

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

(December 17, 2003 Session)

**ROBERT W. KELLEY v. LUMBERMENS MUTUAL CASUALTY
COMPANY AND WILSON SPORTING GOODS CO.**

**Direct Appeal from the Chancery Court for Coffee County
No. 01-505 John W. Rollins, Chancellor**

**No. M2003-00773-WC-R3-CV - Mailed - February 24, 2004
Filed - March 29, 2004**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The trial court found the claim to be barred by the statute of limitations. We affirm.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, CHIEF JUSTICE., and JOHN A. TURNBULL, SP. J. joined.

Rick L. Moore, Moore & Hedges, Tullahoma, Tennessee, for the Appellant, Robert W. Kelley.

Edward A. Hadley, North, Pursell, Ramos and Jameson, PLC, Nashville, Tennessee, for the Appellees, Lumbermens Mutual Casualty Company and Wilson Sporting Goods, Co.

MEMORANDUM OPINION

Facts

Robert W. Kelley filed a Complaint on November 16, 2001, seeking workers' compensation benefits for an injury "arising from an accident which occurred on 9/14/92, during the course and scope of his employment with Wilson Sporting Goods Co." As a result of the injury, Wilson Sporting Goods paid Mr. Kelley temporary total disability benefits on two separate occasions. He returned to work at his regular job but avoided heavy lifting. His pain worsened after the injury and activities such as sneezing or raising his left arm above his shoulder increased the pain. He was unable to play golf or bowl because of the pain, which also interfered with his sexual relationship with his wife.

The employer afforded medical treatment for the injury by Drs. Mittur Ramprasad, Richard Bagby, Terry McClarney, Lucian Davis, and Mary Ellen Clinton. Mr. Kelley eventually came under the care of Dr. Roger W. Catlin, a pain management specialist, who implanted a spinal cord stimulator in Mr. Kelley's spine in January 1995. While the device improved his condition, Mr. Kelley continued to have pain. Dr. Catlin continued to monitor Mr. Kelley, but no medical treatment was provided for the injury by Dr. Catlin or any other physician after April 2, 1999. On January 10, 2001, Mr. Kelley returned to Dr. Catlin following a work-related automobile accident on January 8, 2001. No payments for medical treatment of the 1992 injury were made between January 4, 2000 and the January 10, 2001 visit to Dr. Catlin.

The trial judge found that the statute of limitations ran on January 4, 2001 and dismissed the action. The trial court made a provisional finding that Mr. Kelley sustained a 20 percent permanent partial permanent disability which the employer contends is excessive. This issue is pretermitted by our disposition of this appeal.

Standard of Review

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of § 50-6-225(e)(2); *Tucker v. Foamex, L.P.*, 31 S.W.3d 241, 242 (Tenn. 2000). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (2002). Where there is an issue of law and not of fact, our standard of review is *de novo* without a presumption of correctness. *Bradshaw v. Old Republic Ins. Co.*, 922 S.W.2d 503 (Tenn. 1996).

Issues

The employee submits the following issues:

1. Is the Statute of Limitations set forth in Tenn. Code Ann. § 50-6-203 and § 50-6-224(1) tolled while an injured employee remains under the long term care of the duly authorized treating physician, which future care would include surgery to repair/replace an implantable surgical device in the plaintiff?
2. Does a subsequent aggravation of the prior injury revive the cause of action?

Discussion

I

The commencement of the statute of limitations is a factual issue to be determined by the circumstances of each case. *Blocker v. Regional Medical Center*, 722 S.W.2d 660, 662 (Tenn. 1987). The statute of limitations and the time for giving notice of an injury is suspended until by reasonable care and diligence it is discoverable and apparent that an injury compensable under the Workers' Compensation Act has been sustained. *Livingston v. Shelby Williams Industries, Inc.*, 811 S.W.2d 511 (Tenn. 1991). In the present case, Mr. Kelley knew that the accident of September 14, 1992 resulted in spine surgery and that he continued to have pain and physical limitations after January 1995. It was clearly apparent by that time that he had sustained a compensable injury, and the statute of limitations commenced to run at that time. Mr. Kelley maintains that the statute of limitations was tolled when his employer provided and paid for medical services he received on January 10, 2001. The voluntary payment of medical expenses tolls the statute of limitations until the last payment is made. Tenn. Code Ann. § 50-6-203; *Threadgill v. Lexington Metal Products Co.*, 632 S.W.2d 550, 551 (Tenn. 1982). If the statute of limitations was tolled in this case, it clearly expired by January 4, 2001, one year after the employer last paid for medical treatment of Mr. Kelley's 1992 injury. More than a year passed before he was provided additional medical treatment. Voluntary payment of a medical bill after the statute of limitations has expired does not revive the employee's cause of action. *Ogden v. Matrix Vision*, 838 S.W.2d 528, 531 (Tenn. 1992); *Threadgill*, 632 S.W.2d at 552. We agree with the trial court that the payment for medical treatment following the January 8, 2001 automobile accident did not revive the claim for the 1992 injury.

II

Mr. Kelley also contends that the subsequent aggravation on January 8, 2001 of the 1992 injury revived the cause of action. Counsel relies on *Norton Co. v. Coffin*, 553 S.W.2d 751 (Tenn. 1977), a case that also held that the statute of limitations was tolled until the employee discovered the injury and by the furnishing of medical services, as

noted above. We have found no case holding that aggravation of a previous injury will revive a cause of action. The rule governing aggravation of preexisting injuries is stated in *Baxter v. Smith*, 211 Tenn. 347 at 361-363, 364 S.W.2d 936 at 943 (1962) as follows:

(T)he most recent injury causally related to the employment renders the employer at the time liable for full compensation for all of the resulting disability even though increased by aggravation of a previous condition of disease or injury of such employee.

Thus, if the January 2001 accident aggravated the prior injury, Mr. Kelley's workers' compensation award would be based on the disability caused thereby, and not on the disability that resulted from the 1992 injury.

Conclusion

The judgment of the trial court is affirmed. Costs of this appeal are taxed against the appellant, Robert W. Kelley, and his surety.

Howell N. Peoples, Special Judge

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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 will be paid by the appellant, Robert W. Kelley and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM