

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

September 11, 2003 Session

GAYLON LOWRY v. HARDEMAN COUNTY BOARD OF EDUCATION

**Direct Appeal from the Chancery Court for Hardeman County
No. 13056 Dewey C. Whitenton, Chancellor**

No. W2002-02822-WC-R3-CV - Mailed October 31, 2003; Filed December 2, 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, statute of limitations and causation. As discussed below, the panel has concluded the evidence fails to preponderate against the findings.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE H. WALKER, III, SP. J., joined.

B. Duane Willis, Allen, Kopet & Associates, Jackson, Tennessee, for the appellant, Hardeman County Board of Education

Gayden Drew IV, Drew & Martindale, Jackson, Tennessee, for the appellee, Gaylon Lowry

MEMORANDUM OPINION

The employee or claimant, Ms. Lowry, initiated this civil action to recover workers' compensation benefits for a work related injury. The employer denied liability and asserted the claim was barred by failure of the claimant to give timely notice and by the statute of limitations. After a trial on the merits, the trial court resolved the issues in favor of the claimant. The employer, Hardeman County Board of Education, 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). 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). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

The claimant is fifty-four years old with a high school education and a real estate license. She has experience as a real estate agent, office worker, cashier and emergency room supervisor. She began working for the employer as a secretary and bookkeeper in 1992. She had no prior hip problems.

On November 29, 1999, a student slammed into her, knocking her some four feet into a concrete wall. She suffered immediate pain in her pelvic area. The school's principal became immediately aware of the accident. Ms. Lowry testified that the principal may have seen the accident. On May 18, 2000, she learned from her treating physician, Dr. Lee Hunter, an orthopedic surgeon, that she had suffered from avascular necrosis and would need hip replacement surgery. She also saw Dr. Michael Lynch, another orthopedic surgeon, and other doctors. Drs. Hunter and Lynch, testified by deposition.

Dr. Lynch diagnosed necrosis in both hips, but was equivocal as to the cause. He conceded the condition could be caused by trauma, but said it could also occur without trauma. Dr. Hunter testified that the claimant's injury was probably related to the accident at work. He operated on the right hip on June 21, 2000 and on the left hip on June 20, 2001. He testified that she reached maximum medical recovery on November 5, 2001, estimated her permanent medical impairment to be 28 percent to the whole body and prescribed restrictions.

The record contains conflicting testimony from live witnesses as to when the injury occurred. There is also a conflict between the claimant's testimony that she was knocked against the concrete wall or to the floor. Dr. Hunter attributed the injury to the accident, however, whether the claimant collided with the wall or the floor. The trial court accredited the claimant's testimony in all respects.

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 which 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 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). We therefore defer to the trial court's findings on the credibility issue.

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. 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). The trial court accepted the claimant's testimony that the employer had actual notice of her injury. Written notice was thus unnecessary.

An action by an employee to recover benefits for an accidental injury, other than an occupational disease, must be commenced within one year after the occurrence of the injury. Tenn. Code Ann. § 50-6-224(1). The running of the statute of limitations is suspended, however, until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained. Hibner v. St. Paul Mercury Ins. Co., 619 S.W.2d 109 (Tenn. 1981). It is the date on which the employee's disability manifests itself to a person of reasonable diligence - not the date of accident - which triggers the running of the statute of limitations for an accidental injury. Id. Ms. Lowry commenced this action within one year after the occurrence and less than two months after she was advised she had a serious injury.

In a workers' compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given incident "could be" the cause of a claimant's injury, when, from other evidence, it may reasonably be inferred that the incident was in fact the cause of the injury, McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995). Where equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn under the case law. White v. Werthan Industries, 824 S.W.2d 158 (Tenn. 1992). Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award, for expert opinion must always be more or less uncertain and speculative. McCaleb at 414-15. Generally, an injury arises out of and in the course of employment if it has a rational causal connection to the work and occurs while the employee is engaged in the duties of his employment; and any reasonable doubt as to whether an injury arose out of the employment or not is to be resolved in favor of the employee. White v. Werthan Industries, 824 S.W.2d 158 (Tenn. 1992).

Giving due deference to the findings of the trial court, we cannot say the preponderance of the evidence is otherwise. The judgment is therefore affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

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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 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, Hardeman County Board of Education, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM