IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

FILED

January 17, 1997

Cecil W. Crowson
Appellate Court Clerk

BARBARA JENKINS, Plaintiff/Appellee	)	MACON COUNTY CRIMINAL COURT
v.	)	HON. J.O. BOND, JUDGE
YASUDA FIRE & MARINE INSURANCE COMPANY, Defendant/Appellant.	)	No. 01S01-96021-CR-00036 (No. 92-318 below)

FOR APPELLANT:

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FOR APPELLEES:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., CHIEF JUSTICE, SUPREME COURT
WILLIAM H. INMAN, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

REVERSED AND DISMISSED RUSSELL, SPECIAL JUDGE

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 CASE

The dispositive issue in this case is whether or not the suit is barred by the statute of limitations. The trial court tried this issue separately on December 23, 1993. After hearing proof relative to this issue, the court recessed the trial and took the statute of limitations issue under advisement. A year and a half later, on May 14, 1995, the court ruled that the suit was not barred by the statute of limitations. The trial was resumed on September 27, 1995, and resulted in a judgment for a 45% permanent partial disability to the body as a whole.

The employee was injured on the job on February 13, 1991. She injured her shoulder while lifting. This suit was not filed until July 31, 1992. To counter the obvious statute of limitations problem the complaint alleged that the plaintiff "has learned that her injuries will be disabling and that she learned same within one year previous to the filing of this complaint".

The trial court, in overruling the statute of limitations defense, based the ruling upon this finding:

> This worker did not know that the work injury was not a temporary injury but permanent in character. In fact, the company doctor told her the injury was temporary. She was not afforded a list of three (3) doctors, but was "sent" to Dr. Lu Ponce, who x-rayed her and provided ultrasound treatments. Drs. Hearn and Ferrell did not attribute any permanent disability to her work injury. It was not until April 1993 that the plaintiff was diagnosed with a condition that was job related, and that the condition was permanent and disabling in nature.
>
> The employee was reasonably diligent in her quest for medical help. She relied on the medical experts who treated her. She had no reason to believe her injuries were permanent.
>
> I find from all of the evidence that the employee was not informed any time before April 1993 that her injury at work caused her permanent disability and restrictions. The statute of limitation was tolled and her suit was timely filed.

Note that the trial court found that it was not until April 1993 that the plaintiff was informed that her injury at work caused her permanent disability and restrictions; but, as heretofore noted, this suit was filed on July 31, 1992. It is alleged in the complaint:

> 4. As a result of said injury, plaintiff has suffered temporary and <u>permanent</u> <u>disability</u> <u>to</u> <u>the</u> <u>body</u> <u>as</u> <u>a</u> <u>whole</u> * * *
>
> 5. As a result of the aforenoted injury to plaintiff, she is entitled to the worker's compensation benefits of this State as provided for by statutes.
>
> * * * * * *
>
> 7. Plaintiff has not reached her maximum

> medical improvement at this time and plaintiff has learned that her injuries will be disabling and that she learned same within one year previous to the filing of this complaint.
>
> WHEREFORE PLAINTIFF PRAYS:
>
> * * * * * *
>
> 4. That plaintiff be awarded temporary total disability from the date of her injury until she reaches maximum improvement, temporary partial disability, permanent partial disability, permanent total disability, * * *

The evidence presented upon the trial was that the plaintiff, then 46 years old, had nine years of formal schooling. Her work history was mostly as a homemaker, sewing machine operator and assembly line worker. In May of 1990 she fell at home and fractured her collarbone. A subsequent x-ray revealed a callus over the break, an indication of healing. She was employed by Yamakawa Manufacturing Corporation of America, insured by the defendant, in November of 1990, six months after having broken her collarbone in a fall at home. She testified that she worked without pain until February 11, 1991, at which time she felt a "pop" in the area of her collarbone halfway between her neck and shoulder.

She reported this injury to her employer. She was not offered a panel of physicians, but was sent to a Dr. Ponce. He diagnosed an overuse injury to her shoulder and a muscle sprain. She was off work February 13 through 17, 1991; and worked with restrictions until March 18, 1991. She quit her job in May of 1991 because of continued pain. She then went to Dr. Alan S. Henson, M.D., an orthopaedic surgeon, on July 3, 1991, upon the recommendation of a friend, complaining of a left shoulder girdle problem; i.e., pain predominantly in the clavicle or collarbone

area. She gave a history of having fractured the collarbone in April 1990, and said nothing about any work injury. The medical record of Dr. Ponce, the original treating physician for the work injury, reflected that she had a muscle strain in the left shoulder girdle, and x-rays at that time showed the old clavicle fracture and non-union. Dr. Henson found her current problem to be non-union of the broken collarbone, and this was "absolutely not" caused by the work injury. He noted that she had been previously treated by another orthopaedic surgeon, and his records indicated noncompliance by the patient with the physician's instructions, which could have contributed to the non-union.

Dr. M. Craig Ferrell, M.D., another orthopaedic surgeon, provided a second opinion at Dr. Henson's request. It was Dr. Ferrell's opinion that the non-union of the fractured collarbone probably dated from the time of the original fracture caused by the fall at home. He diagnosed non-union, brachial plexus irritation and work-related tenderness of the shoulder. The plaintiff saw Dr. Ferrell on July 16, 1991, more than a year before she filed suit. She discussed with this physician her trapezius strain that was "workmen's comp related". She told this doctor that this "caused her trouble out in the shoulder itself, with tenderness over the front of the shoulder, not over the clavicular non-union".

It was Dr. Ferrell's opinion that on July 16, 1991, she had a non-union that developed as a result of her fracture from her fall at home about a year prior to seeing me, and that was "the reason she came to see me was that non-union". It was his unequivocal opinion that the work injury muscle strain could temporarily aggravate the non-union site, but not permanently.

Dr. Richard Fishbein, M.D., an orthopaedic surgeon who practices in Tullahoma, Tennessee, examined the plaintiff on April 8, 1993, at the behest of her attorney, nearly a year after suit was filed. He opines that she has a 26% anatomical disability to the body as a whole as a result of the work injury of February 13, 1991. He largely ignores the fact that her underlying problem, the fractured clavicle and subsequent non-union, pre-dated the muscle strain and was not work related. His opinion is in conflict with all of the prior treating physicians.

CONCLUSION

We review the record de novo with a presumption of correctness of the findings below, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated Section 50-6-225 (e)(2) (1991). This standard of review requires this court to weigh in depth the factual findings and conclusions of the trial court. Humphrey v. David Witherspoon, Inc., 734 S.W. 2d 315 (Tenn. 1987).

The overwhelming preponderance of the evidence is that the plaintiff's work injury was simply a muscle strain, that it temporarily aggravated a pre-existing non-united fracture of the plaintiff's clavicle, which fracture had its genesis in a fall at home.

The attempt to avoid the facial bar of the statute of limitations by showing a lack of timely knowledge of the nature and extent of the injury fails because it is clear that whatever

permanent disability the plaintiff has is the result of her fall at home and not the later lifting accident on the job. She was at all times aware of her true condition, as it is defined by the treating medical specialists. The "knowledge" that her disability is all work related imparted to her by Dr. Fishbein is contrary to the preponderance of the evidence.

The judgment of the trial court is reversed and the suit dismissed. The arguments for the tolling of the statute of limitations are not supported by the greater weight of the evidence. Costs are assessed to the appellee.

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WILLIAM S. RUSSELL, RETIRED JUDGE

CONCUR:

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ADOLPHO A. BIRCH, JR.,
CHIEF JUSTICE

_____
WILLIAM H. INMAN, SENIOR JUDGE

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BARBARA JENKINS,	}	MACON CRIMINAL
	}	No. 92-318 Below
Plaintiff/Appellee	}	
	}	Hon. J. O. Bond,
vs.	}	Judge
	}	
YASUDA FIRE & MARINE INSURANCE COMPANY,	}	No. 01S01-9602-CR-00036
	}	
Defendant/Appellant	}	REVERSED AND DISMISSED.

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 Plaintiff/Appellee for which execution may issue if necessary.

IT IS SO ORDERED on January 17, 1997.

PER CURIAM

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