

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

FILED

January 29, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

ROBERT JAMES WATKINS,)

Plaintiff/Appellee,)

v.)

INMAN CONSTRUCTION COMPANY,)

Defendant/Appellant.)

Shelby Chancery

No. 02S01-9710-CH-00098

Honorable Neal Small, Chancellor

For the Appellant:

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

Senior Judge John K. Byers
Special Judge F. Lloyd Tatum
Special Judge Paul R. Summers

AFFIRMED AS MODIFIED

TATUM, Special Judge

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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The plaintiff, Robert James Watkins, injured his right ankle on February 20, 1995 in the course of his employment for Inman Construction Company. He was temporarily working in Oxford, Mississippi, but was employed to work in Memphis, Tennessee.

After hearing the evidence, the trial judge found that the plaintiff sustained a permanent partial disability of thirty-five percent to the right leg. The court also found that the plaintiff had been paid temporary total disability benefits for the period prior to October 1, 1995. The trial judge also found that the plaintiff worked sporadically on a part-time basis for the defendant from October 3, 1995 until December 29, 1995 and that plaintiff was entitled to temporary partial disability benefits through that period. The court also found that the plaintiff suffered temporary total disability from the date of the injury until November 7, 1996, excluding the period for temporary partial disability, and that the plaintiff was entitled to recover additional temporary total compensation for the period from October 1, 1995 until November 7, 1996 except for the aforesaid period for which an award was made for temporary partial disability benefits. The court also directed the defendant to pay the medical expense incurred for treatment of plaintiff by Dr. T. E. Rizk in the sum of \$850.00.

On this appeal, the defendant presents two issues:

- (1) Whether the trial court's award of temporary total disability benefits following the date of maximum medical improvement was error.
- (2) Whether the trial court erred in ordering the employer to pay for the medical treatment of Dr. T. E. Rizk.

The defendant does not attack the portion of the judgment awarding compensation for 35 percent permanent partial disability to the leg.

It is conceded that the plaintiff injured the Achilles tendon of his right ankle while working on a construction site for defendant on February 20, 1995. He was treated conservatively by Dr. Wayne Lamar until May 16, 1995 when Dr. Lamar performed surgery

to remove a nodule from his right Achilles tendon. Dr. Lamar attempted to return the plaintiff to work on three occasions, but the plaintiff was unable to perform his duties without pain and swelling in the ankle.

While the plaintiff was still under treatment of Dr. Lamar, the defendant's work in Oxford, Mississippi was completed so Dr. Lamar referred the plaintiff to Dr. Greer Richardson at Campbell Clinic in Memphis, although Dr. Lamar at that time felt that plaintiff should be able to do his regular job as a construction laborer. However, when the plaintiff arrived at Campbell Clinic on September 2, 1995, the Clinic assigned his case to Dr. Garnett Murphy, who was a board eligible orthopedic surgeon, but had not been certified at that time.

Dr. Murphy testified that he first saw the plaintiff on September 22, 1995 and that plaintiff had a history of a nodule in his right tendon which was surgically removed. His diagnosis was Achilles tendonitis and modified by the fact that he had a debridement of his Achilles tendon. His treatment was physical therapy three times a week and pain medication. Dr. Murphy stated that plaintiff's "work status" was that "no prolonged standing or walking more than two hours at a time."

On October 13, 1995, Dr. Murphy again saw the plaintiff and found that plaintiff still had tenderness around the tendon. The doctor instructed that he continue working forty-five minutes out of every hour and resting fifteen minutes.

On November 27, 1995, Dr. Murphy again saw the plaintiff. The plaintiff still had occasional pain behind his ankle and he told the doctor that he had not been fully rehabilitated. His Achilles tendon was still mildly enlarged. Dr. Murphy released the plaintiff on that date to return to full duty and felt that he had reached maximum medical improvement. The doctor instructed the plaintiff to return as needed. The plaintiff did return on January 2, 1996, but Dr. Murphy was not working that day. The plaintiff saw Dr. C. A. Christian, continuing to complain of his Achilles. Examination revealed no swelling or any erythema. Fusiform thickening had not changed and his repair was intact. Dr. Christian's notes reflected, "I am not sure he is going to get much better than he is right now. . . . [H]e is going to expect to have good times and bad times." Dr. Christian did not change his work status. He instructed the plaintiff to see Dr. Murphy again as soon as possible.

The plaintiff again returned to Dr. Murphy on January 5, 1996. Physical examination revealed some mild swelling with really no minimal physical findings. At that time, Dr. Murphy thought that the plaintiff was able to perform the normal duties of a construction laborer. He informed plaintiff that there was nothing more that he had to offer him in the way of orthopedic treatment. Dr. Murphy was then of the opinion that plaintiff had "reached his maximum medical improvement at the beginning of January and that he had zero percent permanent impairment of his lower extremity." He placed no work restrictions on plaintiff. Dr. Murphy advised the plaintiff at that time that if he was unable to continue his work he should seek some "job retraining" on his own.

The plaintiff testified that at the time he was discharged by Dr. Murphy and at the time of trial he still could not do the strenuous work he was required to do for the defendant as a construction laborer. He requested the defendant to permit him to work half days until his ankle and whole body became strong enough to do the work. The defendant refused this request so the plaintiff terminated his employment with the defendant. The plaintiff testified that after quitting his job, he requested the defendant to allow him to see a chiropractor or return to Campbell Clinic. He testified that the defendant refused this request.

The plaintiff testified that he attempted to get appointments with other doctors, but none would see him since he was not working and could not pay a doctor in advance. Finally, Dr. T. E. Rizk agreed to see plaintiff without prepayment. The plaintiff first saw Dr. Rizk on June 13, 1996 at which time Dr. Rizk noted swelling and tenderness around the ankle. There was altered sensation around the scar tissue, and the muscle circumference on the right calf was one-half inch less than the left calf.

Dr. Rizk's diagnosis was post-traumatic degenerative joint disease of the right ankle joint which had injuries around the joint itself. Dr. Rizk treated the plaintiff with anti-inflammatory and analgesic pain medication, also muscle relaxants.

Dr. Rizk continued to treat the plaintiff until September 12, 1997. During the course of treatment, the plaintiff would have "flare-ups" with his ankle. At times, they would be caused by a change of weather. Dr. Rizk's final diagnosis was post-traumatic degenerative joint disease of the right ankle joint and reflex muscle wasting of the right calf muscle. Dr. Rizk thought that plaintiff's arthritic changes would continue for life, and his ability to

function would be inhibited at times. His prognosis was that the plaintiff would have flare-ups of these symptoms “on and off.” The doctor testified, “If he overdoes it or there is a change of weather or he receives another trauma on that joint, he will have a bad flare-up.” Dr. Rizk did not think that the plaintiff could work as a construction laborer and that he should avoid repetitive ankle joint movement as much as possible. Dr. Rizk testified that according to the AMA Guidelines, plaintiff had fifteen percent permanent partial impairment of the right ankle, or ten percent permanent partial disability to the right leg. At no time was Dr. Rizk asked, and he did not state his opinion as to when the plaintiff reached maximum medical recovery.

Our review is *de novo* on the record accompanied by the presumption that the findings of fact of the trial court are correct unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

ISSUE 1 - TEMPORARY DISABILITY BENEFITS

In considering this issue, we must bear in mind the rules stated in *Simpson v. Satterfield*, 564 S.W.2d 953, 955 (Tenn. 1978):

It is clear, therefore, 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. Temporary total disability benefits are terminated either by the ability to return to work or attainment of maximum recovery.

In *Lock v. Nat'l Union Fire Ins. Co. of Pa.*, 809 S.W.2d 483, 488 (Tenn. 1991), the court observed:

It is well settled in this state that “[t]emporary total disability benefits . . . are terminated either by the ability of the employee to return to work or [by] the attainment of maximum recovery from his injury.” *Brown Shoe Company v. Pipes*, 581 S.W.2d 140, 141 (Tenn. 1979); *Simpson v. Satterfield*, 564 S.W.2d 953 (Tenn. 1978). 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.

The evidence reveals that at no time after the accidental injury was the plaintiff able to return to the construction work that he was doing when injured. Although the plaintiff returned to work sporadically and on a part-time basis from October 3, 1995 until December 29, 1995, he was not able to resume the full duties that he had previously

performed. The evidence establishes that the plaintiff was prevented from returning to full employment as a construction laborer from the date of the accident. At the time of trial, the plaintiff was working as a security guard and testified that he had received other employments after he terminated his employment for the defendant, but the record does not reveal when he had these jobs. The record does reveal that the plaintiff did not find other work, or do other work, until after Dr. Murphy opined that he had reached maximum recovery. Thus, this issue must be decided on the question as to when the proof reveals that the plaintiff reached maximum recovery. As previously noted, the burden of proof is upon the plaintiff.

As previously stated, Dr. Rizk was of no assistance whatsoever on this question. In fact, the only evidence in the record as to when the plaintiff reached maximum recovery is the testimony of Dr. Murphy.

When plaintiff visited Dr. Murphy on November 27, 1995, Dr. Murphy at that time was of the opinion that the plaintiff had reached maximum medical improvement and released him to go to work at full duty. The plaintiff attempted work, but was unable to do it. Following Dr. Murphy's instructions, the plaintiff returned to visit Dr. Murphy on January 2, 1996, but in Dr. Murphy's absence he saw Dr. Christian. Dr. Christian testified that plaintiff would expect to have "good times and bad times" and instructed the plaintiff to see Dr. Murphy as soon as possible. The plaintiff returned to Dr. Murphy on January 5, 1996 and at that time, Dr. Murphy thought that plaintiff was able to perform normal duties as a construction laborer and then thought that plaintiff had reached his maximum medical improvement "at the beginning of January." It is noted that the symptoms the plaintiff testified continued to exist at trial time were no less than his suffering when discharged by Dr. Murphy.

Thus, we find that the date of the plaintiff's maximum recovery was reached on

January 5, 1996, and that he is entitled to temporary total disability benefits to that date, excluding the period from October 3, 1995 until December 29, 1995, when the plaintiff was entitled to temporary partial disability benefits.

ISSUE 2 - THE FEES OF DR. RIZK

It is undisputed that the defendant did not approve of the plaintiff procuring the services of Dr. Rizk. “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). See also *United States Fidelity and Guaranty Co. v. Morgan*, 795 S.W.2d 653, 655 (Tenn. 1990); *Burlington Ind., Inc. v. Clark*, 571 S.W.2d 816, 819 (Tenn. 1978); *Pickett v. Chattanooga Convalescent and Nursing Home, Inc.*, 627 S.W.2d 941, 944 (Tenn. 1982). Under the totality of circumstances, we think that the plaintiff was justified in seeing Dr. Rizk. Dr. Murphy discharged the plaintiff and told him that he had no further services he could render. Later, the plaintiff wanted to return to Dr. Murphy, but the defendant refused. The plaintiff also requested to go to a chiropractor or another doctor and this request was refused by the defendant. Dr. Murphy had discharged the plaintiff for full previous employment at a time when the plaintiff was still having pain and swelling in his ankle, which was found by the trial court to be permanent. According to plaintiff’s testimony, this pain and swelling continued to exist at the time of trial, but Dr. Murphy had told the plaintiff that he had no disability. Under these circumstances, the plaintiff was entitled to further medical treatment, or at least another examination. We find that the circumstances justify the finding of the trial court that the defendant should pay the medical expenses of Dr. Rizk.

It results that the temporary disability benefits of the plaintiff terminated on January 5, 1996, and the judgment of the trial court is so modified. The portion of the judgment granting the medical bills of Dr. Rizk is affirmed.

Costs are taxed equally between the plaintiff and the defendant.

F. LLOYD TATUM, SPECIAL JUDGE

CONCUR:

JOHN K. BYERS, SENIOR JUDGE

PAUL R. SUMMERS, SPECIAL JUDGE

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ROBERT JAMES WATKINS,)	Shelby Chancery
)	No. 107758-1
Plaintiff-Appellee,)	
)	
v.)	Hon. Neal Small, Chancellor
)	
INMAN CONSTRUCTION)	NO. 02S01-9710-CH-00098
COMPANY,)	
)	
Defendant-Appellant.)	AFFIRMED AS MODIFIED

JUDGMENT ORDER

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 are taxed equally between the plaintiff-appellee and the defendant-appellant and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM