IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS= COMPENSATION APPEALS PANEL
AT NASHVILLE
July 2000 Session

CARL WAYNE GRIFFIN V. CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE AND TRAVELERS PROPERTY CASUALTY

Direct Appeal from the Criminal Court for Wilson County
No. 98-0830 - James O. Bond, Criminal Court Judge

No. M1999-02213-WC-R3-CV - Mailed - March 15, 2001
Filed - April 16, 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 Section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The sole issue raised on appeal is whether the trial court's award of sixty percent permanent partial disability to each lower extremity is excessive. After a complete review of the entire record, the briefs of the parties, and the applicable law, we affirm the judgment of the trial court.

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

LEE RUSSELL, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J. and JAMES L. WEATHERFORD, SR.J., joined

Frederick W. Hodge, Nashville, Tennessee, for the appellant, Consolidated Freightways Corporation of Delaware and Travelers Property Casualty

Hugh Green, Lebanon, Tennessee, for the appellee, Carl Wayne Griffin

MEMORANDUM OPINION

The Claimant was forty-two years of age at the time of trial. He graduated from high school with honors in 1975, and he also attended one year of college at Vol State Community College. The Claimant intended to study engineering at Vol State, but the record does not indicate what subjects were studied during his year of college work. The Claimant has had no additional formal education and no vocational education other than training on the job, but he does have a commercial drivers license.

Prior to going to work for Consolidated Freightways ("Employer"), the Claimant worked as a groundskeeper and as a meter reader, and then he worked on the dock at McLean Trucking loading and unloading trailers. He went to work with the Employer on April 23, 1984, initially as a combination driver. In that capacity he drove, loaded, and unloaded trucks. At the Employer, the Claimant did some "yard hostling," which involved hooking, unhooking, and moving trailers in the dock area. For the last two or three years of his employment before the injury, the Claimant worked on the dock loading and unloading trailers.

In July of 1996, the Claimant reported soreness in both heels, but he continued for a period of time to work fulltime and without restrictions or accommodations. On December 12, 1996, the Claimant was examined by Dr. Joseph A. Chenger, an orthopedic surgeon. Dr. Chenger diagnosed bilateral tendonitis of the Achilles tendon, and he tried unsuccessfully to treat the condition by placing the right foot in a cast. The Claimant was released to light duty effective March 4, 1997, but he returned to Dr. Chenger on April 27, 1997, with worsening pain in both heels.

Dr. Chenger performed surgery on May 1, 1997, to remove a bone spur on the Claimant's right heel. The doctor contemplated performing the same surgery on the left heel but decided not to do so because of the limited benefit that surgery had to the right heel. Dr. Chenger released the Claimant to return to light duty in June of 1997 and then released him in October of 1997 to return to full duty. Dr. Chenger administered post-surgical cortisone injections. The doctor concluded that the Claimant reached maximum medical improvement on January 22, 1998, and that he could not return to his previous job with the Employer. Dr. Chenger rated the Claimant as retaining a seventeen (17%) percent permanent impairment to the two lower extremities and then broke that down to an eight and one half (8 ½%) percent permanent partial impairment to each lower extremity. The doctor restricted the Claimant to doing "sitting desk-type work" or working in a "clerical-type occupation." The doctor limited the Claimant to walking no more than an hour and with frequent breaks. Dr. Chenger specifically opined that his patient could not return to his job as a dock worker.

The Employer maintained a "modified work program" for its employees who were injured, but the jobs in this program were by the nature of the program only temporary jobs and were not intended to become permanent jobs for employees with permanent restrictions. The Claimant was given an assignment with "T-Con," which involved receiving telephone calls from customers and entering information into the computer system for use by dispatchers in directing truck drivers. When the Claimant received his permanent restrictions, he was sent home by Gary Tankersley, the

manager of the Employer's Nashville facility, because there was no work for the Claimant to perform with the Employer given the Claimant's restrictions.

Mr. Tankersley, who at trial described the Claimant as an "excellent employee," sought a second medical opinion on the Claimant's restrictions. The second doctor agreed with Dr. Chenger's restrictions, and on March 10, 1998, the company had to send the Claimant home. There were additional meetings held and letters exchanged between the Claimant and personnel of the Employer seeking to determine whether there was any job with the Employer that he could perform. The last such meeting was held approximately a month before the trial. The Claimant has never been rehired and was actually unemployed from March 10, 1998, to August 6, 1999.

The Claimant went to work with the sanitation department of the City of Mt. Juliet on August 6, 1999. He answers a telephone at a desk, and he assists applicants obtaining building permits and paying bills. The job is entirely sedentary and involves no lifting, walking, or driving. The Claimant works eight hour days, with a hour off for lunch which he uses to elevate his feet. He works five days a week and earns $8.57 per hour. The Claimant had earned $18.00 per hour when he last worked for the Employer in March of 1998.

There was some dispute between the parties as to whether there were jobs at the Employer's Nashville operation which the Claimant could in fact perform, and there was a dispute as to why the Claimant did not take one of those jobs. The trial court concluded, and a careful review of the record supports his conclusion, that the parties' two versions of the facts actually can readily be reconciled. The Claimant was never actually offered a supervisory position by the Employer. This was in part because the Claimant had expressed an unwillingness to give up his union membership in order to take a supervisory job. However, the Claimant also had serious doubts about his ability to handle those jobs due to his physical limitations, and these reservations appear quite reasonable when all of the job requirements are taken into account.

This is not a case in which the statutory caps on an award set out in Tennessee Code Annotated Section 50-6-241(a)(1) , will apply, because the award is to scheduled members and it is therefore not necessary to determine whether there was a meaningful return to work. It is not necessary to determine whether there was actually a refusal to return to work by the Claimant and if so whether that refusal was reasonable. It is not necessary to determine whether it was reasonable on the part of the Employer to ask the Claimant to leave his union job, with its protections and with the superior benefits package that union membership carried in the facts of this case. The relevance in this case of the fact that the Claimant did not obtain a different job with the Employer is what this fact suggests, if anything, about the Claimant's employability in the open labor market.

On August 5, 1999, approximately a month before trial, the Claimant met with the Employer's dispatch operations manager to discuss the Claimant taking a position as a line haul supervisor. The manager testified that the Claimant expressed reservations about leaving the union to accept the job, but the manager admitted that the Claimant also raised questions about the duration of the shifts and the amount of walking required for that job. The Claimant asked that the shift for him be reduced from the standard twelve hours to eight or nine hours. The

Claimant expressed concern that the job required walking the entire length of the dock, and the manager conceded that ten percent of the time involved in this job is walking. The Employer never responded to the Claimant's offer to try the job with an eight to nine hour shift.

Similar negotiations between the Claimant and the Employer occurred earlier on the possibility of the Claimant operating a tow motor modified to be operated entirely by hand and not with the feet. The Claimant believed that he could do such a job, but the Employer did not offer to make this accommodation. What is relevant in these negotiations between the parties is what they reveal about the Claimant's ability to perform jobs which involve a physical component. The Claimant apparently believed that he could in fact do some very limited physical work if he was accommodated by the Employer, but even that work would have been beyond the restrictions given by Dr. Changer, who recommended only sedentary work.

The Claimant's activities out of the workplace have been restricted but not eliminated by the condition of his feet. The Claimant was heavily involved in his sons' sports activities before the injury. He no longer is able to demonstrate proper baseball technique to his sons and their teams, but now is largely limited to coaching from a position seated on a bucket of balls. By employing pain medication, the Claimant is able to carry the chains at five football games each fall, but he is no longer heavily involved in the physical aspects of coaching his sons in football.

A party claiming benefits under the Tennessee Workers' Compensation Act has the burden of proof to establish his or her claim in the trial court by a preponderance of the evidence. *Roark v. Liberty Mutual Insurance Company*, 793 S.W.2d 932 (Tenn. 1990). Review on appeal of findings of fact by the trial court shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated Section 50-6-225(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 548 (Tenn. 1999). The appellate court must perform an independent examination in depth of a trial court's factual findings in order to determine where the preponderance of the evidence lies. *Galloway v. Memphis Drum Serv.,* 822 S.W.2d 584 (Tenn. 1991).

In making an award of permanent impairment, the trial court considers both the anatomical impairment awarded by the doctor or doctors and also lay testimony. *Collins v. Howlett Corp.*, 970 S.W.2d 941 (Tenn. 1998). Tennessee Code Annotated Section 50-6-241(a)(1) sets out the following factors to be considered by the trial court, along with other "pertinent" factors: "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."

The trial judge made fairly extensive oral findings of fact when he made his award. The trial judge recited the undisputed facts with regard to the Claimant's age, education, and past work experience, and he recited the conclusions of the one medical doctor who testified. The trial judge expressly found the Claimant's testimony to be credible on all issues and specifically found credible the Claimant's need to take pain medication in order to perform as simple a task as running the

chains at a football game. The trial judge pointed out the Claimant's rate of pay had been reduced by over fifty percent since being terminated by the Employer.

The evidence does not preponderate against any of the factual findings made by the trial judge or against the award of permanent partial disability benefits made by the trial judge. The one medical expert who testified, a company approved physician, testified that the Claimant could do only sedentary work. Prior to his injury on the job, the Claimant had held no sedentary jobs, and the job he had at the time of trial was a sedentary job. The Claimant has a very limited educational background and no formal training for clerical work. As the trial judge concluded, the Claimant's commercial drivers license is useless to him in the job market when his condition makes it impossible for him to drive for a living. The Claimant's rate of pay has been reduced by more than half.

For the reasons set out above, the judgment of the trial court is affirmed. Costs on appeal are taxed against the Appellant.

DISPOSITION

Judgment of the Criminal Court affirmed.

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LEE RUSSELL, 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