IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 24, 2001 Session

TRAVELERS INSURANCE CO. v. LISA FUSON, ET AL.

Direct Appeal from the Chancery Court for Rhea County
No. 9122 Jeffery Franklin Stewart, Chancellor

Filed January 8, 2002

No. E2000-02532-WC-R3-CV

This 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 employee had sustained a twenty-five percent permanent partial disability, based on the medical impairment of five percent, to her left arm. The trial court further held that *Barker v. Home-Crest Corp.*, 805 S.W.2d 373 (Tenn. 1991) controlled and because March 24, 1998, was the last day the employee was able to work, the plaintiff insurer was liable for the employee's workers' compensation award. 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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and WILLIAM H. INMAN, SR. J., joined.

Robert J. Uhorchuk, Chattanooga, Tennessee for the appellant, Travelers Insurance Company.

Sarah C. Hardison Reisner and James L. May, Jr., Nashville, for the appellees, Lisa Fuson, et al.

MEMORANDUM OPINION

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance

of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

The employee, age thirty-six at the time of trial, has a high school diploma and some college credits. She served in the Army for six years as a health inspector before being honorably discharged. During her Army service, she learned basic computer skills in the Lotus and WordPerfect programs. She was employed by the parties' insured, Dunlap Industries, from November of 1993 until January of 1999. She sustained a gradually occurring injury–carpal tunnel syndrome–while employed with Dunlap Industries.

During the time relevant to this case, Dunlap Industries was insured by two insurers. The defendant provided workers' compensation coverage to the employer from September 11, 1996 until September 11, 1997. The plaintiff provided coverage beginning September 12, 1997.

The plaintiff's injury resulted in the filing of three claims and three First Report of Injury forms before surgery was performed on March 26, 1998. After both the first claim, filed on October 23, 1996, and second claim, filed on May 1, 1997, the employee was released by her treating physician and returned to work. The final claim was filed on September 5, 1997. The defendant insurer authorized surgery after the final claim and then denied coverage on April 23, 1998. The defendant insurer claims the date of injury was the last day the employee was able to work, that date being March 24, 1998–the date of surgery, which was outside of the workers' compensation policy issued by the company to cover claims for work-related injuries.

The trial court found the employee had sustained a twenty-five percent permanent partial disability, based on the medical impairment of five percent, to her left arm. The trial court further held that *Barker v. Home-Crest Corp.,* 805 S.W.2d 373 (Tenn. 1991) controlled and because March 24, 1998, was the last day the employee was able to work, the plaintiff insurer was liable for the employee's workers' compensation award.

Medical Evidence

Dr. John P. Nash, an orthopedic surgeon, testified by deposition. Dr. Nash first saw the employee on December 10, 1996, approximately six weeks after she began having symptoms. She complained of pain in her left elbow with occasional tingling in her small finger that began after she lifted a box at work. Dr. Nash diagnosed left lateral epicondylitis or "tennis elbow." He returned her to work on January 31, 1997, after her symptoms improved. The employee was next seen in June of 1997 for additional elbow complaints. The employee was treated conservatively on several occasions for what Dr. Nash referred to as "flare ups." According to Dr. Nash, surgery was

discussed on the first visit as a future, but unlikely, option. The first serious discussion of surgery and the first occasion on which Dr. Nash thought surgery was indicated as treatment, was September 22, 1997. Prior to surgery, Dr. Nash placed restrictions on the employee but did not take her off work. Dr. Nash testified that the employee's job duties worsened her condition over time during the course of her treatment.

Discussion

The central question in this appeal is which insurer is liable for the employee's injury. Under the controlling case of *Barker v. Home-Crest Corp.*, 805 S.W.2d 373 (Tenn. 1991),[1] the threshold question is when the injury became compensable. The Court in *Barker* held that in cases of gradually occurring injuries, the fixing of the time of injury is the date when the employee's condition reaches a point that he or she is no longer able to work.

The Court further held that in order to resolve the dispute between competing insurance carriers, a determination must be made as a matter of fact whether this was an accidental injury that occurred on a specific date or whether it was a gradual injury that continued to develop up to the time of surgery. The analysis begins with the medical testimony and the injured employee's testimony.

The employee in *Barker* testified that the more she worked and stretched her hands, the worse her condition became. Her physician testified that the condition waxed and waned and every time she worked using repetitive motions with her hands, she caused new trauma to the carpal tunnel. The *Barker* Court then found the gradual injury continued at least until the date of surgery, which was held to be the date of injury.[2]

In this case, the employee testified that her condition became better and worse from the time the symptoms first appeared until and after surgery was performed. Dr. Nash testified that although the employee's diagnosis did not change during the course of time from her first visit until surgery, she continued to sustain trauma up to the time of surgery and beyond. The facts of this case as presented in the lay and medical testimony are virtually identical to those of the *Barker* case. We therefore find the evidence does not preponderate against the finding of the trial court that March 24, 1998–the date the employee was last able to work–was the date of injury. Because March 24, 1998 is within the period of coverage provided by the plaintiff we affirm the trial court's finding that the plaintiff is liable for the employee's workers' compensation award of twenty-five percent to the left

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[1] The plaintiff insurer argues *Zurich American v. Kent*, 2000 Tenn. LEXIS 313 should apply to this case and that under the facts of this case *Barker* does not apply. The *Kent* case is an unreported Special Workers' Compensation Panel decision that was not appealed to the full Tennessee Supreme Court and has no subsequent history. The analysis of the *Kent* case is not helpful to our resolution of this case.

[2] The holding of *Barker* was recently reiterated with approval in *Story v. Legion*, 3 S.W.3d 450 (Tenn. 1999).

arm and for future medical care, etcetera related to the injury.

Frivolous Appeal

The defendant insurer urges us to find the plaintiff's appeal frivolous. We find the plaintiff's appeal presents a genuine question of law and is not, therefore, frivolous. Finally, we find the employee is entitled to interest on the judgment.

The costs of this appeal are taxed to the plaintiff

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JOHN K. BYERS, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon the motion for review filed by Travelers Insurance 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Travelers Insurance Company, for which execution may issue if necessary.

BARKER, J., NOT PARTICIPATING