IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 22, 2001 Session

JERRY RUSSELL v. BILL HEARD ENTERPRISES, INC., ET AL.

Direct Appeal from the Circuit Court for Shelby County
No. 303468 James F. Russell, Judge

No. W2000-00965-WC-R3-CV - Mailed May 22, 2001; Filed June 26, 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-appellant insists (1) the trial court erred in admitting into evidence the expert testimony of an independent medical examiner, (2) the award of permanent partial disability benefits based on 20 percent to the body as a whole is excessive and (3) the trial court erred in commuting the award to a lump sum, sua sponte. The employee-appellee insists the award of permanent partial disability benefits should be increased to one based on 40 percent to the body as a whole. As discussed below, the panel has concluded the award should be reduced to one based on 15 percent to the body as a whole, payable periodically.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and L. TERRY LAFFERTY, SR. J., joined.

Ronald L. Harper, Memphis, Tennessee, for the appellants, Bill Heard Enterprises, Inc. and Atlantic Mutual Insurance Company.

Steve Taylor, Memphis, Tennessee, for the appellee, Jerry Russell.

MEMORANDUM OPINION

On August 17, 1998, the employee or claimant, Jerry Russell, was performing mechanical work on a motor home, while at work, when he fell and was injured. It is undisputed that his injuries are compensable. The employer has provided medical care primarily by Dr. Steven Waggoner,

beginning the next day.

An MRI of the employee's right shoulder revealed a complete rotator cuff tear with retraction of both the supraspinatus and infraspinatus tendons. Dr. Waggoner recommended surgical repair of the rotator cuff, an acromioplasty and distal clavicular resection. The surgery was performed on September 15, 1998. The employee developed a mild infection at the surgical site and tendinitis of the right wrist. He returned to light duty three or four weeks after surgery and to full duty in February 1999. Dr. Waggoner assigned a permanent impairment rating of 10 percent to the right upper extremity, which he equated to 6 percent to the whole person, using appropriate guidelines.

The doctor testified that the AMA guidelines provide a rating for the removal of the distal clavicle, but not for a rotator cuff repair or acromioplasty. It was his opinion that only a loss of range of motion in the shoulder would allow for an impairment rating over and above the rating for the distal clavicle. He conceded that the acromioplasty, which became necessary because of the accidental injury, creates an anatomic change in the shoulder, but gave no impairment rating for it because the guidelines do not assign a rating for that procedure. Dr. Waggoner has been a board certified orthopedic surgeon since 1996.

After his release from Dr. Waggoner, the claimant was evaluated by Dr. Joseph Boals, an orthopedic surgeon for thirty-two years and board certified for twenty-eight years. Dr. Boals reviewed the records of Dr. Waggoner and conducted a physical examination of the employee. Dr. Boals estimated the claimant's permanent impairment at 10 percent for the resection of the distal clavicle, then referred to a section of the guidelines which encourages physicians to express their belief that there is additional impairment, provided they explain their reasons for holding such opinions. Explaining his reasons, Dr. Boals opined, over the objection of the defendant and based upon his own guidelines developed over the years, that the acromioplasty should result in an impairment rating of 10 percent, but less than that when combined with the distal clavicular resection, and opined further that a tear of the rotator cuff will result in an impairment rating of between 5 percent and 20 percent, depending on the severity. The trial court allowed and considered the opinions of Dr. Boals over the objection of the employer and its insurer. Dr. Boals advised Mr. Russell to avoid working over his head and away from his body, and to avoid repetitively using heavy weights.

The claimant is 45 years old with a high school education. He has returned to work at the same or a greater rate of pay.

Upon the above summarized evidence, the trial court awarded benefits based on "impairment and disability" of 20 percent to the body as a whole, payable in a lump sum, although there was no application for a lump sum payment. Appellate review of findings of fact by the trial court is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Conclusions of law are reviewed de novo without any presumption of correctness. Perry v. Sentry Ins. Co., 938 S.W.2d 404 (Tenn. 1996).

The appellant contends it was error for the trial court to consider Dr. Boals' opinion because it was not based on statutorily acceptable guidelines. A physician's testimony as to the extent of a claimant's permanent medical impairment must be based on the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). We therefore hold it was error for the trial court to consider Dr. Boals' estimate of 20 percent permanent medical impairment.

The appellant next contends the award of permanent partial disability benefits based on 20 percent to the body as a whole is excessive because it exceeds two and one-half times the medical impairment rating. 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 pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. Tenn. Code Ann. § 50-6-241(a)(1). In making determinations, the courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Id.

The only competent medical impairment rating is Dr. Waggoner's opinion of 6 percent to the body. Thus the trial court erred in awarding benefits based on more than two and one-half times that number or 15 percent to the body as a whole.

Finally, the appellant contends the trial court erred in commuting the award to a lump sum. Disability benefits are ordinarily paid periodically. Tenn. Code Ann. § 50-6-205(b)(2). However, upon application by a party and approval by a proper court, benefits which are payable periodically may be commuted to one or more lump sum payments, if the court finds such commutation to be in the best interest of the employee and the employee has the ability to wisely manage and control the commuted award. Tenn. Code Ann. § 50-6-229(a). Such applications are not granted as a matter of course. Forkum v. Aetna Life & Cas. Ins. Co., 852 S.W.2d 230 (Tenn. 1993). The injured worker has the burden of establishing first that a lump sum is in his best interest and, second, that he is capable of wisely managing and controlling a lump sum, but the decision whether to commute to a lump sum is within the discretion of the trial court. Edmonds v. Wilson County, 9 S.W.3d 106 (Tenn. 1999). Accordingly it was error for the trial court to commute the award without an application being made and without the required proof.

For the above reasons, the trial court's award of permanent partial disability benefits is reduced to one based on 15 percent to the body as a whole, payable periodically. Costs are taxed one-half to the appellants, Bill Heard Enterprises, Inc. and Atlantic Mutual Insurance Company, and one-half to the appellee, Jerry Russell.

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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 on appeal are taxed one-half to the Appellants, Bill Heard Enterprises, Inc., and Atlantic Mutual Insurance Company, and one-half to the Appellee, Jerry Russell, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM