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

FILED

January 17, 1997

Cecil W. Crowson
Appellate Court Clerk

RANDY WILSON,	)	
	)	BEDFORD CHANCERY
Plaintiff/Appellee	)	
	)	Hon. Tyrus H. Cobb,
v.	)	Chancellor
	)	
EATON CORPORATION,	)	NO. 01S01-9605-CH-00107
	)	(No. 19,453 Below)
Defendant/Appellant	)	

For the Appellant:

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

Chief Justice Adolpho A. Birch
Senior Judge John K. Byers
Special Judge William S. Russell

AFFIRMED
AND REMANDED

BYERS, Senior 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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The trial judge awarded the plaintiff 50% permanent partial disability to the right hand. He refused to award temporary total disability benefits because plaintiff had lost no wages during his period of temporary total disability.

Appellant challenges the trial court's findings that plaintiff sustained a work-related injury by accident to his right thumb in August 1992, that plaintiff gave notice of such an injury and that this claim is not barred by the statute of limitations. Appellee challenges the trial court's refusal to award temporary total disability benefits. Appellee also argues that the appellant should be estopped from pleading the affirmative defenses relied upon for failure to show proper and timely filing of the required notice of controversy.

We affirm the trial court's judgment.

Plaintiff, 40 at the time of trial, has his high school diploma. He has worked primarily in factories; he also worked as a patrolman for two-and-a-half years. He has worked for the appellant since 1984. He now works as a gear lab technician, which requires lifting and grasping of parts ranging from 30 to 40 pounds apiece. In August 1992 he developed a knot on the outside of his thumb and began having stiffness and pain in his thumb and difficulty grasping objects. A few weeks later, a part overturned in his hand and "snapped [his] thumb out."

Plaintiff testified that he reported his injury the next day, August 21, 1992, to the plant nurse. She asked him if he had ever hurt his thumb before, and he told her the only time he had ever hurt it before would have been in 1988 when he had fallen. He testified that the nurse told him that she thought his problem with his thumb had something to do with his 1988 fall. In the 1988 fall, plaintiff hit his left hand against a railing and strained three of his fingers on his left hand; he also jammed the thumb on his right hand, but there is no record of a complaint about the

plaintiff's right thumb. Plaintiff testified that he had not had any problems with his right thumb between the 1988 fall and August 1992.

The plant nurse testified that she did not remember the conversation verbatim but that she copied down what plaintiff told her on the authorization for treatment form, that he was having problems with his right thumb as a result of a 1988 fall. There are no entrances in Mr. Wilson's medical log between 2/14/89 and 3/12/93; the nurse testified that she did not make an entrance in the medical log on August 21, 1992 because she related it to the prior 1988 fall.

The nurse sent the plaintiff to Dr. Samuel Selis, a family practitioner and occupational medicine specialist. He diagnosed "tom ligaments and a dislocation of the right thumb due to the old injury on 5-2-88." Plaintiff did not mention a new injury to him. Dr. Selis was uncertain as to the course of injury, although he opined that plaintiff would have known he hurt his thumb in 1988 if he had torn the ligament then. Dr. Selis had treated plaintiff for the employer in 1991 as well. However, plaintiff did not complain of a thumb injury.

Dr. Selis referred plaintiff to Dr. Richard A. Rogers, an orthopedist. Plaintiff gave Dr. Rogers a history of having dislocated it four years ago and having trouble with it trying to pop out of place and numbing, which caused Dr. Rogers to characterize the plaintiff's condition as chronic. When presented with a hypothetical history of the plaintiff having recently had progressive problems with his thumb followed by a subsequent trauma, he opined that he would assume an aggravation of a pre-existing injury or a repetitive injury such as gamekeeper's thumb. He opined that there was a single injury years previous repeatedly aggravated by continued activity with the hand. However, he admitted that it was possible that the final detachment was recent and opined that if the detachment occurred in 1988, plaintiff's thumb would have bothered him while moving metal objects from ten to fifteen pounds.

Dr. Jeffrey P. Lawrence, also an orthopedic surgeon, performed a surgical repair of plaintiff's torn ligament. The repair was not successful. Dr. Lawrence then

performed a surgical reconstruction that was also unsuccessful. He referred plaintiff to another surgeon for further possible corrective surgery. He opined that plaintiff's injury was probably traumatic rather than repetitive and, based on the history of a 1988 injury with progressive pain and beginning to pop in the past year, he opined that the injury existed in its totality since 1988.

Dr. James Kenneth Lanter, another orthopedic surgeon, fused plaintiff's thumb so it would not keep falling out of joint. He assessed a 30% permanent impairment to the right thumb. Plaintiff related his problems with his thumb to the 1988 injury; Dr. Lanter had no history of any other injury or aggravation. Dr. Lanter testified that it was possible that plaintiff could have partially torn his ligament in 1988 and "a partially torn ligament would give you an increased laxity and increased laxity would predispose you to another injury."

Our review is *de novo* on the record, accompanied by the presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). The trial judge determines the credibility of witnesses who testify before the trial judge, and we are bound by the trial judge's finding on the credibility of the witnesses.

The trial judge saw and heard the witness and the company nurse testify; we did not. The medical testimony as to whether there was a new injury or an aggravation of the 1988 injury is inconclusive, when you take into account the history with which the physicians were provided. We defer to the trial court's judgment that the 1988 injury injured plaintiff's thumb but did not require treatment until 1992 and therefore was not compensable until 1992. Therefore, the plaintiff's claim is not barred by the statute of limitations. As to notice, it is undisputed that plaintiff reported to the nurse on August 21, 1992, and she authorized him to see a physician. The trial judge accredited plaintiff's version of what he told her.

We further hold that plaintiff is not entitled to temporary total disability benefits. Temporary total disability benefits are intended as a substitute for wages lost while an employee is totally disabled from working by his injury. Plaintiff

received his full salary while he was temporarily totally disabled and is not entitled to temporary total disability benefits.

We affirm the trial court's judgment and assess costs to the appellant, Eaton Corporation.

John K. Byers, Senior Judge

CONCUR:

Adolpho A. Birch, Chief Justice

William S. Russell, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

RANDY WILSON,	}	*BEDFORD CHANCERY*
	}	*No. 19,453 Below*
Plaintiff/Appellee	}	
	}	*Hon. Tyrus H. Cobb,*
vs.	}	*Chancellor*
	}	
EATON CORPORATION,	}	*No. 01S01-9605-CH-00107*
	}	
Defendant/Appellant	}	*AFFIRMED & REMANDED.*

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 January 17, 1997.

PER CURIAM