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

GEORGE THOMAS CARTER v. KENNETH O. LESTER COMPANY

Direct Appeal from the Chancery Court for Wilson County
No. 96064 C. K. Smith, Chancellor

No. M2000-00651-WC-R3-CV - Mailed - January 30, 2001
Filed - March 2, 2001

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 employer insists the trial court erred in accrediting the testimony of an examining physician over that of the treating physician and by exceeding the multiplier applicable in cases where the employee returns to work at the same or greater wage. As discussed below, the panel has concluded the judgment should be affirmed.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and HOWELL N. PEOPLES, SP. J., joined.

Kitty Boyte, Ruth, Howard, Tate & Sowell, Nashville, Tennessee, for the appellant, Kenneth O. Lester Company.

William Joseph Butler, E. Guy Holliman, Farrar & Holliman, Lafayette, Tennessee, for the appellee, George Thomas Carter.

MEMORANDUM OPINION

The employee or claimant is 57 years old with a GED, limited intellectual capacity and experience as a truck driver and police officer. He had rehabilitated himself from a previous back

injury when, on August 29, 1995, while working for the employer, Kenneth O. Lester Company, as a truck driver, he became entangled in a shrink wrap and injured his back. He was referred to Dr. Larry Laughlin, who examined him briefly and returned him to work.

Dr. Arthur Cushman, who treated the claimant following the prior back injury, also examined him following the August 29, 1995 injury and guessed his impairment to be 10 percent from the first injury and none from the second injury. Dr. Robert Landsman examined the claimant following the second injury and estimated his impairment at 23 percent to the body as a whole, of which 14 percent resulted from the second accident. By his own testimony, the claimant had fully recovered from the first injury and passed a physical examination before going to work for the employer. In February 1996, the claimant suffered an unrelated arm injury and, because he was no longer able to drive a truck, he was assigned to another lower paying job.

From the above summarized evidence, the trial court awarded, inter alia, permanent partial disability benefits based on 4 times 14 percent or 56 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. § 50-6-225(e)(2). This standard requires the panel to examine in depth a trial court's factual findings and conclusions. The reviewing court is not bound by a trial court's factual findings but instead conducts an independent examination to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584 (Tenn. 1991).

The appellant contends Dr. Cushman was in the best position to evaluate the employee's permanent impairment, because he treated him following the first injury, and that it was thus error for the trial court to accept the opinion of Dr. Landsman instead of Dr. Cushman. Dr. Cushman's opinion, however, is difficult to accept in light of the claimant's own testimony, which the trial judge found to be credible. 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, Story v. Legion Ins. Co., 3 SW.3d 450 (Tenn. 1999), 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 (Tenn. 1999).

When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675 (Tenn. 1983).

The employer next contends the award should not exceed two and one-half times the medical impairment rating because the reason the employee did not return to work at the same or a greater wage was the unrelated arm injury. For injuries arising after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating. Tenn. Code Ann. § 50-6-241(a)(1). Where an injured worker is entitled to receive permanent partial disability benefits to the body as a whole, and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is six times the medical impairment rating. Tenn. Code Ann. § 50-6-241(b).

If the injured worker returns to work and thereafter loses his or her pre-injury employment, the court may, upon proper application made within one year of the employee's loss of employment, and if such loss of employment is within four hundred weeks of the day the employee returned to work, enlarge the award to a maximum of six times such impairment rating, allowing the employer credit for permanent partial disability benefits already paid for the injury. Tenn. Code Ann. § 50-6-241(a)(2). Such applications are viable even if the worker's failure to return at an equal or greater wage is unrelated to his compensable injury. See Niziol v. Lockheed Martin Energy Systems, Inc., 8 S.W.3d 622 (Tenn. 1999). The purpose of Tenn. Code Ann. § 50-6-241 is to promote uniformity in workers' compensation awards. Brewer v. Lincoln Brass Works, Inc., 991 S.W.2d 226 (Tenn. 1999), citing Brown v. Campbell County Bd. of Educ., 915 S.W.2d 407, 414 (Tenn. 1995). Because the loss of employment occurred within the 400-week period after the employee's return to work, we conclude that the trial judge did not err in exceeding the multiplier contained in Tenn. Code Ann.§ 50-6-241(a)(1).

For the above reasons, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant.

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JOE C. LOSER, JR., SPECIAL JUDGE

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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 appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM