

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

March 27, 2002 Session

JAMES HANNAH v. YELLOW FREIGHT SYSTEM, INC.

**Direct Appeal from the Chancery Court for Davidson County
No. 97-3255-I Irvin H. Kilcrease, Chancellor**

**No. M2001-00617-WC-R3-CV - Mailed - May 14, 2002
Filed - June 17, 2002**

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. In this appeal, the appellant insists the trial court erred in (1) allowing an attorney's fee on 20 percent of the actual recovery, instead of on what the claimant would have recovered if he had lived to age 65, (2) refusing to award bad faith penalties, (3) determining the injured employee's average weekly wage, (4) disallowing unauthorized medical and drug expenses, and (4) disallowing benefits beyond the death of the injured worker. As discussed below, the judgment of the trial court is affirmed in part and the cause remanded for further consideration only of the attorney fee issue.

Tenn. Code Ann. § 50-6-225(e) (2001 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Remanded.

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

Ann Buntin Steiner, Nashville, Tennessee, for the appellant, Tommy Hannah, administrator of the Estate of James Hannah

Stephen K. Heard and Jeffrey M. Beemer, Nashville, Tennessee, for the appellee, Yellow Freight System, Inc.

Paul G. Summers, Attorney General and Reporter, and E. Blaine Sprouse, Assistant Attorney General, Nashville, Tennessee, for the appellee, Jim Farmer, Director, Tennessee Department of Labor and Workforce Development's Workers' Compensation Division, Second Injury Fund.

MEMORANDUM OPINION

James Hannah, an employee of Yellow Freight System, Inc., the employer, first suffered a compensable back injury on June 26, 1996, while lifting a trailer door. He suffered a herniated disk, which was surgically repaired, and for which he was awarded permanent partial disability benefits based on 20 percent to the body as a whole and lifetime medical benefits. He returned to work, but only sporadically. He injured his back again in July 1997.

When he was denied additional disability benefits for the second injury, he initiated this civil action against the employer and the Second Injury Fund, seeking permanent total disability benefits for his physical and psychological injury. The employer and the Fund insisted the alleged second injury was a mere manifestation of the first injury. By an amended complaint, Mr. Hannah demanded bad faith penalties against the employer. The case was taken under advisement by the trial court following trial on May 11, 2000 and July 20, 2000.

The trial court weighed and evaluated conflicting evidence and filed a memorandum, finding the employee to be permanently and totally disabled as a result of a second compensable injury. In the case of permanent total disability, a covered injured employee will receive, as disability benefits, sixty-six and two-thirds percent of the wages received at the time of the injury, subject to the maximum weekly benefit and minimum weekly benefit, but not beyond the employee's sixty-fifth birthday, provided, that with respect to disabilities resulting from injuries which occur after age sixty, regardless of the age of the employee, permanent total disability benefits are payable for a period of 260 weeks. Tenn. Code Ann. § 50-6-207(4)(A)(i).

The award was apportioned between the employer and the Fund. The plaintiff's attorney's fee was commuted to a lump sum but no amount was fixed. The claim for bad faith penalties was denied. After the trial court filed its memorandum on October 3, 2000, the plaintiff died on October 17, 2000. On October 19, 2000, the plaintiff's attorney lodged with the court a proposed order reflecting the findings of the court's memorandum opinion. The chancellor signed the order, but did not file it. Instead, the trial court, after hearing post-trial motions, filed a judgment awarding disability benefits from the date of injury to the date of death and approved an attorney's fee equal to 20 percent of the recovery. The substituted plaintiff, Tommy Hannah, has appealed.

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. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998). Issues of statutory construction are solely questions of law. Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000). 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, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d.57, 61 (Tenn. 2001).

The appellant first contends the trial court erred in failing to base the attorney's fee on 400 weeks. Attorneys' fees in contested cases of permanent total disability are calculated upon the first 400 weeks of disability. Tenn. Code Ann. § 50-6-207(4)(A)(iii). An attorney's fee for representing an employee for the purpose of recovering workers' compensation benefits may not exceed twenty percent of the amount of recovery or award obtained on behalf of the employee, must be paid by the party who employs the attorney, and is subject to court approval. Tenn. Code Ann. § 50-6-226(a).

On December 1, 2000, the plaintiff's counsel, Ann Buntin Steiner and Frank Steiner, filed a motion for approval of proposed attorneys' fees. The motion spelled out in detail the work the two attorneys had done in the case and estimated the time spent by them to be "four to six weeks." The motion also set forth the attorneys' qualifications and experience.

Ann Buntin Steiner is a graduate of the Vanderbilt Law School and has practiced law in Tennessee for fifteen years. She spends approximately 15 percent of her time representing plaintiffs in workers' compensation cases. Frank Steiner is a 1956 graduate of Vanderbilt University Law School. He has extensive experience as a lawyer for the federal government and has been in private practice since 1989. They requested a fee of \$39,300.00 plus \$300.00 in discretionary costs. The motion was accompanied by appropriate affidavits.

On December 7, 2000, the employer filed a motion to alter or amend the court's memorandum. On January 29, 2001, the trial court entered a final judgment in which it awarded, inter alia, disability benefits from the date of the injury until the date of death, a period of 170 weeks, and an attorney's fee based on 20 percent of the actual recovery, rather than 20 percent of what Mr. Hannah would have recovered after 400 weeks, if he had lived.

The argument advanced by the appellant is that the attorney's fee should be based on the original award rather than the reduced recovery brought about by the untimely and unrelated death of the injured employee.

This is a contested case of permanent total disability. Thus § 50-6-207(4)(A)(iii) is applicable. It appears from the record that, except for the untimely and unrelated death of Mr. Hannah, the fee would have been calculated on the first 400 weeks of disability and paid by the employer in a lump sum. The fee could not have exceeded 20 percent of Mr. Hannah's recovery during the first 400 weeks and would have been deducted from that recovery.

At least one case involved similar circumstances. In Summers v. Knoxville Utilities Board, 1998 WL 560182 (Tenn. Sp. Workers' Comp.), the injured employee who had been awarded permanent total disability benefits died, from an unrelated cause, within the first 400 weeks of his injury. His attorney had already been paid a lump sum fee calculated on the first 400 weeks, as the statute requires. The employer sought an order from the trial court requiring the attorney to remit the "unearned" portion of the fee. The trial court denied the request. On appeal, this court affirmed. Citing Larson, "Effect of Subsequent Events on Fee Awards," Workmens' Compensation Law, § 83.13(i), p.15-1401, we held that an attorney's fee should be based on the facts as to his or her services in the case as of the time the services were rendered and should not be at the mercy of subsequent or collateral events over which the attorney has no control. In the present case, it appears from our independent examination of the record that the trial court based its decision to reduce the attorney's fee on subsequent events rather than facts existing at the time the attorneys' services were rendered. We therefore remand the case for consideration in accordance with the rule in Summers.

The appellant next asserts the trial court erred in denying her demand for a bad faith penalty. An employer or its insurer who fails to pay compensation benefits as required by the Act may be required to pay a penalty of six percent on any unpaid installments, Tenn. Code Ann. § 50-6-205(b)(3), but only if such failure to pay results from bad faith on the part of such employer or insurer, Mayes v. Genesco, Inc., 510 S.W.2d 882, 885 (Tenn. 1974), in which case the penalty is mandatory. Woodall v. Hamlett, 872 S.W.2d 677, 679 (Tenn. 1994). The trial court found the employer's failure to pay to be based on a good faith belief that Mr. Hannah's injury was not a new one, but a manifestation of one for which he had already been fully compensated. The evidence does not preponderate otherwise.

Additionally, if an employer wrongfully fails to pay an employee's claim for temporary total disability payments, the employer shall be liable, in the discretion of the court, to pay the employee, in addition to the amount due for temporary total disability payments, a sum not exceeding twenty-five percent of such temporary total disability claim; provided, that it is made to appear to the court that the refusal to pay such claim was not in good faith and that such failure to pay inflicted additional expense, loss or injury upon the employee; and provided further, that such additional liability shall be measured by the additional expense thus entailed. Tenn. Code Ann. § 50-6-225(g)(2)(i). From a consideration of all the facts and circumstances, we cannot say the trial court abused its discretion by failing to award a bad faith penalty.

The trial court found Mr. Hannah's compensation rate to be \$464.60 per week. The appellant next contends the evidence preponderates against that finding and in favor of \$492.80 per week.

Disability benefits are computed on a weekly basis and, subject to maximum and minimum amounts fixed by law, are based on the employee's average weekly wages, or the earnings of an injured employee in the employment in which he was working at the time of the injury during the fifty-two weeks immediately preceding the date of the injury, divided by fifty-two. Tenn. Code Ann. § 50-6-102(a)(1)(A). Days lost because of sickness or other fortuitous circumstances should be

deducted. Russell v. Genesco, Inc., 651 S.W.2d 206, 209 (Tenn. 1983). Where an employee works part time, or has been employed for less than fifty-two weeks immediately preceding the injury, his average weekly wage is ordinarily computed by dividing the total wages received during the year by the number of weeks during which the employee received wages. Gaw v. Raymer, 553 S.W.2d 576, 580 (Tenn. 1977). As noted above, Mr. Hannah's compensation rate was sixty-six and two-thirds percent of his average weekly wage.

The proof reflects that James Hannah worked a total of eight weeks during the fifty-two week period immediately preceding his injury and earned \$5,575.40. Using the above formula, the trial court correctly found the applicable compensation rate to be \$464.60.

The appellant next questions the disallowance of certain medical expenses. When a covered employee suffers an injury by accident arising out of and in the course of his employment, his employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Such care includes medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members and other apparatus, nursing services or psychological services as ordered by the attending physician, dental care, and hospitalization. The only limitation as to the amount of the employer's liability for such care is such charge as prevail for similar treatment in the community where the injured employee resides. Tenn. Code Ann. § 50-6-204(a)(4)(A). The injured employee is required to accept the medical benefits provided by the employer and must consult with the employer before choosing a treating physician or operating surgeon. State Auto Mut. Ins. Co. v. Cupples, 567 S.W.2d 164 (Tenn. 1978). Unless the injured employee has a reasonable excuse for the failure to consult with the employer first, the injured employee may be responsible for his own medical expenses. Emerson Electric Co. v. Forrest, 536 S.W.2d 343, 346 (Tenn. 1976). The medical expenses disallowed by the trial court were either excessive, not authorized by the employer or not shown by the proof to be reasonably necessary.

Prior to oral arguments, the appellant was allowed to submit, as an additional issue, the argument that the decedent's estate is entitled to receive the benefits the decedent would have received if he had lived for 400 weeks, citing, as authority for the argument, the rule in the recent case of Warrick v. Cheatham County Highway Dept., 60 S.W.3d 815, 818 (Tenn. 2001). In that case, we held, "a worker's personal representative may recover benefits on behalf of the deceased employee from the time of the injury to the time of death, even though the worker's death was unrelated to the employment," overturning previous rulings which had disallowed any non-adjudicated benefits when a injured worker died from an unrelated cause. We are unaware of any authority for an award of disability benefits, adjudicated or otherwise, beyond the date of an injured worker's death.

For the above reasons, the cause is remanded to the Chancery Court for Davidson County for further consideration of the attorney's fee issue. The judgment of that court is affirmed in all other respects. Costs on appeal are taxed to the parties, one-half each.

JOE C. LOSER, JR.

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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 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 the parties, one-half each, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM