

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

STEVEN RAY NORFLEET v. J. W. GOAD CONSTRUCTION, INC., ET AL.

**Direct Appeal from the Chancery Court for Montgomery County
No. 96-10-0065 Carol Catalano, Chancellor**

**No. M2001-00425-WC-R3-CV - Mailed - September 6, 2001
Filed - December 3, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this case, the employer and its insurer contend (1) the action is time barred, (2) the claim is barred by the plaintiff's failure to give timely notice, (3) the award of benefits is excessive, (4) the award of bad faith sanctions is erroneous, and (5) the trial court erred in awarding attorney fees for the collection of unpaid medical expenses. As discussed below, the panel has concluded the award of attorney fees against the employer should be vacated, and the judgment otherwise affirmed.¹

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J., and HAMILTON V. GAYDEN, JR, SP. J., joined.

D. Brett Burrow and Gordon C. Aulgur, Nashville, Tennessee, for the appellants, J. W. Goad Construction, Inc., Sue Goad, Executrix for the estate of Jackie W. Goad, deceased, and Maryland Casualty Company.

Thomas R. Meeks and Gregory D. Smith, Clarksville, Tennessee, for the appellee, Steven Ray Norfleet.

MEMORANDUM OPINION

¹

Because the Rule 59 motion has not been addressed by the trial court, the appeal may be premature. However, because the injury occurred more than eight years ago, we have elected to address the merits of the appeal. This case needs to be finally resolved.

This civil action was commenced on October 10, 1996 following voluntary dismissal of a timely filed complaint on August 14, 1995. No issue was raised in the answer to the second complaint as to its timeliness. Following a trial on the merits on July 31, 2000, the trial court awarded permanent partial disability benefits based on 63 percent to the body as a whole, discretionary costs, bad faith penalties, temporary total disability benefits and medical expenses. The judgment was filed on October 3, 2000. On November 14, 2000, the trial court awarded attorney fees of \$19,500.00 pursuant to 50-6-204(b)(2).² Although the defendant had filed a timely Tenn. R. Civ. P. 59 motion, the award of attorney fees appears from the record to be unrelated to that motion.

On February 26, 2001, the trial court ordered the appellants to provide medical treatment for the appellee, pending appeal. So did a Special Workers' Compensation Appeals Panel.

At the time of the trial, the injured employee or claimant was 45 years old. He was injured on April 10, 1993, when he fell from a scaffold. The treating physician, Dr. Steven McLaughlin treated him for multiple injuries, including an elbow injury, a shoulder injury and carpal tunnel syndrome, all causally related to the fall, as well as a knee injury occurring during rehabilitation. Permanent impairment ratings of 5 percent to the elbow, 10 percent to the shoulder and 10 percent to the wrist were estimated by the doctor. The claimant has not returned to work for the same employer.

Relying largely on the testimony of Dr. McLaughlin, the trial court awarded, inter alia, permanent partial disability benefits based on 63 percent to the body as a whole and temporary total disability benefits for 51 2/7th weeks. Appellate review of findings of fact 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).

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 that 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.

2

(2) In addition to any attorney fees provided for pursuant to the provisions of § 50-6-226, a court may award attorney fees and reasonable costs to include reasonable and necessary court reporter expenses and expert witness fees for depositions and trials incurred when the employer fails to furnish appropriate medical, surgical and dental treatment or care, medicine, medical and surgical supplies, crutches, artificial members and other apparatus to an employee provided for pursuant to a settlement or judgment under this chapter.

Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). The extent of an injured worker's vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999).

The employer's insurance carrier refused to authorize medical care because Dr. McLaughlin refused to express an opinion as to the cause of the injuries, because, he said, that was up to the judge. In his deposition, however, he conceded that the injuries were probably caused by the fall. The appellant argues they could have been caused by other things and that there is therefore no coverage. Our independent investigation of the record reveals no other probable cause of the claimant's injuries.

The appellants argue the claim for benefits for carpal tunnel syndrome and the shoulder injury was not timely because it was not included in the original complaint, but was added by amendment, which it says was not filed until after the one-year statute of limitations had run. However, they cite no rule which requires a workers' compensation claimant to specify his injuries in the complaint. The original complaint in this case was sufficient. The amendment was unnecessary, as the trial judge concluded. The issue is resolved in favor of the claimant.

The appellants argue the claimant failed to give 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 his employer. Tenn. Code Ann. § 50-6-201. This employer had actual knowledge of the injury. Written notice was therefore unnecessary.

The appellants argue the award of permanent disability benefits was excessive. For injuries occurring on or after August 1, 1992, where an injured worker is entitled to receive permanent partial disability benefits to the body as a whole, and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is six times the medical impairment rating determined pursuant to the above guidelines. Tenn. Code Ann. § 50-6-241(b). In making determinations, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). Our independent investigation of the record fails to reveal a medical impairment rating to the whole body, but does reveal separate impairment ratings to three separate members. An injury to three or more members of the body, whether or not one or more of the members is included in the schedule, is not a scheduled injury and, in such case, benefits are allowable to the body as a whole. Tennlite, Inc. v. Lassiter, 561 S.W.2d 157, 159 (Tenn. 1978).

A medical or anatomic impairment rating is not always indispensable to a trial court's finding of a permanent vocational impairment. Anatomic impairment is distinct from the ultimate issue of vocational disability and a medical expert's characterization of a condition as chronic and the placement of permanent medical restrictions is sufficient to prove permanency. Walker v. Saturn

Corp., 986 S.W.2d 204, 207 (Tenn. 1998), citing Hill v. Royal Ins. Co., 937 S.W.2d 873, 876 (Tenn. 1996). We extend that rule to cases such as this one, where there is no medical impairment rating for the combined effect of concurrent injuries. From a consideration of the relevant factors, to the extent they were established by the proof, we are not persuaded the evidence preponderates against the award of permanent partial disability benefits.

Temporary total disability refers to the injured employee's condition while disabled to work because of his injury and until he recovers as far as the nature of his injury permits. Redmond v. McMinn County, 209 Tenn. 463, 468, 354 S.W.2d 435, 437 (1962). Benefits for temporary total disability are payable until the injured employee is able to return to work or, if he does not return to work, until he attains maximum recovery from his injury, at which time his entitlement to such benefits terminates. Simpson v. Satterfield, 564 S.W.2d 953, 955 (Tenn. 1978). 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). From our independent examination of the record, we cannot say the evidence preponderates against the award of temporary total disability benefits.

When a covered employee suffers an injury by accident arising out of and in the course of his employment, his 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).

Because of the employer's lack of good faith in failing to provide medical benefits as required, the trial court imposed upon the employer attorney fees totaling \$19,500.00 for the collection of medical expenses incurred by the employee following the injury, but before adjudication of his claim. The employer insists the award was premature because there was no judgment or settlement requiring such payments by the employer at the time the expenses were incurred. We must respectfully agree with the employer. Where an employer refuses to provide reasonably necessary medical benefits, it may be assessed attorney fees and reasonable costs necessary to enforce a court order requiring the payment of expenses incurred by the employee for the recovery such expenses. Tenn. Code Ann. § 50-6-204(b)(2). At the time the medical expenses were incurred, they were not "provided for pursuant to a settlement or judgment," as the statute provides. The award of \$19,500.00 in attorney fees against the employer is therefore vacated.

Nevertheless, the refusal of the employer to provide medical expenses because a physician chosen by it refused to state with reasonable medical certainty that the claimant's injuries were causally connected to his accident at work is evidence of bad faith. Liability for medical benefits

often exists because of a mere probability of such causal connection. No degree of certainty is required. The award of sanctions, other than attorney fees, by the trial court was therefore appropriate. In addition, the employer may be liable for attorney fees necessarily incurred for the collection of reasonably necessary medical expenses incurred since the judgment was filed on October 3, 2000.

Except as modified with respect to attorney fees, the judgment of the trial court is affirmed. Costs are taxed to the appellants.

JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**STEVEN RAY NORFLEET v. J. W. GOAD CONSTRUCTION,
INC., ET AL.**

**Chancery Court for Montgomery County
No. 96-10-0065**

No. M2001-00425-SC-WCM-CV - Filed - December 3, 2001

JUDGMENT ORDER

This case is before the Court upon motion for review filed by the appellants, J. W. Goad Construction, Inc., Sue Goad, Executrix of the Estate of Jackie W. Goad, deceased, and Maryland Casualty Company, 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 appellants and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Drowota, J., not participating