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

DONALD L. HUGHES v. MEMPHIS LIGHT, GAS & WATER, et al.

Direct Appeal from the Chancery Court for Shelby County
No. 109710-II Floyd Peete, Jr., Chancellor

No. W2000-01056-WC-R3-CV - Mailed March 8, 2001; Filed May 3, 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 employer insists (1) the trial court erred in finding a causal connection between the injury and the employment and (2) the trial court violated Tenn. R. Civ. P. 52.02 by filing findings of fact and conclusions of law after entry of final judgment. The Second Injury Fund insists the award of permanent partial disability benefits based on 85 percent to the body as a whole is excessive. The employee insists that the Second Injury Fund lacks standing in this tribunal because it did not file a notice of appeal, that the award is inadequate and that the appeal is frivolous. 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 JANICE M. HOLDER, J., and L. TERRY LAFFERTY, SR. J., joined.

Robert L. J. Spence and Michelle L. Betserai, Memphis, Tennessee, for the appellant, Memphis Light, Gas & Water.

Paul G. Summers, Attorney General & Reporter, and E. Blaine Sprouse, Assistant Attorney General, Nashville, Tennessee, for the appellee, Second Injury Fund.

R. Sadler Bailey and Andrew C. Clarke, Bailey & Clarke, Memphis, Tennessee, for the appellee and cross-appellant, Donald L. Hughes.

MEMORANDUM OPINION

At the time of his injury on February 26, 1997, the employee or claimant, Hughes, was fifty-seven or fifty-eight years old with a long history of back problems. Until that date, he had worked for the employer, Memphis Light, Gas & Water (MLGW) for thirty-nine years. He has a high school education.

It all began in February 1985, when he suffered a herniated disc at L-4 on the right and underwent his initial lumbar laminectomy with excision of the disc. He had a second surgery at the same location four years later and a re-exploration of the same level two or three weeks after that. Then, in February 1991, he again had a re-exploration at the same place. The last three surgeries were performed by Dr. Joseph S. Hudson, who followed him until May 15, 1996. He then had no treatment for approximately nine months.

On February 26, 1997, Mr. Hughes stepped in a hole with his right foot and twisted his back and right leg, while performing his job. Following this injury, he was eventually referred back to Dr. Hudson. When conservative care failed to relieve his symptoms, an MRI was ordered. The test revealed a worsening of the claimant's back since April 1996, when a previous MRI was performed. Following a myelogram, Dr. Hudson recommended another exploration, which he performed on April 1, 1997. A psychological evaluation revealed depression without any psychotic features or personality disorder, compatible with the claimant's long-standing back problems. Dr. Hudson ordered another myelogram and referred the claimant to Dr. Moacir Schnapp.

Dr. Schnapp prescribed Neurotin and performed a block. Neither gave the claimant any relief. He was referred to Dr. Maurice Smith. Dr. Smith ordered yet another MRI, which revealed a significant disc herniation at L4-5 on the right and suggested a slight anterior subluxation of the L4 vertebral body on L5. Dr. Smith performed a sixth surgery, including a lumbar fusion and placement of bilateral pedicle screws.

The claimant did not return to work for MLGW. He retired instead. At the time of the trial, he was working 24 hours per week answering a friend's phone, for which he is paid.

Dr. Hudson's testimony in response to whether the February 26, 1997, accident at work caused a new injury was equivocal, but the doctor testified without any such equivocation that the accident aggravated the claimant's preexisting condition. Drs. Schnapp and Smith did not disagree. Dr. Hudson estimated the claimant's permanent impairment at 10 percent preexisting and 1 percent for the aggravation or new injury. Dr. Smith estimated the claimant's permanent impairment at 12 percent overall.

His attorney referred Mr. Hughes to Dr. Joseph Boals, III, for an evaluation. Dr. Boals conducted a thorough examination and agreed that the accident in question either caused a new injury or aggravated the claimant's preexisting and long-standing back condition. The doctor estimated the preexisting permanent medical impairment at 14 percent to the whole body and opined, based on AMA Guides, that the claimant's permanent medical impairment was increased by 41 percent. Dr. Boals also opined that the claimant is disabled from working. Before the present injury,

Mr. Hughes had received awards totaling 30 percent to the body as a whole.

Upon the above summarized evidence, the trial court awarded, inter alia, permanent partial disability benefits based on 85 percent to the body as a whole and apportioned the present award 70 percent to the employer and 15 percent to the Second Injury Fund.

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). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Ivey v. Trans Global Gas & Oil, 3 S.W.3d 441 (Tenn. 1999). 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, 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). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998).

The appellant's contention that the claimant's injury is not medically causally related to his accident at work is without merit. An injury is compensable, even though the claimant may have been suffering from a serious preexisting condition or disability, if a work-connected accident can be fairly said to be a contributing cause of such injury. An employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Parks v. Tennessee Municipal League Risk Management Pool, 974 S.W.2d 677, 679 (Tenn. 1998). The first issue is resolved in favor of the claimant.

The final judgment was filed on March 23, 2000. The court adopted the plaintiff's proposed findings and conclusions on April 13, 2000. Tenn. R. Civ. P.52.02[1] does not prohibit that. Since it occurred within 30 days of entry of judgment, the trial court had not lost jurisdiction. It is unfortunate that the defendant's objections were never ruled on, but the panel is not persuaded it was reversible error. The second issue is resolved in favor of the claimant.

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[1] 52.02 Amendment. Upon motion of a party made not later than thirty (30) days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

The employee argues that the award should be increased from 85 percent to the body as a whole to 99 percent to the body as a whole, and the Second Injury Fund argues that the award is excessive. Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450 (Tenn. 1999). Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Dorris v. INA Insurance Company, 764 S.W.2d 538 (Tenn. 1988). From our independent examination of the evidence and consideration of the relevant facts and circumstances, we cannot say the evidence preponderates against the trial court's award of permanent partial disability benefits based on 85 percent to the body as a whole.

The employee further argues that the Second Injury Fund, though a party to this civil action, has no standing to participate in this appeal, because it did not file a Notice of Appeal in the trial court. By TRAP 13(a), separate appeals are not required. Any question of law may be brought up for review by any party once a party has appealed. Thus, the Second Injury Fund is not without standing to participate in the appeal.

At oral argument, the claimant's counsel argued that damages should be awarded for a frivolous appeal. When it appears that an appeal in a workers' compensation case is frivolous or taken solely for delay, the reviewing court may, upon motion of either party or on its own initiative, award damages against the appellant and in favor of the appellee without remand, for a liquidated amount. We do not deem this appeal to have been taken frivolously or solely for delay.

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

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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 to the Appellant, Memphis Light, Gas & Water, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM