

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

February 18, 2004 Session

SHARON D. KELLER v. NATIONAL HEALTHCARE CORPORATION

Direct Appeal from the Chancery Court for Hamilton County

No. 00-0065 W. Frank Brown III, Chancellor

Filed May 26, 2004

No. 2003-01527-WC-R3-CV - Mailed April 19, 2004

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 awarded the employee 42 percent permanent partial disability as a result of a rotator cuff tear injury. The employer contends the evidence preponderates against the award. Other issues relate to the award of temporary total benefits, proper notice and the statute of limitations. The judgment is affirmed.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and H. DAVID CATE, SP. J., joined.

Paul Campbell III, Chattanooga, Tennessee, for Appellant, National Healthcare Corporation.

John Mark Griffin, Chattanooga, Tennessee, for Appellee, Sharon D. Keller.

MEMORANDUM OPINION

The employer, National Healthcare Corporation, has appealed from the trial court's action in awarding the employee, Sharon D. Keller, 42 percent permanent partial disability to the body as a whole.

Factual Background

The employee, a fifty-one year old high school graduate, was working as a medical

receptionist during March 1999¹ when she testified she injured her right shoulder while moving a box of medical records. She described the incident as causing a “stabbing horrible pain” in her shoulder. She said she immediately told office Manager Tina Cline, who was also working in the general area.

Ms. Cline admitted being told of the incident and said she told Ms. Keller to not do anymore lifting. She stated she did not fill out an accident report but probably should have. When pressed by counsel as to why she did not fill out a report, she responded that the office was in the process of closing, records were being packed and sent to another location, and it was just a chaotic time and she just never got around to doing it. She also testified that her supervisor, Janet Avery, was aware of Ms. Keller having hurt her shoulder while working. Ms. Cline left this employment during May 1999.

The employee sought medical treatment from Dr. Lester F. Littell, a physician she had been seeing for other problems. An MRI report indicated she had a right rotator cuff tear and surgery was performed on May 20, 1999. After recovering from surgery, she worked on a part-time basis for Dr. Littell from August 1, 2000 until December 2000, when he relocated his practice. She also worked some for a Dr. Driskin, who took over Dr. Littell’s practice. Since then and up to the time of the trial, she has worked as a sitter for different patients.

Witness Janet Avery testified she was the regional contract account manager for the employer and that her first knowledge of a work-related injury was not until August 1999 when she talked with Ms. Keller by phone.

Dr. Lester F. Littell, an orthopedic surgeon, was the only medical witness and testified by deposition. He stated Ms. Keller had been under his care for some period of time and that he had operated on both of her knees due to a congenital condition. He repaired the rotator cuff tear on her right shoulder during May 1999 and felt by history she had sustained the injury while lifting or moving the box of medical records. He was of the opinion she had a 7 percent medical impairment to the body as a whole and said her recovery period would be from three to six months. His records were filed as an exhibit to his deposition and they indicated she reached maximum medical improvement during November 1999. Other statements in the records indicated she was totally disabled from April 13, 1999 to August 27, 1999. Restrictions on reaching and lifting were imposed.

Issues on Appeal

The employer has raised a number of questions on appeal which we find narrows down to the following issues. The employer contends (1) the employee failed to give proper notice of the injury, (2) the statute of limitations had run on the claim, (3) the court was in error in awarding temporary total disability payments, and (4) the evidence preponderates against the award of 42

¹ The time of the incident was in dispute. The employee originally stated the incident happened during February 1999 but later amended the complaint to allege the injury occurred during mid-March 1999.

percent permanent partial disability.

Standard of Review

The review of the issues on appeal is *de novo* accompanied by a presumption of the correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony is involved, the trial court is usually in a better position to judge credibility and weigh evidence but where evidence is introduced by deposition the appellate court is in as good a position as the trial court in reviewing and weighing testimony. ***Landers v. Fireman's Fund, Inc. Co.***, 775 S.W.2d 355, 356 (Tenn. 1989).

Analysis of Issues

The employer argues Ms. Keller failed to give proper notice of any work-related injury. Our statute, Tenn. Code Ann. § 50-6-201, requires an employee to give written notice to the employer of a work-related injury unless the employer has actual notice of the injury. The notice must be given within thirty days after the accident or becoming reasonably aware of the injury unless a reasonable excuse exists for not complying with the rule. Generally, notice of injury must be given to an agent or representative of the employer who is in a supervisory or management capacity. ***Kirk v. Magnavox Consumer Electronics Co.***, 665 S.W.2d 711 (Tenn. 1984).

In the present case, the employee testified that immediately after she injured her shoulder she notified the office manager, Tina Cline, who was working nearby. Ms. Cline testified she received such information but later failed to make out an accident report. Other evidence was in dispute as to whether Ms. Cline's supervisor was aware of the incident. The trial court accepted the evidence of the employee on this point and we find the evidence does not preponderate against this finding.

The employer also contends the claim was barred by the running of the one year statute of limitations, Tenn. Code Ann. § 50-6-302. This action was filed during January 2000 which was well within the one year period of an accident occurring during March 1999. Although the amendment to the complaint alleging the accident occurred during March 1999 rather than February 1999 was several years after the complaint was originally filed, Rule 15, Tenn. R. Civ. P., expressly provides the amended language relates back to the filing of the original complaint. Therefore, we must hold the complaint as amended was timely filed.

It is next insisted the court was in error in fixing an award of temporary total disability. In this connection, the trial court awarded temporary total benefits from May 3, 1999 to August 2, 1999. Temporary total disability benefits end when the employee becomes able to work at any employment permitted by the nature of his/her injuries or when the employee has reached maximum recovery or improvement. ***Lock v. National Union Fire Ins. Co.***, 809 S.W.2d 483 (Tenn. 1991).

Although Dr. Littell was of the opinion Ms. Keller did not reach maximum medical

improvement until November 1999, the trial court concluded she became able to do some work sooner. These benefits began during May 1999 the month in which she had surgery. From our review of the record, we find the allowance of temporary total benefits was fixed for a reasonable period of time under the evidence.

Lastly, the employer complains that the award of 42 percent permanent partial disability is not supported by the evidence. The trial court fixed the award at six times the 7 percent medical impairment, the maximum statutory cap pursuant to Tenn. Code Ann. § 50-6-241(b). The record indicates the employee was terminated from her employment on about April 30, 1999 and she did not work until sometime after her surgery and then on a part-time basis. Considering her age, education, the nature of her disability, etc., we do not find the evidence preponderates against this award.

Conclusion

The evidence does not preponderate against the findings of the trial court. The judgment is affirmed in all respects. Costs of the appeal are taxed to the employer.

ROGER E. THAYER, SPECIAL JUDGE

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SHARON D. KELLER V. NATIONAL HEALTHCARE CORPORATION
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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 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 to the appellant, National Healthcare Corporation, for which execution may issue if necessary.