IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 23, 1997

FILED

January 15, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

EDDIE FREEMAN,	) SHELBY CIRCUIT
	) NO. 52212
Plaintiff,	)
	) Hon. Robert A. Lanier, Judge
v.	)
	)
KIMBERLY-CLARK CORPORATION,	) NO. 02S01-9612-CV-00106
	)
	)
Defendant.	)

For Plaintiff:

Dixie White Ishee
Harkavy, Shainberg, Kosten & Kaplan
530 Oak Court Dr., Suite 350
Memphis, TN 38117

For Defendant:

Carol M. Hayden
McDonald Kuhn
80 Monroe Ave., Suite 550
Memphis, TN 38173-0160

MEMORANDUM OPINION

Members of Panel:

JANICE M. HOLDER, JUSTICE
HEWITT P. TOMLIN, JR., SENIOR JUDGE
DON R. ASH, JUDGE

MODIFIED IN PART AND
REVERSED IN PART

TOMLIN, SENIOR 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. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer, Kimberly-Clark, appeals and contends that the evidence preponderates against the trial court's findings (1) in ordering the extension of temporary total disability benefits through July 1996, and (2) in ordering the defendant to pay the medical expenses and deposition costs resulting from Plaintiff's treatment by and the deposition of Dr. Berry. The panel concludes that the judgment should be modified in part and reversed in part.

Edward Freeman ("Plaintiff") was employed by Kimberly-Clark ("Defendant") for some eight years as a maintenance insulator. While lifting a load of cardboard boxes during work hours he suffered an injury to his neck. His treating physician determined that Plaintiff had ruptured two discs in his neck which required surgery. Following surgery, due to undetermined causes, fusion plugs that had been inserted into Plaintiff's neck during the first surgery slipped out of place, causing him to have to undergo two additional surgeries to correct the problem. In order to prevent future slippage of the fusion plugs, Plaintiff was fitted with a halo traction device following his third surgery for immobilization of his head and neck. This device was secured by steel pins screwed through the scalp and into the outer surface of the skull.

Following the third surgery in August of 1992, one of Plaintiff's treating physicians, Dr. Lindermuth, released Plaintiff into the care of the other treating physician, Dr. Meredith, who after treating Plaintiff for slightly over a year determined that he had reached maximum medical improvement as of September 7, 1993. During this same period of time Plaintiff was referred by his counsel to Dr. McAfee for pain management and evaluation. On October 15, 1993 Dr. McAfee produced a plan for Plaintiff to gradually taper off his therapy and medication over the course of approximately one month. Dr. McAfee testified that in his opinion Plaintiff had achieved maximum medical improvement at that time. He encouraged Plaintiff "to think positive toward going back to work by the end of December of 1993."

Since 1989, Plaintiff had been under the care of Dr. Harris, a licensed psychiatrist. From that time through May of 1992, Dr. Harris treated Plaintiff for

depression and borderline personality disorder, a non-work related mental disorder that had no significant effect on his employment with Defendant. Following his injury and ensuing surgeries, Plaintiff developed symptoms of Post-Traumatic Stress Disorder (PTSD) which caused him to relive the anxiety and fear of his injury and subsequent treatment. It is undisputed that PTSD is a compensable injury under the workers' compensation laws.

In his two depositions, given November 11, 1993 and April 22, 1996, Dr. Harris testified that as part of his treatment he had hospitalized Plaintiff to be able to manage his treatment and medications more closely and to develop a firmer diagnosis of his condition. During this hospitalization period, Dr. Harris asked Dr. Neal, a psychologist, to make an independent evaluation of Plaintiff. Dr. Harris stated that both he and Dr. Neal agreed that Plaintiff should get back to work to improve his feelings of self-esteem and thus improve his mental health. In the November 1993 deposition, Dr. Harris stated that as of that time he felt Plaintiff had reached his maximum medical improvement insofar as the PTSD was concerned. He further voiced the opinion that Plaintiff had no psychiatric limitations that would prevent him from returning to work at that time.

During the seven months that followed November, 1993 Plaintiff did not attempt to return to work with Defendant. By the same token, Plaintiff sought no further medical treatment during that time. However, in June of 1994, Plaintiff sought treatment from another psychiatrist, a Dr. Berry. Plaintiff testified that he did not return to Dr. Harris because Dr. Neal had advised him that Dr. Harris had given a negative deposition about his condition. Plaintiff further testified that Dr. Harris had released him into the care of Dr. Neal after the hospitalization. However, Dr. Harris later testified that he referred Plaintiff to Dr. Neal only during the period of hospitalization, and no more.

Plaintiff's new psychiatrist, Dr. Berry, diagnosed Plaintiff as continuing to suffer from PTSD, testified that Plaintiff had "difficulty functioning on a day-to-day basis" and was "unable to work." She estimated that Plaintiff required at least two additional years of treatment. Plaintiff was undergoing treatment by Dr. Berry at the time of trial below.

I. Temporary Total Benefits

In accordance with T.C.A. § 50-6-225(e)(2) our scope of review of findings of fact by the trial court is *de novo* upon the record, accompanied by presumption of correctness of these findings, unless we find that the preponderance of evidence is otherwise. See also Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988). The law in this state is well-settled that:

> to make out a prima facie case of entitlement to temporary total disability, an employee must prove that he was (1) totally disabled to work by a compensable injury; (2) that there was a causal connection between the injury and his inability to work; and (3) the duration of that period of disability.
> Simpson v. Satterfield, 564 S.W.2d 953, 955 (Tenn. 1978).

Only the duration of Plaintiff's period of psychological disability is in question.

It is well-settled in that "[t]emporary total disability benefits are terminated either by the ability to return to work or attainment of maximum recovery." Id.; see also Lock v. National Union Fire Ins. Co., 809 S.W.2d 483, 487 (Tenn. 1991). "Thus, when a Plaintiff becomes able to work at any employment permitted by the nature of his injuries or has attained maximum recovery, his temporary total disability benefits end." Lock, 809 S.W.2d at 487. Plaintiff does not dispute the medical testimony to the effect that he was physically able to return to work as of November 19, 1993. However, he does contend that he was not mentally able to do so at that time and that his mental condition had never been such that he could return to work. As noted, Plaintiff's original psychiatrist, Dr. Harris considered that Plaintiff had resolved his PTSD difficulties as of November, 1993. In her deposition, Dr. Berry acknowledged that at the time of Dr. Harris' evaluation of Plaintiff his mental condition was such that it did enable him to return to work, but that his condition had deteriorated significantly during the time between this release to work and his first visit with Dr. Berry. As already noted, the record does not show any effort on the part of plaintiff to return to work or to seek out treatment for his condition during this seven month period.

Plaintiff relies upon Riley v. Aetna Casualty & Surety, 729 S.W.2d 81 (Tenn. 1987) as authority for the proposition that Plaintiff had failed to obtain maximum medical improvement from his injury and ensuing conditions. In our opinion, Plaintiff's reliance upon Riley is misplaced. In Riley the court had the issue of the issue of maximum improvement that hinged upon tangible, physical evidence of an injury to the

foot. In the case before us we have the matter of intangible evidence relating to the psyche. Furthermore, in Riley the Plaintiff obtained a second opinion immediately. In the case before us, Plaintiff did nothing to obtain treatment, if such was needed, following the seven month period after Dr. Harris released him. In our opinion the evidence preponderates against the finding of the trial court that Plaintiff's temporary total disability benefits should be paid through July 1996. We opine that they should have ended as of November 19, 1993.

II. The Fees Relative to Dr. Berry

It is undisputed that Plaintiff failed to seek the approval of Defendant in procuring the services of Dr. Berry. While material, this alone does not eliminate the potential liability of Defendant for Dr. Berry's fees, and deposition expenses. "Whether an employee is justified in seeking additional medical services to be paid for by the employer without consulting the employer depends on the circumstances of each case." Bazner v. American States Ins. Co., 820 S.W.2d 742, 746 (Tenn. 1991). The proper standard in regard to this issue is the good faith of the employee in seeking another physician without employer approval. See United States Fidelity & Guaranty v. Morgan, 795 S.W.2d 653, 655 (Tenn. 1990); Burlington Indus. Inc. v. Clark, 571 S.W.2d 816, 819 (Tenn. 1978); see also Pickett v. Chattanooga Convalescent & Nursing Home, Inc., 627 S.W.2d 941, 944 (Tenn. 1982). There is nothing in this record to the effect that Plaintiff notified Defendant of his dissatisfaction with Dr. Harris nor sought the services of another psychiatrist immediately. Furthermore, Plaintiff's delay in seeking psychiatric help for seven months to us negates Plaintiff's argument that necessity drove him to seek a psychiatrist on his own.

In addition, Plaintiff relies upon the failure of Defendant to provide the statutorily required list of three potential psychiatrists as justification for his action in going to Dr. Berry under these circumstances. In Pickett v. Chattanooga Convalescent & Nursing Home, Inc., 627 S.W.2d 941, 944 (Tenn. 1982) the court held that the failure of the employer to provide the required list "does not give the employee the right in every case to select a physician without consultation with the employer, nor does the statutory violation automatically make the employer liable for medical expenses incurred by the

employee on his own." Id. at 944. In our opinion it was error for the trial court to award Plaintiff the medical fees and deposition costs of Dr. Berry.

Accordingly, we modify the judgment of the trial court insofar as the period of time during which Plaintiff's temporary total disability benefits were allowed, fixing the cut off date as November 19, 1993. The action of the trial court directing Defendant to pay the medical bills and deposition fee of Dr. Berry is reversed. Costs in this cause on appeal are taxed one-half to Plaintiff and one-half to Defendant, for which execution may issue if necessary.

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HEWITT P. TOMLIN, JR., SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
DON R. ASH, JUDGE

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Defendant/Appellee.	)	MODIFIED IN PART AND
	)	REVERSED IN PART

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 equally; one-half by Appellant, and one-half by Appellee, for which execution may issue if necessary.

IT IS SO ORDERED this 15th day of January, 1998.

PER CURIAM

(Holder, J., not participating)