

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON  
(November 27, 1996 Session)

**FILED**  
  
January 23, 1997  
  
Cecil Crowson, Jr.  
Appellate Court Clerk

RICHARD D. ROBERTS,	)	OBION CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. W. Michael Maloan,
	)	Judge.
v.	)	
	)	No. 02S01-9607-CV-00066
GOODYEAR TIRE AND RUBBER	)	
COMPANY,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Randy N. Chism  
Elam & Glasgow  
Union City, Tennessee

For Appellee:

Lance E. Webb  
Union City, Tennessee

MEMORANDUM OPINION

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court  
Joe C. Loser, Jr., Special Judge  
Cornelia A. Clark, Special Judge

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. The employer, Goodyear, contends the evidence preponderates against the trial court's findings that (1) the employee or claimant, Roberts, did not knowingly and willfully misrepresent his physical condition in an employment application, (2) the claimant suffered a compensable injury by accident and (3) the claimant retains a twenty percent permanent partial disability of twenty percent to the body as a whole. As discussed below, the panel has concluded the judgment should be affirmed.

From 1970 until April, 1988, the claimant was employed by another employer, Carborundum, as an electrician. In April, 1988, Carborundum ceased its operations. The out-of-work claimant applied to Goodyear for a job and, in March of 1989, was called to Goodyear regarding available jobs in its production department.

After an interview, he was hired subject to a medical evaluation. He completed a medical evaluation form, including the medical history portion, then was examined by a physician, in accordance with the employer's standard practice. The claimant was approved for hiring on March 13, 1989.

In completing the personal medical history portion of the medical evaluation form, the claimant checked "no" in response to the question which asked whether he had any "Disorder of the musculo-skeletal system -- back trouble, knee trouble, painful or swollen joints, bone fracture, gout, arthritis, amputations, etc.?" In response to another question, however, he noted a previous broken hip and repair to his urethra during a previous injury at Carborundum, for which he asserted a claim for workers' compensation benefits in 1976. After that injury and surgery, the claimant complained from time to time about low back pain.

In the pre-employment physical examination, the physician reviewed the claimant's personal medical history and questioned him regarding the broken hip and urethra repair, but did not ask about any back pain associated with the injury. None was related. The physician then conducted a physical examination of the claimant and approved him for work with no restrictions. The claimant was assigned to the production department.

On April 7, 1989, while at work and changing a roll weighing approximately 120 pounds, the claimant injured his back. The injury was diagnosed as a ruptured disc and treated with open surgery. The operating surgeon assigned an eleven percent permanent whole person impairment, from appropriate guidelines.

After successful surgery and a period of rehabilitation, the claimant has returned to work for Goodyear in its maintenance department and plans to bid for an electrician's job when a vacancy occurs. He is a high school graduate with two years of college and has completed a course in aviation electronics. He was fifty years old at the time of the trial and is a licensed electrician.

The trial judge found, among other things, that the evidence failed to establish that the plaintiff had knowingly and willfully made a false representation concerning his medical condition, that the injury in question was compensable and that the claimant would retain a permanent partial disability of twenty percent to the body as a whole. 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). 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).

#### (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 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 record contains fifty-four pages of testimony from the claimant, including a comprehensive cross-examination.

The claimant's explanation was that he either overlooked or did not carefully read the question concerning prior back trouble. The trial judge found him to be a credible witness. The evidence fails to preponderate against the trial judge's finding that there was no knowing and willful misrepresentation.

#### (2) Compensability.

Unless admitted by the employer, the employee has the burden of proving, among other things, that he suffered an injury by accident arising out of and in the course of employment. Oster v. Yates, 845 S.W.2d 215 (Tenn. 1992). In the present case, the employer contends the employee's injury was

nothing more than a "continuation" of the claimant's previous injury. We are not so persuaded.

An accidental injury includes whatever lesion or change to any part of the system that produces harm or pain or lessened facility of the natural use of any bodily activity or capability. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability, if a work-connected accident can be fairly said to be a contributing cause of such injury. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993).

The operating surgeon testified it was within reasonable medical probability that the accident at Goodyear was at least a contributing cause. The evidence fails to preponderate against the trial judge's finding that the claimant suffered a compensable injury by accident arising out of and in the course of employment.

(3) Extent of Disability.

In determining the extent of an injured employee's permanent disability, the courts are obliged to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in the employee's disabled condition. Tenn. Code Ann. section 50-6-241(a)(1). From a consideration of those factors, as well as the expert medical testimony concerning permanent impairment, we are not persuaded the evidence preponderates against the trial judge's award of benefits based on twenty percent permanent partial disability to the body as a whole.

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the defendant-appellant.

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Joe C. Loser, Jr., Judge

CONCUR:

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Lyle Reid, Associate Justice

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Cornelia A. Clark, Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

RICHARD D. ROBERTS,	)	OBION CIRCUIT
	)	NO. 7543
Plaintiff/Appellee,	)	
	)	Hon. W. Michael Maloan,
vs.	)	Judge
	)	
GOODYEAR TIRE AND RUBBER COMPANY,	)	NO. 02S01-9607-CV-00066
	)	
Defendant/Appellant.	)	AFFIRMED

<p><b>FILED</b></p> <p><b>January 23, 1997</b></p> <p><b>Cecil Crowson, Jr.</b> Appellate Court Clerk</p>
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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 will be paid by Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 23rd day of January, 1997.

PER CURIAM

(Reid, J., not participating)

