IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 30, 2000 Session

JESUS M. PARRA v. RIETH-RILEY CONSTRUCTION CO., ET AL.

Direct Appeal from the Circuit Court for Shelby County
No. 92672 T.D. Robert L. Childers, Judge

No. W1999-00419-WC-R3-CV - Mailed - February 9, 2001; Filed March 30, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial judge found the plaintiff, Jesus M. Parra, suffered an 80 percent permanent partial disability to the right foot. The defendants, Rieth-Riley Construction Company and Zurich-American Insurance Group, contend the evidence does not support the award and further say the injury was limited to two toes rather than to the foot. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which DON R. ASH, SP.J., and JAMES E. SWEARENGEN, SP.J., joined.

Archie Sanders, III, Memphis, Tennessee, for the appellants Rieth-Riley Construction Company, Inc. and Zurich-American Insurance Group.

Donna M. Fields, Memphis, Tennessee, for appellee, Jesus M. Parra.

OPINION

Factual Background

On September 27, 1996 the plaintiff was operating a jack hammer to break up pieces of concrete. The plaintiff was struck on the right foot by the jack hammer and hit his great toe and the second toe were fractured. The plaintiff testified he continued to suffer pain in his foot because of the injury. He testified the pain was aggravated by his work.

Medical Evidence

The plaintiff was treated by Dr. Harold Knight, an orthopedic surgeon, on the date of his injury and was placed in a short leg cast. Subsequent x-rays showed satisfactory alignment of the bones. The plaintiff was released to return to work on November 4, 1996, without restrictions.

On November 14, 1996, x-rays revealed the great toe had rotated ninety percent and the fracture had become displaced. On November 18, 1996, surgery was performed on the toe, and two pins were inserted lengthwise through the great toe into the plaintiff foot to hold the fracture in place. The pins were removed on January 7, 1997.

On January 30, 1997, Dr. Knight released the plaintiff to return to work without restrictions. Dr. Knight testified the plaintiff could wear regular shoes and was not complaining of pain at the time.[1] Dr. Knight found the plaintiff had suffered a three percent impairment to the foot.

Dr. James Galyon, an orthopedic surgeon, saw the plaintiff in January of 1999. He described the surgical scars, which ran across the metatarsal bone and across the great toe. The metatarsal bone is the bone immediately behind the great toe. He found the plaintiff had little motion in the great and second toe and found little motion in the metatarsophalangeal joint, which is the joint that connects the toe to the foot.

Dr. Galyon found the joint had become fused and opined the plaintiff would suffer pain upon movement and would have difficulty standing all day, walking, and more difficulty squatting, stooping or bending because these put more force on his toes and right foot.

Dr. Galyon found the plaintiff had suffered a fifteen percent permanent partial disability to his right foot.

Discussion

The defendant contends the right to recover on the case is limited to the great toe and second toe because the injury was limited to these scheduled members. The plaintiff on the other hand insists the trial court correctly found the injury to the toes produced injury to the foot also.

In *Jeffrey Manufacturing Co. of Tenn. V. Underwood*, 426 S.W.2d 189 (Tenn. 1968), the Supreme Court held the legislature, in passing the statute which provided for injury to scheduled members, intended the amount allotted for the loss of a scheduled member to be full compensation for the consequences of the disability related to other members of the body to the extent which would be normal, usual and expected.

In *Carney v. Safeco Insurance Co.*, 745 S.W.2d 868 (Tenn. 1988), the Court–citing previous

[1]The plaintiff spoke little English, and the doctor had no interpreter with him on the visit. The doctor did not know the Spanish word for pain. The plaintiff testified he did not know how to ask for pain medication in English.

rulings–held that when the injury to a scheduled member authorizes an award for another scheduled member if the injury causes a disability or loss of use of the other member.

Medical evidence in the case reflects that the injury to the plaintiff's toes causes him to suffer pain in his foot when attempting to work. Further, the plaintiff testified that he suffers disability in the use of his foot when doing the type of work he is trained to do. We find therefore that the evidence does not preponderate against the finding of the trial court that the plaintiff suffered disability to his foot as a result of the injury he sustained.

The defendant argues the trial court's award of eighty percent loss of use is excessive because the plaintiff has returned to work doing the same work as before.

A divergence between the medical proof exists in this case. Dr. Knight released the plaintiff with no restrictions. Dr. Galyon on the other hand found the plaintiff had suffered a fifteen percent medical impairment to his foot. The trial judge accepted the testimony of Dr. Galyon in determining the extent of the disability suffered by the plaintiff. The trial court has the discretion to do so, *Kellerman v. Food Lion Inc.*, 929 S.W.2d 333 (Tenn. 1996). Although we may make an independent assessment of the medical proof when it is submitted by deposition, *Cooper v. Insurance Company of North America*, 884 S.W.2d 446 (Tenn. 1994), we must give deference to the finding of the trial judge, and we do not disagree with such finding unless there is a reasonable reason to do so.

Whether a worker is able to return to the pre-injury employment or similar work is relevant evidence for the trial court to consider in finding an award for an injury to a scheduled member. However, an employee is not required to show vocational disability to recover for an injury to a scheduled member. *Duncan v. Boeing Tenn. Inc.*, 825 S.W.2d 416 (Tenn. 1992).

We find the evidence does not preponderate against the finding of the trial judge in this case, and we affirm the judgment.[2] The cost of the appeal is taxed to the defendants.

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JOHN K. BYERS, SENIOR JUDGE

[2]The plaintiff makes a strong claim that the appeal in this case is frivolous. It is not. The issues raised by the defendant are reasonable and factually based. The use of T.C.A. § 50-6-225(H) is a right which is to be used in obvious cases of frivolity and should not be asserted lightly or granted unless clearly applicable–which is rare.

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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 on appeal are taxed to the Defendants/Appellants, Rieth-Riley Construction Company, Inc., and Zurich-American Insurance Group for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM