IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
September 11, 2003 Session

WILLIE WOOTEN v. WAL-MART STORES EAST. INC., ET AL.

Direct Appeal from the Circuit Court for Shelby County
No. CT-002350-00 George H. Brown, Judge

No. W2002-02682-WC-R3-CV - Mailed November 24, 2003; Filed December 31, 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, the employer questions the trial court's findings as to compensability and rate of compensation benefits. The employer also insists the trial court erred in ordering it to pay medical expenses to TennCare, and not directly to the health care providers. The employee insists the employer should have been assessed with a penalty for its failure to provide medical benefits. As discussed below, the panel has concluded the evidence fails to preponderate against the trial court's findings as to compensability and compensation rate, but should be remanded for determining TennCare's subrogation interest, if any.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE H. WALKER, III, SP. J., joined.

Jay L. Johnson, Allen, Kopet & Associates, Jackson, Tennessee, for the appellants, Wal-Mart Stores, Inc.

Keith V. Moore, Memphis, Tennessee, for the appellee, Willie Wooten

MEMORANDUM OPINION

The employee or claimant, Mr. Wooten, initiated this civil action to recover medical benefits, temporary total disability benefits and permanent partial disability benefits for a back injury occurring on November 15, 1999, arising out of and in the course of his employment with the

employer, Wal-Mart Stores, Inc. He also sought general relief. The employer denied liability. After a trial on the merits, the trial court awarded permanent partial disability benefits based on 60 percent to the body as a whole, with a weekly benefit rate of $317.73 per week, temporary total disability benefits at the same rate from November 15, 1999 to July 10, 2000, discretionary costs and medical expenses in the sum of $12,907.25. The employer 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). 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).

On the above date, the claimant was stacking cases of juice when he suffered severe and sudden back pain and fell to the floor, while working for the employer. He reported the accident to his supervisor immediately and the store's general manager a few hours later. He was referred to Dr. Evan Murray, who treated him conservatively for two to two and one-half months, then referred him to a neurosurgeon, Dr. Davies, who diagnosed chronic low back radiculopathy and scheduled corrective surgery. Surgery was performed by Dr. Davies on May 23, 2000. On August 3, 2000, Dr. Davies released him to return to work with restrictions.

The claimant has not returned to work. He continues to complain of pain and inability to work. He has seen a number of doctors.

Dr. Parsioon, who had treated the claimant for a prior low back injury, visited briefly with him on April 26, 2000. Dr. Parsioon testified that he found no evidence of a new injury as a result of the November 15, 1999 accident. However, the claimant's own testimony, the report of Dr. Davies and the testimony of Dr. Boals reflect that the accident contributed to the claimant's disability, either as the direct cause or by aggravating a pre-existing condition.

The employer contends the event of November 15, 1999 was no more than a manifestation of the previous injury, which also occurred while the claimant was working for the employer and for which the claimant received no permanent disability benefits. The employer relies entirely on the testimony of Dr. Parsioon.

When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983). Any reasonable

doubt concerning the cause of the injury should be resolved in favor of the employee. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 168 (Tenn. 2002). The issue of compensability is resolved in favor of the claimant.

The employer next questions the trial court's calculation of the claimant's weekly compensation rate. Disability benefits are computed on a weekly basis and, subject to maximum and minimum amounts fixed by law, Tenn. Code Ann. § 50-6-207, are based on the employee's average weekly wages, or the earnings of an injured employee in the employment in which he was working at the time of the injury during the fifty-two weeks immediately preceding the date of the injury, divided by fifty-two. Tenn. Code Ann. § 50-6-102(a)(2)(A). Days lost because of sickness or other fortuitous circumstances should be deducted. Russell v. Genesco, Inc., 651 S.W.2d 206 (Tenn. 1983). In its calculation of the claimant's average weekly wage, the employee failed to deduct days lost because of sickness. The calculation used by the trial court correctly did deduct those days. The issue is resolved in favor of the claimant.

The employer paid the claimant temporary total disability benefits for time lost immediately following the injury, but quit paying them after the claimant was examined by Dr. Parsioon. 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, 354 S.W.2d 435 (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. Prince v. Sentry Ins. Co., 908 S.W.2d 937 (Tenn. 1995). In this case, the claimant did not return to work. Thus, the trial court correctly awarded additional temporary total disability benefits until the claimant reached maximum medical recovery.

The claimant's medical expenses were paid in part by TennCare. The claimant agrees that TennCare must be reimbursed from the award of medical expenses. See Tenn. Code Ann. § 71-5-117. The judgment is therefore remanded to the trial court for a determination of the manner in which the state's subrogation interest should be protected.

The claimant argues the employer should be assessed with a 25 percent penalty for its failure to pay temporary total disability benefits. Where an employer wrongfully fails to pay an employee's claim for temporary total disability payments, the employer is liable, in the discretion of the court, to pay the employee, in addition to the amount due for temporary total disability payments, a sum not exceeding twenty-five percent of such temporary total disability claim; provided, that it is made to appear to the court that the refusal to pay such claim was not in good faith and that such failure to pay inflicted additional expense, loss or injury upon the employee; and provided further, that such additional liability shall be measured by the additional expense thus entailed. Tenn. Code Ann. § 50-6-225(j) (2002 Supp.). The argument fails for two reasons. First, the claimant waived the issue by failing to present it to the trial court. Second, our independent examination of the record fails to reflect that the employer's failure to pay temporary total disability benefits inflicted additional expense, loss or injury upon the claimant. The issue is resolved in favor of the employer.

The cause is remanded for the purpose of determining TennCare's subrogation interest, but otherwise affirmed. Costs are taxed to the parties, one-half each.

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JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
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WILLIE WOOTEN v. WAL-MART STORES EAST, INC., et al.

Shelby County Circuit Court
No. CT-002350-00

No. W2002-02682-WC-R3-CV - Filed December 31, 2003

ORDER

This case is before the Court upon 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 Memorandum Opinion of the Panel should be accepted and approved; 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 on appeal are taxed equally to the Appellant, Wal-Mart Stores, Inc., and to the Appellee, Willie Wooten, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM