

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

FILED

May 21, 1998

**Cecil W. Crowson
Appellate Court Clerk**

LUMBERMEN'S MUTUAL)
INSURANCE COMPANY,)
Plaintiff/Appellee) No. 01S01-9704-CV-00081
)
)
v.) DAVIDSON COUNTY, CIRCUIT
)
)
LOUIS J. MOTELEONE,) HON. THOMAS W. BROTHERS, JUDGE
Defendant/Appellant.)

FOR RESPONDENT/APPELLANT:

DOYLE E. RICHARDSON
ROGERS, RICHARDSON & DUNCAN
100 North Spring Street
Manchester, TN 37355

FOR PETITIONER/APPELLEE:

EDWARD U. BABB
BUTLER, VINES & BABB
P. O. Box 2649
Knoxville, TN 37901-2649

MEMORANDUM OPINION

MEMBERS OF PANEL:

LYLE REID, ASSOCIATE JUSTICE, SUPREME COURT
JOSEPH C. LOSER, JR., RETIRED JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

AFFIRMED

RUSSELL, SP. J.

This appeal in a workers' compensation case has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Lumbermen's Mutual Insurance Company, the workers' compensation insurance carrier for a company named Rock Tenn Company, filed this petition against Louis J. Moteleone, a former employee of Rock Tenn Company, seeking an adjudication of Moteleone's rights growing out of an alleged back injury claimed to have happened in the course and scope of Moteleone's employment by Rock Tenn Company on or about May 30, 1994.

After a full hearing the trial judge held that no compensable back injury occurred on May 30, 1994; and, even if it did, no proper notice as required by Tennessee Code Annotated Section 50-6-201 was timely given. Consequently, the court held that Mr. Moteleone was entitled to no compensation. As a matter of fact, all medical expenses arising from the employee's back problems, including surgery, were paid by the insurance carrier. This occurred because this employee had suffered a compensable back injury in 1992, and a part of his court-approved settlement was lifetime medical care.

The employer and the insurance carrier presented a total of three convincing witnesses who testified that Mr. Moteleone complained of back pain that he attributed to kidney reaction to large doses of motrin that his physician-surgeon, Dr. George H. Lien, had suggested that he take. Dr. Lien had previously performed back surgery after his 1992 injury, and was approved to render lifetime care. When the employee went back to Dr. Lien he did not report an injury while lifting boxes, as he now claims, but the doctor's records indicate that he reported a gradual onset of increased back pain. It developed that Dr. Lien had to do another surgical operation upon Mr. Moteleone's back, and his original permanent partial disability of 8% was increased by an additional 4%. However, the original injury had been settled for a lump sum.

At trial Mr. Moteleone testified that he received a new injury on May 30, 1994, when he was lifting boxes; and that he immediately reported that fact. Both the occurrence of a new injury and the reporting thereof were sharply disputed. The trial court held that the employee failed to carry his burden of proof on both issues. Certainly the credible evidence does not preponderate against those findings. Per Tennessee Code Annotation Section 50-6-225 (e)(2), we affirm. Costs on appeal are assessed to the appellant.

WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

LYLE REID, ASSOCIATE JUSTICE

JOE C. LOSER, JR., SPECIAL JUDGE

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LUMBERMEN'S MUTUAL
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Davidson Circuit **Cecil W. Crowson**
No. 94C-3083 **Appellate Court Clerk**

Hon. Thomas W. Brothers, Judge

NO. 01S01-9704-CV-00081

Affirmed

JUDGMENT ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; 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 are taxed to the defendant-appellant and his surety, for which execution may issue if necessary.

It is so ordered this 21st day of May, 1998.

PER CURIAM

Reid, Sp.J., Not Participating