IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 28, 2000 Session

BOBBY GATES v. JACKSON APPLIANCE COMPANY

Direct Appeal from the Chancery Court for Madison County
No. 54294 Honorable Joe C. Morris, Chancellor

No. W1999-00743-SC-WCM-CV - Mailed March 21, 2001; Filed June 27, 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. The defendant, Jackson Appliance Company, appeals the judgment of the Chancery Court of Madison County awarding plaintiff, Bobby Gates, twenty-five (25) percent permanent partial disability to the body as a whole. For the reasons stated in this opinion, we affirm the judgment of the trial court.

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

W. MICHAEL MALOAN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. joined. HENRY D. BELL, SP. J., filed a concurring and dissenting opinion.

Steven W. Maroney and Michael A. Carter, Jackson, Tennessee, for the appellant, Jackson Appliance Company.

David Hardee, Jackson, Tennessee, for the appellee, Bobby Gates.

MEMORANDUM OPINION

The plaintiff, Bobby Gates (Gates) was fifty (50) years old at trial. He graduated from high school, attended two years of college at Austin Peay State University, and concluded a two-year course in electricity at Jackson State Community College. Prior to being employed at Jackson Appliance Company, commonly referred to as Maytag, in 1994, Gates worked on a farm, drove a truck, installed insulation, sold shoes, sold insurance door-to-door and worked in a dry-cleaning business.

On April 13, 1995, Gates strained a muscle in the groin area of his left leg while moving a basket of parts. Gates reported the injury and Maytag sent him to Dr. Ronald Bingham who referred him to Dr. Dean Currie. Gates testified that Dr. Currie told him in June of 1995 that he "tore the muscle and it would be a nagging and reoccurring thing" and that he had a problem he was going "to have from that point forward." Dr. Currie put Gates on light duty for two (2) to three (3) weeks. Gates returned to see Dr. Currie in July, 1997, complaining that his leg "got worse." Gates did not describe a new work injury, just that his leg would give way and he had trouble walking. Since July 1997, Gates has seen Dr. Joseph Rowland, Dr. Randy Fly, Dr. Keith Nord, and others for various treatments including therapy, injections, TENS unit, and pain therapy-- none of which Gates testified has provided him any lasting relief from pain.

Dr. Keith Nord, an orthopedic surgeon in Jackson, first saw Gates on August 27, 1997. Gates gave a history of being injured on April 13, 1995, and that his pain had fluctuated but never went away. Dr. Nord reviewed the medical records of Drs. Currie, Fly and Rowland. Dr. Currie's report of June 5, 1997 referred to a muscle pull. Dr. Rowland's records of July 11, 1997, and Dr. Fly's records of July 31, 1997, both diagnosed adductor tendinitis. Dr. Nord agreed with this diagnosis and reported left adductor flexor strain, chronic at this point. On November 3, 1997, Dr. Nord placed permanent work restrictions on Gates of floor to waist lifting of forty-five (45) pounds frequently, twenty (20) pounds continuously; push-force limitation of forty (40) pounds frequently, twenty (20) pounds continuously; right and left hand carry of thirty (30) pounds frequently and fifteen (15) pounds continuously. Dr. Nord felt Gates had reached his maximum medical improvement on November 3, 1997, but assigned no permanent impairment because the *AMA Guidelines* do not assign an impairment for chronic muscle strain. Dr. Nord did state "he could still have a permanent injury."

Gates testified he began to have emotional problems in July or August, 1997. On July 29, 1998, he first complained to Dr. Nord of emotional problems. Dr. Nord felt "he had developed a depression from having his chronic pain" and recommended a psychiatric consultation. Dr. Nord testified the cause of his problems were all consistent with the history of his injury of April 13, 1995. Dr. Nord was the only medical doctor whose testimony was introduced by deposition at trial.

On January 29, 1998, Dr. Robert Kennon, Ph. D., examined Gates for a psychological and vocational evaluation. Dr. Kennon described Gates as "significantly depressed" in the moderate range caused by the chronic pain from his work injury. Dr. Kennon stated Gates' prognosis was poor due to his chronic pain problems and his condition was very likely to be permanent. Dr. Kennon opined Gates was excluded from ten (10) percent of jobs in the national open labor market by Dr. Nord's restrictions. Dr. Kennon did not assign any jobs excluded due to Gates' depression. Dr. Kennon explained the 4th Edition of the *AMA Guidelines* do not provide a numerical rating for mental impairment but classifies disorders as mild, moderate, or severe. Under an earlier 2nd Edition, moderate impairment would be twenty-five (25) to fifty (50) percent impairment to the body.

Gates testified he did not miss any work after the April 13, 1995 injury, but he had missed a lot of work after July 1997 due to his leg and emotional problems. His left leg hurts all the time

and walking, working, and general activity make it worse. He continues to work at Maytag, but he stated "I don't know how much longer I can do it."

