

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(August 29, 1996 Session)

FILED

December 6, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

CAROLYN S. TODD,)	DYER CIRCUIT
)	
Plaintiff-Appellee,)	Hon. J. Steven Stafford,
)	Judge.
v.)	
)	No. 02S01-9603-CV-00023
ST. PAUL FIRE AND MARINE)	
INS. COMPANY,)	
)	
Defendant-Appellant.)	

For Appellant:

Marianna Williams
Ashley, Ashley & Arnold
Dyersburg, Tennessee

For Appellee:

Steve Taylor
Memphis, Tennessee

MEMORANDUM OPINION

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
F. Lloyd Tatum, Special Judge
Joe C. Loser, Jr., Special Judge

MODIFIED IN PART
AFFIRMED

Loser, Judge

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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer's insurer contends (1) benefits should be denied because of a false application for employment, (2) the trial court erred in awarding medical expenses not authorized by it, (3) the trial court erred in awarding temporary total disability benefits from the date of the injury until September 13, 1993 and (4) the award of medical benefits based on ten percent permanent partial disability to the body as a whole is excessive. The employee contends the award of permanent partial disability benefits is inadequate. As discussed below, the panel has concluded the award of temporary total disability benefits should be modified and the judgment otherwise affirmed.

The employee or claimant is thirty-four and has an eighth grade education. She first completed a job application on September 25, 1989 and was hired as a flagman at Ford Construction Company, but performed other jobs, including driving a truck and shoveling or sweeping asphalt. Because the work was seasonal, she signed three subsequent applications. In her applications, the claimant denied any previous back injury or workers' compensation claim.

In both respects, the application was false. She had in fact received in the past benefits for a back injury, from another employer.

On July 2, 1992, the claimant injured her back while shoveling asphalt at work. She continued working until July 16th, when she was referred to Dr. J. Canale. Dr. Canale diagnosed myositis and muscle inflammation, for which he treated her conservatively until August 27th, when he released her to return to work without restrictions, limitations or permanent impairment.

The claimant informed the employer that she was dissatisfied with Dr. Canale and asked to be referred to another doctor. In her testimony, she said the insurance company failed to provide her with the name of another doctor or a list from whom she could have made a choice. The trial judge apparently believed her.

On the advice of her attorney, she saw Dr. James McAfee on September 11, 1992. Dr. McAfee diagnosed cervical strain, for which he prescribed physical therapy and nerve blocks. The doctor opined the injury was related to the injury at work and estimated the claimant's permanent impairment at eight percent to the whole body, from appropriate guidelines. The claimant incurred medical expenses for care prescribed by Dr. McAfee totaling \$5,974.00, which the trial court found to be reasonable and reasonably necessary.

We find in the record no medical evidence that the claimant's injury of July 2, 1992 was causally related to her previous back injury. The medical proof was by deposition.

The trial court awarded temporary total disability benefits for 66 weeks, permanent partial disability benefits on the basis of ten percent to the body as a whole and medical benefits of \$5,974.00. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). Conclusions of law are subject to de novo review 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, 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). This tribunal is, however, as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Seiber v. Greenbrier Industries, Inc., 906 S.W.2d 444 (Tenn. 1995).

(1) False Application for Employment.

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 willfully made a false representation as to her 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 Company 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).

As already noted, the evidence fails to establish the required causal connection. Consequently, the evidence fails to preponderate the findings of the trial court with respect to this issue.

(2) Medical Expenses.

When a covered employee suffers an injury by accident arising out of and in the course of employment, the employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Tenn. Code Ann. section 50-6-204. The employer is required to provide the injured employee with the names and addresses of three or more reputable physicians or surgeons not associated together in practice if available in the community from which the injured employee may have the privilege of selecting the operating surgeon or attending physician. *Id.*

If an employer fails to give the employee the opportunity to choose the treating physician from a panel of at least three, it risks having to pay all reasonable medical expenses incurred for treatment of the employee's injuries by a physician of the employee's own choosing. Lindsey v. Strohs Cos., Inc., 830 S.W.2d 899 (Tenn. 1992). When this claimant expressed dissatisfaction with Dr. Canale, it became the duty of the employer or its insurer to provide a list of three doctors other than Dr. Canale. Because the evidence in this regard was in the form of oral testimony, it fails to preponderate against the findings of the trial court as to the second issue.

(3) Temporary Total Disability Benefits.

Temporary total disability refers to the injured employee's condition while disabled to work because of the injury and until the employee recovers as far as the nature of the injury permits. Redmond v. McMinn County, 209 Tenn. 463, 354 S.W.2d 435 (1962). Benefits for such disability are payable until the injured employee is able to return to work. Simpson v. Satterfield, 564 S.W.2d 953 (Tenn. 1978). The employee may not extend the period by simply not working.

From our independent examination of the record, we find that Dr. Canale was in the best position to determine when the claimant was able to return to work. Accordingly, we find that the evidence preponderates against the findings of the trial court as to this issue and in favor of a finding that she was totally disabled from July 16, 1992 until August 27, 1992. The judgment is modified to provide temporary total disability benefits between those dates.

(4) Permanent Partial Disability Benefits.

Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability and job opportunities for the disabled, in addition to anatomical impairment, for the

purpose of evaluating the extent of a claimant's permanent disability. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). The judgment fails to preponderate against the trial court's finding of ten percent permanent partial disability.

As modified with respect to temporary total disability benefits, the judgment of the trial court is affirmed. Costs on appeal are taxed to the defendant-appellant.

Joe C. Loser, Jr., Judge

CONCUR:

Lyle Reid, Associate Justice

F. Lloyd Tatum, Judge

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AT JACKSON

CAROLYN S. TODD,)	DYER CIRCUIT
)	NO. 92-501
Plaintiff/Appellee,)	
)	Hon. J. Steven Stafford,
vs.)	Judge
)	
ST. PAUL FIRE AND MARINE)	
INSURANCE COMPANY,)	NO. 02S01-9603-CV-
00023)	
)	
Defendant/Appellant.)	MODIFIED IN PART;
)	AFFIRMED.

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 will be paid by Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 6th day of December, 1996.

PER CURIAM

(Reid, J., not participating)