IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 26, 2001 Session

FIREFLY INDUSTRIES, INC. v. RHONDA SEXTON

Direct Appeal from the Circuit Court for Scott County
No. 4878 Conrad Troutman, Jr., Circuit Judge

No. E2001-00132-WC-R3-CV - Mailed - November 6, 2001
FILED: DECEMBER 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. The trial court awarded the employee 25 percent disability to the body as a whole. The employee has appealed insisting the award is inadequate and should be much higher. The employer argues certain medical expenses were unauthorized and that the incident in question caused no vocational disability. Judgment of the trial court is affirmed as to the award of disability and modified as to the allowance of medical expenses.

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

THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, J. and BYERS, SR. J., joined.

Charles B. Sexton, Oneida, Tennessee, for the Appellant, Rhonda Sexton.

Linda J. Hamilton Mowles, Knoxville, Tennessee, for the Appellee, Firefly Industries, Inc.

OPINION

In this case the trial court awarded the employee, Rhonda Sexton, 25 percent permanent partial disability to the body as a whole. Being dissatisfied with the amount of the award, the employee has appealed.

Basic Facts

The record indicates the employee was 49 years of age and lacked one and one-half credits in graduating from high school. She never obtained a G.E.D. certificate but has some vocational

training in a basic computer course. She was a licensed cosmetologist and had 15 years experience in this type of work. She had some training and experience as an insurance sales agent and five years experience (part-time) as a school bus driver. During her employment career, she had 15 years experience in secretarial work.

At the time in question, January 13, 1998, she was employed as a secretary with Firefly Industries, Inc., a company involved in metal fabrication. On this day she was asked to go down in the plant and work with a box of metal parts. She testified the box of parts weighed about 40-50 pounds and as she attempted to pull it off the table to move the box, she said the box started to fall and she felt a pop in her back with pain running down her buttock and left leg. She called for help and supervisor Gloria Adkins came over and assisted her. She told Adkins she had hurt herself but did not need medical treatment.

On January 20, she decided she had better go see a doctor and went to Dr. D. Bruce Coffey, a family practice physician, who treated her with medicine and therapy and then after a period of time referred her to several other doctors. She eventually returned to work during March 1998 but only worked a light duty job for about 10 days.

As to her physical condition prior to the incident in question, she told the court she had neck and shoulder pain that had been diagnosed as fibromyalgia; she suffered from endometriosis which caused some back pain; she had upper back pain for which she took pain medication; and she had suffered from depression. She also testified she had hurt her back at work during June 1997 while lifting but never mentioned the event to her employer. Medical records (Exhibit #3) from a doctor's clinic indicate chronic back pain dating back to late 1996.

At the trial she stated she could not do housework or walk very far; that because of the pain she could not really do any type work and had not looked for work. She said she was very depressed and had gained 30-40 pounds since the accident.

Gloria Adkins, a supervisor in the plant, testified that before the January 13 incident, she complained all the time about back pain and she quoted the employee as saying she hurt her back (1) at home scrubbing carport concrete, (2) at a family reunion, (3) vacuuming the office, and (4) moving stuff in the office. She said the box of metal parts weighed about 20-30 pounds and that the box did not start to fall but was still resting part on and part off the table when she took it from her. Adkins also testified that before the incident the employee said she was taking six different kinds of medicine for various problems.

Lester S. Webster, Sr., part owner and president of the company, testified she told him shortly after the incident she had hurt her back but she did not need to see a doctor. The incident was not reported to the workers' compensation carrier as an injury. He stated the first he realized she was claiming any injury was when one of the doctors called his office several weeks thereafter. He said she had a lot of complaints about back pain before the incident and she said she was taking six different kinds of medicine. Mr. Webster also told the court that when she stopped working she

never notified the company why she was not coming back.

Terri Westerman, the workers' compensation adjuster, testified the incident was not reported to the insurance company as a claim or injury until February 13, 1998, and that by that time she had already selected and seen several doctors of her own choice. She said soon after the notice of injury was received, the employee was furnished a list of doctors and she chose Dr. Paul Johnson, an orthopedic surgeon.

Expert Medical Evidence

All of the medical evidence was presented to the court by deposition and came from five different doctors.

Dr. D. Bruce Coffey testified he initially felt the employee had a muscle strain and prescribed medicine and therapy treatments. Later M.R.I. findings indicated degenerative disc disease and a small ruptured area in her low back. Since his treatment did not substantially help her, he referred her to an orthopedic surgeon, Dr. Hyde. Later she appeared to be depressed and he referred her to a psychiatrist. Dr. Coffey told the court he related the rupture to her last work activity "since I have no history of her having back problems prior to that." He felt she had impairment but left the determination of that to the orthopedic surgeon.

Dr. Gilbert L. Hyde, the orthopedic surgeon, examined the employee on February 13, 1998 and took a history that she had injured her back at work during June 1997, which was about seven months before the date in question, and had reinjured herself on January 13, 1998 while working. He testified the M.R.I. study showed degenerative disc disease and a small disc herniation at L5-S1. During his testimony he originally said he attributed the cause of the problem to the June 1997 work incident and the 1998 work incident but later testified her condition was probably more related to the last incident. He said his diagnosis was given on the assumption she had no significant prior back problems before these dates. He opined she had a 10 percent medical impairment and was not employable. He recommended she have a caudal block which was performed.

Dr. William E. Kennedy, a retired orthopedic surgeon who is now engaged in only doing independent medical examinations, examined the employee during November 1998 and took a history that she had no significant low back pain prior to the January 13, 1998 work activity; he felt her symptoms were exaggerated; he said the M.R.I. showed broad-based disc bulge which was consistent with degenerative disc disease but not indicative of any disc injury; that the main cause of her condition was the aging process but the 1998 work incident aggravated her condition; and that she had 13 percent impairment.

Dr. Laraine Lieberman, a psychiatrist, examined Mr. Sexton during May 1998 and testified she was extremely depressed apparently due to the fact she was not able to work, had no earnings and her employer had instituted this proceeding against her. She classified her condition as major depression, chronic and recurrent, with 55 - 60 percent impairment which is referred to in the

guidelines as marked to extreme impairment.

Dr. Paul H. Johnson, an orthopedic surgeon, examined Mrs. Sexton on March 3, 1998 and saw her again on March 16, and concluded the diminished disc height on the M.R.I. at L5-S1 was a long-standing condition and that surgery would not be recommended. He stated she did not have any impairment and he released her to return to work. He also added that he felt the M.R.I. study was of marginal quality.

Vocational Evidence

Dr. Norman E. Hankins, a vocational consultant, reviewed medical records and/or depositions of the various doctors and administered certain tests to the employee in order to help determine her vocational disability. He testified by deposition and stated even though Mrs. Sexton did not graduate from high school, she had performed at the level of a high school graduate. He administered a test to determine her general learning ability and found she had an I.Q. of 122. Dr. Hankins opined that if one accepted the opinions and restrictions of Drs. Hyde and Lieberman, the vocation disability would be 100 percent. Also, if the restrictions of Drs. Hyde and Kennedy were accepted, the vocational disability would still be 100 percent. However, without any psychological problems, vocational disability would be about 68 percent. Also, under Dr. Johnson's assessment of her condition, there would be no vocational disability.

Dr. Rodney Caldwell, also a vocational consultant, testified orally at the trial and found vocational disability to be 20 - 25 percent if Drs. Hyde and Kennedy's restrictions were imposed. He agreed that no vocational disability would exist under Dr. Johnson's testimony.

Issues on Appeal

On appeal the employee contends the evidence preponderates against the award of 25 percent disability to the extent it should be fixed at a higher amount. The employer argues a preponderance of the evidence shows the employee has no disability resulting from the January 13, 1998 incident. Also, the employer contends if the claim is compensable, it should not be liable for certain medical expenses as they were unauthorized expenses.

Standard of Review

The review of the issues on appeal is *de novo* accompanied by a presumption of the correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is usually in a better position to judge credibility and weigh evidence but where evidence is introduced by deposition, the appellate court is in as good a position as the trial court in reviewing and weighing testimony. ***Landers v. Fireman's Fund, Inc.***,

775 S.W.2d 355, 356 (Tenn. 1989).

Analysis

On the question regarding the award of 25 percent disability to the body as a whole, we find the evidence is somewhat equivocal with reference to the cause of the employee's present condition. Drs. Coffey and Hyde gave opinion the January 13 incident probably caused her present physical condition but based their opinions on the assumption she had no prior back complaints or problems. There is considerable evidence pre-existing back problems did exist and this reduces the complete acceptability of these expert opinions. If these opinions on causation are eliminated, it only leaves the opinion of Dr. Kennedy to support an award based on physical disability as the only other doctor, Dr. Johnson, found no disability.

Dr. Kennedy was of the opinion the employee was exaggerating her complaints and her main problem was due to degenerative disc disease but that this prior condition had been aggravated by the lifting incident she described on the January 13 date and that this resulted in permanent impairment.

The psychiatrist, Dr. Lieberman found extensive depression but other evidence indicated she had been treated for depression prior to the 1998 work activity.

Despite all of this conflicting evidence on causation of the injury, the record is clear that whatever her condition was she had continued to work until after the January 13 date. In rendering a decision, the trial court apparently concluded that some but not all of her problems were work-related.

We must observe that when evidence of this nature exists, it is difficult for medical experts and courts to separate an old injury or condition from a recent injury or condition in reaching a decision on permanent disability of a worker. However, in a workers' compensation case, the burden of proof is on the employee to establish by a preponderance of the evidence the injury upon which the award is sought. In our final analysis, we conclude that the evidence does not preponderate against the award of disability fixed by the trial court.

The only other issue relates to the allowance of all medical expenses claimed by the employee. In this connection, the employer contends the court was in error in allowing recovery of certain charges of Drs. Coffey, Hyde and Lieberman.

Although the employee initially reported she had hurt her back, she declined medical treatment thinking she would be all right in a few days and the employer did not report the matter to the insurance carrier. She later decided she needed to see a doctor and went to see Dr. Coffey and then came under the care of Dr. Hyde. The employer was not aware that she was being treated for any injury until on about February 13 when one of the doctors called concerning her treatment. Up until that time, she was being treated under her general health and medical insurance policy through

her employment.

The adjuster for Safeco Insurance Company personally appeared at the trial and testified she immediately notified the employee and two doctors that the workers' compensation carrier would pay for their treatment up until that point in time but not thereafter because they were not on the approved list of physicians being furnished to the employee. The record indicates several charges of Dr. Coffey occurred after this February 13 date up until March 11, 1998, and that numerous charges of Dr. Hyde were incurred after this time up until August 11, 1998.

Upon receiving the list of physicians, the employee chose Dr. Johnson, an orthopedic surgeon, who saw her on March 3 and 16, 1998; determined she had no impairment and released her to return to work without any restrictions.

On March 9, 1998, the employee's attorney wrote a letter to the adjuster notifying that Mrs. Sexton needed to see a psychiatrist and requested a list of doctors from which she could make a choice. A reply dated March 19, 1998 from the carrier's attorney declined the request and stated that a psychiatrist would not be furnished unless the treating doctor (Dr. Johnson) requested same. During May 1998 the employee came under the care of a psychiatrist, Dr. Lieberman.

Our statute, Tenn. Code Ann. § 50-6-204, requires the employer to furnish medical services free to the employee and the employee is also generally bound to accept the medical services. Generally, if the employee is dissatisfied with the treating doctor's services, the employee may (1) move the court to appoint a neutral physician, (2) consult with the employer and make other arrangements, or (3) go to a physician of his or her own choice, without consulting the employer, and thus be liable for such services. ***Consolidated Coal Co. v. Pride***, 452 S.W.2d 349, 354 (Tenn. 1970).

Whether an employee is justified in seeking additional medical services without consulting the employer usually depends on the circumstances of each case. In order to bind the employer to pay for such expenses, there must be some reasonable excuse or justification for the employee to unilaterally seek additional medical services. ***Dorris v. INA Ins. Co.***, 764 S.W.2d 538 (Tenn. 1989).

The trial court found the employee was justified in seeking treatment from all doctors. We are inclined to agree with most of this ruling. The insurance carrier agreed to pay for the unauthorized expenses up to February 13, 1998, when the injury was reported and a list of physicians was being furnished. The employee chose Dr. Johnson from the list and he saw her on two visits during March and discharged her on March 16. Several days later her request for permission to see a psychiatrist was denied so she was without a designated orthopedic doctor an/or psychiatrist. Under these circumstances, we find it reasonable for her to seek medical attention of her own choosing since she claimed she was still in need of treatment. However, we modify the trial court's ruling to disallow medical expenses of Dr. Coffey and Dr. Hyde which were incurred from February 13, 1998 to March 16, 1998, the period of time between furnishing the list of designated physicians and the discharge of the employee by that physician. We hold that the employer is liable for all

medical expenses of these doctors and the psychiatrist which were incurred after this period of time. *See* ***U.S. Fidelity & Guar. Co. v. Morgan***, 795 S.W.2d 653 (Tenn. 1990) where the employer was held responsible for unauthorized medical expenses after employer's doctor discharged the employee under circumstances similar to the present case.

The judgment of the trial court is affirmed as to the award of disability and is modified as to the allowance of medical expense. Costs of appeal are taxed to the employee.

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ROGER E. THAYER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

FIREFLY INDUSTRIES, INC. V. RHONDA SEXTON
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No. E2001-00132-WC-R3-CV - Filed: December 11, 2001

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the appellant, Rhonda Sexton and Charles B. Sexton, surety, for which execution may issue if necessary.

12/11/01