

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

January 28, 2008 Session

FRANCES ANGELA DODSON v. VF IMAGEWEAR (WEST), INC.

**Direct Appeal from the Circuit Court of Maury County
No. 10177 Jim T. Hamilton, Judge**

**No. M2007-00922-WC-R3-WC - Mailed - April 11, 2008
Filed - May 13, 2008**

This workers' compensation appeal 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 a hearing and a report of findings of fact and conclusions of law. The employee has been treated for a shoulder injury and a back injury. The shoulder injury occurred on July 1, 2000. The back injury occurred on January 28, 2002. After the shoulder injury, the employee sought treatment from numerous doctors for pain in her shoulder. The doctors were unable to determine the cause of her pain until a SLAP lesion was diagnosed on October 29, 2003. On December 13, 2002, the employee filed a complaint seeking compensation for both injuries. The trial court determined that both injuries were compensable and awarded the employee eighty percent (80%) permanent partial disability to the body as a whole. On appeal, the employer contends that the trial court erred in finding that the shoulder injury was not barred by the statute of limitations and as a result erred in determining the employee's vocational disability by including the shoulder injury. The judgment is affirmed.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Circuit Court Affirmed

JERRY SCOTT, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J. and DONALD P. HARRIS, SR. J., joined.

Michael W. Jones, Nashville, Tennessee, for the appellant, VF Imagewear (West), Inc.

J. Daniel Freemon, Lawrenceburg, Tennessee, for the appellee, Frances Angela Dodson.

OPINION

Factual and Procedural Background

This action concerns two alleged work injuries. Frances Angela Dodson, a former employee of VF Imagewear (West), Inc. (“VF”), contends that she sustained a compensable injury to her right shoulder on or about July 1, 2000 and a compensable injury to her back on January 28, 2002 while working for VF. VF denied both claims.

Ms. Dodson testified that she injured her shoulder while taking inventory on July 1, 2000. She stated that she was on a ladder which began to sway. She reached for and grabbed a nearby object to steady herself. Her right shoulder began to hurt immediately. Ms. Dodson’s supervisor, Betty Grooms, was in a meeting, and it was near the end of the work day, so she did not report the injury at that time. She advised Ms. Grooms of the incident on the next work day, which was a Monday. Ms. Grooms testified, and acknowledged that the conversation occurred, although her recollection of the event was not clear. It is undisputed that a workers’ compensation claim was not initiated at that time.

After the incident, Ms. Dodson was treated by Dr. Charles A. Ball or Dr. Robert A. Bain, but she could not remember which one. They were physicians who maintained an office at the VF plant on certain days. She was treated by them at the plant and at their office in Mt. Pleasant.¹ One of the doctors gave her pain medication, put her arm in a sling and placed her on light duty for two weeks. Ms. Grooms testified that when Ms. Dodson returned from her first visit to the doctor, she reported she had been diagnosed as having bursitis. She missed some days of work while hurting and worked other days in spite of the pain. Dr. Ball or Dr. Bain referred her to Dr. Randall Davidson, an orthopaedic surgeon at the Middle Tennessee Bone and Joint Clinic in Columbia, who prescribed Vioxx. On November 6, 2000, Dr. Davidson allowed Ms. Dodson to return to work without restrictions. After returning to work, Ms. Dodson continued to experience pain. Finally, on September 1, 2001, she was referred to Dr. David Bratton, an orthopaedic surgeon in Franklin. Dr. Bratton then referred her to Dr. Michael McNamara who treated her with pain medication and ordered a “neurology consult for EMG and nerve conduction velocities of the right upper extremity” to be performed by Dr. Kenneth Gaines. Although the history given to Dr. Gaines described her injury to her right arm in the ladder incident, he noted in his chart on January 21, 2002, that “[t]his is not a WC injury at present, there is an absence of objective findings but a persistent pain problem.”

On January 28, 2002, while still being treated for her shoulder by Dr. McNamara, Ms. Dodson injured her back at VF while moving plastic tubs containing fabric. She reported the injury to her supervisor that day. Her supervisor, Annie Webster, confirmed that a conversation concerning an injury had taken place, but her recollection of the details was very limited. Ms. Dodson never

¹ Ms. Grooms testified that Dr. Ball or Dr. Bain was compensated by VF’s group medical insurance, by VF’s workers’ compensation carrier or by VF. While she did not remember who paid, she distinctly remembered that the doctor was paid.

worked for VF again after that date. A workers' compensation claim was initiated in June 2002. However, the claim was denied by VF. VF's facility closed in the latter part of 2002.

Dr. McNamara continued to treat Ms. Dodson for both the shoulder and back injuries until November 2002. On December 13, 2002, Ms. Dodson filed her complaint alleging both injuries. Along with the complaint, Ms. Dodson filed a motion to require VF to begin the payment of benefits to her, and an order to show cause regarding that motion was issued on December 13, 2002. On January 2, 2003, an order was entered which recites that the motion was heard on December 23, 2002, and that no representative of VF was present at that hearing. The order required VF to pay temporary disability benefits and medical expenses. On January 21, 2003, VF filed a motion to set aside the earlier order. It does not appear that a hearing was held concerning that motion. However, in August 2003 and August 2004, Ms. Dodson filed motions which sought similar relief. At trial, counsel stated that payments and medical treatment were provided to Ms. Dodson by VF as a result of an agreement, the terms of which do not appear to be in the record.²

As a result of the litigation, Ms. Dodson returned to Dr. McNamara who requested an MRI of her shoulder. Based on the MRI results, Ms. Dodson was finally diagnosed as having a SLAP lesion, an injury to the labrum of the right shoulder, on October 29, 2003. Dr. Paul Thomas, a partner of Dr. McNamara, surgically repaired the SLAP lesion in June 2004.³

The case was tried on March 2, 2007. On the date of trial, Ms. Dodson was forty-two years old and had not worked since January 28, 2002. She is a high-school graduate, and prior to working for VF, she worked as a presser, packager and kitchen helper.

Dr. McNamara testified by deposition and concluded that Ms. Dodson had a ruptured disk at the L5-S1 level. Previously, on July 9, 2002, he performed a microdiscectomy to remove the ruptured disk. At the time of trial, Dr. McNamara recommended an additional surgical procedure. He opined that Ms. Dodson had a 10% permanent impairment as a result of the injury and first surgery.

Prior to the trial date, Dr. John Bacon, an orthopaedic surgeon, performed an independent medical evaluation at the request of the employer. He testified that Ms. Dodson's injuries were consistent with the July 2000 and January 2002 events as she described them. He opined that she retained permanent impairments of 6% to the body as a whole for the shoulder injury and 12% to the body as a whole for the back injury, yielding an 18% anatomical disability to the body as a whole. He suggested that she lift no more than twenty pounds occasionally, fifteen pounds frequently and

² The record indicates that prior to the agreement, Ms. Dodson's medical expenses, except those paid to Dr. Ball or Dr. Bain, were paid by her health insurance carrier.

³ Unfortunately, the record fails to enlighten the court on a number of issues surrounding Ms. Dodson's treatment for her shoulder injury, including just when she was first seen by a doctor, which doctor she saw, what she reported to the doctor, and what he told her. The record does not include the doctor's chart for that visit or any explanation as to how she was informed that the diagnosis was for bursitis, if that was, in fact, the diagnosis.

to limit bending and stooping. He also recommended that she lift no more than ten pounds with her right arm and to avoid work above shoulder level with that arm.

Wes Cox, a vocational evaluator, testified on behalf of Ms. Dodson. He administered tests which indicated that she was able to read at the eleventh grade level and perform arithmetic at a fifth grade level. He opined that she had a vocational disability of 82% to 99% as a result of the combination of her injuries.

Patsy Bramlett, also a vocational evaluator, testified on behalf of VF. Her testing indicated that Ms. Dodson was able to read at a high school level and perform arithmetic at a sixth grade level. She opined that Ms. Dodson had a 45% vocational disability.

The trial court entered written findings of fact and conclusions of law on April 9, 2007. The court found that Ms. Dodson's claim concerning the July 2000 shoulder injury was not barred by the statute of limitations; that she had sustained compensable injuries to her right shoulder and low back, as alleged; and that she had sustained a permanent partial disability of 80% to the body as a whole. VF has appealed, arguing (1) that the trial court erred in determining that Ms. Dodson's July 2000 shoulder injury was not barred by the statute of limitations pursuant to Tennessee Code Annotated section 50-6-203(a) (1999), and (2) that the trial court consequently erred by considering the medical impairment rating to Ms. Dodson's shoulder when awarding her an eighty percent (80%) vocational disability.

Issues

- I. Did the trial court err in determining that Ms. Dodson's July 2000 shoulder injury was not barred by the statute of limitations pursuant to Tennessee Code Annotated section 50-6-203(a)(Supp. 2000)?
- II. If Ms. Dodson's July 2000 shoulder injury was barred by the statute of limitations, did the trial court err by considering the medical impairment rating to Mr. Dodson's shoulder when awarding her an eighty percent (80%) vocational disability?

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987). A reviewing 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); Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn.

1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

- I. Did the trial court err by determining that Ms. Dodson's July 2000 shoulder injury was not barred by the statute of limitations pursuant to Tennessee Code Annotated section 50-6-203(a)(Supp. 2000)?

VF contends that Ms. Dodson's right shoulder claim is barred by the applicable statute of limitations pursuant to Tennessee Code Annotated section 50-6-203(a)(Supp. 2000).⁴ The injury occurred in July 2000. The complaint was filed on December 13, 2002. With the possible exception of the first visit to Dr. Ball or Dr. Bain, no payments were made by VF for temporary disability or medical treatment until 2004. On the basis of those facts, VF argues that the claim was not filed within one year from the date on which the injury occurred and is therefore barred. VF cites Dye v. Witco Corp., 216 S.W.3d 317, 322 (Tenn. 2007), in support of its position.

In Dye, the employee had an allergy to potassium dichromate. The employer accepted the claim and provided medical care. After an industrial hygiene study determined that the workplace did not contain significant amounts of the allergen, the employer discontinued providing workers' compensation medical care in October 1999. The employee filed suit in December 2002.⁵ The employer moved for summary judgment based upon the statute of limitations, which the trial court granted. On appeal, the employee argued that the statute had not begin to run until March 2002, when medical tests were conducted, or March 2005, when a permanent impairment was assigned. Because those issues had not been raised in the trial court, the Supreme Court did not consider them, and the judgment was affirmed. Id. at 321, 322.

This case differs from Dye in several significant particulars. First, in Dye, the employer initiated a workers' compensation claim and began to provide medical care at or near the time the problem was reported. Here, no claim was initiated and Ms. Dodson sought care for her injury through her health insurance carrier. Also, benefits in Dye were explicitly terminated by the employer, an event which would cause a reasonable person to believe that action to preserve his claim was necessary. No similar event occurred in this case until 2002. Further, the nature of the injury in Dye was known to the employee at the outset.

Additionally, in this case, Ms. Dodson knew that she had shoulder pain, but the source of that pain, the SLAP lesion, was not discovered until an MRI of the shoulder was performed in 2003. In fact, either Dr. Ball or Dr. Bain noted in his chart on October 18, 2000, that there was "[n]o known

⁴ The statute of limitations is now found at Tennessee Code Annotated section 50-6-203(g)(2) (2005) as a result of the 2004 amendments to the workers' compensation statutes.

⁵ The employee had nonsuited a previous lawsuit more than one year prior to re-filing.

injury.” Furthermore, Dr. Kenneth Gaines, who performed a “neurology consult for EMG and nerve conduction velocities of the right upper extremity,” noted in his chart on January 21, 2002, that “[t]his is not a W.C. injury at present, there is an absence of objective findings but a persistent pain problem.” Finally, after seeing five different doctors, an MRI of Ms. Dodson’s shoulder was performed, and based on the results of the MRI, Ms. Dodson was diagnosed on October 29, 2003 with a SLAP lesion, an injury to the labrum of the right shoulder.⁶

In Norton Co. v. Coffin, 553 S.W.2d 751, 752 (Tenn. 1977), the Supreme Court stated that “the running of the statute of limitations is suspended until by reasonable care and diligence it is discoverable and apparent that an injury compensable under the workmen’s compensation laws has been sustained.” Soon after the shoulder injury occurred, Ms. Dodson visited Dr. Ball or Dr. Bain complaining of shoulder pain. Over the next four years, Ms. Dodson was referred to numerous doctors and was ultimately treated by five different doctors. Therefore, we find that Ms. Dodson exercised reasonable care and diligence when trying to discover whether she had sustained a compensable injury.

Furthermore, the doctors treating Ms. Dodson were unable to determine the cause of her pain until October 29, 2003 when her SLAP lesion was finally diagnosed. As stated above, Dr. Gaines noted in Ms. Dodson’s chart on January 21, 2002, that she had a persistent pain problem, but classified her injury as not a “W.C.” injury because there was an “absence of objective findings.” As a result, Ms. Dodson’s injury did not become compensable until that time. Hence, pursuant to the Supreme Court’s finding in Norton, the statute of limitations did not begin to run until October 29, 2003 and the complaint was already filed on December 13, 2002. Therefore, Ms. Dodson’s shoulder injury claim was not barred by the statute of limitations.

The trial court determined that the injury became compensable when corrective surgery was performed on her shoulder in June 2004. As stated above, the shoulder injury became compensable when the SLAP lesion was discovered on October 29, 2003, not when the corrective surgery was performed. Therefore, the trial court erred in determining the date that the injury was discovered. However, that error had no effect on the outcome of the case or this Panel’s decision regarding the issues on appeal.

- II. If Ms. Dodson’s July 2000 shoulder injury is barred by the statute of limitations, did the trial court err by considering the medical impairment rating to Mr. Dodson’s shoulder when awarding her an eighty percent (80%) vocational disability?

VF’s argument on the second issue, that the trial court erred by considering the medical impairment rating to Mr. Dodson’s shoulder when awarding her an eighty percent (80%) vocational disability, is premised on its position that the shoulder claim is barred. Having determined that Ms. Dodson’s shoulder injury claim was not barred by the statute of limitations, this issue is moot.

⁶ The complaint for the back injury, which included the shoulder injury, had been filed ten months before the injury to the right shoulder was diagnosed.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, VF Imagewear (West), Inc. and its surety, for which execution may issue if necessary.

JERRY SCOTT, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JANUARY 28, 2008 SESSION

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**Circuit Court for Maury County
No. 10177**

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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 appeals 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 the Appellant, VF Imagewear (West), Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM