IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 20, 2001 Session

DAVID KEE v. UNIMIN CORPORATION

Direct Appeal from the Circuit Court for Benton County
No. 99CCV-195 Julian P. Guinn, Judge

No. W2000-02673-WC-R3-CV - Mailed October 2, 2001; Filed November 9, 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. This is an action by an injured employee to recover workers' compensation benefits for three separate claimed injuries by accident occurring at different times. After a trial on the merits, the trial judge dismissed the claim based on an arm injury for insufficient proof that it occurred at work, but awarded, inter alia, permanent partial disability benefits based on 40 percent to the body as a whole for the injuries to the neck and back. The employer has appealed contending (1) the evidence preponderates against the trial court's finding that the employee's claimed neck injury is compensable and (2) the trial court erred in awarding permanent disability benefits for the neck injury and for an admittedly compensable low back injury. As discussed below, the panel has concluded the judgment should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (2000) Appeal as of Right; Judgment of the Circuit Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and W. MICHAEL MALOAN, SP. J., joined.

Richard C. Manglesdorf, Jr., and Thomas J. Dement, II, Nashville, Tennessee, for the appellant, Unimin Corporation

Terry J. Leonard, Camden, Tennessee, for the appellee, David Kee

MEMORANDUM OPINION

The employee or claimant, David Kee, is 59 years old with a high school education and no

vocational training. He worked for Genesco for one year after graduating from high school and worked for Unimin, formerly Hardy Sand Company, for 37 years, advancing to the position of shift production and shipping supervisor until he was terminated on February 24, 1999.

One of the claimed injuries is to the left arm. It appears from the record, as the trial court found, that the arm injury was an old one, not related to work, although a manifestation of it occured at work on or about April 21, 1998. The testimony of Dr. Lowell F. Stonecipher clearly supports that finding. It also appears from the record that the claim should fail for lack of written notice. No issue is raised in the appellee's brief concerning the trial court's disallowance of benefits for the arm injury.

As Dr. Joseph C. Boals, III, understated in his deposition, the claimant's history is convoluted and confusing. It appears from the record that an injury occurred at work on April 28, 1998, when the claimant slipped on oil and fell,, injuring his lower back. The employer does not contest the compensability of the back injury, but insists it did not cause any permanent disability. The treating physician, Dr. John Neblett, diagnosed acute lumbar sprain with nerve root irritation at L5-S1 on the left side. The injury was superimposed on preexisting degenerative arthritis. Conservative care was provided by Dr. Neblett. Dr. Boals, to whom the claimant was referred by his attorney for evaluation, estimated his permanent impairment at 10 percent to the whole body.

The claimant testified that he fell down a flight of stairs at work on February 22, 1999, landing on his neck and injuring it. There is conflicting testimony as to whether the employer had notice of it. A supervisor at Unimin, David Hayes, was nearby when it happened. Hayes testified that he heard a noise and saw the claimant picking himself up. When he asked the claimant if he was hurt, the claimant said something, then walked away, according to the testimony of Hayes. The claimant believes the supervisor saw more than he is telling. No written report was made. Dr. Neblett diagnosed acute neck sprain and exacerbation of preexisting arthritis. Dr. Boals estimated the claimant’s permanent impairment for all three injuries at 33 percent.

The trial judge found the employee to be a credible witness and awarded permanent partial disability benefits on the basis of 40 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).

The appellant first argues the neck injury did not happen. The argument overlooks the

testimony of the claimant and the treating physician's diagnosis of an acute injury. The trial judge believed the claimant. The appellant argues the injuries are not permanent. The trial court accepted the testimony of Dr. Boals to the contrary. An employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). The evidence fails to preponderate against the trial court's finding that the claimant's neck injury is compensable.

Next, the appellant argues the claimant failed to give written notice of the accidental neck 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 his 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.

Whether or not the excuse offered by an injured worker for failure to give timely written notice is sufficient depends on the particular facts and circumstances of each case. A. C. Lawrence Co. v. Britt, 220 Tenn. 444, 414 S.W.2d 830, 834 (1967). The presence or absence of prejudice to the employer is a proper consideration. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). 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. Jones v. Sterling Last Corp., 962 S.W.2d 469, 471 (Tenn. 1998). The trial court made no specific finding, but it appears the claimant's supervisor, Hayes, did have actual notice of the accident, in which case written notice is excused. The second issue is resolved in favor of the claimant.

For the above reasons and because the evidence fails to preponderate the findings of the trial court, the judgment is affirmed. Costs are taxed to the appellant.

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JOE C. LOSER, JR.

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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 fact 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, Unimin Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM