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

December 9, 2004 Session

LOUCINDRA TAYLOR V. AMERICAN PROTECTION INSURANCE CO., ET AL.

Direct Appeal from the Chancery Court for Gibson County
No. CT-16267 George R. Ellis, Chancellor

No. W2004-01011-WC-R3-CV- Mailed March 14, 2005; Filed April 13, 2005

American Protection Insurance Company and Tower Automotive Products Company, Inc. appeal the trial court's grant to Loucindra Taylor of 12% permanent partial disability to both of her arms. First, the Appellants contend that the injured employee did not give notice to the employer as required by law. Second, the Appellants argue that the medical evidence failed to show that the Plaintiff's condition was related to her employment. Third, the Appellants claim that the 12% award to each arm is excessive and not supported by the evidence. For the reasons set forth below, we affirm the decision of the trial court.

Tenn. Code Ann. § 50-6-225(e)(3) (Supp. 2003); Appeal of Right; Judgment of the Chancery Court Affirmed

W. FRANK BROWN, III, Sp. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and MARTHA B. BRASFIELD, Sp. J., joined.

Deana C. Seymour and Lee R. Sparks, Jackson, Tennessee for the Appellants, American Protection Insurance Company and Tower Automotive Products Company, Inc.

Floyd S. Flippin, Humboldt, Tennessee, for Appellee, Loucindra Taylor

MEMORANDUM OPINION

I. Factual and Procedural Background

At the trial the Plaintiff, Loucindra Taylor ("Ms. Taylor"), was a 34-year-old female. She had a high school education. She had worked for Tower Automotive Products Company, Inc. ('Tower") and its predecessor company since 1993. She became a grinder in 2002. The job of grinder involves significant and repetitive use of her hands. Ms. Taylor noticed a knot in and

had pain from her right wrist. She reported this situation to the plant nurse, Debbie Bowling ("Ms. Bowling"). The nurse diagnosed the problem as a ganglion cyst and gave her a splint to wear, which Ms. Taylor did use at work.

Later, Ms. Taylor developed the same problem in her left wrist and again reported to the plant nurse. Ms. Bowling again diagnosed the problem as a ganglion cyst. Ms. Bowling gave Ms. Taylor another splint for her left wrist. Thereafter, Ms. Taylor's right wrist began to swell. She again reported to the nurse. Ms. Bowling put Ms. Taylor on light duty and also sent her to see Dr. Kenneth Tozer, II ("Dr. Tozer") for treatment. Ms. Bowling informed Ms. Taylor that Tower did not pay workers' compensation benefits for ganglion cysts because such were not work related. Ms. Bowling did not provide a panel of physicians due to Tower's position. However, as a former employee of Dr. Tozer, Ms. Bowling knew he treated ganglion cysts.

On November 26, 2002 Dr. Tozer surgically removed the left cyst. On December 24, 2002, Dr. Tozer surgically removed the right cyst. Ms. Taylor missed approximately 11 weeks of work. Ms. Taylor filed her complaint for workers' compensation benefits on January 6, 2003. The case was tried on January 13, 2004. At the end of the hearing the trial court gave a detailed opinion from the bench and awarded Ms. Taylor 12% to each arm. The Defendants appealed.

II. Standard of Review

Findings of fact are *de novo* upon the record of the trial court with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2004 Supp.), Tenn. R. App. P., 13(d). In making this determination, we must give considerable deference to the trial judge's findings with regard to weight and credibility of oral testimony. *Townsend v. State,* 826 S.W.2d 434, 437 (Tenn. 1992). We weigh the evidence to determine where the preponderance lies and make an evaluation of the judgment within the confines of established rules. If medical testimony is given by deposition or report of physician, we may make an independent assessment of the medical proof to see where the preponderance of evidence lies. *Cooper v. Ins. Co. of N.A.,* 884 S.W.2d 446 (Tenn. 1994). Futhermore, the trial court has the discretion to accept the opinion of one medical expert over that of another medical expert. *Kellerman v. Food Lion, Inc.,* 929 S.W.2d 333 (Tenn. 1996).

III. Analysis

The Appellants raise three issues on appeal. The Appellee raised one issue. These issues will be discussed separately.

A. The Notice Issue.

The Appellants first complain that Ms. Taylor cannot recover because she did not give Tower written notice of her injuries. Despite all of the "lawyering", it is clear that Ms. Taylor took her medical issues to Ms. Bowling, upon discovering the condition. Ms. Bowling was also the employee designated by Tower to receive notice of workers' compensation claims. Thus,

Ms. Taylor reported her physical condition to Tower's representative for workers' compensation claims.

Notice to the plant nurse is notice to Tower. The statute and the case law are clear that written notice to an employer is not necessary when the employer has actual knowledge of the injury. Here Ms. Bowling's knowledge is Tower's knowledge. See *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 169 (Tenn. 2002) (written notice is not necessary when the employer has actual notice).

Tower complains that Ms. Taylor did not give it written notice saying her wrist problems resulted from her work duties. However, the employee is not required to do so where the cause of the condition or injury is not known. Here, Ms. Bowling told Ms. Taylor that she would not be paid workers'compensation benefits for these ganglion cysts because it was Tower's position that such were not compensable.

The panel notes that Ms. Bowling did not testify at trial. This case is similar to *Raines v. Shelby Williams Enterprises, Inc.,* 814 S.W.2d 346 (Tenn. 1991). In *Raines*, the employee had gone to the company nurse about her condition. The company subsequently defended the workers' compensation lawsuit on the lack of notice. The Supreme Court, by Justice Anderson, wrote:

> The plaintiff testified that on the day of her accident she attempted to report her injury to the company nurse, but the nurse was on vacation; when the plaintiff returned from her vacation on July 11, 1988, she told Katherine Suttles, the company nurse, that she had injured her back while picking up a heavy chair. Although Suttles was present at trial, she was not called by the defendant to testify.
>
> "Normally, the failure of a party to produce an available witness who is in a position to know the facts, and who is apparently favorable to him, gives rise to a presumption or inference, permissive and rebuttable in nature, that the testimony of such witness would not sustain the contention of such party."

Id. at 349 (quoting Delk v. State, 590 S.W.2d 435, 448 (Tenn. 1979) (dissenting opinion) (other citation omitted)).

> The evidence that Suttles had actual knowledge of the plaintiff's accidental injury is such that it was incumbent upon the defendant to have Suttles deny it, if in fact she had no such knowledge. "All of the elements necessary to invoke the missing witness rule are present."

Raines, 814 S.W.2d at 349 (quoting Sweeney v. State, 768 S.W.2d 253, 259 (Tenn. 1989)).

Tower had actual notice of Ms. Taylor's injuries. No written notice is required where the employer has actual notice of the employee's injury. Further, the Appellants have shown no prejudice from a lack of written notice. This conclusion is most just because Tower's nurse told Mr. Taylor that the injury/condition was not compensable. There is no reason for the employee to submit a written notice of injury to the employer's agent who has actual knowledge of the injury and who has said this condition is not compensable.

B. The Medical Evidence on Causation.

The Appellants next contend that the medical evidence does not supply the causal link between Ms. Taylor's work and her employment.

The trial court has the discretion to believe one (or more) doctors as to his/her medical opinion(s) as opposed to other medical opinions. In these type cases the appellate court has the same opportunity as the trial court to read the depositions for the medical evidence. The trial court in this case was presented with opinions by four physicians.

First, Dr. Tozer testified by deposition. The following supports the opinion and conclusion of the trial court. The initial questioning is by Ms. Seymour, counsel for the Appellants:

> Q. And while you have given us your opinion regarding the cause of the ganglion cysts, it's very difficult in ganglion cysts to give an opinion to a reasonable degree of medical certainty since it appears that most – all literature indicates that the etiology of a ganglion cyst, unless it is a result of a traumatic fall or a direct blow, is questionable. Is that right?
>
> **MR. FLIPPIN:** I object to the form. I don't believe you've laid a foundation that all of the literature supports that, but he can answer.
>
> A. No, I don't believe that is correct because it does show that it's – that there's increased formation in repetitive activities.
>
> **RE-DIRECT EXAMINATION BY MR. FLIPPIN:**
>
> Q. Just a couple of followup. Dr. Tozer, what relevance factually is it to you that she developed bilateral ganglion cysts as opposed to one-sided ganglion cyst?
>
> A. I think that supports the proposition that it is work related and that if she's using both hands in that activity in a repetitive traumatic activity that she developed a cyst on both sides.

> Q. The form that you were asked about, the disability form that you filled out saying it was not work related, did you understand that in order for her to receive non-Workers' Comp benefits, that box had to be checked "no"?
>
> A. Yes.
>
> Q. And that was why you would have checked that box "No". Is that a fair statement?
>
> **MS. SEYMOUR:** Object to form.
>
> A. Correct.
>
> Q. And you're being asked now your opinions on – based upon a reasonable degree of medical certainty as to whether her repetitive work at Tower was the cause of the ganglion cysts that you treated, and what is your answer to that?
>
> A. I believe that it is.

Dr. Boals also testified that Ms. Taylor's cysts were work related. Although Dr. Tozer did not give Ms. Taylor any permanent medical impairment, Dr. Boals assigned 5% to each arm.

The trial court did not discuss on the record why he did not follow the opinions of Dr. Murrell or Dr. Riley Jones. Dr. Murrell saw Ms. Taylor one time. Dr. Jones gave his opinion based on reading medical records and did not examine Ms. Taylor. The trial court may have thought that the treating physician was in the best position to testify about the employee's condition and the cause thereof. The medical evidence is more than sufficient to establish the causation link between the employee's work and the injury.

C. The Excessive Award.

The Appellants argue that the 12% award to each arm is excessive. They point to the fact that Dr. Tozer did not assign any permanent medical impairment nor did he assign any permanent work restrictions. The Appellants also point to Ms. Taylor's return to work and her overtime work as additional factors to support their position.

Dr. Boals assigned a 5% permanent medical impairment rating to each arm. He also stated that Ms. Taylor should restrict her work activities to eliminate or reduce the use of the grinder in her work activities. He said she should be careful with "real manual intensive work" as well as "heavy gripping and repetitive work." Further, it is noted that Ms. Taylor did not return to her grinding position after her surgery.

Ms. Taylor testified as to her loss of grip strength and pain. This was corroborated by Dr. Boals. Under all of the circumstances, including the fact that medical impairment and/or work restrictions are only two of many factors to consider, we affirm the trial judge's award in this case. The evidence supports the trial judge's award. Ms. Taylor had surgery on both arms. She has permanent damage to her arms. She has pain and loss of grip strength. One doctor has assigned permanent work restrictions as well as permanent medical impairment.

D. Frivolous Appeal.

Counsel for Ms. Taylor has asked us to dismiss this appeal and to award damages to the Appellee. This request is made pursuant to Tenn. Code Ann. § 27-1-122, which provides:

> **Damages for frivolous appeal.** – When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

It must be remembered that a party to a workers' compensation case has an appeal as of right. It is not unusual for an attorney to believe that his/her client has not been treated correctly by the trial court. This view results from the attorney's zealous representation of the client and (sometimes) the inability to observe the facts and/or law favoring the other party.

The Supreme Court held that damages for a frivolous appeal were appropriate where "[t]he issues raised by appellant were issues of fact with abundant material evidence supporting the chancellor's findings. *Liberty Mutual Ins. Co., v. Taylor*, 590 S.W.2d 920 (Tenn. 1979)." *Hall v. American Freight Systems,* 687 S.W.2d 713, 714 (Tenn. 1985). The arguable difference in the medical opinions here keeps this panel from holding that this is a frivolous appeal. The court does note that the Appellants' characterization of the medical evidence is, at best, "very zealous" toward the Appellant's position and, at worst, close to a misrepresentation of the medical evidence.

IV. Conclusion

The employer had actual notice and knowledge of Ms. Taylor's medical condition and injury. The employer has not shown any prejudice and the court does not believe that Tower could show any prejudice due to a lack of written notice, under the facts of this case. The medical evidence supports the required causal link between Ms. Taylor's work and her injuries. Finally, the 12% award to each arm is well within the discretion of the trial court.

Therefore, the opinion of the trial court is affirmed. The Appellee's Motion to Award Damages based upon a frivolous appeal is denied. The costs of appeal are taxed to the Appellants, for which execution may issue if necessary.

W. FRANK BROWN, III, SP. J.

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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 Appellants, American Protection Insurance Company and Tower Automotive Products Company, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM