

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE
(March 6, 1996 Session)

FILED
October 15, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

VANESSA PHILLIPS,)
)
Plaintiff-Appellee,)
v.)
PENNSYLVANIA NATIONAL)
INSURANCE COMPANY,)
Defendant-Appellant.)

JEFFERSON CIRCUIT
Hon. Ben W. Hooper, II,
Judge
No. 03S01-9512-CV-00128

For Appellant:

J. Brent Nolan
Clinton, Tennessee

For Appellee:

P. Richard Talley
Dandridge, Tennessee

MEMORANDUM OPINION

Members of Panel:

Penny J. White, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

REVERSED AND DISMISSED

Loser, Judge

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 contends (1) that the evidence preponderates against the trial court's finding that the employee suffered an injury by accident in the course of her employment, (2) that the evidence preponderates against the trial court's finding that the employee's permanent impairment is causally related to her employment, (3) that the trial court erred in awarding medical expenses of an unauthorized provider, and (4) that the trial court abused its discretion with respect to the award of discretionary costs. The panel concludes that the judgment should be reversed, for the reasons set forth below.

The employee or claimant, Vanessa Phillips, now Vanessa Dunkhase, is a thirty-three year old graduate of Jefferson County High School, who was employed as a boarder for Tennessee Machine & Hosiery. The employer manufactures socks, among other things. In the production process, damp socks are delivered in boxes or buggies to a pressing machine, where boarders remove them one at a time and place them on a form to be machine dried and pressed before being packaged for delivery and sale.

On February 2, 1993, the claimant was treated by a dentist for an abscessed tooth. The next day, she asked to be excused from work, but the request was denied by the employer.

After working a full shift for another employer, Hardee's, she reported to work at approximately 3:30 p.m. About an hour later, she ran to the bathroom crying. Another employee checked on her but she did not claim any work related injury. The co-worker summoned the claimant's supervisor, Jim Sullivan. The claimant told Sullivan that she was sick with an upset

stomach and that her back had been hurting all day. She was excused from working the rest of the shift.

The next day, the claimant sought out Marta Cogburn, a nurse practitioner at the Parrotsville Clinic. She told Ms. Cogburn that she had been in pain since awakening on the previous day, but did not relate any accident at work or otherwise. We find no credible proof in the record of a sudden onset of pain, repetitive trauma resulting in anatomical change, aggravation of a pre-existing condition or fortuitous event at work.

On February 12, 1993, the claimant contacted Sullivan to say that she wished to file a workers' compensation claim. Sullivan arranged a meeting between her and the plant manager, Bob Lane. That meeting occurred on February 16, 1993 and, although the claimant still did not report any work related accident, she was given a list of doctors from which to choose a treating physician. She selected Dr. Wayne Page, who treated and immediately released her to return to work..023

The employer's insurer, Pennsylvania National, provided a second list of doctors, from which the claimant selected Dr. Archer Bishop. Dr. Bishop saw her once and released her to return to work. Without consulting the employer or its insurer, the claimant visited several other doctors, not on either list.

Doctor Charles Gouffon found nothing to justify her complaints of pain. Dr. William Gutch assessed her permanent impairment at five percent and, on her history, opined that her pain was caused by her work for the employer. He later increased his opinion of permanent impairment to nine percent.

Dr. John H Kinser assessed her permanent impairment at nineteen percent to the body as a whole from loss of motion. Dr. Gilbert L. Hyde assessed her permanent impairment ten percent to the whole body based on pain.

Expert opinions of her industrial disability range from none to fifty-seven percent, depending on her restrictions, but there was none that she could not return to work for the employer as a boarder, even with her restrictions. The claimant has returned to her job at Hardee's.

The trial judge found that the claimant had suffered a compensable injury and awarded the claimant her medical expenses and permanent partial disability benefits based on thirty-five percent to the body as a whole. Appellate review is de novo on 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). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991).

Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee, and occupational diseases arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. section 50-6-102(a)(5). Ms. Phillips is seeking benefits for a claimed injury by accident.

An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of

fortuitous circumstances. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). The term "injury" includes whatever lesion or change to any part of the system that produces harm or pain or lessened facility of the natural use of any bodily activity or capability. Id. The panel finds that the evidence preponderates against a finding that the claimant suffered an accidental injury at Tennessee Machine & Hosiery on February 3, 1993, as claimed.

Since there was no injury by accident, it is immaterial whether the claimant's permanent impairment is causally related to her employment.

If the claimant's injury were found to be compensable, the employer or its insurer would be required to provide, free of charge to the employee, all medical care reasonably necessary on account of the injury. Tenn. Code Ann. section 50-6-204. However, the employee is required to accept the medical care provided by the employer and must consult with the employer before choosing a treating physician, and, unless the employee has a reasonable excuse for the failure to consult with the employer first, the injured employee may be responsible for her own medical expenses. Emerson Electric Co. v. Forrest, 536 S.W.2d 343 (Tenn. 1976). The evidence preponderates against any finding that the claimant had the required reasonable excuse.

The judgment of the trial court is accordingly reversed and the case dismissed. Costs on appeal are taxed to the plaintiff-appellee.

Joe C. Loser, Jr., Judge

CONCUR:

Penny J. White, Associate Justice

William H. Inman, Senior Judge

