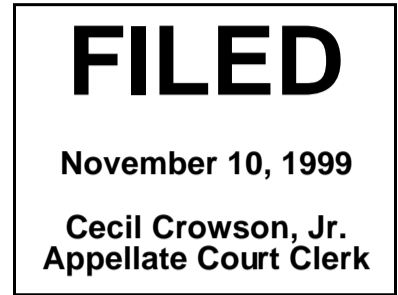


IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE



JOHN AILWORTH,	)	
	)	DAVIDSON
	)	CIRCUIT
	)	No.
97C-391 T.D. Below	)	
Plaintiff/Appellee,	)	
v.	)	Hon. Thomas Brothers,
	)	Judge
	)	
	)	No. 01S01-9808-CV-00146
ROADWAY EXPRESS, Inc. )	)	
	)	
Defendant/Appellant.	)	AFFIRMED.

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 on appeal are taxed to the appellant.

PER CURIAM

Birch, J. - Not participating.

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

**FILED**  
November 10, 1999  
Cecil Crowson, Jr.  
Appellate Court Clerk

JOHN AILWORTH, )  
01S01-9808-CV-00146 )  
DAVIDSON COUNTY )  
Plaintiff/Appellee, )  
vs. )  
ROADWAY EXPRESS, INC., )  
Defendant/Appellant. )

Hon. Thomas Brothers, Judge  
No. 97C-391

FOR THE APPELLANT:

DAVID T. HOOPER, Esquire  
109 Westpark Drive  
Suite 410

FOR THE APPELLEE:

H. Tom Kittrell, Jr., Esquire  
404 James Robertson Pkwy.  
Nashville, TN 37219  
Brentwood, TN 37027

MEMORANDUM OPINION

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., JUSTICE  
HENRY DENMARK BELL., RETIRED JUDGE  
HAMILTON V. GAYDEN, JR., SPECIAL JUDGE

HENRY DENMARK BELL  
Special 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 contends that the trial court erred in awarding compensation for temporary total disability and permanent partial disability and in

awarding medical expenses of non authorized providers. As discussed below, the panel has concluded that the judgment should be affirmed.

At the conclusion of the hearing the trial court awarded, *inter alia*, reasonable and necessary medical expenses for Dr. John Rogers, St. Thomas Hospital and Anesthesiology Medical Group in the amount of \$8,936.00, temporary total disability for the period of 24 weeks in the amount of \$9,980.88 and permanent partial disability of 20% to the right foot in the amount of \$10,396.75.

At the time of trial John Ailworth, the employee/appellee was 33 years old and had been employed for about nine years by Roadway Express, the defendant/appellant. He had a Bachelor of Science degree in nursing from Tennessee State University and had a job lined up with St. Thomas Hospital as an I.C.U. nurse. He also has a pastoral degree from Freewill Baptist College and has a year of experience as a youth minister.

On July 26, 1995 Ailworth was loading trucks for Roadway when a box weighing about 140 pounds fell against his right posterior heel. There is no issue as to compensability.

On the following day Roadway sent Ailworth to Baptist Convenient Care for medical treatment. After he was seen and x-rays taken he was instructed to stay off work for three days and then return to work which he did. Several days after returning to work Ailworth complained that he was still in pain whereupon Roadway tendered a panel of three physicians from which Ailworth chose Dr. John McInnis, an orthopaedic surgeon, for medical treatment. After

