IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 10, 2000 Session

KATHY KAY SCOTT v. CANTECH INDUSTRIES, ET AL.

Direct Appeal from the Chancery Court for Washington County
No. 6613 Jean A. Stanley, Circuit Court Judge

No. E2000-00728-WC-R3-CV - Mailed - December 6, 2000
FILED: JANUARY 9, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found that the plaintiff suffered carpel tunnel syndrome as a result of her work with Contech Industries, Incorporated, that the disability should be converted to an injury to the body as a whole, and that the plaintiff had sustained a forty-two percent vocational impairment to the body as a whole. The trial judge found that Wausau Underwriters Insurance Company was the workers' compensation carrier at the time the plaintiff became unable to continue to work, and therefore, was the carrier responsible for the coverage. Wausau raises the issue of whether the trial judge properly found it, rather than Aetna Casualty & Surety Company, liable for the award to the plaintiff. Wausau and Contech Industries Incorporated further argue the trial court erred in finding the plaintiff gave sufficient or timely notice of the carpel tunnel syndrome injury. We affirm the judgment of the trial court.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J. and WILLIAM H. INMAN, SR. J., joined.

J. Eddie Lauderback, Johnson City, Tennessee, for the appellant, Wausau Underwriters Insurance Company.

Clint Woodfin and Laura Bradley Myers, Knoxville, Tennessee, for the appellees, Contech Industries, Inc. and Aetna Casualty & Surety Company.

David H. Dunaway, LaFollette, Tennessee, for the appellee, Kathy Kay Scott.

OPINION

The trial court found the plaintiff had suffered carpel tunnel syndrome as a result of her work with Contech Industries, Incorporated ("Contech") that the disability should be converted to an injury to the body as a whole[1], and that the plaintiff had sustained a forty-two percent vocational impairment to the body as a whole. The trial judge found that Wausau Underwriters Insurance Company ("Wausau") was the workers' compensation carrier at the time the plaintiff became unable to continue to work, and therefore was the carrier responsible for the coverage.[2]

Wausau raises the issue of whether the trial judge properly found it, rather than Aetna Casualty & Surety Company ("Aetna"), liable for the award to the plaintiff. Wausau and Contech further argue the trial court erred in finding the plaintiff gave sufficient or timely notice of the carpel tunnel syndrome injury. We affirm the judgment of the trial court.

Plaintiff's Biography

The plaintiff, born in September of 1956, was forty-three years of age at the time of the trial; she was married and had one child as well. She has a twelfth grade education. The plaintiff has worked as an inspector for a tooling industry and as a machine operator for a tool company. She worked for Contech for nine and one-half years.

Facts

The litigants do not dispute the plaintiff suffered from carpel tunnel syndrome as a result of the repetitive use of her arms and hands while carrying out her work assignments for Contech.

Timely Notice of Injury

The plaintiff was working on May 16, 1994, when she dropped a roll of tape. As she picked it up, she felt a pop in her back and suffered pain. She also testified her arms and hands were hurting on this date. The record shows she was taken to the hospital for medical care.

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[1] We are unable to determine from the record why the award was converted to a body as a whole award. In all but the most unusual cases an injury to a scheduled member can not be converted to a whole body injury merely because the AMA Guidelines so provide. *Thompson v. Leon Russell Enterprises,* 834 S.W.2d 927. The defendants do not raise this issue, thus we presume the record supports the trial judge's action.

[2] The Second Injury Fund was an original defendant. The trial judge dismissed the Fund at the trial. The Fund is not involved in this appeal.

Aetna was the workers' compensation carrier for Contech during the majority of time the plaintiff's problem with her arm. Our decision in the matter relieves Aetna of responsibility; therefore, we do not discuss the issue.

On May 19, 1994, the plaintiff returned to work but had to quit because of the pain in her wrist, which was caused by the repetitive nature of the work. The plaintiff testified she discussed her inability to work because of the pain in her hands and arms with two supervisors. One of the supervisors testified the plaintiff did not report this to him; however, he did not recall that the plaintiff had worked again after May 16, 1994–the personnel records show she did. The other supervisor did not testify.

Medical Evidence

For purposes of the disability award, the part of the medical evidence pertaining to the extent of the carpal tunnel syndrome is not as significant as is the portion relating to the issue of the timeliness of the notice of injury given to Contech. The pertinent medical evidence on the notice issue consists of the deposition testimony of Dr. Thomas M. Koenig, an orthopedic surgeon, Dr. Mark T. McQuain, a psychiatrist and physical rehabilitation specialist, and Dr. Robert J. DeTroye, an orthopedic surgeon.

Dr. Koenig testified he first saw the plaintiff on May 18, 1994. An EMG done on April 6, 1994, showed the plaintiff was suffering from carpal tunnel syndrome. Dr. Koenig testified the plaintiff would aggravate this condition by returning to repetitive work for the defendant. Dr. Koenig testified that the last five days the plaintiff worked would not have likely substantially worsened the plaintiff's pre-existing carpal tunnel syndrome.

Dr. McQuain testified he assumed the plaintiff returned to work without significant episodes of light repetition wrist or hand activity. He stated he would not expect the plaintiff's EMG to have changed significantly nor would it have brought on a more classic carpel tunnel complaint.

Dr. DeTroye testified the amount of work the plaintiff did during May of 1994 would not have aggravated the carpal tunnel syndrome.

Discussion

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995).

The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the

preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

Wausau and Contech argue the medical evidence shows the plaintiff knew she had carpal tunnel syndrome at least on April 6, 1994, or before, thus the notice she gave to them on May 19, 1994, was not timely. Wausau further argues that the evidence shows the carpal tunnel syndrome occurred prior to the time it became the workers' compensation carrier for Contech: Wausau became the carrier on April 18, 1994–prior to that date, Aetna was the workers' compensation carrier for Contech.

Wausau argues the plaintiff suffered no subsequent carpal tunnel syndrome injury after at least April 9, 1994. Its argument is based on the theory that a second injury did not occur because the plaintiff only suffered pain when she returned to work with no increase in her physical disability. The defendant cites several cases for this view. However, we are of the opinion the cited cases are not controlling in this instance because the injury sustained by the plaintiff was a gradually occurring injury, and for the purpose of workers' compensation determination, the date the plaintiff is last able to work is controlling on the time of occurrence. *Lawson v. Lear Seating Corp.*, 944 S.W.2d 340, 343 (Tenn. 1997). The same rule also applies when examining the timeliness of notice given by the plaintiff to the defendant. *Id.*

In *Barker v Home-Crest Corporation*, 805 S.W.2d 373 (Tenn. 1991) the court held that carpal tunnel syndrome is a gradually occurring injury and the accidental injury occurs on the day the employee's condition was sufficiently severe to cause the employee to quit work. In such case, the insurer on that date is liable for the injury. *Id.*

Based upon the evidence in the record and the holding of the court in *Barker*, we affirm the judgment of the trial court.

The cost of the appeal is taxed to Contech Industries Incorporated and to Wausau Underwriters Insurance Company.

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JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

KATHY KAY SCOTT V. CANTECH INDUSTRIES, ET AL
Washington County Chancery Court
No. 11,660

No. E2000-00728-WC-R3-CV - Filed: January 9, 2001

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the defendant,Cantech Industries and Wausau Underwriters Insurance Company and J. Eddie Lauderback, surety, for which execution may issue if necessary.

01/09/01