IN THE SUPREME OF TENNESSEE

AT NASHVILLE

FILED

November 19, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

BOBBY DAVID MCELHANEY	*}*	*RUTHERFORD CHANCERY*
	}	*No. Below 98WC413*
Plaintiff/Appellee}		
	}	*Hon. Don R. Ash*
vs.	*}*	
	}	
	}	*No. M1998-00244-WC-R3-CV*
CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE	*}*	
	}	
Defendant/Appellant	*}*	*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 employer/appellant, Consolidated Freightways Corporation of Delaware, for which execution may issue if necessary.

IT IS SO ORDERED on November 19, 1999.

PER CURIAM

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

AT NASHVILLE
(July 15, 1999 Session)

FILED

November 19, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

BOBBY DAVID MCELHANEY,	)	RUTHERFORD CHANCERY
	)	
	)	
Plaintiff/Appellee,	)	DON R. ASH,
	)	Trial Judge
v.	)	
	)	No.M1998-00244-WC-R3-CV
CONSOLIDATED FREIGHTWAYS	)	
CORPORATION OF DELAWARE,	)	
	)	
Defendant/Appellant.	)	

For Appellant:
Susan Bradley
Wilson & Bradley
Murfreesboro, Tennessee

For Appellee:
William McCaskill, Jr.
Taylor, Pigue, Marchetti
Bennett & McCaskill
Nashville, Tennessee

MEMORANDUM OPINION

Mailed:

Members of the Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
Frank Clement, Jr., Special Judge
Samuel L. Lewis, Special Judge

AFFIRMED

Lewis, 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. § 50-6-225(e)(3) (Supp. 1998) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer/appellant, Consolidated Freightways Company ("Consolidated"), contends (1) that the employee/appellee, Bobby David McElhaney ("McElhaney"), did not provide proper notice of his August 1996 and June 1997 injuries; (2) that McElhaney's suit should be barred by the statute of limitations; (3) that McElhaney did not sustain any injuries arising during the course and scope of his employment; and (4) that the evidence presented at trial does not support an award of twenty percent vocational disability. Therefore, the employer requests that this panel reverse the judgment of the trial court. As discussed below, the panel affirms the judgment of the trial court.

The employee, McElhaney, is a high school graduate with two years of college and a background in truck driving. At the time of trial in 1998, McElhaney was 52 years old and had been employed as a truck driver for Consolidated for twenty years.

On August 9, 1996, McElhaney fell while climbing into his tractor truck and injured his back. He reported his injury to one of Consolidated's dispatchers, Don Sissom, and to Henrietta Dillon ("Dillon"), the Consolidated employee in charge of workers' compensation matters. Dillon referred McElhaney to Columbia Health Convenient Care Center ("Columbia Health Care") and then to Dr. Robert Weiss, a neurosurgeon. An MRI ordered by Dr. Weiss revealed that McElhaney had a bulging disc at the L4-5 level of his lower back. Consolidated paid McElhaney's medical expenses resulting from the August 9, 1996 injury. McElhaney returned to his job as a Consolidated truck driver in October of 1996 and worked full time until June

of 1997.

On June 1, 1997, McElhaney drove his truck into Consolidated's terminal area. As he stepped on the clutch and shifted gears, he felt a sharp pain in his back. The next day McElhaney called Dillon at Consolidated and told her that he needed to see a doctor. McElhaney told Dillon that his back was hurting and that it had been hurting since his previous injury in 1996. Dillon did not ask McElhaney for further details conceming his injury, and he did not provide any to her. Dillon told him to return to Dr. Weiss or go to Columbia Health Care for treatment.

In early June 1997, McElhaney went to Columbia Health Care and also visited Dr. Weiss and Dr. Thomas O'Brien. McElhaney did not inform any of those medical providers that he experienced the pain in his back after shifting gears in his truck. On July 15, 1997, McElhaney visited Dr. James Renfro who determined from an MRI that McElhaney had a large disc herniation at the L4-5 level of his lower back. McElhaney returned to Dr. Weiss in January of 1998, and Dr. Weiss recommended surgery for McElhaney's herniated disc. Dr. Weiss scheduled the surgery for January 30, 1998. However, because Consolidated refused to authorize payment; Dr. Weiss' office informed McElhaney that his surgery had been canceled.

McElhaney returned on his own to Dr. Weiss in March of 1998. Dr. Weiss operated on McElhaney's back and then told him that he could return to work. Dr. Weiss instructed McElhaney to avoid heavy lifting, repetitive bending and stooping, and maintaining a single posture for long periods of time.

Following an evidentiary hearing the trial court held: (1) McElhaney's August 1996 and June 1997 injuries were work-related; (2) McElhaney had sustained a twenty percent vocational impairment to the body as a whole, and (3) McElhaney was entitled to receive his permanent benefits in a lump sum award. The trial court also awarded future medical expenses and attorney's fees.

Our review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings below, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 1998). This standard of review requires this Court to weigh in depth the factual findings and conclusions of the trial court. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987).

The employer argues that McElhaney did not give notice of his June 1, 1997 injury as required by Tenn. Code Ann.§ 50-6-201 (1991). The statute provides in pertinent part:

> Every injured employee or his representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has not actual notice, written notice of the injury.

Workers' compensation claims may be barred unless " the employer has actual notice of an accidental injury, the employer receives written notice within 30 days after the occurrence of the accident, or reasonable excuse for failure to give such notice is made to the satisfaction of the trial court." Raines v. Shelby Williams Indus., 814 S.W.2d 346, 348 (Tenn. 1991). However, an employee is not required to give notice of each of several injuries he received in a work-related accident to receive workers' compensation benefits. Quaker Oats Co. v. Smith, 574 S.W.2d 45, 48 (Tenn. 1978).

In Osborne v. Burlington Industries, Inc., 672 S.W.2d 757 (Tenn. 1984), the employee immediately informed his supervisor of a sharp pain in his back. The employee's condition gradually worsened; however, it was not until more than two years after the original injury that the employee's physician diagnosed a ruptured disc. This Court found that the employee satisfied the statutory notice requirement by informing his supervisor of his initial injury almost three years prior to filing his lawsuit. Id. at 760.

Here, Consolidated stipulated that McElhaney gave timely notice of

the August 1996 injury. Additionally, one day after the June 1997 injury occurred, McElhaney informed Dillon, the Consolidated employee who specifically handles workers' compensation claims, of the back pain he had experienced. Dillon testified that she did not need to fill out an accident report because McElhaney's injury was a "reoccurrence." The record supports the conclusion that Consolidated had actual notice of McElhaney's August 1996 injury and of his June 1997 injury.

Consolidated also argues that McElhaney failed to file his lawsuit within the

one year statute of limitations for workers' compensation suits. Tenn. Code Ann.

§ 50-6-203(a) (Supp. 1998) provides:

> . . . if within the one year period voluntary payments of compensation are paid to the injured person or the injured person's dependants, an action to recover any unpaid portion of the compensation, payable under this chapter, may be instituted within one (1) year from the later of the date of the last authorized treatment or the time the employer shall cease making such payments, except in cases provided for by § 50-6-230.

Consolidated made a payment to Dr. Weiss in January of 1998. McElhaney filed his lawsuit on April 2, 1998, less than one year after the last payment Consolidated made on his behalf. Therefore, we find that McElhaney's action is not barred because he filed it within the statute of limitations for workers' compensation suits.

Consolidated further contends that McElhaney's June 1997 injury was not work-related. Consolidated emphasizes the fact that McElhaney did not tell anyone that his back pain occurred when he was shifting or changing gears in his tractor truck.

To prove a "work-related" injury, a plaintiff must establish by a preponderance of the evidence that he or she sustained an injury "arising out of and in the course of" the plaintiff's employment. Tenn. Code Ann. § 50-6-102(a)(5) (Supp. 1998). Generally, a plaintiff must establish the causation element by expert medical evidence. Orman v. Williams Sonoma, Inc., 803

S.W.2d 672, 676 (Tenn. 1991). Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required, and reasonable doubt must be extended in favor of the employee. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997).

In P&L Construction Co. v. Lankford, 559 S.W.2d 793 (Tenn. 1978), this Court discussed the standard for establishing causation in workers' compensation cases. The Court determined that

> In a workman's compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given injury "could be" the cause of the plaintiff's injury, when he also had before him lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury.

Id. at 794 (citations omitted).

In his deposition, Dr. Weiss testified that McElhaney's June 1997 injury was a continuum of his August 1996 work-related injury. Dr. Weiss also stated that within a reasonable degree of medical certainty, McElhaney's June 1997 injury was caused by his job at Consolidated. Dr. Weiss' deposition was countered by Dr. Thomas O'Brien's office records which indicate that
McElhaney's June 1997 injury was "due to degenerative disc disease unrelated
to the August 1996 work incident."

Although the testimony of Dr. Weiss and Dr. O'Brien conflicted as to whether McElhaney's June 1997 injury was work-related; additional trial testimony substantiates Dr. Weiss' opinion. At trial, McElhaney testified that he felt the pain in his back while he was shifting gears in his tractor truck. Further, McElhaney's wife, Mrs. Valerie McElhaney, testified that when McElhaney returned home from work on June 1, 1997, she had to help him into the house because he was in pain. The testimony of Dr. Weiss, McElhaney, and his wife supports the trial court's finding that McElhaney's injuries arose out of his employment.

Finally, Consolidated argues that the evidence presented at trial does not support a twenty percent vocational disability award. Instead, Consolidated submits that McElhaney's vocational disability award should be limited to one (1) times the anatomical rating.

In determining the extent of vocational disability, the trial court considers job skills, education, training, duration of disability and job opportunities for the disabled in addition to anatomical disability determined by experts. Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995). The court also considers the employee's own assessment of his or her condition. Id. "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." Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992).

The record reveals substantial evidence which supports the trial court's finding on vocational disability. After operating on McElhaney's herniated disc, Dr. Weiss assigned McElhaney a ten percent permanent impairment rating. Dr. Weiss allowed McElhaney to return to work but instructed him to avoid heavy lifting, repetitive bending and stooping, and maintaining a single posture for long periods of time. Moreover, McElhaney testified that the injury to his back has adversely affected his life. McElhaney stated that he often experiences back pain and that he is unable to work in his yard as he did in the past.

After carefully examining the record before us and considering the relevant law governing the issues presented for review, we find that the evidence does not preponderate against the trial court's award. The judgment of the trial court is affirmed. Costs on appeal will be taxed to the employer/appellant, Consolidated.

_____
Samuel L. Lewis, Special Judge

CONCUR:

_____
Frank F. Drowota, III,
Associate Justice Supreme Court

_____
Frank Clement, Jr., Special Judge