

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

**TRANSPORTATION UNLIMITED, INC., v. MICHAEL GRUBER, ET AL.**

**Circuit Court for Maury County  
No. 7689**

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**No. M1999-01540-WC-R3-CV - Decided - June 23, 2000**

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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 appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**TRANSPORTATION UNLIMITED, INC., v. MICHAEL GRUBER, ET AL.**

**Direct Appeal from the Circuit Court for Maury County  
No. 7689 Robert L. Holloway, Jr., Judge**

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**No. M1999-01540-WC-R3-CV - Mailed May 23, 2000  
Filed - June 23, 2000**

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The employer, Transportation Unlimited initiated this civil action, seeking a declaration that it's employee's claim for workers' compensation benefits be disallowed because the claimed injury was merely an episode of pain from a previous injury and because, it averred in its amended complaint, the employee misrepresented his medical condition when he applied for employment. The employee or claimant, Michael Gruber, denied any such misrepresentation and filed a counterclaim for medical and disability benefits. The employer's motion for summary judgment was disallowed and, after a trial on the merits, the trial court awarded benefits and discretionary costs to the claimant.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of right; Judgment of the Circuit Court Affirmed.**

LOSER, SP. J., delivered the opinion of the court, in which DROWOTA, J., and GAYDEN, SP. J., joined.

Reid D. Leitner, Nashville, Tennessee, for the appellant, Transportation Unlimited, Inc.

J. Mark Rogers, Murfreesboro, Tennessee, for the appellee, Michael Gruber.

**MEMORANDUM OPINION**

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. By this appeal, the employer contends (1) the trial judge erred by refusing to dismiss the claim because the claimant made false representations on his application for employment and (2) the trial court erred in awarding discretionary costs. As discussed below, the panel has concluded the judgment should be affirmed.

In January of 1995, the claimant was hired as a truck driver for Cassens Transport, where he worked as a car carrier, the duties of which included securing cars to the deck of a truck with chains,

pulled tight with the use of manual ratchet rollers. Considerable force is required to tighten the chains, particularly when large automobiles and trucks are involved. On July 9, 1996, while tightening chains on cars in Detroit, Michigan, he felt pain in the side of his right shoulder, but continued working. While returning to Tennessee, he reported the incident to Cassens. When the pain worsened, he was referred to Dr. Byrnes.

Dr. Byrnes examined his shoulder and found full range of motion, good grip strength, no neurological deficits or tenderness in the shoulder joint, but tenderness in the right biceps and pain with flexion of the right arm. X-rays were negative. Dr. Byrnes diagnosed a strain of the right biceps muscle, prescribed a muscle relaxer and anti-inflammatory drug, and instructed the claimant not to work for the next two days, Saturday and Sunday. He worked the following week, but the pain persisted. Dr. Byrnes referred him to Dr. Jack Miller.

Dr. Miller suspected a rotator cuff stretch injury. Dr. Miller treated the claimant for a rotator cuff stretch injury, including a prescription for rest, but he told the claimant he had bursitis and/or tendinitis, which he treated with a cortisone injection to the shoulder. The cortisone relieved the pain. Dr. Miller released the claimant to return to work on August 12, 1996. He continued to work with an additional cortisone treatment. Dr. Miller testified that the injury “was not to such severity that he (Gruber) couldn’t continue to work, and it finally got nearly over with.” No permanency was suggested.

On October 19, 1996, the claimant applied to Transportation Unlimited, Inc. (TU) for a position as a car hauler. The claimant’s testimony was that he was simply handed a stack of papers to fill out and sign, and that the entire application process was rushed and highly informal. One of the questions on the employment application was, “Is there any reason you might not be able to perform the functions of the job for which you have applied (as described in the attached job description)?” The claimant answered, “No”, and signed the application. When asked why he had not revealed the prior shoulder injury, the claimant stated that he had not done so because his shoulder pain was minimal and because it had not caused him to miss work. He also testified that because of what Dr. Miller had told him and because of the way the shoulder felt, he believed the injury would not affect his ability to do the job. Additionally, the physician who examined him for TU examined the shoulder and found the claimant’s range of motion to be normal.

The claimant worked regularly at TU for four and one-half months without missing any time. Then, on February 28, 1997, while tightening chains, he felt a severe and sudden pain in his right shoulder. He described the pain as “brutal, horrible.” The injury was diagnosed as a torn rotator cuff.

Dr. Miller, in a letter to TU dated March 24, 1997, said:

“He was having only minimal trouble, if any, with the shoulder until 3/18/97 when I saw him again. At that time, he had begun having more problems with the shoulder on 2/28/97 when he was tightening some chains. Mr. Gruber thought that he had been treated for a shoulder problem which had disappeared, and I think almost any reasonable person would have

thought so too. He was not told by me that he had a chronic, ongoing permanent problem with his shoulder.

“I think it is unrealistic to think further that he should be dismissed from work because he falsified a claim on his employment application. I see nothing unreasonable about his answer to the question, “Is there any reason you might be unable to perform the functions of the job for which you have applied in the attached job description?”. He answered “No,” and I think that is the way I would have answered the question also had I been Mr. Gruber. I certainly feel that, though he did exemplify symptoms of bicipital tendinitis at the last visit of March, 1997, nonetheless, he honestly thought his shoulder problem was a thing of the past.”

Upon the above summarized evidence the trial judge expressly found the claimant to be a credible witness and further found that he “did not knowingly or willfully misrepresent his physical condition in the application process.” Appellate review of findings of fact is de novo upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires the panel to examine in depth a trial court’s factual findings and conclusions. The reviewing court is not bound by a trial court’s factual findings but instead conducts an independent examination to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584 (Tenn. 1991). 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, Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987), 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 (Tenn. 1999).

A false statement in an employee’s application for employment will bar recovery of workers’ compensation benefits if all three of the following elements exist: first, the employee must have knowingly and willingly made a false representation as to his physical condition; second, the employer must have relied upon the false representation and such reliance must have been a substantial factor in the hiring; and third, there must have been a causal connection between the false representation and the injury. Federal Copper and Aluminum Co. v. Dickey, 493 S.W.2d 463 (Tenn. 1973). The causal connection required is a factual showing that the injury upon which the claim is based is causally related to the employee’s prior injury or physical condition which was wrongfully concealed from the employer. Daniels v. Gudis Furniture Co., 541 S.W.2d 941 (Tenn. 1976).

While the record does contain some evidence that the employer relied on the claimant’s application and that his injury was causally related to the prior injury, the evidence fails to preponderate against the trial court’s finding that the claimant did not knowingly or willfully misrepresent his physical condition on the application. For the above reasons, the first issue is resolved in favor of the appellee.

The appellant next contends the award of discretionary costs should be reversed “because (1) the motion for summary judgment should have been granted, and (2) alternatively, the Trial Court’s

finding of compensability at trial was in error”. We have carefully considered the record and find no abuse of discretion in the trial court’s award of discretionary costs.

The judgment of the Circuit Court is affirmed. Costs on appeal are taxed to the appellant.