IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 27, 2002 Session

PHINEAS DORRIS v. AMERICAN LIMESTONE COMPANY, INC.

Direct Appeal from the Circuit Court for Robertson County
No. 9385 John H. Gasaway, III, Judge

No. M2002-00741-WC-R3-CV - Mailed - February 4, 2003
Filed - April 25, 2003

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 questions the trial court's findings as to notice, compensability and extent of vocational disability. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Circuit Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C. J., and JOHN K. BYERS, SR. J., joined.

W. Randall Wilson and Lynda Motes Hill, Chattanooga, Tennessee, for the appellant, American Limestone Company, Inc.

C. Michael Lawson, Nashville, Tennessee, for the appellee, Phineas Dorris

MEMORANDUM OPINION

The employee or claimant, Dorris, initiated this civil action to recover workers' compensation benefits. The trial court awarded permanent vocational disability benefits based on 75 percent to the body as a whole. The employer, American Limestone, has appealed.

Appellate 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. § 50-6-225(e)(2) (2002 Supp.). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies.

Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The extent of an injured worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 915 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002).

At the time of the trial, the employee or claimant, Mr. Dorris, was fifty-four years old. He has an eighth or ninth grade education and experience as a farmer, laborer and mechanic. He worked for the employer from 1978 until his injury. His duties there included heavy lifting. In May or June 2000, he injured his back while unloading material from a trailer. He reported the injury to his supervisor, although the supervisor testified at trial that the claimant did not tell him his back problem was work related. He later gave written notice to the employer, but his claim was denied for lack of notice.

On June 16, 2000, he visited his regular treating physician, Dr. John Anderson, to whom he reported his injury. When the trial court ordered the employer to provide medical care, he was treated by Dr. Arthur Cushman, who performed a lumbar laminectomy, prescribed permanent restrictions and assessed the claimant's permanent medical impairment at 13 percent to the whole body.

The appellant contends the trial court erred in failing to dismiss the claim for failure of the claimant to give timely written 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. 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. The notice may be given by the employee or his representative. Tenn. Code Ann. § 50-6-201(a).

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. 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). No defect or inaccuracy in the notice will bar compensation unless the employer is prejudiced thereby and then only to the extent of such prejudice. Tenn. Code Ann. § 50-6-202(a)(2). 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. McCaleb v. Saturn Corp. at 415. 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 at n 1 (Tenn. 2001). From our independent examination of the record, we are unable to say the trial court erred in excusing the absence of timely written notice under the circumstances of this case, there being no showing that the employer was prejudiced by it

The appellant further contends, pointing to contradictions between the claimant's testimony and that of other employees, that the injury was not compensable. Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee, and occupational diseases arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. § 50-6-103(a); McCurry v. Container Corp. of America, 982 S.W.2d 841, 843 (Tenn. 1998).

An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances. It is the resulting injury which must be unexpected in order for the injury to qualify as one by accident. "Injury" has been defined as including "whatever lesion or change to any part of the system (that) produces harm or pain or lessened facility of the natural use of any bodily activity or capability." Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993) (citations omitted). An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and occurs in the course of one's employment if it occurs while an employee is performing a duty he was employed to do. Id. The trial court accepted the claimant's version of the facts, corroborated by other lay proof and Dr. Cushman's testimony that the work related accident aggravated a preexisting condition. Giving due deference to the findings of the trial court, we cannot say his injury was not caused by an accidental injury arising out of and in the course of employment.

The appellant finally contends the award of permanent partial disability benefits is excessive in that it exceeds two and one-half times the claimant's medical impairment rating and because the only reason the claimant does not continue to work for the employer is his own misconduct. 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 or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical

Impairment. Tenn. Code Ann. § 50-6-241(a)(1). Since, as the trial court also found, the claimant did not make a meaningful return to work for the employer, the statute is inapplicable. Newton v. Scott Health Care Center, 914 S.W.2d 884, 886 (Tenn. 1995).

For those reasons, the judgment is affirmed. Costs are taxed to the appellant.

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JOE C. LOSER, JR.

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by American Limestone Company, Inc., 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to appellant, American Limestone Company, Inc., and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Frank F. Drowota, C.J., not participating