

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

FILED
June 23, 1999
Cecil Crowson, Jr.
Appellate Court
Clerk

ERIC K. MACK)
)
Plaintiff-Appellee,)
)
vs.) NO.03S01-9805-CV-00052
)
CNA INSURANCE COMPANY) THE HONORABLE
) JAMES B. SCOTT, JR., JUDGE
)
Defendant-Appellant.)

For the Appellant:

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Mailed April ____, 1999

MEMORANDUM OPINION

Members of Panel:

Justice William M. Barker
Special Judge Howell N. Peoples
Special Judge Joe C. Loser, Jr.

AFFIRMED and REMANDED

PEOPLES, Special Judge

OPINION

This workers= compensation appeal has been referred to the Special Workers= Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The trial court found that the plaintiff sustained a work related injury and awarded benefits for permanent partial disability in the amount of 85 percent to the right foot. The employer has appealed and assigns as error (1) the amount of the award, (2) the finding that treatment rendered more than a year after the injury was causally related to the accident, and (3) the allowance of the expense of treatment by Dr. James A. Engblom. For the reasons hereafter set forth, we affirm the judgment of the trial court.

The plaintiff, Eric K. Mack, graduated from Clinton High School in 1987. He has worked for (1) Moore=s Building Supply, loading trucks and carrying building supplies; (2) Harold Barnes Construction, framing houses; and (3) James Ridenour, erecting steel buildings. He also worked as a meat cutter for a few months. He began working for Clayton Homes in 1994 where his job involved building side walls of houses. In June 1995, he tripped on an I-beam which was concealed by insulation and injured his right foot. He reported the injury to his team leader, Mark Braden and another supervisor, Bob Keller. They assisted him to the tool room and sent him to McNeeley=s Medical Clinic to seek treatment. Dr. Trent McNeeley took x-rays and referred Mr. Mack to Dr. Edward Kahn, an orthopedic surgeon. Dr. Kahn put a walking cast on the injured foot and sent him back to work the next day. Approximately one month later, the cast was removed and when Mr. Mack complained of pain, Dr. Kahn told him his foot was just sore from being in the cast and released him from further treatment. In November 1995, while at work, Mr. Mack stepped on a pile of hoses and had increased pain in his foot at the same location where he had experienced pain since the June 1995 accident. He reported this to his supervisor and was

referred to Dr. Sears at Knoxville Orthopedic Clinic. Dr. Sears tried custom-molded arch supports and, when that did not work, referred him to Dr. McPeake at the same clinic. Dr. McPeake tried anti-inflammatory medication and conservative treatment and then told him that he had arthritis in his foot and that nothing more could be done to help. Mr. Mack continued trying to work. He could not put pressure on his foot and turned his foot sideways to walk which caused him to be stiff-legged and have pain up toward his knee. He was given a light-duty job that allowed him to sit in order to alleviate the pain in his foot and he developed pain in his back. In May 1997, Mr. Mack wrote "I am no longer able to return to work, because of the pain I suffered at work." He, subsequently, met Dr. James A. Engblom, a podiatrist.

Dr. Engblom testified by deposition that he first saw Mr. Mack on May 22, 1997. Based on history and a physical examination, Dr. Engblom thought he had a posterior tibial dysfunction or rupture. A MRI and x-rays revealed breaching or separation of the naviculocuneiform joint and loose osteophyte at the base of the cuneiform. He also has flatfoot deformity of each foot that had been asymptomatic before the injury to the right foot. Dr. Engblom performed a surgical fusion at the naviculocuneiform joint. Since the surgery, Mr. Mack's gait has become more normal and the pain has diminished. He still has trouble coming down stairs and takes one stair at a time; he has a little trouble on uneven surfaces and hilly areas. His foot hurts if he stands longer than three hours. He reached maximum medical improvement on February 16, 1998 and was released to return to work. He has limitations of standing no more than two hours with a fifteen-minute break and no prolonged walking. Dr. Engblom testified that, as a result of the injury that occurred at work in June 1995, Mr. Mack has 67 percent impairment to the right foot according to the AMA Guides for Evaluation of Permanent Impairment, Fourth Edition.

The parties stipulated (1) the records of Dr. Edward Kahn, (2) that he had determined that Mr. Mack did not need surgery or further medical treatment as of the last visit with him on August 14, 1995, and (3) that Dr. Kahn found no significant pathology in the MRI films made during Dr. Engblom's treatment.

Dr. William T. McPeake testified, by deposition, that Mr. Mack was first seen and

treated by Dr. Sears, one of his partners at the Knoxville Orthopedic Clinic on November 11, 1995. Dr. McPeake first saw him on March 6, 1996. He obtained a bone scan and diagnosed arthritic or degenerative changes in the midfoot. He recommended Ibuprofen or some other type of anti-inflammatory medication, suggested a work-hardening program and released Mr. Mack to return to work activities as tolerated. Dr. McPeake saw him four more times; the last time was on February 19, 1997 when he again had Achronic foot pain associated with his deformities, his flatfoot deformity and the early arthritic changes in the midfoot.@ Dr. McPeake testified that he did not find any objective evidence of a tear of the tibial tendon when he examined and treated Mr. Mack. A(H)is tear could have been there and became symptomatic afterwards or it could have developed after he was examined by me.@ He also admitted that, throughout treatment by Dr. Sears and himself, Mr. Mack had complained of posterior tibial tendon pain.

Fred Colvin, associate professor in the rehabilitation counselor training program at the University of Tennessee testified that Mr. Mack had an occupational disability of 40 to 50 percent.

Pursuant to T.C.A. Section 50-6-225(e), this case is reviewed de novo upon the record with a presumption of the correctness of the trial court=s finding. Spencer v. Towson Moving & Storage, Inc., 922 S.W. 2d 508, 509 (Tenn. 1996).

The employer asks this court to weigh the testimony of the physicians who testified and to find that the condition diagnosed by Dr. Engblom and the surgery performed by him are not causally related to the injury Mr. Mack sustained at work in June 1995. Where the medical evidence differs, the trial judge may accept the opinion of one expert over the opinions of others. Johnson v. Midwesco, Inc., 801 S.W. 2d 804, 806 (Tenn. 1990). Where the medical testimony is presented by deposition or medical reports, this Court can make its own independent assessment of the medical proof to determine where the preponderance lies. Cooper v. INA, 884 S.W.2d 446, 451 (Tenn. 1994); Landers v. Fireman=s Fund Ins. Co., 775 S.W. 2d 335, 336 (Tenn. 1989). The testimony of expert witnesses must be considered in light of all the other evidence in the case. Thomas v. Aetna Life Ins. Co., 812 S.W. 2d 278 (Tenn. 1991). The record establishes a consistent pattern of

complaints by Mr. Mack about the injury to his right foot from June 1, 1995 and through his treatment and surgery by Dr. Engblom in August 1997. Dr. McPeake testified that the condition diagnosed by Dr. Engblom could have been present all along and not symptomatic at the time Mr. Mack was seen by Dr. McPeake. He admits that the complaints to him were consistent with the ultimate diagnosis by Dr. Engblom. Dr. Kahn released Mr. Mack to return to work without further treatment in August 1995, and never saw him again. We concur with the trial judge in finding Dr. Engblom's testimony concerning causation to be the most compelling.

The employer now contests the charges of Dr. Engblom arguing that Mr. Mack had no reasonable excuse for not consulting with the employer before incurring expenses of treatment. The liability of the employer turns on the issue of whether, under the circumstances, the employee was justified in obtaining further medical service, without first consulting the employer. @ Pickett v Chattanooga Conv. & Nursing Home, 627 S.W.2d 941, 944 (Tenn. 1982) (citing Burlington Industries, Inc. v. Clark, 571 S.W.2d 816 (Tenn. 1978); Tom Still Transfer v. Way, 482 S.W. 2d 775 (Tenn. 1972); and Holston Valley Community Hospital v. Dykes, 205 Tenn. 336, 326 S.W.2d 486 (1959)). The employer did not initially furnish him a panel of three physicians from which to choose, but directed him to McNeeley's Medical Clinic. He was, subsequently, seen by a number of other physicians provided by the employer, each of whom briefly treated and released him to return to work without further treatment. He continued to have pain and to be severely limited in the use of his right foot for almost two years. We are unable to find Mr. Mack was unreasonable in seeking treatment from a physician of his choosing. The finding of the trial court that the employer should pay for the treatment by Dr. Engblom is affirmed.

Finally, the employer argues that no physician other than Dr. Engblom found any permanent impairment and it was error to award disability benefits. Only Dr. Kahn said he found no permanent impairment. The medical records of the various physicians were stipulated by the parties and are filled with references to Mr. Mack's abnormal gait, swelling and pain. The Court has already addressed the reliance by the trial judge on the opinion of Dr. Engblom. In assessing the extent of the Mr. Mack's disability, his testimony, the

testimony of his wife, and a vocational expert were also available. In light of the substantial medical impairment and the lack of work experience in occupations that do not require prolonged standing and/or walking, the award of 85 percent to the foot was not unreasonable. See Roberson v. Loretto Casket Co., 722 S.W. 2d 380 (Tenn. 1986).

The findings of the trial court are affirmed and the case is remanded for the enforcement of the judgment with interest as provided by law. Costs of the appeal are taxed to CNA Insurance Company.

Howell N. Peoples, Special Judge

Concur:

William M. Barker, Justice

Joe C. Loser, Special Judge

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ERIC K. MACK)	ANDERSON CIRCUIT
)	No. 96LA0224
Plaintiff-Appellee)	
)	No.03S01-9805-CV -00052
v.)	
)	Hon James B. Scott, Jr.
CNA INSURANCE COMPANY)	
)	
Defendant-Appellant,)	

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 facts 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 Appellant, CNA Insurance Company and Linda J. Hamilton Mowles, surety, for which execution may issue if necessary.

06/23/99