IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE
(March 18, 1997 Session)

FILED

August 28, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

VERNON SCOTT GOAD,	)	HAWKINS CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. Ben K. Wexler,
	)	Judge.
v.	)	
	)	No. 03S01-9606-CV-00064
CNA INSURANCE COMPANY, GENERAL SHALE PRODUCTS CORPORATION and LARRY BRINTON, JR., Director of Workers' Compensation, Tennessee Department of Labor,	)	
	)	
Defendants-Appellants.	)	

For Appellant, CNA:

Robert D Van de Vuurst
Steven H. Trent
Baker, Donelson, Bearman & Caldwell
Johnson City, Tennessee

For Appellee:

Mark A. Skelton
Rogersville, Tennessee

M E M O R A N D U M O P I N I O N

Members of Panel:

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

AFFIRMED IN PART
REVERSED IN PART
DISMISSED

Loser, Judge

MEMORANDUM OPINION

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 insists the award of permanent partial disability benefits is excessive; and the claimant or employee insists the award of permanent partial disability benefits is inadequate, the trial court erred in finding part of the claimant's claim to be time barred, the appeal should be dismissed for failure to file part of the transcript, and the appeal is frivolous. As discussed below, the panel has concluded the trial court's judgment that the claim for disability benefits resulting from a 1989 injury is time barred should be affirmed, and that the award of permanent disability benefits from a 1992 injury should be reversed and dismissed.

This claim involves two separate injuries to the claimant, both arising out of and in the course of his employment by the same employer. The first injury occurred in November of 1989, when the claimant strained his lower back while lifting a fuel cell. The treating physician diagnosed lumbar disc injury with mechanical nerve compression. He was unable to work for three months. Although the doctor assigned a permanent whole person impairment rating of five percent, the claimant returned to work and received no permanent disability benefits.

On April 8, 1992, the claimant injured his neck and low back in a fork lift collision, but was unable to work for only a few days. On June 29, 1992, he saw Dr. Robert J. Wilson, who found no objective evidence of injury, but assigned an impairment rating of three percent, from subjective complaints of pain.

On January 5, 1993 and June 25, 1993, he saw Dr. William E. Kennedy, who diagnosed chronic low back and cervical syndrome superimposed on pre-existing degenerative disc disease. Dr. Kennedy assigned a permanent impairment rating of eight percent and restricted the claimant from activities requiring bending, stooping, squatting, heavy lifting, working over

rough terrain, excessive ladder or stair climbing, vigorous or strenuous pushing or pulling, repeated and vigorous jostling, or work requiring his hands to be raised above the level of his shoulders.

The claimant testified at the trial that he can no longer do housework, ride horses, or hunt and fish.

The trial court found the claim for benefits for disability resulting from the November, 1989 injury to be barred by the statute of limitations and awarded permanent partial disability benefits based on twenty-one percent to the body as a whole, from the second injury. Six days later, the claimant saw another doctor and obtained a release to return to work with no restrictions. The employer's insurer moved to alter or amend the award and the trial court reduced the award of permanent partial disability benefits from one based on twenty-one percent to one based on fifteen percent to the body as a whole.

Appellate 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). This tribunal is required to conduct an independent examination of the evidence to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

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. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). In this case, the trial judge found "that the plaintiff and his witnesses gave false testimony at the trial as to the plaintiff's present medical work restrictions, and the activities that he could do before the injury and the lack of such activities after the injury." We have consequently disregarded the testimony of the claimant and his lay witnesses, in our findings and conclusions.

An action by an employee to recover benefits for an accidental injury, other than an occupational disease, must be commenced within one year

after the occurrence of the injury. The action in this case was commenced on November 25, 1992, more than one year after the November, 1989 injury. We affirm trial court's finding that the claim for disability benefits from the first injury is time barred.

The trial court's finding that the claimant will retain a permanent disability from the second accident is heavily dependent on the credibility of the claimant, for the medical experts based their opinions largely on the employee's complaints and the history he provided. Because he lacks credibility, we attach no value to the opinions of the medical experts. The trial court's finding that the employee is permanently and partially disabled is accordingly reversed. True justice does not tolerate false testimony given for the purpose of enhancing or supporting a claim for money.

When it appears that an appeal in a workers' compensation case is frivolous or taken solely for delay, the reviewing tribunal may, upon motion of either party or on its own initiative, award damages against the appellant in favor of the appellee without remand, for a liquidated amount. We do not find this to be such a case.

We find no reversible error concerning the filing of the transcript of the evidence. The complaint is dismissed. Costs are taxed to the plaintiff-appellee.

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Joe C. Loser, Jr., Judge

CONCUR:

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Frank F. Drowota, III, Associate Justice

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William H. Inman, Senior Judge