2

several visits Dr. McInnis released Ailworth to work without restrictions. Ailworth continued to complain to Roadway that he was not getting better and requested further treatment. Roadway then sent Ailworth to Robert E. Clendenin, a physiatrist, specializing in the practice of physical medicine and rehabilitation. Dr. Clendenin basically agreed with Dr. McInnis' conclusion that Ailworth had no permanent impairment. For several months Dr. Clendenin administered conservative treatment, mostly therapy, while Ailworth continued to engage in full-time employment at Roadway. Ailworth expressed his dissatisfaction with Dr. Clendenin to Roadway whereupon Roadway sent him to Dr. Marion C. Harper, an orthopaedic surgeon specializing in foot surgery as a sub-specialty. Dr. Harper was of the opinion that there was no basis for any permanent physical impairment

and that there was no basis for any ongoing limitations in terms of activity. All three of these physicians conducted clinical examinations and various tests and did not find any indication of any injury related to the Achilles tendon. Ailworth once again complained of the lack of effective treatment by the furnished physicians and requested one more referral. Roadway responded by stating that Roadway would not pay for any further medical examinations or treatment.

Ailworth's attorney then referred him to Dr. John Rogers, a podiatrist and podiatric surgeon. He first saw Dr. Rogers in March of 1996. After a course of conservative treatment Dr. Rogers in consultation with Ailworth decided to perform surgery. The surgery was performed at St. Thomas Hospital in Nashville on July 31, 1996. Only after Dr. Rogers opened up the plaintiff's heel and looked into the incision did he discover that Mr. Ailworth had a torn Achilles tendon. Dr. Rogers testified that the disruption of the lateral bands of the Achilles tendon at that area was the "result of obvious trauma, some hard object coming down on his foot." After surgical repair of the Achilles tendon and the draining of the bursitis Dr. Rogers kept Mr. Ailworth off work until February 10, 1997.

3

Ailworth testified at trial that his heel feels better "to a great degree" but that he is still having some swelling and a slight limp. He testified that he still experiences some pain in his heel but "nothing like it was".

Dr. Rogers assigned a 10% permanent partial impairment rating to the foot as a result of the retrocalcaneal bursitis and stated that the torn Achilles tendon was a much worse injury than the bursitis. As to the tendon injury Dr. Rogers testified that "tendon structure is extremely difficult tissue to repair or ever get back to what we would term as normal. As far as him having one hundred percent of the strength he used to have, I don't think he will ever have that." Dr. Rogers further testified that Ailworth should be limited to standing and walking no more than three hours a day, that he should not lift or carry more than thirty pounds, that he should never climb ladders and that he should be cautious in balancing, kneeling, crouching, crawling and twisting. Although, as to the permanent partial impairment of the foot as a result of the Achilles tendon injury he could not give a precise rating under the American Medical Association Guidelines, Dr. Rogers did testify that any such impairment rating would be in addition to the 10% that was given for the bursitis.

Tenn. Code Ann. §50-6-204(a)(1) provides that in the event of a job related

injury “The employer . . . shall furnish free of charge to the employee such medical and surgical treatment . . . as may be reasonably required”.

Tenn. Code Ann. §50-6-204(4) provides that “The injured employee shall accept medical benefits hereunder; provided, that the employer shall designate a group of three (3) or more reputable physicians or surgeons . . . from which the employee shall have the privilege of selecting the operating surgeon or attending physician . . . “

The other provision to be considered in this case as in all workers’ compensation cases is Tenn. Code Ann. §50-6-116 declaring the workers’ compensation statute to be remedial legislation to be liberally construed.

4

As we apply the foregoing statutory provisions to the facts of this case, the employer did not furnish surgical services “as may be reasonably required” if the surgery subsequently performed by Dr. Rogers resulted in significant improvement in the condition of employee’s foot. Unless the plaintiff/appellee’s testimony is to be disbelieved or discounted the evidence preponderates in plaintiff/appellee’s favor on this issue. In addition to the deference due the trial court on credibility we note that plaintiff/appellee’s credibility is re-enforced by the employer’s conduct in furnishing two physicians after the designated and selected physician had found neither permanent impairment nor temporary disability.

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 is 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 defendant/appellant.

---

HENRY DENMARK BELL  
RETIRED JUDGE

CONCUR:

---

ADOLPHO A. BIRCH, JR.  
JUSTICE

---

HAMILTON V. GAYDEN, JR.  
SPECIAL JUDGE