

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

AT JACKSON
(August 29, 1996 Session)

MARY BENSON,)
)
) Plaintiff-Appellee,)
) Hon. Neal Small,
) Chancellor.
)
 v.)
) No. 02S01-9601-CH-00002
)
) THE KROGER COMPANY and)
) CNA INSURANCE COMPANY,)
)
) Defendants-Appellants.)

FILED

November 18, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

For Appellants:

S. Newton Anderson
Thomas F. Preston
Memphis, Tennessee

For Appellee:

R. Sadler Bailey
Andrew C. Clarke
Bailey & Clarke
Memphis, Tennessee

MEMORANDUM OPINION

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
F. Lloyd Tatum, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer and its insurer contend (1) the award of permanent disability benefits based on one hundred percent to both arms is excessive, (2) it was error to award certain medical expenses, (3) it was error to award discretionary costs, and (4) it was error to award judgment against both defendants. The employee contends by cross appeal (1) the trial court erred in limiting the recovery for permanent partial disability to four hundred weeks, (2) the trial court erred in its award of temporary total disability benefits, (3) the trial court erred in allowing the employer credit for temporary total disability benefits paid, and (4) the appeal is frivolous. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant, Benson, is 53 years old with a high school education and experience as a meat wrapper in grocery stores. She has no skills or training. She gradually developed bilateral carpal tunnel syndrome while so employed at Kroger.

She had carpal tunnel surgery on her left arm in November of 1992 and returned to work at Kroger in January of 1993 as a meat wrapper. She continued to have problems with her hands and became disabled to perform her duties, which included heavy lifting and repetitive use of both hands in a cold environment. Medical benefits were discontinued in July of 1994.

She retains a ten percent permanent impairment to her left arm and twenty percent impairment to her right arm, superimposed upon a pre-existing vascular disorder. As a result of the combination of the compensable injury and pre-existing condition, she is medically restricted from repetitive use of the hands, heavy lifting or working in a cold environment.

The trial court awarded permanent partial benefits for four hundred weeks, based on one hundred percent permanent disability to both arms, medical expenses of two unauthorized physicians and future medical benefits. 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. section 50-6-225(e)(2). Where the trial judge has seen and heard the witnesses, especially if issues of credibility are involved, considerable deference must be accorded those circumstances on review. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

Permanent Disability Benefits.

Where a compensable injury causes a permanent and total loss of use of a scheduled member, benefits are payable for the number of weeks established by a statutory schedule. Tenn. Code Ann. section 50-6-207(3)(a)(II). Where, as here, the worker's only injury is to a scheduled member, the worker may receive only the amount of compensation provided by the schedule for her permanent disability. Only v. National Union Fire Ins. Co., 785 S.W.2d 348 (Tenn. 1990).

The schedule provides for an award of 400 weeks for the total loss of use of both arms. Thus, the trial court did not err in limiting the award for permanent partial disability benefits to 400 weeks. Moreover, we do not find the evidence to preponderate against the award, which is thus affirmed.

Medical Expenses.

When a covered employee suffers a compensable injury, the employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Tenn. Code Ann. section 50-6-204. The proof in this case establishes that the employer discontinued, failed or refused to provide reasonably necessary medical care, as required.

It is consequently liable for the reasonably necessary care provided by physicians chosen by the claimant, if the charges were reasonable. The undisputed proof is that the charges were reasonable. The award of medical expenses is affirmed.

Temporary total disability.

For an injury to both arms, the schedule provides for the payment of benefits at the employee's compensation rate for four hundred weeks. Such benefits are payable in addition to any temporary total disability benefits to which the injured worker may be entitled, provided the total amount of benefits does not exceed the maximum allowable compensation. Tenn. Code Ann. section 50-6-205(b)(1).

The maximum allowable compensation in effect on the date of Ms. Benson's injury was 400 hundred weeks times the maximum weekly benefit. Tenn. Code Ann. section 50-6-102(6)(c). The maximum weekly benefit on the

date of injury was sixty-six and two-thirds percent of the employee's average weekly wage. Because she will receive that maximum in permanent disability benefits, the chancellor correctly allowed the employer credit for temporary disability benefits paid and disallowed any additional temporary disability benefits.

Discretionary Costs.

The employer specifically contends the trial court erred by requiring it to pay the fee of a specialist to whom the claimant was referred for the purpose of evaluating her injury and for the cost of obtaining the evidential depositions of that specialist and another specialist who actually treated her. In a workers' compensation case, fees charged by a specialist to whom the employee was referred for giving testimony by oral deposition relative to the claim shall, unless the interests of justice requires otherwise, be considered part of the costs of the case, to be charged against the employer when the employee is the prevailing party. Tenn. Code Ann. section 50-6-226(c)(1).

Additionally, by Tenn. R. Civ. P. 54.04(2), reasonable and necessary court reporter expenses for depositions or trials, and reasonable and necessary expert witness fees for depositions or trials, are recoverable as discretionary costs. The chancellor did not abuse his discretion with respect to discretionary costs.

Frivolous Appeal.

When it appears that an appeal in a workers' compensation case is frivolous or taken solely for delay, the reviewing court may, upon motion of either party or on its own initiative, award damages against the appellant and in favor of the appellee without remand, for a liquidated amount. Tenn. Code Ann. section 50-6-225(i). The panel is not persuaded this appeal is frivolous or solely for delay.

Interest may be awarded, however, on accrued but unpaid benefits, from the date of the trial court's judgment. Tenn. Code Ann. section 50-6-225(h)(1); West American Ins. Co. v. Montgomery, 861 S.W.2d 230 (Tenn. 1993). On remand, the trial court may entertain a motion for an award of such interest.

Both Defendants.

Before the trial of this case, CNA filed and served a motion to dismiss

because it was not the insurer of Kroger but merely serviced its claims. We do not find in the record that the motion was ever presented to, or acted upon by, the chancellor. This panel's jurisdiction is appellate only, and we are not at liberty to act upon a motion that was never presented to the trial court.

The judgment of the trial court is accordingly affirmed and the cause remanded to the trial court. Costs on appeal are taxed to the defendants-appellants.

Joe C. Loser, Jr., Judge

CONCUR:

Lyle Reid, Associate Justice

F. Lloyd Tatum, Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

MARY BENSON,)	SHELBY CHANCERY
)	NO. 104786-1 R.D.
Plaintiff/Appellee,)	
)	Hon. Neal Small,
vs.)	Chancellor
)	
THE KROGER COMPANY and,)	NO. 02S01-9601-CH-00002
CNA INSURANCE COMPANY,)	
)	
Defendants/Appellants.)	AFFIRMED.

<p>FILED</p> <p>November 18, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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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 will be paid by Appellants, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 18th day of November, 1996.

PER CURIAM

(Reid, J., not participating)

