IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 7, 2003 Session

BRINDA J. HILL v. ARCADE MARKETING PRINTING, INC.

Direct Appeal from the Chancery Court for Hamilton County
No. 001353 W. Frank Brown, III, Chancellor

Filed August 21, 2003

No. E2002-01936-WC-R3-CV

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 plaintiff appeals the trial court's decision resolving all issues in favor of the defendant and dismissing the plaintiff's complaint, finding specifically: that the plaintiff failed to give proper, statutorily required notice of her alleged injuries; that the plaintiff's alleged injuries were not causally related to her job with the defendant company; and that the plaintiff was estopped from pursuing workers' compensation benefits for her alleged injuries. We affirm the judgment of the Chancery Court.

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

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

John W. McClarty, of Chattanooga, Tennessee, for the appellant, Brinda J. Hill.

H. Austin Pedigo, of Chattanooga, Tennessee, for the appellant, Arcade Marketing, Inc.

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 finding, 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 (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 (Tenn. 1988).

Facts

The plaintiff (employee) is forty-nine years of age and has been employed at the defendant company as an operator/packer for almost seventeen years. Her duties include feeding an RA machine with paper, putting glue in a tray of the machine, and making boxes for envelopes. She makes ten to eleven boxes per hour, and each box weighs twenty-five to forty pounds.

In 1999, the plaintiff reported a neck and shoulder problem to her primary physician, Dr. James Folkening. After obtaining X-rays, Dr. Folkening prescribed Celebrex and referred her to Dr. Scott Hodges. Dr. Hodges prescribed steroid injections to the neck and physical therapy. In May of 2000, the plaintiff's pain in her left shoulder worsened. Dr. Hodges ordered an MRI and referred the plaintiff to Dr. McElheney. Dr. McElheney, an orthopedic surgeon, operated on the plaintiff's left shoulder in June 5, 2000, and her right shoulder in October of 2000.

The plaintiff testified that she was unsure of how long she had the pain; although she believed it was from her job, no doctor ever told her the cause of the problem. During her absences from work, she provided doctor's statements to her employer; the first statement was provided on June 5, 2000. On a long term disability form, the plaintiff wrote "per her doctor, condition comes from wear and tear on body over the years from repetitive motion." The plaintiff, through her attorney, filed the workers compensation claim in December of 2000. (The employer's payroll manager presented the doctor's statements that had been placed in the plaintiff's file). The plaintiff later returned to work and takes Vioxx for the pain.

Medical Evidence

The medical evidence for the purpose of the issues raised in this trial was provided by the deposition testimony of Dr. N. Earl McElheney and Dr. Gregory White.

Dr. McElheney, an orthopedic surgeon in Chattanooga, testified in two separate depositions. He testified that he first saw the plaintiff on May 23, 2000. At that time, the plaintiff reported she had a "nagging" pain in her shoulder for years and that the injury was a "repetitive type of injury." Dr. McElhaney testified that he performed a physical examination and determined that it was his opinion that the plaintiff had ongoing shoulder impingement syndrome with tendinitis and bursitis. As to causation, Dr. McElhaney testified that the plaintiff's work at a loading company "does go along with the kind of problem she had with the shoulders... and that this is a repetitive type of injury." However, at the later deposition he testified that he agreed with the opinion of Dr. White that the plaintiff's injuries were probably not work-related. Dr. McElhaney performed surgery on both of the plaintiff's shoulders, the left on June 5, 2000, and the right on October 23, 2000. He returned the plaintiff to work around the beginning of 2001. He did not assign an impairment rating.

Dr. White, a specialist in physical medicine rehabilitation in Chattanooga, testified that he first saw the plaintiff on February 26, 2001. At that time he took a history from her that included the onset of gradual shoulder pain in May of 1999 and later neck pain and the treatment of these symptoms. At that visit Dr. White also performed a physical examination and he testified that he concluded from his examination that the plaintiff had a fourteen percent upper extremity impairment of her left shoulder and a twelve percent upper extremity impairment of her right shoulder, equaling fourteen percent whole body impairment. Dr. White testified that he was of the opinion that it was possible that the plaintiff's job "could have caused the injury, or she could have had a pre-existing degenerative condition that was exacerbated by her job," but Dr. White's report that was filed as an exhibit to his deposition indicated that it was his opinion that the plaintiff's injuries were not work-related.

Discussion

Although we are required to weigh the evidence in a case in depth to determine where the preponderance of the evidence lies, we are required to make such evaluation within the confines of established rules in evaluating the propriety of the trial court.

The plaintiff appeals the decision of the trial court on the basis that she argues that the failure to give notice within 30 days should be excused because: the injury occurred gradually; she was not reasonably aware that the injury was work-related; and she gave her employer all the information she knew when she was forced to miss work. She also argues that the medical testimony and her own testimony established that her repetitive-movement injuries were work-related. Third, the plaintiff argues that the trial court erred in failing to award reimbursement to the plaintiff's health insurance carrier under the facts of this case. Finally, she argues that the chancellor erred in holding *sua sponte* that she was estopped from prosecuting her workers' compensation claim.

Regarding the failure to give notice, the plaintiff contends that the notice requirement should have been excused because of the gradual nature of her injuries and the fact that she was not aware that she had a work-related injury. As a general rule, the Last Day Worked Rule applies only to repetitive stress injuries, i.e., the unexpected or unusual injuries that result from the ordinary or usual strain or exertion of the employee's job. When there is no one particular incident or event identifiable as an "accident resulting in the injury" because the employee suffers new trauma each day she works, the date of the accidental injury is the date the employee is no longer able to work because of the injury. The statute of limitations commences to run at that time. Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997). In this case, the plaintiff first missed work on June 5, 2000, but did not give effective notice until December 13, 2000. Additionally, the plaintiff's own testimony at trial indicated that she was of the opinion that her injuries were work-related at least six months before reporting them to the defendant company. The information the plaintiff claims on appeal to have given her employer were doctor's notes that did not contain any mention of a work-related injury. Therefore the plaintiff's

argument on the issue of notice is without merit and we affirm on that issue. The plaintiff failed to give timely notice to the defendant and her complaint was properly dismissed.

Regarding the issue of causation, it is well-settled that in order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. § 50-6-102(a)(5). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690 (Tenn. 1997) (citations omitted); Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690 (Tenn. 1997).

The medical evidence in this case was provided by the reports and deposition testimony of Dr. N. Earl McElheney and Dr. Gregory White. Both doctors testified via deposition that based upon a reasonable degree of medical certainty, they were not of the opinion that the plaintiff's injuries were work-related. In the absence of these statements, we would be required to construe the testimony that the plaintiff's work "could have been" the cause of her injuries in her favor. The testimony of Dr. McElhaney and Dr. White contain inconsistencies in the opinions of whether the plaintiff's injuries were caused by her employment. Dr. McElhaney first testified that the plaintiff's injuries were caused by repetitive motions and overhead lifting. In a subsequent deposition he agreed with Dr. White that the plaintiff's injuries were not work-related. His first diagnosis was based upon overhead reaching by the plaintiff. This diagnosis is suspect, however, because the evidence shows that the plaintiff's work did not require overhead reaching.

Dr. White's opinions on causation are leavened with the word "possible". In answer to one question he said, "Yes, she could have had an underlying condition that could have been – that her job could have exacerbated, or it could have been – her job could have possibly caused it." Later he testified that "it is possible" that the injuries were work-related. However, within the same context he twice said, "But I can't say that they definitely are." Based upon this testimony, we cannot say the medical evidence is sufficient to show the plaintiff has suffered a compensable injury. Further, as each doctor testified that it was his opinion that the plaintiff's work was *not* the cause of her injuries, causation was not established. We thus affirm on this issue as well.

Regarding the plaintiff's argument that the trial court erred in failing to award reimbursement to the plaintiff's health insurance carrier under the facts of this case, the evidence supports the trial court's finding that the plaintiff's health insurance is not entitled to reimbursement of medical expenses. First, there was no causal connection between the

plaintiff's injuries and her work. Second, as the record reflects, the plaintiff knew about her injuries but failed to provide notice in a timely manner. We therefore affirm.

On the plaintiff's final issue, that of estoppel, she is correct in noting that estoppel is not generally favored and that the party seeking to invoke the doctrine of estoppel has the burden of proving each and every element thereof, Sexton v. Sevier County, 948 S.W.2d 747 (Tenn.Ct.App. 1997), but we know of no case in which it has been held that a trial court cannot raise estoppel of its own accord. In this case, we find that estoppel is not applicable and it was error for the trial court to rule as it did on this issue, *sua sponte* or otherwise. Our finding on this issue, however, does not change the outcome of this case.

The defendant argues on appeal that the plaintiff's appeal is frivolous. If an appeal has no reasonable chance of success and if the issues raised were ones of fact with material evidence supporting the trial court's finding on those issues, damages for frivolous appeal may be awarded. Liberty Mutual Ins. Co. v. Taylor, 590 S.W.2d 920 (Tenn. 1979). We do not find that the appeal in this case is frivolous.

For the foregoing reasons, the judgment of the trial court is affirmed. The cost of this appeal is 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 Brinda J. Hill 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 Brinda J. Hill and surety, for which execution may issue if necessary.

ANDERSON, J., NOT PARTICIPATING