IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(January 23, 1997 Session)

RANDY F. SHADDEN,	)	FENTRESS CHANCERY
	)	
Plaintiff-Appellee,	)	Hon. Billy Joe White,
	)	Chancellor.
v.	)	
	)	No. 01S01-9607-CH-00148
ITT HARTFORD INSURANCE COMPANY,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Blakely D. Matthews
Leigh A. Buckley
Cornelius & Collins
Nashville, Tennessee

For Appellee, Randy F. Shadden:

Michael A. Walker
Jamestown, Tennessee

For Appellee, Second Injury Fund:

Charles E. Burson
Attorney General and Reporter

Sandra E. Keith
Assistant Attorney General
Nashville, Tennessee

M E M O R A N D U M O P I N I O N

Members of Panel:

Adolpho A. Birch, Jr., Chief Justice, Supreme Court
Robert S. Brandt, Senior 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's insurer, Hartford, argues (1) the evidence preponderates against the trial court's finding that the employee or claimant, Shadden, suffered a work related injury, (2) the evidence preponderates against the trial court's award of permanent total disability benefits and (3) the trial court erred in awarding medical expenses not disclosed in response to discovery requests and not "properly proven at trial." The Second Injury Fund (the Fund), which was made a party by an amended complaint, contends the evidence preponderates against the trial judge's finding that the claimant is permanently and totally disabled. As discussed below, the panel has concluded the judgment should be affirmed.

As a result of a previous compensable injury in 1984, while working for another employer in another state, the claimant was awarded benefits equating to fifty-three percent to the body as a whole. In a vehicular accident in 1989, which was not work related, he suffered spinal injuries which necessitated the insertion of metal rods in his back. The rods were removed in 1994. The employer at all relevant times knew of his pre-existing disabilities. He continued to work with pain and received a number of awards for sales excellence.

In January of 1995, he was sales manager for a company in Cookeville which sold copiers. There is conflicting evidence with respect to the exact date of the occurrence, but during the week of January 9, 1995, the claimant noticed a truck driver unloading a large copier, weighing over six hundred pounds, from a truck. He attempted to assist the driver with the unloading when something "popped" in his back and he felt immediate pain. He told a co-worker immediately about the occurrence and had her write it down. He also gave timely written notice.

The co-worker testified she had seen the claimant with his hands on the copier, one hand on the side and one on the bottom. The same day, the claimant drove to Fentress County General Hospital's emergency room where he received a shot to relieve his pain. He may or may not have also played racquetball that afternoon, but there is no medical evidence that his new injury was from something other than the lifting incident. He also worked for a few days immediately following the injury but was soon forced to quit because of severe pain.

The treating physician, Dr. Leonard Carroll, who was familiar with the claimant's medical history, testified the claimant suffered a new spinal cord injury causally related to the lifting incident and an exacerbation of the pre-existing conditions and that, as a result, he developed, in addition to severe low back pain, bladder incontinence and depression to the extent of being suicidal.

The doctor estimated the claimant's permanent impairment at fifty-five percent to the body as a whole, from appropriate guidelines and without consideration of the mental injury. Dr. Carroll is a board certified general surgeon.

Dr. Everette Howell, a neurosurgeon, saw the claimant both before and after the occurrence in question. Dr. Howell, testifying for the defendants by deposition, said he observed palpable low back muscle spasms and positive bilateral straight leg raising test results after the incident, but not before, although the results of a post-injury MRI scan were similar to those of a CT scan and myelogram done in 1994. He diagnosed nerve compression or compression or irritation of the ligaments in the claimant's back.

Dr. Ray Hester, a pain management specialist, added "fibromyalgia" to the list of diagnoses. Dr. Todd Moldawer of the Southern California Orthopedic Institute found probable "arachnoidal changes." A vocational expert, Norman Hankins, estimated the claimant's vocational disability at one hundred percent.

The trial judge found the claimant's injury to be work related and that the claimant was permanently and totally disabled. He also awarded, as medical benefits, medical expenses in the sum of $6,689.56 and reasonable and necessary future medical benefits. Appellate review is de novo upon the record of the trial court, accompanied by a presumption 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 and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

(1)

Unless admitted by the employer, the employee has the burden of proving, by competent evidence, every essential element of his case. Mazanec v. Aetna Ins. Co., 491 S.W.2d 616 (Tenn. 1973). He must prove, among other things, that his injury was one arising out of the employment. In order to establish that an injury was one arising out of the employment, the cause of the injury must be proved; and if the claim is for permanent disability benefits, permanency must be proved. In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988).

As the trial judge noted in his findings, "this case resolves into a question of credibility." Since virtually all of the claimant's proof was in the

nature of oral testimony, which the trial judge accepted as true, rejecting Hartford's contention that the claimant "staged" his injury, and from our independent examination of the evidence and a consideration of the deference we are required to give the findings of the trial judge under the circumstances, we cannot say the evidence preponderates against the trial judge's findings that the claimant's injury was work related, or one arising out of the employment, and that the claimant is permanently disabled. The findings are clearly supported by the testimony of the primary physician.

(2)

When an injury, not otherwise specifically provided for in the Workers' Compensation Act, totally incapacitates a covered employee from working at an occupation which brings him an income, such employee is considered totally disabled. Tenn. Code Ann. section 50-6-207(4)(B). Moreover, the employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs far greater disability than if he had not had the pre-existing conditions. Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991). From our independent examination of the evidence, we cannot say the evidence preponderates against the finding of the trial judge that the claimant is permanently and totally disabled, as defined by the statute.

(3)

When a covered employee suffers a compensable injury, his employer or employer's insurer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of such injury. The only limitation as to the amount of the employer's liability for such care is such charges as prevail for similar treatment in the community where the injured employee resides. Tenn. Code Ann. section 50-6-204.

Where, as here, the employer or its insurer fails or refuses to provide such care, it may be liable for the expenses incurred by the injured employee, if those expenses are shown to have been both reasonable and necessary. There is ample proof in the record that the expenses awarded as medical benefits were both reasonable and necessary.

Hartford further contends, however, that the trial judge should have excluded such proof because the claimant did not disclose all his medical expenses in response to a discovery request. A trial judge does have the discretion to impose such a sanction for failure to comply with a discovery

request, but, under all the circumstances, we are persuaded the trial judge did not abuse his discretion by allowing the proof.

Finally, the claimant contends that he is entitled, by virtue of Tenn. Code Ann. section 50-6-207(4)(A), to lifetime disability benefits from the employer or its insurer. We do not know how long the claimant will live, but our view of the section, as it is presently constituted, does not persuade us that any court has the authority to make such an order.

The judgment of the trial court is affirmed. Costs on appeal are taxed to ITT Hartford Insurance Company.

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Joe C. Loser, Jr., Judge

CONCUR:

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Adolpho A. Birch, Jr., Chief Justice

_____

Robert S. Brandt, Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

RANDY F. SHADDEN,	}	*FENTRESS CHANCERY*
	}	*No. 95-3 Below*
Plaintiff/Appellee,	}	
	}	*Hon. Billy Joe White,*
vs.	}	*Chancellor*
	}	
ITT HARTFORD INSURANCE	}	
COMPANY,	}	*No. 01S01-9607-CH-00148*
	}	
Defendant/Appellant	}	*AFFIRMED.*

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 Defendant/Appellant and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on May 13, 1997.

PER CURIAM