

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 2003 Session

MAMIE RICHBURG v. WHIRLPOOL CORPORATION

**Direct Appeal from the Chancery Court for Rutherford County
No. 01-2121WC Robert E. Corlew, III, Chancellor**

**No. M2003-00364-WC-R3-CV - Mailed - February 27, 2004
Filed - April 30, 2004**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of the findings of fact and conclusions of law. The issues presented to the trial court were: (1) whether the plaintiff sustained an injury to her neck arising out of the course and scope of her employment on October 18, 2000; (2) whether proper notice was given of her injury; and (3) whether defendant would be allowed a setoff for payment of unemployment compensation benefits against temporary total disability payments. As discussed below, we affirm the trial court in part and reverse in part.

Tenn. Code Ann. § 50-6-225(e) (2000 Supp.) Appeal as of Right; Judgment of the Chancery Court is Affirmed in part and Reversed in part.

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., joined and JOHN K. BYERS, SR. J., not participating.

David T. Hooper, Brentwood, Tennessee, for Appellant Whirlpool Corporation

Dicken E. Kidwell, Murfreesboro, Tennessee for Appellee Mamie Richburg

MEMORANDUM OPINION

Employee, Mamie Richburg, initiated this civil action to recover workers' compensation benefits for an alleged work-related injury. Employer, Whirlpool Corporation, denied that employee suffered an injury arising out of and in the course and scope of her employment and averred the employee failed to give notice as required by law. Following a trial of this cause on October 3, 2002, the trial court ordered permanent partial disability benefits based on forty percent to the body as a whole. Employer filed a motion to alter or amend the final judgment and made an oral motion to amend their pleadings to conform with the evidence. The motion sought the affirmative defense of

setoff for payment of unemployment benefits received by employee during the time employee received temporary total benefits following her neck injury. The trial court granted the motion allowing setoff. The employer has appealed the trial court's award and employee appeals the trial court's allowance of a setoff.

FACTS

Employee, Mamie Richburg, was forty-three years of age at the time of trial. She began working for employer, Whirlpool Corporation, on a temporary basis in April 1991, and she became a permanent employee in 1992. She worked in a number of areas at employer's business.

Employee started having problems with her right elbow from pushing a dehumidifier unit as she worked in a rebox area of the assembly line. Due to pain in her right arm, she began using her left arm for repetitive work. In February 2001, employee reported an injury to her left elbow. She filled out an employee incident report and was referred to a physician. Unhappy with the first physician, Employee then chose Dr. Callahan from a panel, and he performed some tests but never performed surgery.

Employee alleges that she injured her neck on October 18, 2000, between 8:00 and 9:00 a.m. while pulling some equipment. She claims that she continued to work until she went to the medical department between 12:30 and 1:00 p.m. that day. Employer submitted testimony that employee did not report to the medical department. Employer also submitted a copy of an employee incident report, which was hand written and not signed by anyone. Employee gave inconsistent testimony in her depositions and at trial regarding her visit to the medical department.

Employee also claims that she reported the neck injury to her supervisor, Randall Tidwell, and to Dan Watson, the Human Resources Coordinator in charge of workers' compensation. She further testified that Mr. Watson approved her appointment with the doctor who ultimately performed surgery on her. Neither Randall Tidwell nor Dan Watson testified at trial.

Employee underwent surgery on August 14, 2001, and Dr. Tarek G. Elalayli, M.D. allowed her to work on December 3, 2001. Dr. Elalayli placed restrictions on employee, including avoidance of heavy lifting, overhead lifting, crawling, and carrying weight on a regular basis. He placed a fifteen pound weight limit on heavy lifting and a five pound weight limit on overhead lifting. Dr. Elalayli assessed 25 percent anatomical impairment rating to the body as a whole.

Dr. Elalayli also testified that based on employee's history it was possible her injury was causally related to her work. He further testified that he believed her work certainly contributed to her cervical disease.

ANALYSIS

Employer appeals the judgment of the trial court, arguing the following: (1) that the trial

court erred by finding that employee injured her neck in an incident arising out of and in the course of her employment at Whirlpool on October 18, 2000, (2) that the evidence preponderates against the finding that proper notice was given of a claimed neck injury. Although the two issues are separate and each addresses certain and unique characteristics, the two share substantially the same basis, and will be considered together.

The trial court found that employee had carried her burden of proof and her neck injury arose out of and in the scope of her employment. However, employer insists that employee did not carry her burden of proof due to her inconsistent testimony. The employee has the burden of proving every essential element of her claim. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992). When the trial judge has seen 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 judge who had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. *Long v. Tri-Con Ind., Ltd.*, 996 S.W.2d 173, 177 (Tenn. 1999).

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. § 50-6-102(12). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight System, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997).

Dr. Elalayli testified that based on employee's history it was possible her injury was causally related to her work, and he further testified that he believed her work certainly contributed to her cervical disease. He assessed a twenty-five percent anatomical impairment. Dr. Callahan assessed a five percent impairment to her left upper extremity and said that it was causally related to her work.

Although causation cannot be based on speculative or conjectural proof, absolute medical certainty is not required, and reasonable doubt is to be construed in favor of the employee. *White*, 824 S.W.2d at 159. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Systems, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997)(citations omitted.)

Except where permanent disability is obvious to a layman, a finding of permanency must be based on competent medical evidence that there is a medical probability of permanency or that disability is reasonably certain to be permanent. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335-36 (Tenn. 1996).

The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

Based on the record before us, we are unable to find the proof preponderates against the trial judge's findings as to causation and permanency.

Employee argues that the trial court erred by granting employers' motion to allow a setoff of benefits the employee received from unemployment compensation benefits. This issue involves the interpretation of the Workers' Compensation Act, i.e. if there is a statutory provision allowing such setoff. This is a question of law and is heard by this Court *de novo* with no presumption of correctness. *Perry v. Sentry Ins. Co.*, 938 W.W.2d 404, 406 (Tenn. 1996); *Beare Co. v. Tennessee Dept. Of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993)

Workers' Compensation laws are purely statutory and no authority has been cited allowing such set-off and none has been found by this Court. Tenn. Code Ann. § 50-6-114 provides:

- (a) no contract or agreement, written or implied, or rule, regulation or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this chapter except as herein provided.

Unemployment compensation benefits are not shown in such statute as an exception. There being no statutory authority allowing a set-off for unemployment compensation benefits, we reverse the trial court in allowing such set-off.

CONCLUSION

We affirm the judgment of the trial court as to causation and permanency, but we reverse the judgment of the trial court allowing setoff. The costs of this appeal are taxed to the appellant, Whirlpool Corporation.

ALLEN W. WALLACE, SENIOR JUDGE

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ORDER

This case is before the Court upon the motion for review filed by Whirlpool Corporation 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 Whirlpool Corporation, for which execution may issue if necessary.

PER CURIAM

Birch, J. - Not Participating