be limited to two and one-half times the medical impairment rating because the employee's refusal to return to work was not reasonable. The

trial court found, based on the testimony of the claimant and Dr. McCombs, that her refusal was reasonable and awarded permanent partial disability benefits based on three times the medical impairment rating. From our independent examination of the record, we conclude that the evidence does not preponderate against the trial court's finding.

The employer next contends the award of temporary total disability benefits is excessive because of insufficient proof. Compensable disabilities are divided into four separate classifications: (1) temporary total disability, (2) temporary partial disability, (3) permanent partial disability and (4) permanent total disability. Tenn. Code Ann. § 50-6-207. Each class of disability is separate and distinct and separately compensated for by different methods. Compensation benefits are allowable for an injured employee, separately, for each class of disability which results from a single compensable injury. Temporary total disability refers to the injured employee's condition while disabled to work because of her injury and until she recovers as far as the nature of her injury permits. Benefits for temporary total disability are payable until the injured employee is able to return to work or, if she does not return to work, until she attains maximum recovery from her injury, at which time her entitlement to such benefits terminates. See Redmond v. McMinn County, 209 Tenn. 463, 354 S.W.2d 435 (1962). Temporary total disability benefits that are terminated because of a nominal return to work may be revived when (1) the employee is no longer capable of performing either that job or any other job because of the work-related injury; and (2) the employee, at the time of resignation, has yet to reach maximum medical improvement from the original accidental injury. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 778 (Tenn. 2000).

The claimant testified that she was unable to work from the date she went to the emergency room, April 4, 1996, until she had surgery on April 24, 1996 and from then until she reached maximum medical improvement from the two surgeries performed by Dr. Weiss, a period of approximately 17 weeks. Dr. Weiss did not testify. Thereafter, she lost some time from depression. There is no claim for disability resulting from depression. She had a second period of total disability beginning on April 28, 1997, when Dr. McCombs first operated on her, until December 10, 1997, when she again reached maximum medical improvement. The trial court, noting that the evidence was confusing, awarded temporary total disability benefits from April 4, 1996 until September 24, 1998. The preponderance of the evidence is the claimant was totally disabled during three periods: from April 4,1996 to June 21, 1996, from April 10, 1997 to December 10, 1997 and from September 24, 1998 to February 3, 1999. The award of temporary total disability benefits is modified accordingly.

Next, the employer argues that it should not be required to pay the claimant's medical expenses because she did not consult with it before selecting a treating physician. When a covered employee suffers an injury by accident arising out of and in the course of her 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)(4(A). 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. Once an employee justifiably engages a doctor on her 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).

Moreover, 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, 337-38 (Tenn. 1981). We now hold the same rule applicable where, as here, the employer simply ignores the claim or acts as if the injury did not occur. The issue is resolved in favor of the employee.

The employer finally contends it should not be required, in this case, to reimburse the health insurance carriers who have paid some or all of the employee's medical expenses because those carriers are not parties and the reasonable amount paid by them was not proved. In Staggs v. National Health Corp., 924 S.W.2d 79, at 81 (Tenn. 1996), the Supreme Court held that employers were required to pay medical benefits directly to the provider of medical care and that the injured worker could only recover expenses actually paid by her. The rule has not been extended to protect the interests of insurance carriers who may have a subrogation interest, but have not intervened and proved the extent of their interests.

The order that the employer reimburse carriers that provided medical benefits is therefore vacated, and the judgment otherwise affirmed as modified. The cause is remanded to the Circuit Court for Bedford County. Costs are taxed to the appellant, Bedford County Board of Education.

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JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

LORI ANN PROSSER v. BEDFORD COUNTY BOARD OF EDUCATION

Circuit Court for Bedford County
No. 7575

No. M2000-02424-SC-WCM-CV - Filed - September 4, 2001

ORDER

This case is before the Court upon motion for review of Lori Ann Prosser 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 will be paid by Bedford County Board of Education, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM