

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

January 29, 2007 Session

TAMMY NOONAN v. BRIDGESTONE/FIRESTONE, INC.

**Direct Appeal from the Circuit Court for Rutherford County
No. 50799 Robert Corlew, Circuit Judge**

**No. M2006-00586-WC-R3-CV - Mailed - August 8, 2007
Filed - November 8, 2007**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the 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. The defendant contends that the trial court erred in finding that plaintiff sustained a work-related injury to her right shoulder, in finding that plaintiff timely notified defendant of her injury, in awarding plaintiff fifty-two weeks temporary total disability benefits, and in determining that she suffered a 16% vocational impairment as a result of her injury. We disagree and therefore affirm the trial court's decision.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right;
Judgment of the Trial Court Affirmed**

CLAYBURN PEEPLES, SP.J., delivered the opinion of the court, in which JANICE HOLDER, J., and LAURENCE M. McMILLAN, JR., SP.J. joined.

Terry L. Hill and Stacey Billingsley Cason, Nashville Tennessee, for the appellant, Bridgestone/Firestone, Inc.

Neal Agee, Jr., Lebanon, Tennessee, for the appellee, Tammy Noonan.

MEMORANDUM OPINION

FACTUAL BACKGROUND

The plaintiff, Tammy Noonan, was a thirty-six-year-old employee of defendant Bridgestone/Firestone, Inc. ("Bridgestone"). At the time of trial she had worked there for nine and one-half years. Prior to her employment with Bridgestone, she served four years in the United States Navy as a transmitter of encrypted messages; she had also worked for the Whirlpool Corporation as a production worker.

At Bridgestone's tire-building facility, she worked in numerous positions, but for approximately six years prior to the incident giving rise to this claim she operated a machine known as an 8 X 10 booker, handling and sorting large pieces of green tire rubber. This job required constant pulling and tugging on raw rubber products and metal trays.

On August 10, 2003, she reported a work-related injury to her right arm to her supervisor, who gave her the option of either going to the company medical unit or continuing to work. This occurred at the end of a Friday shift, and she had previously scheduled vacation time the following week. Because of this, she did neither, choosing instead to go home and rest.

After her week long vacation, plaintiff returned to work. On August 22, 2003, after attempting to train a new worker on the booking machine, she notified her supervisor that she was experiencing significant pain in both her arms. The following day, she completed a report of injury and was given a choice of three physicians to see for treatment.

During the next several months plaintiff continued to work, with restrictions, and Bridgestone provided medical treatment for her from several practitioners, none of whom were able to treat her successfully.

On November 21, 2003, Bridgestone received a medical record which revealed that plaintiff had sought treatment from her primary care doctor for shoulder pain caused by sleeping in an awkward position on a futon sofa bed while visiting family members in April 2003. As a result of this information, Bridgestone denied her claim. She was then escorted from the facility.

Subsequently, plaintiff was referred by her personal physician, Dr. Tanzania Dooley, to Dr. Craig Ferrell, an orthopedic surgeon. Dr. Ferrell diagnosed her as having a bursal-sided rotator cuff tear and impingement syndrome of the right shoulder. After attempting unsuccessfully to treat her non-surgically, Dr. Ferrell performed arthroscopic surgery on her right shoulder on July 14, 2004. On November 22, 2004, he released her to return to work, but permanently restricted her to occasional pushing and pulling and no repetitive pushing or pulling over 25 pounds. Defendant honored these restrictions and assigned her to a new position, fork truck operator, which was her job assignment at the time of trial.

In her trial testimony, plaintiff acknowledged that she had first complained to her personal physician regarding shoulder pain in April, 2003, but said that she told her physician that it was pain from work which caused her to suffer while sleeping on a futon sofa bed. Plaintiff said she did not go to her physician for the pain in her shoulder, but simply mentioned it while being treated for thyroid disease. The physician, Dr. Tanzania Dooley, did not testify, but her notes were available to the court as part of the record. Those notes do not indicate any comments from the plaintiff regarding her arm hurting from work.

Dr. Ferrell, the treating physician, testified by deposition that he believed plaintiff's findings to be consistent with an overuse injury and that all three of her major symptoms (rotator cuff injury, tendinitis, and inflammation) were consistent with a repetitive injury. He assigned an impairment rating of 7% to the body as a whole, based on his review of all her medical records, as well as his own personal evaluation

The trial court heard live testimony from Dr. Lane Tippens. Dr. Tippens testified that he had examined plaintiff on September 19, 2003, in the Bridgestone clinic. He said that plaintiff consulted him for “global arm pain” and that she told him she had experienced the problem for more than a year. At that time, Dr. Tippens diagnosed plaintiff as having chronic upper extremity pain of unknown etiology. He examined the plaintiff again on October 20, 2003, and said that he found no problems attributable to her right shoulder on this, or on his previous examination of her. Her complaints, he said, were fairly global, involving multiple areas of both arms. He also stated that company records revealed that she had been treated in the company clinic in 1998 for right shoulder pain upon movement, when lifting and while doing repetitive motions.

Dr. Tippens conceded that he had not seen the reports of other examining physicians or the report of Dr. Ferrell, who performed plaintiff's surgery. He also testified that he had no idea what job plaintiff was performing at the time she was injured. He acknowledged that rotator cuff injuries generally occur as a result of trauma or some type of repetitive use and that working at a physically demanding job could cause such an injury. He had never seen or heard of anyone suffering such an injury from sleeping in an awkward position.

Dr. Tippens testified that he had examined the record of plaintiff's April 2003 visit with Dr. Dooley and an emergency room report from Dr. William Jekot, who had seen her there and had treated her on several occasions for the pain in her right shoulder. Based on these records, and his own examinations, Dr. Tippens testified that he believed plaintiff sustained an injury to her right shoulder on April 30, 2003, while sleeping on a Futon sofa bed.

Dr. James Rungee, an orthopedic surgeon, testified by deposition that he saw plaintiff in October of 2003. He x-rayed her right shoulder and reviewed x-rays of her wrists and elbows and found them all to be normal. That led him to believe that her complaints were from overuse. He felt she was performing in a job beyond her physical capacity. He testified that in his opinion she did not have any impairment according to the most recent edition of the AMA Guides.

At the conclusion of the trial, the court found plaintiff's shoulder injury to be work related and that she gave timely and sufficient notice to the company thereof. The court awarded 16% permanent partial disability and fifty-two weeks of temporary total disability benefits, less credit for the amount of accident and sickness pay received by plaintiff during that time.

ANALYSIS

Bridgestone raises the following issues on appeal: 1) The court below was incorrect in holding that plaintiff's injury was work-related; 2) Plaintiff's notice of her injury was insufficient to apprise the defendant of the injury she had suffered; 3) The court erred in awarding fifty-two weeks of temporary total disability benefits; and 4) The award of 16% permanent partial disability was excessive.

In examining the trial court's decision we begin by acknowledging that for injuries occurring on or after July 1, 1985, appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Under this standard, a reviewing court is required to weigh in more depth the

factual findings and conclusions of the trial court in a workers' compensation case. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 773 (Tenn. 2000). When the trial judge has seen and heard witnesses' testimony, however, considerable deference must be accorded on review to the trial court's findings of credibility and weight given to that testimony. Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992). Thus, we are to presume the correctness of the trial court's findings unless the preponderance of the evidence is otherwise. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987).

In addition to the medical proof in this case, we must also consider the testimony of lay witnesses. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). Both plaintiff and Dr. Tippens testified personally, and in such cases this court must give considerable deference to the trial court's findings regarding their credibility and the proper weight to assign to their conclusions. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 1999). In that regard, Plaintiff testified that she did not feel that the incident on the futon sofa bed injured her arm, but rather made her previously existing injury hurt.

While it is true that medical proof that an injury was caused in the course of the employee's work must not be so speculative or uncertain regarding the cause of the injury that attributing it to the plaintiff's employment would be an arbitrary determination or a mere possibility, it is entirely proper for a trial judge to predicate an award on medical testimony to the effect that a given incident "could be" the cause of a plaintiff's injury when he or she also has before the court lay testimony from which it may reasonably be inferred that the incident was, in fact, the cause of the injury. Clarendon v. Baptist Mem'l Hosp., 796 S.W.2d 685, 688 (Tenn. 1990). Viewing the medical proof in conjunction with the lay testimony, the trial judge was persuaded that there was a rational connection between the plaintiff's shoulder injury and her employment, thus finding that her condition arose out of and occurred in course of her employment. Based upon our independent review of the record, we cannot say that the evidence preponderates against that finding.

We next turn to the question of whether or not plaintiff timely notified defendant of her work-related injury. Tennessee Code Annotated section 50-6-501 (2005) provides as follows:

(a) Every injured employee or such injured employee's representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, and the employee shall not be entitled to physician's fees or to any compensation that may have accrued under the provisions of the Workers Compensation Law, compiled in this chapter, from the date of the accident to the giving of such notice, unless it can be shown that the employer had actual knowledge of the accident. No compensation shall be payable under the provisions of this chapter, unless such written notice is given the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.

(b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or such injured employee's

representative shall provide notice to the employer of the injury within thirty (30) days after the employee:

- (1) Knows or reasonably should know that such employee has suffered a work-related injury that has resulted in permanent physical impairment; or
- (2) Is rendered unable to continue to perform such employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

Bridgestone argues that plaintiff never reported an injury to her right shoulder, that she complained instead that her "arms, elbows, wrist and hands have been hurting . . .," and that thus, her notice was inadequate. Bridgestone further maintains that once plaintiff discovered her rotator cuff injury she had an obligation to inform defendant, even though her claim had already been denied. There is no question that plaintiff informed her supervisor of the pain she experienced on August 10, 2003.

In Quaker Oats Co. v. Smith, 574 S.W.2d 45, 48 (Tenn.1978), the Tennessee Supreme Court addressed a similar argument. In that case, the employee reported to her supervisor that she had injured her legs in a fall but did not mention any injury to her back. The employer argued that this was not sufficient to satisfy the notice requirement for an injury to her back. The Court rejected that argument, stating:

[W]e know of no requirement that an employee give notice of each of several injuries he received in an on-the-job accident. He is in compliance with the statutory requirement of notice if he notifies the employer of the accident and the fact that he has suffered an injury. The nature and extent of the employee's injuries, and the issue of medical causation, usually come to light in the course of treatment of the employee's injuries.

Applying this standard, Ms. Noonan complied with the statutory requirements when she informed her supervisor of her injury on August 10, 2003. Once she reported that injury she had a right to depend on Bridgestone's authorized medical practitioners to accurately diagnose her condition. She cannot be blamed for their failure to do so.

Defendant next claims that the court erred in awarding the plaintiff temporary total disability benefits for fifty-two weeks from November 21, 2003, the date her claim was denied, until November 21, 2004, the date Dr. Ferrell released her to return to work. This position is based upon the contention that her failure to give specific notice of her injury precluded such recovery. For reasons previously set forth, we find this issue without merit.

The final issue raised in this appeal is whether the evidence also preponderates against the trial judge's finding that the plaintiff suffered a 16% vocational impairment. It is appropriate, when determining the correct percentage of disability to the body as a whole, to consider both medical and other factors affecting employability and earning capacity. The trial court is entitled to determine the extent of disability from all the evidence and may consider many pertinent factors. Those factors

include job skills, education, training, duration of disability and job opportunities for the disabled, in addition to the anatomical disability testified to by medical experts. Employers Ins. Co. of Ala. v. Heath, 536 S.W.2d 341, 342 (Tenn. 1976), Jaske v. Murray Ohio Mfg. Co., 750 S.W.2d 150, 151 (Tenn. 1988).

In addition to the medical testimony, the trial court heard evidence from the plaintiff regarding her educational experience and skills. Among other things, she testified that due to the restrictions placed upon her, she could no longer perform any of the jobs she had previously held at Bridgestone or elsewhere. She also said that her shoulder injury still causes her pain when she does housework or mows her yard and that she is no longer able to swim, which she once did for exercise.

Considering the evidence in its entirety, we cannot say that the evidence preponderates against the trial court's finding that the plaintiff suffered a 16% permanent partial disability.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs are taxed to the appellant, Bridgestone/Firestone, Inc., and its surety, for which execution may issue if necessary.

CLAYBURN PEEPLES, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TAMMY NOONAN v. BRIDGESTONE/FIRESTONE, INC.

**Circuit Court for Rutherford County
No. 50799**

No. M2006-00586-SC-WCM-CV - Filed - November 8, 2007

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Bridgestone/Firestone, Inc. pursuant to Tennessee Code Annotated section 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 Bridgestone/Firestone, Inc., and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Janice M. Holder, J., not participating

