IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(June 29, 1998 Session)

FILED
October 21, 1998
Cecil W. Crowson
Appellate Court Clerk

JAMES ED LINKOUS, JR.) MARION CHANCERY
)
Plaintiff-Appellee) Hon. Jeffrey F. Stewart,
) Chancellor
v.)
) No. 01S01-9709-CH-00191
)
FEDERATED RURAL ELECTRIC)
INSURANCE COMPANY,)
)
Defendant-Appellee,)
AND
JAMES ED LINKOUS, JR.,)
)
Plaintiff-Appellee)
)
v.)
)
RELIANCE INSURANCE)
COMPANY,)
)
Defendant-Appellant.)

For Appellant:

Alan B. Easterly
Leitner, Williams, Dooley & Napolitan
Chattanooga, Tennessee

For Defendant-Appellee:

W. Stuart Scott
Stewart, Estes & Donnell
Nashville, Tennessee

For Plaintiff-Appellee:

Thomas L. Wyatt
Summers & Wyatt
Chattanooga, Tennessee

MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED Loser,
Judge

<u>MEMORANDUM OPINION</u>

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. The appellant, Reliance Insurance Company, insists (1) the chancellor erred in applying the successive or "last injurious injury" rule and (2) the award of permanent partial disability benefits is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant, Linkous, is in his late thirties with a high school education, a few junior college courses, apprenticeship training as a journeyman lineman and twenty years' experience as a lineman. On September 13, 1993, he fell from a bucket truck and was injured.

After conservative treatment and work hardening, he returned to work in April of 1994 with no permanent medical impairment or restrictions. He performed the same duties as before the accident, until July of 1994, when he suffered a second injury at work.

The second injury was surgically treated and the claimant has again returned to his same duties, but with restrictions and a permanent impairment rating. The primary dispute before the trial court was whether disability and medical benefits should be the responsibility of the insurer at the time of the first or second injury, a factual dispute. The trial judge invoked the successive injury rule, long recognized in Tennessee, and sometimes referred to as the last injurious injury rule.

Because both issues involve questions of fact, 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)(3). 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. <u>Humphrey v. David Witherspoon, Inc.</u>, 734 S.W.2d 315 (Tenn. 1987).

As to the first issue, Reliance Insurance Company, the insurer in July of 1994 argues that it should not be subjected to liability because the July 1994 injury was merely an onset of increased pain resulting from the first injury, citing <u>Cunningham v. Goodyear Tire and Rubber Co.</u>, 811 S.W.2d 888 (Tenn. 1991) as authority. In that case, the trial court found that plaintiff's condition was due to a general arthritic condition predating his employment at Goodyear Tire and Rubber Company and that, although his employment may have aggravated his preexisting condition by increasing his pain, there was no connecting industrial injury or accident that might be considered the triggering incident producing an acceleration of his condition. That finding was supported by expert medical evidence.

The medical proof in the present case is quite different. The doctor who

treated the claimant for the 1993 injury provided conservative care and testified unequivocally that there was no permanent impairment from that injury. Moreover, two different doctors testified that his disability was causally connected to the second injury.

Where an employee is permanently disabled as a result of a combination of two or more accidents occurring at different times and while the employee was working for different employers, the employer for whom the employee was working at the time of the most recent accident is generally liable for permanent disability benefits. McCormick v. Snappy Car Rentals, Inc., 806 S.W.2d 527 (Tenn. 1991). The same doctrine applies where the employee's permanent disability results from successive injuries while the employee is working for the same employer, but the employer has changed insurance carriers. Bennett v. Howard Johnsons Motor Lodge, 714 S.W.2d 273 (Tenn. 1986); Indiana Lumberman's Mut. Ins. Co. v. Ray, 596 S.W.2d 816 (Tenn. 1980); Globe Co. v. Hughes, 223 Tenn. 37, 442 S.W.2d 253 (1969). The carrier which provided coverage at the time of the last injury is liable for the payment of permanent disability benefits. Id.

For those reasons, the panel has concluded the chancellor did not err by invoking the successive injury rule.

By the second issue, Reliance insists the chancellor erred by accepting the testimony of an examining doctor to the exclusion of the treating doctor, as to the extent of the employee's permanent impairment and because the claimant has returned to work without restrictions. Dr. Warren McPherson, a board certified neurosurgeon, performed a laminectomy for a herniated L5, S1 disc. He returned the employee to work eight weeks later with a whole body impairment rating of ten percent based on AMA Guides.

Dr. Richard Donaldson, a retired orthopedic surgeon, conducted an examination of the claimant after the surgery. He assigned an impairment rating of fifteen percent under the AMA Guides and twenty percent using the Manual for Orthopedic Surgeons. The chancellor awarded permanent disability benefits based on thirty-seven percent to the body as a whole by applying the statutory multiplier of two and one-half times the fifteen percent impairment rating. See Tenn. Code Ann. section 50-6-241(a)(1).

Dr. McPherson excised seventy-five to eighty percent of the disc during surgery and did return the claimant to work without specific limitations. The doctor did testify, however, that the claimant will be bothered by heavy lifting more quickly than if he had not had the surgery.

Dr. Donaldson, who has more than fifty years experience as a medical doctor, assigned a larger impairment rating by considering lost range of motion, which Dr. McPherson apparently did not consider. Dr. Donaldson also prescribed that the claimant, because of his injury, should not lift from a bent position, lift more than thirty pounds, bend, stoop, twist, or kneel, or climb stairs, sit or stand for extended periods of time.

The extent of an injured worker's disability is a question of fact. Collins v.

Howmet Corp., _____ S.W.2d ____ (Tenn. 1998), 1998 WL 312748 (Tenn.). From the above facts and circumstances, we cannot say the evidence preponderates against the findings of the chancellor.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the defendant-appellant, Reliance Insurance Company.

____
Joe C. Loser, Jr., Special Judge

CONCUR:

____
Frank F. Drowota, III, Associate Justice

____
William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

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Cecil W. Crowson
Appellate Court Clerk

JAMES ED LINKOUS, JR.	}	*MARION CHANCERY*
Plaintiff/Appellee	}	*No. Below 5885 and 5904*
vs	}	
FEDERATED RURAL ELECTRIC	}	
INSURANCE COMPANY	}	
Defendant/Appellee	}	*Hon. Jeffrey F. Stewart*
	}	*Chancellor*
AND	}	
	}	
JAMES ED LINKOUS, JR.	}	*No. 01S01-9709-CH-00191*
Plaintiff/Appellee	}	
vs.	}	
RELIANCE INSURANCE CO	}	
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 Defendant/Appellant and Surety for which execution may issue if necessary.

IT IS SO ORDERED on October 21, 1998.

PER CURIAM