

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 20, 2001 Session

DWAIN PARKS v. ROYAL INSURANCE COMPANY OF AMERICA

**Direct Appeal from the Chancery Court for Tipton County
No. 17,312 Martha B. Brasfield, Chancellor**

No. W2000-02778-WC-R3-CV - Mailed October 25, 2001; Filed December 4, 2001

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. In this appeal, the employer's insurance carrier contends (1) the award of permanent partial disability benefits based on 50 percent to the body as a whole is excessive because the trial judge considered aggravation of a pre-existing mental condition in addition to carpal tunnel syndrome, (2) the trial court erred in awarding any permanent vocational disability benefits, (3) the trial court erred in awarding a psychologist's witness fee as discretionary costs, and (4) the trial court erred in awarding a medical examiner's fee as discretionary costs. The employee insists the award of permanent partial disability benefits is inadequate. As discussed below, the panel has concluded the judgment should be modified with respect to discretionary costs, but otherwise affirmed.

**Tenn. Code Ann. § 50-6-225(e) (2000) Appeal as of Right; Judgment of the Chancery Court
Affirmed as Modified**

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and W. MICHAEL MALOAN, SP. J., joined.

Robin H. Rasmussen, Cordova, Tennessee, for the appellant, Royal Insurance Company of America

Michael W. Whitaker, Covington, Tennessee, for the appellee, Dwain Parks

MEMORANDUM OPINION

The employee or claimant, Parks, is a 52 year-old high school graduate. He began working for Ring Can in 1989. He gradually developed bilateral carpal tunnel syndrome from repetitive use of the hands at work. The date of injury is June or July of 1997.

When conservative care failed, the treating physician performed carpal tunnel releases and estimated the claimant's permanent impairment at 2 percent to each. The claimant returned to work for the employer on October 15, 1997, but again developed symptoms of carpal tunnel syndrome. He worked regularly until the death of his father. An independent medical examiner, Dr. Janovich, estimated his permanent impairment at 9 percent on the right and 13 percent on the left, considering his post-operative symptoms. A psychiatrist testified that anxiety from the injury permanently aggravated his pre-existing depression. The psychiatrist characterized the claimant's depression as serious and established the required causal connection to the claimant's carpal tunnel syndrome. The claimant's testimony, accredited by the trial court, is that he is significantly limited in his ability to work. A psychologist testified regarding the claimant's limitations, based on personal observations.

Upon the above summarized evidence, the trial court awarded permanent partial disability benefits based on 50 percent to the body as a whole. Appellate review of findings of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The extent of an injured worker's permanent vocational disability is a question of fact. Collins v. Howmet Corp., 970 S.W.2d 941, 943 (Tenn. 1998).

This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). 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, because it is the trial court that had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999).

The appellant insists the claim, to the extent it is based on aggravation of a preexisting mental condition, should be dismissed for lack of notice. Immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, an injured employee must, unless the employer has actual knowledge of the accident, give written notice of the injury to his employer. Tenn. Code Ann. § 50-6-201 (2000). Benefits are not recoverable from the date of the accident to the giving of such notice, and no benefits are recoverable unless such written notice is given within 30 days after the injurious occurrence, unless the injured worker has a reasonable excuse for the failure to give the required notice. Id. Whether or not the excuse offered by an injured worker for failure to give timely written notice is sufficient depends on the particular facts and circumstances of each case. A. C. Lawrence Co. v. Britt, 220 Tenn. 444, 454, 414 S.W.2d 830, 834 (1967). The presence or absence of prejudice to the employer is a proper consideration. McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995). The reasons for the 30 day statutory notice requirement are (1) to give the employer an opportunity to make an investigation while the facts are accessible, and (2) to enable the employer to provide timely and proper treatment for the injured employee. Id.

In determining whether an employee has shown a reasonable excuse for failure to give such notice, courts will consider the following criteria in light of the above reasons for the rule: (1) the

employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusal of the notice requirement, and (3) the excuse or inability of the employee to timely notify the employer. Id. Delay in asserting the compensable claim is reasonable and justified if the employee has limited understanding of his condition and his rights and duties under the workers' compensation law. Id.

It is significant that written notice is unnecessary in those situations where the employer has actual knowledge of the injury. George v. Building Materials Corp., 44 S.W.3d 481, 485 n. 1 (Tenn. 2001) The employer had actual knowledge of the claimant's underlying injury and was not prejudiced by the claimant's failure to give formal written notice of his mental injury. As the claimant argues, there is no requirement that an injured worker give notice of every condition which may develop from a work-related accident. Quaker Oats v. Smith, 574 S.W.2d 45, 48 (Tenn. 1978). Moreover, we cannot say the evidence preponderates against the trial court's finding that the claimant had a reasonable excuse for failure to give timely written notice.

The appellant next argues the claim for benefits based on a mental injury should fail for lack of expert medical proof of causation. Dr. Goldin, the psychiatrist, testified the injury aggravated a pre-existing depressive condition. The aggravation of a pre-existing nervous condition brought on by a physical injury is compensable. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 488 (Tenn. 1997). Accordingly, the first issue is resolved in favor of the claimant.

The appellant next insists the trial court erred in awarding any permanent vocational disability because it should have accepted the treating physician's testimony. Dr. Tabor estimated the claimant's permanent medical impairment to be 2 percent to each arm. Trial courts are not required to accept the opinion of a treating physician over any other conflicting expert medical testimony, but may do so. When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of one expert should be accepted over that of another expert and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983). The trial court did not abuse its discretion in rejecting the testimony of the treating physician. The second issue is resolved in favor of the claimant.

Next, the appellant insists the trial court erred by allowing, as discretionary costs, the witness fee of John Ciocca, a psychologist, who testified concerning his observations of the manifestations of the claimant's mental injury. The witness charged a fee of \$400.00. By Tenn. R. Civ. P. 54.04(2), reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials, and guardian ad litem fees are recoverable as discretionary costs. Miles v. Voss Health Care Center, 896 S.W.2d 773, 776 (Tenn. 1995). Because Dr. Ciocca testified as a fact witness, rather than an expert witness, his fee is not recoverable as costs. The award of costs is reduced by the amount of his fee.

The appellant finally argues that the trial court erred in allowing Dr. Janovich's fees as costs. The claimant was referred to Dr. Janovich by his attorney for the purpose of evaluation. Fees charged to a claimant by the treating physician or a specialist to whom the employee was referred for giving testimony by oral deposition relative to the claim, shall, unless the interests of justice require otherwise, be considered a part of the costs of the case, to be charged against the employer, when the employee is the prevailing party. The claimant is entitled to recover, as costs, Dr. Janovich's fee for testifying, but not his fee for examining the claimant. The trial court found, "that the bill of Dr. Janovich should also be paid by Defendant." The judgment is further modified by omitting from the award, "the bill of Dr. Janovich." Id at 776.

The appellee insists the award is inadequate. In making determinations as to the extent of an injured worker's permanent disability, the trial 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. § 50-6-241(a)(1). From our independent examination of the record, we are not persuaded the evidence preponderates against the trial court's award.

For the above reasons, the judgment of the trial court, as modified herein, is affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

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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 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, Royal Insurance Company of America , for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM