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

MICHAEL LANE v. OLSTEN STAFFING SERVICES, INC., ET AL.

Direct Appeal from the Chancery Court for Washington County
No. 32994 Thomas J. Seeley, Jr., Chancellor

No. E2001-00380-WC-R3-CV - Filed January 31, 2002

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 found the employee sustained a compensable injury but concluded there was no permanent disability. Also, the court declined to allow certain medical expenses ordered by an independent medical examiner. Judgment of the trial court is affirmed.

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

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

Howell H. Sherrod, Jr., Johnson City, Tennessee, for Appellant, Michael Lane.

Lynn C. Peterson, Knoxville, Tennessee, for Appellee, Olsten Staffing Services, Inc.

Paul G. Summers, Attorney General and Reporter and E. Blaine Sprouse, Assistant Attorney General for Appellee, James Farmer, Director of Division of Workers' Compensation, Second Injury Fund, Dept. of Labor.

OPINION

The trial court found the employee, Michael Lane, sustained a work-related injury but dismissed his claim for permanent disability. The court also disallowed two items of medical expense as unauthorized expenditures. The employee has appealed.

Basic Facts

The employee was 31 years of age and held a G.E.D. certificate. He had sustained a prior back injury in 1993 when he was working installing a heating unit in an attic. This accident resulted in a herniated disc and surgery was performed by Dr. Alex Williams. The surgeon gave a 9 percent medical impairment and imposed restrictions of not lifting over 25 pounds frequently and 50 pounds infrequently. The employee testified he recovered fully from this prior injury and could do about anything.

On June 11, 1999, while working at the Inland Container job site, he was injured when he squatted down to put cardboard box lids on a buggy when he felt a sharp pain in his low back. Upon returning to work, he was assigned a job in the office and sometime later was laid off. He tried to find other work but had not been successful as of the date of the trial. He told the trial court he could not get comfortable sitting, had trouble bending in order to put his shoes on and could not do work around the house such as running a vacuum or sweeping.

The medical evidence was presented by deposition. One doctor testified he had a new injury as a result of the June 11th incident and the other doctor testified there was no new injury as the pain was coming from the prior injury and surgical procedure.

Dr. William E. Kennedy, an orthopedic surgeon who had retired from the practice of treating patients but was engaged in performing independent medical examinations, testified he saw the employee only one time on November 22, 1999 at the request of his attorney. In addition to the medical examination, he was furnished the record of Dr. Williams and the records of the treating doctor. He was of the opinion the incident at work had caused a new injury, a disc bulge or herniation, and that this was a new anatomical change from the old injury. He ordered a second MRI exam and said it showed the bulge or herniation had decreased as compared to the results of the first MRI. He indicated that certain restrictions concerning lifting, bending, etc. should be imposed but admitted that these restrictions would be the same that he would have imposed after the first injury if he had been treating the employee then. He found medical impairment to be 15 percent of which 5 percent was from the last injury.

Dr. Richard Duncan, an orthopedic surgeon, testified the employee came under his care during June 1999 and that the MRI examination (first one) showed no evidence of recurrent herniated disc; that he was of the opinion he had degenerative disc disease and he had not sustained a new injury as the pain was coming from scar tissue from the prior surgery and that a nerve was being irritated causing pain; that further surgery would not help his condition and he would have flare-ups from time to time all because of the prior injury and surgery; that he had no permanent disability from the last incident, and restrictions that should be imposed would be the result of the old injury. He said the second MRI exam showed a small bulge, but no recurrent herniated disc.

Two rehabilitation consultants testified by deposition. One found no vocational disability

as a result of the second incident and the other found substantial vocational disability.

Findings of Trial Court

The trial court found the employee had sustained a compensable injury but there was no permanent disability. The court also found some credibility problems with the employee's testimony regarding a felony conviction and answers in his discovery deposition as compared to his oral testimony during the trial. The court disallowed certain medical expenses ordered by the doctor who performed the independent medical examination.

Standard of Review

In a workers' compensation case, the review on appeal is *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Analysis

On the question of permanent disability, the trial court was faced with sharply conflicting medical evidence. The rule is that the trial court is primarily responsible to resolve conflicting testimony and on appeal, the issue is only whether the evidence preponderates against the evidence accepted by the court. Thus, the trial court has considerable discretion to accept evidence by a medical expert over that of another expert. ***Thomas v. Aetna Life & Cas. Co.***, 812 S.W.2d 278 (Tenn. 1991); ***Johnson v. Midwesco, Inc.***, 801 S.W.2d 804 (Tenn. 1990). From our review of the record, we cannot say the evidence preponderates against the conclusion of the court.

As to the disallowance of medical expenses, the amounts in question involve the expense of $1,232 for an MRI examination ordered by Dr. Kennedy, the independent medical examiner who was consulted without the employer's consent or knowledge. The other item was a radiology bill for $240 in connection with the MRI exam. The employee testified he was dissatisfied with Dr. Duncan and wanted a second opinion. He admitted he never expressed his dissatisfaction to his employer or even requested the employer to procure a second opinion. The record indicates his attorney referred him to Dr. Kennedy.

Our statute, Tenn. Code Ann. § 50-6-204, requires the employer to furnish medical services free to the employee (subsection (a)(1)) and the statute also requires the employee to accept said services (subsection (a)(4)(A)). The mere dissatisfaction by the employee with the treating doctor's findings or opinion as to his condition does not prove that the employer is furnishing inadequate care. ***Buchanan v. Mission Ins. Co.***, 713 S.W.2d 654 (Tenn. 1986).

As a general rule, if the employee is dissatisfied with the treating doctor's findings, 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. ***Consolidation 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).

In the present action, we find that at the time of independent medical examination, this action was pending. Also at that time, the doctor had the results of the MRI ordered by the treating doctor. The expenses in question were incurred in preparation for trial and not directly in treatment of the claimant. Our examination of the record does not indicate any reasonable excuse or justification by the employee for seeking a second opinion without consulting the employer. We hold that mere dissatisfaction by the employee as to the treating doctor's finding is not sufficient to bind the employer to the expenses which were incurred. Thus, the trial court was correct in disallowing these medical expenses.

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the employee.

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ROGER E. THAYER, SPECIAL JUDGE

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FILED JANUARY 31, 2002

No. E2001-00380-SC-WCM-CV

ORDER

This case is before the Court upon motion for review filed on behalf of Michael Lane 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 Michael Lane, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM