

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

AT NASHVILLE
(June 25, 1996 Session)

FILED
September 5, 1996
Cecil W. Crowson
Appellate Court Clerk

WOODROW CECIL FOSTER,) COFFEE CHANCERY
)
Plaintiff-Appellee,) Hon. John W. Rollins,
) Chancellor.
v.)
) No. 01S01-9512-CH-00232
COFFEE COUNTY HIGHWAY)
DEPARTMENT and COFFEE COUNTY,)
TENNESSEE,)
)
Defendants-Appellants.)

For Appellant:

Steven A. Dix
McClellan, Powers, Ehmling & Dix
Murfreesboro, Tennessee

For Appellee:

Robert Peters
Swafford, Peters, O'Neal & Priest
Winchester, Tennessee

MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
Joe C. Loser, Jr., Retired Judge
Cornelia Clark, Special Judge

AFFIRMED

Loser, Judge

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 questions the trial court's conclusion that the claim is not barred by Tenn. Code Ann. section 50-6-203, a one year statute of limitation. The employer also contends the award of permanent partial disability benefits based on forty-five percent to the body as a whole is excessive. This panel finds that the judgment should be affirmed.

The action was commenced by the employee or claimant, Woodrow C. Foster, by the filing of a complaint on March 6, 1991, against the employer, Coffee County Highway Department and Coffee County, Tennessee, seeking workers' compensation benefits for injuries occurring in 1986 and 1987. The defendants served an answer raising the affirmative defense that the claim was barred by the above statute of limitation. Our 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) (1992).

We accept the chancellor's relevant findings of fact as follows:

"The plaintiff was a 59 year old male with a tenth grade education who, for the most part, had spent his adult life either driving a truck or loading and unloading a truck with short periods of employment as a carpenter's helper and working at a service station. Mr. Foster testified that in March, 1986, while changing a flat tire, he thought he 'broke his back,' that he went to a doctor who put a corset on him for two weeks and told him he had a 'pulled muscle.' Plaintiff went back to work and testified that he thought (the 'pulled muscle') was the only condition for which he suffered any discomfort. Plaintiff testified that in 1990 he saw a doctor because his back continued to hurt. He saw Dr. Robison and Dr. Jekot, who asked him to return for another appointment but he did not let him return to work without seeing a neurosurgeon. He went to see Dr. Verne Allen...(who) performed an MRI that showed a bulging disc...(for which) he ultimately had surgery.... Plaintiff testified that he went back to work after surgery. He was off work approximately two months, but despite being given no restrictions as a result of the surgery he has constant pain out of the left side of his back and down his leg, that he presently takes steroids and walks to try to stay limber although he continues to hurt. Plaintiff testified that he continues to try to perform his job as a truck driver with the defendant Highway Department."

An action by an employee to recover workers' compensation benefits for an accidental injury must be commenced within one year after the occurrence of the injury. Tenn. Code Ann. section 50-6-224(1). However, if within such one year period the employer or its insurer makes voluntary payment of benefits, the action may be commenced within one year after the cessation of benefits. Tenn. Code Ann. section 50-6-203.

The Supreme Court has consistently held that the running of these statutes of limitation are suspended until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained, and that it is the date on which the employee's *disability* manifests itself to a person of reasonable diligence, not the date of accident, which triggers the running of the statute of limitations. See Hibner v. St. Paul Mercury Ins. Co., 619 S.W.2d 109 (Tenn. 1981) and its progeny. The preponderance of the medical evidence in this case fails to establish that the claimant's disability manifested itself more than one year before the commencement of the action.

Dr. Allen opined that the claimant is permanently impaired as a result of the injury and assigned a permanent impairment rating of ten percent to the whole body. Moreover, as the trial judge found, "this plaintiff is a classic example of a hard-working man with limited education, a non-complainer who with limited skills did everything within his power despite constant pain and discomfort to continue his employment.... Considering the plaintiff's age, education, employment history and present condition, he sustained an occupational disability of forty-five percent to the body as a whole."

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). We have carefully examined the record with respect to those factors and are not persuaded that the evidence preponderates against the findings of the trial court with respect to the extent of the claimant's permanent disability.

The judgment is affirmed. Costs on appeal are taxed to the defendants-appellants. The case is remanded to the trial court for collection of costs and such other proceedings, if any, as may be appropriate.

Joe C. Loser, Jr., Judge

CONCUR:

Frank F. Drowota, III, Associate Justice

Cornelia Clark, Judge