IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(January 19, 1999 Session)

NATHAN V. HARRIS,	)	DAVIDSON CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. Hamilton V. Gayden Jr.,
	)	Judge.
v.	)	
	)	No. 01S01-9801-CV-00009
WENDEL ADKINS d/b/a TENNESSEE RIDERS, INC., VALIANT INSURANCE COMPANY and STEPHEN N. CIANCIO,	)	
	)	
Defendants-Appellants.	)	

For Appellants:

Sean Antone Hunt
Spicer, Flynn & Rudstrom

Nashville, Tennessee

For Appellee:

Joseph K. Dughman
Bruce, Weathers, Corley, Dughman & Lyle
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., Associate Justice
James L. Weatherford, 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. The employer and its insurer contend in this appeal that the trial court erred in awarding the medical expenses of a nonauthorized provider and that the award of permanent partial disability benefits is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant initiated this civil action to recover medical and disability benefits for injuries resulting from a work related accident which occurred on May 23, 1995. After a benefit review conference and trial, the trial court awarded, *inter alia*, medical expenses and disability benefits based on sixty percent to the body as a whole. Our review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2).

At the time of the trial, the claimant was thirty years old with a high school education and vocational training in automobile repair. He was in good health before the accident.

On the date of the accident, the claimant was working for the employer, Tennessee Riders, operating a mower next to I-40 when his tractor was struck from the rear by a speeding pick-up truck. The truck's bumper struck him in the back and its hood struck him in the head. He was soon transported to the emergency room at St. Thomas Hospital in Nashville, where he was treated and released.[1] When the accident occurred, his supervisor, Wendell Adkins, was operating a mower about one hundred yards ahead of him, but did not talk to him at the scene. However, two co-workers visited the claimant to inquire about his condition soon after the accident. He has not returned to work for Tennessee Riders.

When his condition worsened, he contacted Dr. Melvin Law, who diagnosed S1 radiculopathy and two bulging discs with nerve root impingement. The doctor provided conservative care, including a back brace, and referred the claimant to a neurologist. Dr. Law assessed his permanent impairment at ten percent to the whole body and restricted him from lifting more than twenty pounds, thirty minutes of continuous standing and walking and thirty minutes of continuous sitting.

The neurologist, Dr. Morgan, advised him not to return to work as a mower operator. This doctor diagnosed disequilibrium, post-concussive syndrome and intermittent paresthesias of the hands, possibly resulting from a mild spinal cord contusion or brachial plexus stretch type injury and assessed his permanent medical impairment at fourteen percent to the whole body, of which nine percent was from persistent labyrinthine vertigo. Dr. Morgan restricted the claimant from repetitive bending or prolonged standing of more than two hours and from lifting more than twenty-five pounds; and he referred

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[1] The claimant testified that St. Thomas refused to treat him because he did not have any identification, but performed a CT scan when he returned and demanded it.

the claimant to a clinical psychologist for therapy.

The claimant was examined and evaluated by Dr. Alan F. Bachrach, a neurologist, at the request of the employer. He assigned a permanent impairment rating of two percent to the whole body. The claimant was examined and evaluated further at the employer's request by Dr. Robert Weiss, a neurological surgeon. Dr. Weiss assessed his permanent whole body impairment at five percent.

The employer contends it should not be required to pay the nonauthorized medical expenses because the claimant did not insist on being provided with a list from which he could have chosen a treating physician. We find nothing, however, in the statutory scheme or body of workers' compensation cases which permits an employer to withhold medical benefits until they are demanded by the injured worker. Moreover, as to the emergency room expense, the statute expressly requires payment of those expenses up to $300.00, where the employer fails to provide emergency care. Tenn. Code Ann. section 50-6-204(g)(1).

When a covered employee suffers an injury by accident arising out of and in the course of his employment, his employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Such care includes medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members and other apparatus, nursing services ordered by the attending physician, dental care, and hospitalization. The only limit 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(a)(1). City of Bolivar v. Jarrett, 751 S.W.2d 137 (Tenn. 1988).

The employer is required to designate a group of three or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee has the privilege of selecting the treating physician or operating surgeon, which list may include chiropractors. Tenn. Code Ann. section 50-6-204(a)(4); Forest Prods. v. Collins, 534 S.W.2d 306 (Tenn. 1976). Where the employer fails or refuses to provide such a list, the employee may be justified in selecting his or her own treating physician and once an employee justifiably engages a doctor on his own initiative, any belated attempt by the employer to offer a doctor chosen by the employer will not cut off the right of the employee to continue with the employee's own doctor. Lambert v. Famous Hospitality, Inc., 947 S.W.2d 852, 854 (Tenn. 1997).

The first effort to provide medical benefits occurred a few days before trial and more than two years after the injurious accident. Under such circumstance, we cannot say the employee acted unreasonably or in bad faith by choosing his own treating physician. The first issue is resolved in favor of the employee.

As to the next issue, the employer and its insurer contend the award of permanent partial disability benefits issue should be limited to one based on two

and one-half times the medical impairment rating because the claimant returned to his pre-injury part-time employment as a deliverer for Pizza Hut. In support of this argument, the employer submitted in evidence a videotape of the claimant delivering pizzas. The videotape does not reflect that his part-time work requires him to exceed his prescribed limitations.

For injuries arising after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the *pre-injury employer* returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment, the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment, or, in cases where an impairment rating by any appropriate method is used and accepted by the medical community. Tenn. Code Ann. section 50-6-241(a)(1). That limitation does not apply to this case because the employee has not returned to work for the pre-injury employer for whom he was working when injured, a prerequisite for the imposition of it, as we understand the law. The employer insists that because the claimant was working part-time for Pizza Hut before his on-the-job injury while working for it, the above two and one-half multiplier applies. We do not so construe the statute.

The employer and its insurer further contend the award is excessive because "the plaintiff was misleading his doctors regarding his abilities and symptoms and able to carry on activities that are inconsistent with his complaints and symptoms." The record does not support that contention. Moreover, the trial judge implicitly found the claimant to be a credible witness and expressly accredited the medical experts who testified in his behalf.

In making determinations as to the extent of an injured worker's permanent industrial disability, the courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition; Tenn. Code Ann. section 50-6-241(a)(1); and 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. Collins v. Howmet Corp., 970 S.W.2d 941 (Tenn. 1998).

Upon a consideration of the above principles and authorities, we cannot say the evidence preponderates against the findings of the trial judge. The judgment of the trial court is affirmed and the cause remanded to the Circuit Court for Davidson County for enforcement of the judgment and such further proceedings, if any, as may be necessary. Costs on appeal are taxed to the defendants-appellants.

Joe C. Loser, Jr., Special Judge

CONCUR:

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Adolpho A. Birch, Jr., Associate Justice

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James L. Weatherford, Senior Judge

IN THE SUPREME OF TENNESSEE

AT NASHVILLE

NATHAN V, HARRIS	}	*DAVIDSON CIRCUIT*
	}	*No. Below 96C-1819*
Plaintiff/Appellee	}	
	}	*Hon. Hamilton V. Gayden*
vs.	}	
	}	
	}	*No. 01S01-9801-CV-00009*
WENDEL ADKINS d/b/a	}	
TENNESSEE RIDERS, INC.,	}	
VALIANT INSURANCE COMPANY	}	
and STEPHEN N. CIANCIO	}	
	}	
Defendant/Appellants	}	*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 defendants/appellants, for which execution may issue if necessary.

IT IS SO ORDERED on April 7, 1999.

PER CURIAM