Gates filed suit on January 27, 1998, for the April 13, 1995, injury to his left leg and on December 10, 1998, he amended his complaint to include a mental or emotional injury. In its answer, Maytag relied on the one year statute of limitations and denied Gates had sustained any permanent injury. After a June 22, 1999 trial, the trial court entered his findings on July 2, 1999, awarding Gates twenty-five (25) percent permanent partial disability to the body as a whole.

On appeal, Maytag presents the following issues for review.

I. Gates' complaint for workers' compensation benefits is time-barred by the applicable statute of limitations.

II. The testimony of Dr. Keith Nord is insufficient to prove the permanency of Gates' depression.

III. The testimony of Dr. Keith Nord is insufficient to prove the permanency of Gates' disability due to his leg injury.

IV. Gates' recovery exceeds the maximum amount allowed pursuant to Tenn. Code Ann. § 50-6-241(a)(1).

ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143, 149 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Overman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

I. STATUTE OF LIMITATIONS

Tenn. Code Ann. § 50-6-203 requires a claim for workers' compensation benefits to be filed within one (1) year after the accident resulting in injury. The Tennessee Supreme Court has stated the statute of limitations begins to run "at that time when the employee, by a reasonable exercise of diligence and care, would have discovered that a compensable injury had been sustained." *Ogden*

v. Matrix Vision of Williamson County, Inc., 838 S.W.2d 528, 530 (Tenn. 1992). Further, "the date the employee's disability manifests itself to a person of reasonable diligence, not the date of the accident, triggers the statute of limitations." *Hibner v. St. Paul Mercury Ins. Co.*, 619 S.W.2d 109, 110 (Tenn. 1981). Therefore, the commencement of the statute of limitations is a factual issue to be determined by the circumstances of each case.

Maytag submits Gates had a specific injury on April 13, 1995, and when Dr. Currie told him on June 5, 1995, that he had a problem he was "going to have from that point forward" he knew or should have known he had a compensable injury. Gates did not file suit until January 27, 1998, more than one (1) year after the date he knew or should have known he had sustained a compensable injury.

Gates submits the statute of limitations did not begin to run until July, 1997, when his condition worsened and became chronic or that he did not appreciate the seriousness of his injury until Dr. Nord placed permanent restrictions on him on November 3, 1997. Prior to that time he thought he had a pulled muscle which would be a "nagging and reoccurring thing" which did not cause him to miss any work.

The trial court stated in his findings that Maytag's "position is not well taken, because the injury was not reasonably apparent to the plaintiff until it became disabling which was July of 1997. Prior to that date, the plaintiff had not lost any time from work as a result of this accident."

Both parties have submitted numerous cases to support their position on this issue. Each of these cases are fact specific and only offer general guidance in this case. The trial court found Gates neither knew nor should have known he had suffered a compensable injury until it manifested itself in July of 1997. Gates filed suit on January 27, 1998, which is within one (1) year of that date. We find the evidence does not preponderate against the trial court's findings.

II. PERMANENCY OF MENTAL INJURY

The plaintiff in a workers' compensation case has the burden of proving causation and permanency of his injury by a preponderance of the evidence and, in all but the most obvious cases, permanency must be established by expert medical testimony. *Hill v. Royal Ins. Co.*, 937 S.W.2d 873, 876 (Tenn. 1996). Proof of permanency must be more than "possible," *Singleton v. Procon Products*, 788 S.W.2d 809, 811-12 (Tenn, 1990), and must be "reasonably certain," *Kerr v. Magic Chef, Inc.*, 793 S.W.2d 927, 929 (Tenn. 1990), or "preponderates in favor of permanency," *Owens Illinois, Inc. v. Lane*, 576 S.W.2d 348, 350 (Tenn. 1978). A doctor describing a plaintiff's condition as "chronic" and placing restrictions on activities has been held to be sufficient to establish permanency. *Walker v. Saturn Corp.*, 986 S.W.2d 204, 207 (Tenn. 1998).

The only medical proof of permanency of a mental injury in this case comes from Dr. Nord, who testified as follows:

Q. Doctor Nord, you've told me that you've diagnosed Mr. Gates to be suffering from depression. I now want to ask you, to a reasonable degree of medical certainty, to explain for us the causal relationship between the work injury described to you in the history and the depression that you diagnosed in this gentleman.

A. In my practice, frequently I'll see patients that are in a –that have chronic pain and that develop a depression because they're always hurting and it impairs their normal lifestyles, and he fits this type of pattern very well.

Q. Doctor Nord, again, based upon a reasonable degree of medical certainty, what is the likelihood that this gentleman's depression will continue if the physical pain and limitations that he is suffering from continue to plague him?

A. As long as he has continued pain and it interferes with his lifestyle, people will continue to have depression, usually requiring some type of treatment, whether it be medications or counseling.

The trial court resolved the issue of permanency in favor of Gates. We find Dr. Nord's statement that Gates has chronic pain that will cause him to continue to have depression satisfies the requirement of permanency.

III. PERMANENCY OF LEG INJURY

As previously stated, the permanency of any injury must be established by the preponderance of expert medical evidence. Again, Dr. Nord is the only medical evidence to consider concerning permanency of a leg injury. Dr. Nord did not assign a permanent impairment rating because the *AMA Guidelines* do not rate a chronic muscle strain. When asked, "Does the fact that you were unable to assign a numerical impairment rating under the *AMA Guidelines* mean that this gentleman has not suffered a permanent injury?", Dr. Nord answered, "No, he could still have a permanent injury."

A permanent impairment may be based on expert medical testimony that the claimant has permanent restrictions even where no anatomical impairment was given. *Walker*, 986 S.W.2d at 208; *Hill*, 937 S.W.2d at 876; *Newman v. National Union Fire Ins.* Co., 786 S.W.2d 932, 934 (Tenn. 1990); *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 457 (Tenn. 1988). Dr. Nord assigned very specific permanent restrictions in regard to the left leg injury which support the trial court's finding of a permanent injury.

IV. TENN. CODE ANN. § 50-6-241(a)(1)

Tenn. Code Ann. § 50-6-241(a)(1) provides as follows:

> For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to Tenn. Code Ann. § 50-6-207(3)(A)(I) and (F), 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 injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 ½) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

There is no dispute in the present case that Gates returned to work at Maytag at a wage equal to or greater than the wage he was receiving at the time of his injury and, therefore, his permanent partial disability award may not exceed two and one-half (2 ½) times his medical impairment rating. The obvious problem is Dr. Nord did not assign a numerical anatomical impairment rating for Gates' leg injury or his depression. Maytag suggests that two and one-half (2 ½) times zero (0) equals zero (0) and, therefore, Gates is not entitled to receive any award of permanent partial disability.

The trial court stated in his findings that "It is not mandatory that there has to be an anatomical impairment rating in order for the plaintiff to recover his benefits from an injury that has been proven to be disabling and permanent." Numerous decisions have supported awards of permanent partial disability where a specific numerical anatomical impairment rating was not provided. *Walker*, 986 S.W.2d at 208; *Hill*, 937 S.W.2d at 876; *Corcoran*, 746 S.W.2d at 457 .

As stated in *Corcoran*:

> We do not think that, when medical evidence established permanency, the failure of a medical expert to attribute a percent of anatomical disability can justify a denial of compensation if other evidence demonstrates that an award of benefits is appropriate.

Corcoran, 937 S.W.2d at 876.

We find Maytag's argument to be inconsistent with the legislative intent of the workers' compensation act to fairly compensate injured workers for their injuries and resulting disabilities. To accept Maytag's position would be to only provide disability benefits to workers who make a meaningful return to work at the same or greater wage than at the time of their injury and have injuries which are rated by the *AMA Guidelines* or other appropriate method used and accepted by the medical community.

Maytag's position is further without support in the present case due to Dr. Kennon's finding that Gates' moderate depression would be rated at twenty-five (25) to fifty (50) percent to the body under the 2nd Edition of the *AMA Guidelines*. The difficulty in rating mental injuries was discussed in *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 445 (Tenn. 1999), where the rating doctors acknowledged the current 4th Edition of the *AMA Guidelines* does not assign a numerical percentage of impairment for mental injuries, and, therefore, the rating doctors relied on the earlier 2nd Edition of the *AMA Guidelines* to support a fifty (50) percent impairment to the body as a whole.

This panel is mindful of the decisions which require expert medical evidence and not that of a psychologist to establish causation and permanency of a mental injury. *Cigna Property & Casualty Ins. Co. v. Sneed*, 772 S.W.2d 422, 424 (Tenn. 1989); *Henley v. Roadway Exp.*, 699 S.W.2d 150, 155 (Tenn. 1985); *Freeman v. VF Corp., Kay Windsor Div.* , 675 S.W.2d 710, 711 (Tenn. 1984). However, once causation and permanency of a mental injury have been established by medical testimony, vocational experts such as Dr. Kennon may express an opinion as to the extent of vocational disability.

After considering all of the relevant factors such as Gates' age, education, skills and training, the lay and expert testimony, and capacity of Gates to work at types of employment available to him in his disabled condition, we find the evidence preponderates in favor of the trial court's finding of twenty-five (25) percent permanent partial disability to the body as a whole.

CONCLUSION

The judgment of the trial court of twenty-five (25) percent to the body as a whole is affirmed. Defendant, Jackson Appliance Company, is taxed with the costs of the appeal.

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W. MICHAEL MALOAN, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

BOBBY GATES v. JACKSON APPLIANCE COMPANY

Chancery Court for Madison County
No. 5492 Joe C. Morris, Chancellor

No. W1999-00743-SC-WCM-CV - Filed June 27, 2001

JUDGMENT

This case is before the Court upon defendants' motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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 taxed to the defendant, Jackson Appliance Company, for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating.