IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 17, 2006 Session

CAROL PIPKIN v. TENNESSEE ELECTROPLATING, INC.

Direct Appeal from the Chancery Court for Lauderdale County
No. 12,921 Dewey C. Whitenton, Chancellor

No. W2005-02835-WC-R3-CV - Mailed July 26, 2006; Filed August 30, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 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 insists the evidence preponderates against the trial court's findings as to causation and extent of permanent partial disability. The employer further insists the claim should have been dismissed by the trial court because the injured worker failed to give timely written notice. We conclude the trial court's judgment should be affirmed.

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

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

William B. Walk, Jr., Memphis, Tennessee, for the appellant, Tennessee Electroplating, Inc.

J. Thomas Caldwell, Ripley, Tennessee, for the appellee, Carol Pipkin

MEMORANDUM OPINION

The employee or claimant, Carol Pipkin, initiated this civil action to recover workers' compensation benefits from the employer, Tennessee Electroplating, Inc., for a work-related knee injury. The employer denied liability. After hearing all the evidence, the trial court resolved the issues in favor of the claimant and awarded, among other things, permanent partial disability benefits based on twenty-five percent to the right leg. 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). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Gov't of Sumner County, 908 S.W.2d 921, 922 (Tenn. Workers' Comp. Panel 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Hill v. Wilson Sporting Goods Co., 104 S.W.3d 844, 846 (Tenn. Workers' Comp. Panel 2002). Issues of statutory construction are solely questions of law. Id. 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, McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. Workers' Comp. Panel 1995), 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 Indus., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57 (Tenn. 2001). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Id at 61. Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Bridges v. Liberty Ins. Co. of Hartford, 101 S.W.3d 64, 67 (Tenn. Workers' Comp. Panel 2000).

The claimant is forty-five years old with a high school education. She has worked for the employer for a number of years. On May 23, 2003, she injured her right knee when a chair rolled out from under her, causing the knee to strike a file cabinet and the concrete floor. A supervisor heard the commotion and saw the claimant on the floor after she had fallen. Although she felt some pain, she continued working with the belief she had not suffered any serious injury. When the pain and swelling persisted, she sought medical attention.

She initially visited Dr. Robert Walter Magee, who referred her to Dr. Carl Huff, an orthopedic surgeon. Dr. Huff ordered an MRI, which confirmed a torn meniscus in the injured knee. Dr. Huff performed arthroscopic surgery to remove the damaged meniscus in December 2003 and released the claimant to return to work on February 27, 2004. Dr. Huff, who has seen the claimant a number of times since the surgery for additional treatment of the injured knee, said the accident at work could have caused the injury and estimated the claimant's permanent anatomical impairment to be five percent to the leg. Dr. Joseph Boals examined the claimant and viewed her medical records. He opined the accident caused the torn meniscus and aggravated her pre-existing degenerative arthritis. Dr. Boals estimated her permanent anatomical impairment at twenty percent and said she would have permanent limitations on standing, walking, stooping and bending.

On September 30, 2003, the claimant learned from Dr. Huff that she had a permanent injury. She notified the employer on the same day. The employer referred her to an insurance adjuster, who denied the claim because her doctors reported that the knee was injured in an accident involving a four-wheeler. Our independent examination of the record reveals no evidence that the claimant was injured in, or even involved in, a four-wheeler accident, although the claimant told Dr. Magee that

she rode such a vehicle the evening before her first visit to him.

The employer contends the trial court erred in not dismissing the claim for failure to give notice. Immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, an injured employee must, unless the employer has actual knowledge of the accident, give written notice of the injury to his employer. Tenn. Code Ann. § 50-6-201(a). Benefits are not recoverable from the date of the accident to the giving of such notice, and no benefits are recoverable unless such written notice is given within 30 days after the injurious occurrence, unless the injured worker has a reasonable excuse for the failure to give the required notice. Tenn. Code Ann. Id. It is significant that written notice is unnecessary in those situations where the employer has actual knowledge of the injury. Raines v. Shelby Williams Indus., Inc., 814 S.W.2d 346, 349 (Tenn. 1991). The claimant's testimony that the employer's agent, her immediate supervisor, had actual knowledge of her accident is uncontradicted. Thus, from our independent examination of the record, we cannot say the trial court erred in refusing to dismiss the claim for lack of notice.

The employer further contends the evidence preponderates against the trial court's finding that the claimant's injury was caused by an accident at work. In order to establish that an injury was one arising out of the employment, the cause of the injury must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873 (Tenn. Workers' Comp. Panel 1996). In all but the most obvious cases, causation may only be established through expert medical testimony. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn.1991). In a workers' compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given incident "could be" the cause of a claimant's injury, when, from other evidence, it may reasonably be inferred that the incident was in fact the cause of the injury. McCaleb , 910 S. W. 2d at 415. Any reasonable doubt as to whether such an injury arises out of the employment should be resolved in favor of the employee. Tapp v. Tapp, 192 Tenn. 1, 236 S.W.2d 977 (1951). Dr. Magee testified the accident at work could be the cause of the claimant's injury. Dr. Boals unequivocally agreed. Our independent examination of the record reveals no medical evidence to the contrary. Under the circumstances, we conclude the evidence fails to preponderate against the trial court's finding that the injury arose out of the employment relationship between the parties.

The employer finally contends the award of benefits based on twenty percent to the right leg is excessive. The argument seems to be based on the fact that the claimant continues working and that her earnings have not diminished because of her injury. When an injured employee's partial disability is adjudged to be permanent, the employee is entitled to benefits based on a percentage of disability rather than the amount the employee is able to earn in her partially disabled condition. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988). In determining the extent of an injured worker's vocational disability, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). The extent of an injured worker's vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. Workers' Comp. Panel 1999). Ms. Pipkin is a high school graduate with limited vocational skills and training. She

weighs approximately 270 pounds and, because of her knee injury has difficulty climbing, kneeling, bending and stooping. From a careful consideration of all the facts and circumstances contained in the record, we conclude the evidence fails to preponderate against the trial court's award of permanent partial disability benefits.

The judgment is therefore affirmed. Costs, for which execution may issue if necessary, are taxed to the appellant and its surety.

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JOE C. LOSER, JR., SPECIAL JUDGE

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JUDGMENT 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 to the Appellant, Tennessee Electroplating, Inc., ant its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM