

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE
(November 19, 1997 Session)

FILED
February 24, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

| | | |
|---------------------|---|-------------------------|
| ULYES WILLIAMS, |) | KNOX CIRCUIT |
| |) | |
| Plaintiff-Appellee, |) | Hon. Dale C. Workman |
| |) | Judge. |
| v. |) | |
| |) | No. 03S01-9706-CV-00070 |
| CITY OF KNOXVILLE, |) | |
| |) | |
| Defendant-Appellant |) | |

For Appellant:

George T. Underwood
Knoxville, Tennessee

For Appellee:

J. Randolph Humble
Knoxville, Tennessee

MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED AND REMANDED

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. The City of Knoxville contends (1) the claim is barred by the statute of limitations and (2) the trial court erred in not accepting the opinion testimony of the treating physician. The claimant contends the trial court erred in allowing credit for overpaid temporary total disability benefits. The panel has concluded the judgment should be affirmed.

The claimant, Williams, has less than an eighth grade education, little or no reading or writing skills and no vocational training. He was 39 years old at the time of the trial. He has worked for the city since about 1988, first as a laborer and later as tractor-mower operator.

In 1992, he suffered a compensable back injury, was temporarily disabled and returned to work until September 18, 1995, when he re-injured his back at work. Back surgery was performed on or about November 18, 1995 and he returned to work around March 1, 1996 for a few weeks, quit because of post-surgical problems, then returned again around July 1, 1996. He has since been terminated.

This civil action was commenced on March 29, 1996. The defendant filed and served its answer on April 26, 1996, but did not aver therein that the claim was barred by any statute of limitations. That a claim is so barred is an affirmative defense and the facts constituting such defense must be set forth in short and plain terms in a defendant's answer. Tenn. R. Civ. P. 8.03. Moreover, the record fails to establish that the claimant had fair notice of the employer's intention to assert the statute of limitations as a defense. The defense was thus waived. Tenn. R. Civ. P. 12.08. Additionally, the panel finds the defense to be without merit. The first issue is resolved in favor of the appellee.

As the employer insists, citing Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991), the trial judge must choose which of conflicting expert medical opinions to accept. We are aware of no rule which

would require in all cases that the opinion testimony of a treating physician be accepted to the exclusion of other credible opinion evidence. Moreover, the record fails to establish that the evidence preponderates against the trial judge's finding with respect to the extent of the claimant's permanent partial disability. The second issue is resolved in favor of the appellee.

Benefits for temporary total disability are payable until the injured employee is able to return to work or until he attains maximum recovery from his injury, at which time his entitlement to such benefits terminates. Simpson v. Satterfield, 564 S.W.2d 953 (Tenn. 1978). The record, particularly the testimony of Dr. Bishop, reflects that the claimant was able to return to work and reached maximum medical improvement on or before February 12, 1996. The trial judge properly allowed the employer credit for temporary total disability benefits paid after that date, against permanent partial disability benefits awarded. The final issue is resolved in favor of the appellant.

The judgment of the trial court is affirmed and the cause remanded to the Circuit Court of Knox County. Costs on appeal are taxed to the parties, one-half each.

Joe C. Loser, Jr., Special Judge

CONCUR:

Frank F. Drowota, III, Associate Justice

William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

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| ULYES WILLIAMS, |) | KNOX CIRCUIT |
| |) | No. 2-212-96 |
| Plaintiff/Appellee, |) | |
| |) | |
| vs. |) | Hon. Dale C. Workman |
| |) | Judge |
| CITY OF KNOXVILLE, |) | |
| |) | No. 03S01-9706-CV-00070 |
| Defendant/Appellant. |) | |

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation 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 on appeal are taxed to the parties, one-half to Ulyes Williams and one-half to City of Knoxville, for which execution may issue if necessary.

2/23/98

This case is before the Court upon motion for review pursuant to Tenn. Code Ann .§ 50-6-225 (e) (5) (B), 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 motion for review is not well taken and should be denied; 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 the plaintiff-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating

al to the Special Worker' Compensation 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 act and conclusions of law are adopted and affirmed, and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the plaintiff-appellant, Vernon Harris and Gilbert and Faulkner. surety, for which execution may issue if necessary.

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