IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 31, 2003 Session

HELEN LOUISE HENSON v. FACTORY & STEEL TRANSPORTATION, INC., ET AL.

Direct Appeal from the Circuit Court for Humphreys County
No. 8978 Allen Wallace, Judge

No. M2002-02761-WC-R3-CV - Mailed - September 30, 2003
Filed - December 15, 2003

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. In this appeal, Tennessee Insurance Guaranty Association insists the trial court erred in determining (1) the employee was permanently and totally disabled, (2) the last injurious injury rule did not apply and (3) the employee's permanent and total disability benefits accrued beginning March 14, 2001. The employee insists the preponderance of the evidence supports the findings of the trial court. As discussed below, the panel has concluded the judgment should be modified with respect to the date of injury.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JAMES L. WEATHERFORD, SR. J., joined.

Robert O. Binkley, Jr. and Latosha Mason Dexter, Rainey, Kizer, Reviere & Bell, Jackson, Tennessee, for the appellant, Tennessee Insurance Guaranty Association

J. Frank Thomas and Jennifer L. Shumate, Leitner, Williams, Dooley & Napolitan, Nashville, Tennessee, for the appellee, Commerce & Industry Insurance Company

Charles L. Hicks, Camden, Tennessee, for the appellee, Helen Louise Henson

MEMORANDUM OPINION

The employee or claimant, Mary Louise Henson, initiated this civil action to recover workers' compensation benefits against her employer, Factory & Steel Transportation, and its insurer, Reliance Insurance Company, alleging that she suffered work related injuries on or about March 14, 2001,

May 22, 2001 and June 19, 2001. The appellant, Tennessee Insurance Guaranty Association (TIGA), was later added as a defendant. The defendants denied liability, particularly for any injuries occurring after April 1, 2001, when the employer changed insurance carriers. After a trial on the merits, the trial court found the claimant to be permanently and totally disabled as a result of the March 14, 2001 injury and that she suffered no disability as a result of the later injuries. TIGA has appealed.

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). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

The claimant is approximately 56 years old with a tenth grade education and experience as a punch press operator, waitress and school bus driver. She worked for the employer from 1995, as a truck driver, until she was laid off in June 2001. Her duties included loading and unloading cargo.

She suffered three separate injuries by accident while working for the employer. On March 14, 2001, she tripped over a rubber barrier in the warehouse, fell to the ground, bounced and slid several feet. On March 17, she was examined by Dr. Stanley Hopp. Dr. Hopp found no permanent disability resulting from the first injury. He advised her to continue working, which she did.

On May 22, 2001, she tripped again. Although she did not fall she felt pain in the upper and lower back. A chiropractor, Dr. Wayland Brooks, treated her for pain from May 24, 2001 through the date of trial, October 9, 2001. Dr. Brooks advised the claimant to continue working with restricted lifting, bending and stooping. She did.

The third injury by accident occurred on June 19, 2001, when the claimant backed a truck under a trailer and struck the tank pin. The accident "jerked everything all the way up my spine," according to the claimant's testimony. She was laid off by the employer three days later and has not worked since then. Commerce and Industry Insurance Company insured the employer's liability on that date.

TIGA and Commerce and Industry Insurance Company contend the claimant is not permanently and totally disabled. When an injury, not otherwise specifically provided for in the Act,

totally incapacitates a covered employee from working at an occupation which produces an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B). The definition focuses on an employee's ability to return to gainful employment. Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn. 1997).

Dr. Grafton Thurman, a certified independent medical examiner and social security disability examiner, examined the claimant on August 13, 2002. He diagnosed multi-level lumbar and cervical injuries and assessed her permanent medical impairment at 33 percent for the combined injuries. The claimant testified that she has applied for work at several other employers, but has been unsuccessful in acquiring gainful employment because, as she testified, there is not a job she can perform and "everything I try to do causes pain." The trial court observed that she is "tough as nails" and would be working if she could work. In the absence of any countervailing evidence, we cannot say the evidence preponderates against the trial court's finding that the claimant is permanently and totally disabled. The first issue is resolved in favor of Ms. Henson.

By its second issue, TIGA questions the trial court's finding that the operative date for determining whether it or Commerce and Industry Insurance Company is liable for disability benefits, and the trial court's determination that the beginning date for such benefits is March 14, 2001, the date of the first of the claimant's three successive injuries. Where an employee is permanently disabled as a result of a combination of two or more accidents occurring at different times and while the employee was working for different employers, the employer for whom the employee was working at the time of the most recent accident is generally liable for permanent disability benefits. McCormick v. Snappy Car Rentals, Inc., 806 S.W.2d 527 (Tenn. 1991). The same doctrine applies where the employee's permanent disability results from successive injuries while the employee is working for the same employer, but the employer has changed insurance carriers. The carrier which provided coverage at the time of the last injury is liable for the payment of permanent disability benefits. Globe Co. v. Hughes, 223 Tenn. 37, 442 S.W.2d 253 (1969).

An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability, if a work-connected accident can be fairly said to be a contributing cause of such injury. An employer takes an employee as the employee is, with all defects and diseases, and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Express Personnel Services, Inc. v. Belcher, 86 S.W.3d 498, 500 (Tenn. 2002).

While Dr. Thurman testified that the first injury was the one which caused the claimant's pre-existing back condition to become symptomatic, he also testified unequivocally that the claimant suffered three separate injuries, each of which worsened her pre-existing condition. Moreover, it is undisputed that the claimant was not disabled from working until after the injury of June 19, 2001. Accordingly, we find that June 19, 2001 is the date from which permanent total disability benefits must be measured. The employer and its insurance carrier on that date, Commerce and Industry Insurance Company, are liable for permanent total disability benefits.

The judgment of the trial court is modified accordingly and the cause remanded to the Circuit Court for Humphreys County. As modified, the judgment is affirmed. Costs are taxed to Commerce and Industry Insurance Company.

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JOE C. LOSER, JR.

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JUDGMENT

This case is before the Court upon a motion for review filed by Commerce & Industry 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 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 assessed to Commerce & Industry Insurance Company, for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating.