

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 27, 2009 Session

DONNIE D. McNEELY v. UCAR CARBON CO., INC., ET AL.

**Direct Appeal from the Circuit Court for Maury County
No. 12237 Jim T. Hamilton, Judge**

**No. M2008-02407-WC-R3-WC - Mailed - October 12, 2009
Filed - December 9, 2009**

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 a hearing and a report of findings of fact and conclusions of law. Employee had several compensable work injuries, the last of which was carpal tunnel syndrome. The trial court awarded benefits for permanent total disability ("PTD"). Liability was apportioned 90% to the Second Injury Fund ("The Fund") and 10% to the employer. The Fund has appealed, contending, *inter alia*, that Employee's claims as to it are barred by the applicable statute of limitations. We agree, and modify the judgment accordingly.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court
Modified**

E. RILEY ANDERSON, SP. J., delivered the opinion of the court, in which SHARON G. LEE, J., and ALLEN W. WALLACE, SR. J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Joshua Davis Baker, Assistant Attorney General, for the appellant, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

Richard T. Matthews, Columbia, Tennessee for the appellee, Donnie D. McNeely.

MEMORANDUM OPINION

Factual and Procedural Background

Donnie McNeely ("Employee") was a crane operator for UCAR Carbon Company ("Employer"), a manufacturer of carbon electrodes. He had a compensable injury to his right knee on June 19, 2004. That claim was resolved by a court-approved settlement on June 22, 2005, based upon a 7% permanent partial disability ("PPD") of the right leg. He subsequently sustained an injury

to his lower back on July 7, 2006. That injury resulted in surgery, which was performed by Dr. Vaughn Allen, a neurosurgeon. He reached maximum medical improvement on March 30, 2007. That claim was also resolved by a court-approved settlement on June 19, 2007, based upon 40.75% PPD of the body as a whole.

The injury at issue in this action arose on July 24, 2006, approximately two weeks after the back injury. Employee controlled the movements of his crane by using two joysticks. The crane often bounced and shook while it was being operated. On this occasion, it shook more violently than usual. While tightly grasping the joysticks, he felt a popping sensation in his neck and pain in his left hand. He reported the incident, describing an injury to his neck, face, arms, and hands. He was initially treated by Dr. Douglas Kennedy, a primary care physician. In June 2007, he returned to Dr. Allen, who ordered a cervical myelogram, which showed only degenerative changes unrelated to employment. Dr. Allen also ordered an EMG study, which showed moderate to severe carpal tunnel syndrome. He performed a left carpal tunnel release on September 13, 2007. Dr. David Jones, an orthopaedic surgeon, performed a right carpal tunnel release on February 20, 2008. Dr. Allen testified that Employee retained impairments of 3% to each arm as a result of the carpal tunnel syndrome and surgery. He opined that these conditions were work related. He placed no permanent restrictions upon Employee's activities. He had previously imposed a thirty-pound lifting restriction due to the back injury and surgery.

Employer permanently closed down operations on July 31, 2006, three weeks after Employee's back injury, and one week after his wrist injuries. For that reason, Employee could not return to work at his previous job where he had worked for thirty-two years. Thereafter, he was employed by the City of Franklin as a utility serviceman for approximately three months in the summer of 2007. The job consisted of installing water meters and similar tasks. He testified that he was unable to continue in that job because of the pain caused by his various work injuries. He was fifty-six years old on the date of the trial. He had attended school into the ninth grade. In addition to operating a crane, he had driven fork lifts and dump trucks while working for Employer.

Employee testified that he had worn a knee brace since his 2004 injury. He said that standing or walking for extended periods caused his knee to become stiff and swollen. The knee also caused him difficulty in climbing ladders or stairs, although he was able to climb a ladder to enter the cab of his crane. His lower back symptoms also increased with walking or standing. Extended sitting also caused pain. His back pain interfered with sleep. Employee also testified that he had stiffness and reduced strength in his hands and arms.

On the same day that Employee and Employer settled the claim for his lower back injury (June 19, 2007), Employee filed a Request for a Benefit Review Conference ("BRC") with the Department of Labor and Workforce Development regarding the injury at issue in this case. The claim was not settled, and an impasse was declared on September 28, 2007.¹ Employee filed suit against Employer on October 4, 2007. The Second Injury Fund was not a party to the BRC proceedings, and was not named as a defendant in the lawsuit. The complaint alleged that Employee

¹ This was only two weeks after surgery by Dr. Allen, and more than three months before surgery by Dr. Jones.

had sustained PPD or PTD as a result of the injury.

On January 28, 2008, Employee amended his complaint to add the Fund as a defendant. The Fund filed a motion to dismiss for lack of subject matter jurisdiction, based upon the absence of a BRC to which it was a party. Employee sought another BRC, which occurred on March 28, 2008. The Fund was a party to that proceeding. The motion to dismiss was then denied. Employee filed a second amended complaint on April 14, 2008. That complaint named the Fund as a defendant. The Fund filed an answer which raised the statute of limitations as defense.

The case was tried and the trial court took the case under advisement. It then issued a written decision, which found that Employee was permanently and totally disabled as a result of the combination of his work injuries. It found that the statute of limitations as to the Fund began to run in December 2007, when Employee “first discovered the true nature and extent of his injuries from Dr. Vaughn Allen,” and that the complaint was therefore not barred. In accordance with Tenn. Code Ann. § 50-6-208(a), it determined that 10% of his disability was due solely to carpal tunnel syndrome. It therefore assigned 90% of the award to the Fund.

The Fund has appealed, contending that the trial court erred by finding that Employee’s claim against it was not barred by the statute of limitations. In the alternative, it argues that the trial court erred by finding that Employee was permanently and totally disabled, and by assigning 90% of the liability for the total disability to the Fund.

Standard of Review

Our standard of review of factual issues in a workers’ compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court’s factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 732 (Tenn. 2002); see Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004). When expert medical testimony differs, it is within the trial judge’s discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court’s conclusions. Gray v. Cullom Machine, Tool & Die, Inc., 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

The Fund contends that the statute of limitations applicable to this claim is Tenn. Code Ann. § 50-6-203(b)(1), which provides:

In those instances where the employer has not paid workers' compensation benefits to² or on behalf of the employee, the right to compensation . . . shall be forever barred, unless the notice required by § 50-6-202 is given to the employer and a benefit review conference is requested on a form prescribed by the commissioner and filed with the division within one (1) year after the accident resulting in injury.

Employee filed a BRC request on June 19, 2007, which is within one year of the date of injury. The Fund was not part of the proceedings resulting from that request. An impasse report was issued on September 28, 2007. Tenn. Code Ann. § 50-6-203(g)(1) allows the parties to file suit within ninety days of the issuance of that report. Suit was filed against Employer on October 4, 2007. However, the Fund was not named as a party until the filing of the first amended complaint on January 28, 2008, which was one hundred twenty-two days after the impasse report, and more than one year past the date of the injury.

Employee contends, and the trial court ruled, that Employee was unaware of the extent of his injuries until some time in December 2007. Employee testified that Dr. Allen advised him that he had carpal tunnel syndrome at that time.³ Employee cites Nelson v. Norandal USA, Inc., No. W2005-02312-SC-WCM-CV, 2006 WL 2924817 (Tenn. Workers' Comp. Panel Sept. 26, 2006), in support of his position. Nelson, which relies upon Hibner v. St. Paul Mercury Ins. Co., 619 S.W.2d 109 (Tenn. 1981), restates the proposition that the limitation period for filing of a workers' compensation action does not commence until "the date on which the employee's disability manifests itself to a person of reasonable diligence." Nelson, 2006 WL 2924817 at *3.

Employee also makes an alternative argument that, because the injury was a gradual one, the statute began to run on his last day worked. See Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997). He contends that his last day worked was in September 2007, when he left his job with the City of Franklin, rather than July 31, 2006, the last day he worked for Employer.

The Fund cites Pearson v. Day Int'l, Inc., 951 S.W.2d 375 (Tenn. 1996) in support of its position. In that case, the employee filed suit against the employer shortly after the injury, well within the applicable one-year statute of limitations. More than a year later, the employee filed a motion to amend to add the Fund as a defendant. The employee argued that the limitation period with regard to the Fund did not begin to run until the date "that he was determined to be disabled because of the combination of two or more injuries and not on the date of the work related injury." Id. at 376. The trial court found the claim to be barred. The panel held that: "an action against the Second Injury Fund under T.C.A. § 50-6-208(a) must be commenced within one year after the

² There is not any evidence in the record to substantiate that no payments were made. In his opening statement at trial, counsel for the Fund referred to Requests for Admissions and responses thereto which purportedly established this. Those documents were not made exhibits, and are not in the technical record. However, Employee did not dispute the assertion, either at trial or in his brief.

³ This testimony and the finding are in conflict with Dr. Allen's records, which reflect that this discussion took place on July 18, 2007. Dr. Allen performed a left carpal tunnel release on September 13, 2007.

occurrence of the injury, as required by T.C.A. § 50-6-224(1) or, if the employer has made voluntary payment of compensation benefits within that period, within one year after the cessation of benefits, as required by T.C.A. § 50-6-203.” Id. at 378. Further, citing Travelers Ins. Co. v. Austin, 521 S.W.2d 783 (Tenn. 1975), the panel in Pearson determined that the same limitation period applied to both the employer and the Fund, and therefore affirmed the ruling of the trial court.

Employee has cited no authority to support his contention that the statute of limitations for an action against the Fund may commence at a later date than it begins to run against an employer for a claim arising from the same injury. Both Travelers and Pearson clearly stand for the contrary proposition. We therefore conclude that the trial court erred in holding that Employee’s claim against the Fund was not barred by the statute of limitations. We also observe that the facts of this case, including the language of the original complaint and the contradictions between Employee’s testimony and the records of Dr. Allen, do not provide a strong basis for uncoupling the limitation period for the Fund from that of the Employer. We can, however, envision circumstances in which rigid application of the current rule could lead to inequitable results. However, such basic changes in the law of workers’ compensation are the function of the legislative, rather than the judicial branch.

Our resolution of this issue makes it unnecessary for us to consider the additional arguments raised by the Fund.

Conclusion

The judgment of the trial court is modified to dismiss all claims against the Second Injury Fund. Costs are taxed to Donnie McNeeley, for which execution may issue, if necessary.

E. RILEY ANDERSON, SPECIAL JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**DONNIE D. McNEELY v. UCAR CARBON COMPANY, INC.
AND THE SECOND INJURY FUND**

**Circuit Court for Maury County
No. 12237**

No. M2008-02407-SC-WCM-WC - Filed - December 9, 2009

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Donnie D. McNeely, 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Donnie D. McNeely and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Lee, Sharon G., J., Not Participating