

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 23, 2002 Session

LIBERTY INSURANCE COMPANY v. RICHARD W. BURGIN, ET AL.

**Direct Appeal from the Chancery Court for Knox County
No. 132120-2 John F. Weaver, Chancellor**

Filed July 29, 2002

No. E2001-01574-WC-R3-CV

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 trial court found the employee had only sustained an injury of a temporary nature and dismissed his claim for permanent disability. Judgment of the trial court is affirmed.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed

THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, J., and BYERS, SR. J., joined.

David L. Hull, of Knoxville, Tennessee, for Appellant, Richard W. Burgin.

James T. Shea IV, of Knoxville, Tennessee, for Appellees, Liberty Mutual Insurance Company and Direct Insurance Company.

MEMORANDUM OPINION

The employee, Richard Burgin, has appealed from the trial court's finding that he has no permanent disability as a result of a work-related accident.

Facts

The employee, an appraiser for Direct Insurance Company, was involved in an automobile accident on April 18, 1996, while on his way to inspect a damaged vehicle. He was taken to a hospital emergency room and released shortly thereafter. He testified he did not miss much time from work but was having pain in his low back. His employer reassigned him to an office job

answering phones, filing work, etc. He continued to work until the last part of December 1996 when he was terminated from employment.

Prior to the April 18 automobile accident, he had been involved in numerous incidents or events which resulted in problems with his back. In 1985 he was involved in an automobile accident and had surgery for two ruptured discs. Sometime after this event and prior to the accident in question, he testified that one day he bent over to pick up a diaper and his back “went out”; that he had fallen on the golf course and hurt his back; he fell in the snow and strained his back; and he injured his back while putting a lawn mower on a trailer when the mower turned over. He also testified that on one occasion after the incident in question, he hurt his back while lifting his daughter.

After being terminated by Direct Insurance Company, he became self-employed by starting his own company to do appraisal work. This work lasted about one year and ended in September 1998 when he stopped, saying his back complaints were so bad he could not work. He has not worked since then.

The only medical evidence in support of the employee’s claim for permanent disability was the C-32 Report of Dr. Gilbert L. Hyde, an orthopedic surgeon, and his attached office notes. The office notes indicated he was of the opinion the accident in question had resulted in an “aggravation of lumbar spondylosis, Status post lumbar discectomy at L4/5.” The report stated the employee had a 16 percent medical impairment and that the injury was work-related. Also, the report indicated certain restrictions should be observed on his physical activity. The report did not indicate whether any of the impairment percentage included impairment from his 1985 surgery or whether the doctor was aware of all of the other incidents where he had injured his back.

The employer submitted the deposition of Dr. William K. Bailey, also an orthopedic surgeon, who testified he had seen employee Burgin in 1993 after a lifting incident at work and also during June 2000 for an independent medical examination in connection with the present claim. He gave a diagnosis of lumbosacral strain with previous lumbar laminectomy. He said the employee had degenerative disc disease and an 8 to 10 percent medical impairment as a result of the prior accident and surgery. He stated the accident in question aggravated his pre-existing condition but was of the opinion he had no permanent disability as there was no change in his physical condition.

In rendering a decision, the trial court specifically found the medical deposition testimony outweighed the medical C-32 Report and attachments and that the employee had no permanent disability as a result of the April 18 auto accident. The court found he had sustained a temporary injury and that he was entitled to future medical expenses if he could relate same to the April 18, 1996 incident.

Standard of Review

The case is to be reviewed *de novo* accompanied by a presumption of the correctness of the

findings of fact unless we find the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Analysis of Issues

The employee argues the evidence preponderates against the trial court's conclusion there was no permanent disability. In this connection, we must cite the often stated rule that in weighing conflicting testimony, the trial judge has discretion to conclude that the opinion of a particular expert should be accepted over that of another expert. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). In the present action, it is not hard for us to understand that the trial court chose to accept medical deposition testimony over an extremely brief C-32 report and attached office notes that were not subject to cross-examination. Therefore, we find the evidence does not preponderate against the conclusion the employee did not sustain a permanent injury or disability.

The employer insists the trial court was in error in finding the employee had sustained a temporary injury and granting an award for future medical expenses. We do not concur with this position. The injury from the automobile accident did disable the employee for a short period of time and altered the type of work that he could do up until he was terminated by his employer. We find he has sustained a compensable injury of a temporary nature and that he would be entitled under our statute to medical treatment. An employee is entitled to medical treatment and expenses for work-related injuries even though the injury does not produce vocational impairment or otherwise affect the worker's employability. *Stephens v. Henley's Supply & Indus., Inc.*, 2 S.W.3d 178 (Tenn. 1999).

As to the award for future medical expenses, the employee would have the burden of establishing that any medical treatment is needed directly as a result of the April 18, 1996 event and not from some of the many other incidents where he has injured his back. Under the factual circumstances of this case, this may be a heavy burden upon the employee but such questions would have to be presented to the trial court as the issue arises.

Judgment of the trial court is affirmed. Costs of the appeal are taxed equally to the parties.

ROGER E. THAYER, SPECIAL JUDGE

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AT KNOXVILLE, TENNESSEE

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No. 132120-2

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No. E2001- 01574-WC-R3-CV

JUDGMENT

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.

The costs on appeal are taxed equally to the parties Richard W. Burgin, Liberty Mutual Insurance Company, and Direct Insurance Company and their sureties, for which execution may issue if necessary.