IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(April 26, 2000 Session)

TENNESSEE PROTECTION AND ADVOCACY, INC., ET AL v. JANIS GREENE

Direct Appeal from the Chancery Court for Davidson County
No. 97-3068-II Carol McCoy, Chancellor

No. M1999-00884-WC-R3-CV - Mailed - July 11, 2000
Filed - October 24, 2000

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.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Reversed in part and Affirmed in part; Remanded.

LOSER, SP. J., delivered the opinion of the court, in which BIRCH, J. , and KURTZ, SP. J., joined.

Carson W. Beck, Nashville, Tennessee, for the appellant, Janis Greene.

Richard E. Spicer, Nashville, Tennessee, for the appellees, Tennessee Protection and Advocacy, Inc., et al.

MEMORANDUM OPINION

By this appeal, the employee or claimant, Janis Greene, insists the evidence preponderates against the trial court's finding that her carpal tunnel syndrome did not arise out of and in the course of her employment. The employer, Tennessee Protection and Advocacy, Inc. contends the claim is barred by the employee's failure to give timely written notice. As discussed below, the panel has concluded the trial court's order dismissing the claim as not having arisen out of and in the course of employment should be reversed; and the panel has further concluded the trial court's findings with respect to notice and the extent of the claimant's permanent partial disability should be affirmed.

The employer initiated this action on September 15, 1997, seeking a declaration that the employee's claimed injury did not arise out of and in the course of employment. The employee served her answer and a counterclaim. Construing the counterclaim fairly and consistently with the

evidence and arguments, we have concluded the employee was and is seeking disability and medical benefits authorized by the Workers' Compensation Act. Tenn. Code Ann. § 50-6-101 *et seq*.

After a trial of all the issues on February 25, 1999, the chancellor made her findings. Paraphrased, those findings were that (1) the claimant suffered "serious" carpal tunnel syndrome, cause unknown because of insufficient medical proof, (2) timely written notice of her claimed injury was given, (3) as a result of her carpal tunnel syndrome, the claimant retained a permanent partial vocational disability of twenty-five percent to the right hand and twelve and one-half percent to the left hand, (4) her claimed medical expenses were reasonable and necessary and (5) the claimant was a credible witness.

Review of findings of fact by the trial court is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings, 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). Conclusions of law are reviewed de novo without any presumption of correctness. Presley v. Bennett, 860 S.W.2d 857 (Tenn. 1993).

Where the trial judge has seen and heard the witnesses, considerable deference should be accorded those circumstances on review, Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996), because it is the trial court which had the opportunity to observe the witness's demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of depositional testimony as the trial judge. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676-77 (Tenn. 1991).

The claimant is a forty-eight year old college graduate, who began working for the employer in 1993 as an advocate. Her duties include assisting persons with needs in educational and other settings and speaking at seminars. Those duties required repetitive use of the hands to operate a computer terminal, use the telephone, prepare case notes, set up case files, fill out forms and drive a car. She testified that she would spend five to seven hours a day talking on the phone and writing notes at the same time. In the spring of 1997, she began to notice burning pain, numbness and tingling in her hands, wrists and forearms, especially while using the telephone and writing notes. A family practitioner prescribed a splint which she regularly wore while at rest. She continued working. She was also referred to Dr. W. Cooper Beazley, an orthopedic surgeon.

Dr. Beazley ordered diagnostic testing, from the results of which he diagnosed bilateral carpal tunnel syndrome. The claimant continued to work until January 21, 1998, when corrective surgery was performed by Dr. Beazley. She returned to work with restrictions on February 2, 1998. Even before that, on July 14, 1997, the claimant's representative provided the employer with written notice that he had been "consulted by Janis Greene on a Workers' Compensation matter involving bilateral

carpal tunnel." We first address the issue of notice.

Immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, an injured employee must, unless the employer has actual knowledge of the accident, give written notice of the injury to her employer. No benefits are recoverable unless such written notice is given within thirty days after the injurious occurrence, unless the injured worker has a reasonable excuse for the failure to give the required notice. The notice may be given by the employee or her representative. Tenn. Code Ann. § 50-6-201. The notice may be given by mail, William H. Coleman Co. v. Isbell, 159 Tenn. 459, 19 S.W.2d 243 (1929), and complies with the statutory requirements if it notifies the employer of the accident and the fact that the employee has suffered an injury. Quaker Oats Co. v. Smith, 574 S.W.2d 45 (Tenn. 1978).

The reasons for the requirement are (1) to give the employer an opportunity to make an investigation while the facts are accessible, and (2) to enable the employer to provide timely and proper treatment for the injured employee. Jones v. Sterling Last Corp., 962 S.W.2d 469 (Tenn. 1998). In determining whether an employee has shown a reasonable excuse for failure to give such notice, courts will consider the following criteria in light of the above reasons for the rule: (1) the employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusal of the notice requirement, and (3) the excuse or inability of the employee to timely notify the employer. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). It is significant that written notice is unnecessary in those situations where the employer has actual knowledge of the injury. Raines v. Shelby Williams Industries, Inc., 814 S.W.2d 346 (Tenn. 1991).

Where, as here, the injury is a gradually occurring one, the beginning date for giving the written notice is the date on which the employee is forced to quit work because of the injury. Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997). In the present case, that date was January 21, 1998.

While it may be reasonably argued that the written notice given by the claimant's representative in the present case was not timely, since it was given before the date on which the employee was forced to quit working, it cannot be said that the employer did not have at least as much knowledge as the employee that she had a work related injury. The untimely notice is evidence of the employer's actual knowledge. Moreover, the fact that the employer raced to the courthouse after receiving notice, rather than offering to provide medical care, is evidence of the lack of prejudice to the employer. The chancellor's finding with respect to notice is affirmed.

Next, the employee contends the injury is compensable because the evidence preponderates against the trial court's finding of insufficient medical proof of causation. It has long been the law of this state that an injury arises out of the employment if there is a rational causal connection between the duties of employment and the injury. In this case, the chancellor's findings included the following excerpt:

> "With regard to whether this injury arose out of and in the course of employment, and with regard to the issue of causation, the Court is not in a position to make a determination based

on the proof before it. It is essential to making such a conclusion that there is sufficient medical testimony to support such a finding. Dr. Beazley, for whatever reason, would not render such an opinion. The Court is not in a position to make that determination based on lay testimony solely. Case law requires that the physician, this one or perhaps another physician, render an opinion that the injury was caused by the work that they were performing ...."

We are persuaded that the above quoted excerpt misstates the degree of certainty of proof of medical causation required by the case law, where there is also credible lay proof of causation. Dr. Beazley's deposition, which contained the only medical proof, included the following questions and answers concerning causation:

Q. Do you have an opinion as to what caused the carpal tunnel that Ms. Greene experienced?

A. Well, her complaints were from her job activities where she was using the computer.

Q. Okay. Is there anything in Ms. Greene's history that would not be consistent with a work related injury?

A. It could be. I mean, I can't say 100 percent whether it is or isn't. She has some areas in her history, use of a terminal and driving a lot, that have been shown in the past to cause carpal tunnel.

....

Q. Okay. Have you treated people, in the past, who developed carpal tunnel syndrome from keyboard use?

A. Yes.

Q. These activities could be consistent with (or) related to carpal tunnel....?

A. Could be.

....

Q. Is there any evidence – is there any notations in your records as to any other activities that might cause carpal tunnel, such as playing a guitar, or any other activities that she might have done?

A. No, sir.

Q. Did Ms. Greene relate to you that she felt that it was caused by her work?

A. She thought it was, yes, sir.

....

Q. Dr. Beazley, is it your practice – as we spoke earlier – not to comment on a work related injury unless it's a specific incident at work?

A. It's my practice to allow the employer and employee to determine that. Yes, I try to stay away from it if at all possible.

Q. So in a case like this you would not form an opinion as to whether it was work related or not work related, is that correct?

A. That's correct.

On cross examination:

Q. ...If you thought that a person's injury was, within a reasonable degree of medical certainty, incurred in the scope of one's employment, you would testify, wouldn't you?

A. Yeah. I mean, if it's – as an example, if someone has their finger cut off or had an acute injury and it was very black and white – I mean, it was obvious that this was the point in time it happened, that's common sense, yes, sir.

On redirect examination:

Q. Dr. Beazley, have you – you testified in the past that carpal tunnel is work related?

A. I can't remember any time in the near past, no, sir. Not unless it was related to, like, someone had a distal radius fracture and it was from direct trauma from that. But I don't remember the last time that I said that, no.

Q. Okay. So your position is, you do not –

A. I try not to do it unless it's just really – it's so obvious that it's not a point of contention in a deposition.

Dr. Beazley did not testify, with any degree of certainty, that the injury was work related, but he clearly did testify that the injury "could be" consistent with or related to the claimant's activities at work. Our understanding of the rule is that because medical witnesses are rarely, if ever, able to state their opinions on medical causation with reasonable certainty, medical testimony that the employment could have caused an injury is sufficient to make out a prima facie case that the injury

arose out of the employment, and that, if the employer introduces no evidence to the contrary, the preponderance of the evidence supports an award of workers' compensation benefits. See Downen v. Allstate Ins. Co., 811 S.W.2d 523 (Tenn. 1991) and authority cited therein. Moreover, where the injury occurs in the course of the employment, as the claimant testified without contradiction that her injury did, any reasonable doubt as to whether such an injury arises out of the employment should be resolved in favor of the employee. Reeser v. Yellow Freight Systems, Inc., 938 S.W.2d 690 (Tenn. 1997). From those authorities, we conclude that Dr. Beazley's testimony, while insufficient by itself to prove medical causation, establishes a prima facie case, when considered in context with the credible testimony of the claimant. In addition to testifying that the injury could be work related, the doctor seemed to rule out other possible causes. Because the employer chose not to offer any countervailing medical proof, the evidence thus preponderates against the trial court's finding of insufficient proof of causation.

For the above reasons, the judgment of the trial court disallowing the claim is reversed. In all other respects, the judgment is affirmed. The case is remanded to the Chancery Court for Davidson County. Costs on appeal are taxed to the appellees.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TENNESSEE PROTECTION AND ADVOCACY, INC. and TRAVELERS INSURANCE COMPANY v. JANIS GREENE

Chancery Court for Davidson County
No. 97-3068-II

No. M1999-00884-WC-WCM-CV - Filed October 24, 2000

ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well taken and should be denied; 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 Tennessee Protection and Advocacy, Inc. and Travelers Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM