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LARRY WHITE v. FEDERATED MUTUAL INSURANCE COMPANY

No. M2002-00621-COA-R3-CV

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

2003 Tenn. LEXIS 329

May 1, 2003, Filed

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION. CONSULT THE TENNESSEE SUPREME COURT RULES FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Affirmed by, Adopted by *White v. Federated Mut. Ins. Co., 2003 Tenn. LEXIS 330 (Tenn., May 1, 2003)*

PRIOR HISTORY: *Tenn. Code Ann. § 50-6-225(e)* (1999) Appeal as of Right; Judgment of the Circuit Court Affirmed. Direct Appeal from the Circuit Court for Maury County. No. 9096. Robert L. Holloway, Judge.

DISPOSITION: Judgment of the Circuit Court Affirmed.

COUNSEL: Gordon C. Aulgur and David Brett Burrow, Nashville, Tennessee, attorneys for the appellant, Federated Mutual Insurance Company.

Tracy White Moore, Columbia Tennessee, attorney for the appellee, Larry White.

JUDGES: JOHN K. BYERS, SR. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., and JOE C. LOSER, SP. J., joined.

OPINION BY: JOHN K. BYERS

OPINION

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. § 50-6-225(e)(3)* for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found the plaintiff had suffered a 16 percent loss of his left arm and 28 percent [*2] loss to his right arm and entered judgment accordingly. The trial court further ordered the defendant to hold the plaintiff harmless for any subrogation claims against him for recovery of medical bills paid by an insurance company under a policy for health care owned by the plaintiff. The defendant says the evidence does not support a finding the plaintiff was injured in the course and scope of his employment with the defendant; the court erred in not finding the last injurious rule should apply; there is no showing the plaintiff suffered any vocational disability to his arms, and that the trial court erred by finding the defendant should hold the plaintiff harmless for any subrogation claims of a health insurance policy for payment made on behalf of the plaintiff for treatment of the carpal tunnel syndrome. We affirm the judgment of the trial court.

Plaintiff (employee) was forty-nine years of age at the time of trial. He has a twelfth grade education and completed a three-year apprenticeship as an iron worker. Upon completing this apprenticeship, he received a card certifying him as a journeyman iron worker, which entitled him to perform all aspects of the trade including welding, [*3] structural steel, concrete work, fundamental iron, and all aspects of building metal buildings and concrete buildings.

The plaintiff testified that at the time of the injury that is the cause of this action, he earned his income as a

member of a trade union. At the local union hall, there was a listing of jobs he could perform if qualified and he would go out and perform the work. When he was finished with the job or laid off, he would return to the union hall for more work. This is how he came to work for Tomlin Construction Company, the company insured by the defendant.

The plaintiff began working for Tomlin on March 24, 1999. He testified that while working for Tomlin between April 19, 1999, and April 26, 1999, he noticed for the first time that his hands were "going to sleep" and becoming numb and his arms began to hurt. He testified that his hands and arms had never bothered him in this manner before April 19, 1999.

On May 6, 1999, while seeing his physician for unrelated treatment to his back, the plaintiff told this doctor, Dr. Darrell Rheinhart, about the problems with his hands. Dr. Rheinhart sent the plaintiff for an EMG (nerve conduction study) which was conducted on [*4] May 10, 1999. After the EMG, the plaintiff reported his injury to his supervisor at Tomlin and completed a First Report of Injury. After May 10, the plaintiff did not perform any work with his hands (such as welding or tying rebar,) for Tomlin. The remainder of his work for Tomlin involved light duty work that did not involve his hands.

The last day the plaintiff worked for Tomlin was July 3, 1999. After leaving Tomlin, the plaintiff continued to work full-time performing welding work for other companies through his trade union. The plaintiff continued seeing physicians about his hand problems as he continued to work as an iron worker. He testified that during this time, his hand condition got no worse but got no better. At the recommendation of these physicians, the plaintiff had carpal tunnel release surgery performed on his right hand on November 9, 1999, and on his left hand on December 11, 1999, by a Dr. Schmidt in Nashville. The plaintiff testified that these surgeries relieved the numbness and tingling in his hands, but that he lost much of his hand strength as a result of the surgeries. He testified that he believed that thirty to forty percent of jobs that formerly would [*5] have been available to him are now not available to him due to the loss of strength in his hands.

The work the plaintiff did at Tomlin required extensive use of his hands especially the bending and tying of rebar. Rebar is a rod used to strengthen concrete walls. To tie rebar, the worker must use a large pair of pliers to twist wire onto the bar and to bend or shape the bar. The plaintiff was doing this work for Tomlin from four to six hours a day. In addition to this, the plaintiff used an impact drill to place the bar in the construction process. This drill caused considerable vibration of the plaintiff's hands.

Medical Evidence

Dr. Jane M. Siegel, an orthopedic surgeon who specializes in treatment and diagnosis of hand and upper extremity injuries, testified she first saw the plaintiff on May 17, 1999. The plaintiff reported he had previously worked as a welder for industrial contractors. The plaintiff reported to her the work of tying rebar and using an impacting drill while working for the defendant. The plaintiff told Dr. Siegel his symptoms first started almost a year prior to being seen by her but that they became worse after going to work for Tomlin. She testified [*6] the plaintiff's condition would worsen if he did repetitive work with his hands or work which would cause vibration.

Dr. Siegel testified an EMG, performed prior to her seeing the plaintiff, showed the condition of his right hand became worse after he quit working at Tomlin. She testified that, in her opinion, the condition of the plaintiff's left hand would have gotten worse by the same type work even though she did not have a May 1999 EMG of the left hand. Dr. Siegel did not give an evaluation of the plaintiff's impairment as a result of his condition.

Dr. David W. Gaw, an orthopedic surgeon, saw the plaintiff on February 7, 2001, for evaluation. The plaintiff described the work he was doing, *i.e.*, typing rebar and using an impact drill. Dr. Gaw determined the plaintiff had bilateral carpal tunnel syndrome, which had led to surgery. Dr. Gaw testified the plaintiff would continue to have pain if he did labor intensive work with his hands. Dr. Gaw was unable to pinpoint a particular time the plaintiff developed carpal tunnel syndrome. He did, however, testify the work with his hands could cause symptoms that had come and gone in the past which could reach a point like "the straw [*7] that broke the camels back."

Dr. Gaw testified the plaintiff's condition as shown by the October 1999 test was worse than it was in the May 1999 test. He found the plaintiff sustained a four

percent impairment to his left arm and a seven percent impairment to this right arm.

Discussion

The defendant's argument that the evidence does not show the plaintiff suffered a compensable injury while working for Tomlin Construction is unavailing. Clearly the evidence shows the plaintiff's carpal tunnel syndrome became so intense while working for Tomlin that the plaintiff was placed on light duty and furnished medical care for the carpal tunnel syndrome. The evidence is sufficient to show the plaintiff suffered a compensable injury while employed by Tomlin.

The defendant seems to raise a before-and-after defense, *i.e.*, they are not liable because the plaintiff's symptoms began before he became employed by the defendant or they are not liable under the last injurious injury rule because the plaintiff began work for another company after leaving Tomlin and his symptoms became worse.

In this case, the plaintiff first acquired medical evidence while working for the defendant. [*8] The plaintiff was put on light duty by the defendant, which was a departure from the intensive hand use required to twist rebar and use the impact drill. This was done on May 11, 1999.

The Last Injurious Exposure Rule was adopted to protect employees who suffer gradual injuries because of the uncertainty of such concepts as timely notice, statute of limitations and other reasons which would bar recovery for work related injuries for which they should be compensated.

In *Helton v. State, 800 S.W.2d 823 (Tenn. 1990)*, the Supreme Court said:

[1-3] We are of the opinion the Commission erred in denying payment of medical benefits. The rule in a successive occupational injury context places full liability on the carrier covering the risk at the time of the most recent injury bearing a causal relation to the disability. See Larson, Workmen's Compensation Law, § 95.12. The rule operates to place liability on the last employer, if the trier of fact is convinced that the disability was caused by successive work-related injuries but is unconvinced that any one employment is the more likely cause of the disability. When a compensable injury at one employment contributes to [*9] a disability occurring during a later employment involving work conditions capable of causing the disability, but which did not contribute to the disability, the "last injurious exposure" rule does not apply, and the first employer is liable. See *Boise Cascade Corp. v. Starbuck, 296 Or. 238, 675 P.2d 1044 (1984)*.

The evidence in this case shows the plaintiff was doing intensive, repetitive work with his hands and this led to the need for medical care and light duty work while at Tomlin.

Whether the defendant or the last employer would be liable was a question of fact for the trial judge. By the judgment, the trial court found the defendant liable for the plaintiff's injury because the injury occurred in the course of the plaintiff's work with the defendant. The evidence does not preponderate against this finding.

The defendant contends the plaintiff cannot recover in this case because there is no showing of vocational disability. Although vocational disability evidence is admissible in scheduled member cases, it is not required. *Duncan v. Boeing Tenn. Inc., 825 S.W.2d 416 (Tenn. 1992)*. We therefore find the defendant is not entitled to a new trial [*10] on this issue.

The defendant asks us to set aside the order of the trial court that required the defendant to hold the plaintiff harmless for any medical bills the plaintiff's health insurers attempt to collect from him for his injury. The defendant relies upon the case of *Prosser v. Bedford County, 2001 Tenn. LEXIS 634*, in which the court held the employer is only liable for medical bills paid by medical providers where the medical providers has intervened to protect its interest.

The Supreme Court held in *Staggs v. National Health Corp., 924 S.W.2d 79 (Tenn. 1996)*, that an employee could not personally receive payment for medical bills they did not pay. This is to prevent unjust enrichment of a worker who seeks such payment.

We do not construe the hold-harmless order in this case to fall under this rule. The trial court did not order the defendant to pay any sums to the plaintiff which the defendant has already paid. The order required the defendant to hold the plaintiff harmless for any medical bills that are unpaid and owed by the defendant if the plaintiff's health insurance carrier seeks to recover from

the plaintiff for any medical bills [*11] which it has paid or will pay on the plaintiff's behalf that should be paid by the defendant. The plaintiff sought medical coverage from his health policy when the defendant notified him his claim was not compensable. This is what the order covers.

We affirm the judgment. The costs of the appeal is taxed to the defendant.

JOHN K. BYERS, SENIOR JUDGE