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

RICKY SHORT V. DIETZ MOBILE HOME TRANSPORT, ET AL.

Direct Appeal from the Circuit Court for Putnam County
No. 98N-0007 - John A. Turnbull, Circuit Judge

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No. M1999-01460-WC-R3-CV - Mailed - March 15, 2001
Filed - April 16, 2001

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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 Appellants, Dietz Mobile Home Transport (hereinafter called the "Employer") and ITT Hartford Insurance Company (hereinafter the "Carrier") contest the amount of the trial court's award of permanent partial disability benefits on three grounds: (1) that the trial judge established and relied upon an anatomical impairment that was not a rating given by any of the three doctors who testified and that the impairment rating was too high under all of the facts in the case; (2) that the trial judge erroneously found that Ricky Short (hereinafter the "Claimant") did not have a meaningful return to work and therefore erroneously failed to cap the award at two and a half times the anatomical rating; and (3) that the trial judge's award of sixty percent permanent partial disability to the body as a whole was 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 on all of the issues raised.

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

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

Blakeley D. Matthews, Nashville, Tennessee, for the appellants, Dietz Motor Home Transport and ITT Hartford Insurance Company

Jerry Lee Burgess, Cookeville, Tennessee, for the appellee, Ricky Short

MEMORANDUM OPINION

The Claimant was injured on November 5, 1997, and filed this action on January 9, 1998. Four medical doctors saw the Claimant, and three of the medical doctors testified by deposition, variously rating the Claimant as retaining a five percent, a seven percent, and a twenty percent anatomical impairment to the body as a whole. The trial judge found that the Claimant suffered a fifteen percent anatomical impairment and awarded permanent partial disability benefits in the amount of sixty percent to the body as a whole. The Appellants appealed from the amount of the award on the grounds that the trial judge could not determine an anatomical impairment rating which did not match exactly the assessment of at least one doctor who testified and that the impairment rating was excessive. We affirm the trial judge's right to determine an impairment rating somewhere between the highest and the lowest rating but not exactly the rating of any one doctor, and we find that the fifteen percent anatomical rating was not excessive.

The Appellants appeal from the award of benefits because they claim that the cap of two and a half times the impairment rating set out in Tennessee Code Annotated § 50-6-241(a)(1) applies to this case because there was a meaningful return to work by the Claimant. We affirm the trial court's conclusion that there was not a meaningful return to work and that therefore the award is capped at six times the medical impairment rather than two and a half times the impairment. The Appellants assert that the award of sixty percent permanent disability to the body as a whole is excessive regardless of the applicability of the caps. We affirm the trial court's award.

FACTS

The Claimant had been working for the Employer for approximately fifteen years when he was injured on November 5, 1997. The Claimant was one of two crew chiefs for the Employer and was engaged in the business of transporting and setting up mobile homes. On this occasion he was underneath a mobile home assisting in its placement when the owner of the business, the other crew chief, accidentally bumped a button which caused the trailer to be lowered onto the Claimant. The Claimant suffered a compression or crush-type injury to his mid-back area.

The Claimant was seen at a hospital emergency room by a Dr. Joseph Jestus, a neurosurgeon, on the day of the accident. Dr. Jestus identified at least one anterior compression fracture of the lower back. This doctor recommended conservative measures, including a fabric brace. The Claimant then briefly saw Dr. Arthur Cushman, another neurosurgeon, from a list provided by the Carrier, but the Carrier subsequently allowed the Claimant to resume treatment with Dr. Jestus. Dr. Jestus continued to be the Claimant's primary treating physician until July 13, 1998. An MRI revealed a twenty percent compression fracture of the T-12 vertebra, a minor end plate fracture at
T-11, and disc hemiations at the T4-5 and T12-L1 levels.

Dr. Jestus continued conservative treatment until June of 1998, when he concluded that the compression fracture was healed, and the doctor referred the Claimant to Fred Bowen, a physical therapist, for a functional capacity evaluation. Dr. Jestus interpreted the results of that

functional capacity test to be that the Claimant was making a sub-maximal effort in multiple categories of testing. On July 10, 1998, Dr. Jestus released the Claimant to return to work without any work restrictions, in spite of the fact that the Claimant continued to complain of pain. Dr. Jestus did not find that the Claimant's complaints of pain fit any nerve root distribution, and the doctor could not explain the pain of which the Claimant complained.

In May of 1998, before the release by Dr. Jestus, the Claimant sought and obtained a second opinion from Dr. Robert Weiss, another neurosurgeon. Dr. Weiss' examination revealed that the Claimant "had a lot of back pain and took short, mincing steps," had restricted range of motion, had tenderness in the mid to lower thoracolumbar area, had difficulty standing on his heels and toes, and had some numbness in the left lower extremity. Dr. Weiss reviewed the MRI previously taken and noted that the test revealed a small bone fragment pushing into the spinal canal at T12-L1.

Dr. Weiss concluded that the two vertebrae had been crushed or damaged as a result of the accident. This doctor could find no objective evidence of the cause for the leg pain and numbness.

The Claimant saw Dr. Ray Hester, another neurosurgeon, on September 3, 1998. The Appellants assert in their brief that Dr. Hester had only a "scant portion" of the Claimant's prior treatment records, but Dr. Hester's testimony was that he did have results of the Claimant's x-rays, lumbar and thoracic myelogram, CAT scan, and MR scan. Dr. Hester concluded that the Claimant sustained a compression fracture at T12-L1 and that in addition the Claimant "had a ruptured disc at the T12, L1 area, protruding to the right side." This doctor also found an "area of disc protrusion in the mid-line at the T4-5 area." Dr. Hester opined that there was "persistence" of the fracture and disc at T12-L1, but with "some mild improvement" up to July or August of 1998. This doctor also found a "thoracic strain" or soft tissue injury in the mid-thoracic area.

The Claimant reported back to work on July 10, 1998, after being released by Dr. Jestus and after being off work for eight months. The Claimant drove one of the Employer's lift trucks for approximately ten minutes to a local mobile home lot, hooked up a trailer, and pulled the load with the truck for approximately one hundred feet. His legs became numb, and he could not feel the brake pedal under his foot. The Claimant left the jobsite, at least in part because he was still taking Hydrocodones, a narcotic pain medication which had been prescribed for him. The Claimant testified that he did not believe that it was safe for him to drive while still on this narcotic medication. After this incident, the Claimant called the owner of the company to inquire whether there any positions available with the Employer that had requirements which could be performed within the restrictions given to the Claimant by Drs. Weiss and Hester. The Employer held the old job open for the Claimant for over a year, but the Employer was never able to offer the Claimant any employment within the restrictions of Drs. Weiss and Hester. The Employer had no job openings for full-time sedentary work.

Dr. Jestus rated the Claimant as retaining a five percent permanent impairment to the body as a whole based upon the elements of DRE Category II for the Thoracolumbar Spine. He employed the "Injury Model" portions of the *AMA Guidelines* in assessing the medical impairment, and his

rating of five percent was for less than a twenty-five percent compression of one vertebral body. Dr. Jestus expressed concern about the candor of the Claimant in describing his symptoms, and this neurosurgeon did not place the Claimant on any restrictions.

Dr. Weiss agreed with Dr. Jestus' diagnosis and with his measurement of the T12-L1 compression as being less than twenty-five percent. Dr. Weiss agreed that the Claimant was neurologically intact, that a compression of this degree ordinarily would resolve itself satisfactorily, and that there was no evidence of radiculopathy. However, Dr. Weiss employed Table 75 on the *AMA Guidelines* and rated the Claimant as retained a seven percent anatomical impairment. More significantly, Dr. Weiss advised the Claimant to wear a back brace as needed and placed significant restrictions on the Claimant's work activities: that he not lift over fifty pounds and that he avoid repetitive bending and stooping.

Dr. Hester examined the Claimant and found decreased range of motion in the back. He rated the Claimant's fracture, disc rupture, and radiculopathy at the T12-L1 area as a "thoracolumbar, Category 3 impairment under the diagnostic related estimates of the *AMA Guidelines*" at fifteen percent. In addition, Dr. Hester rated the thoracic strain under a "diagnostic related estimate, Category 2" under the *AMA Guidelines* at five percent, for a total anatomical impairment rating of twenty percent to body as a whole. This doctor advised the Claimant to avoid bending from the waist while standing, avoid working with his arms extended out in front of him when standing, and avoid lifting more than forty to fifty pounds infrequently. Dr. Hester advised the Claimant to "change his position frequently."

SCOPE OF REVIEW

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."

ANALYSIS

A. IMPAIRMENT RATING

The Appellants assert that the trial judge erred by setting an anatomical impairment rating other than the rating made by any one of the three neurosurgeons who testified. Rather than finding the impairment rating to be five, seven, or twenty percent, the trial judge found the appropriate anatomical rating to be fifteen percent. The Appellants contend that the trial judge interpreted and applied the *AMA Guidelines* himself rather than relying on the doctors to apply the *Guidelines.*

The Appellants were not able to cite any statute or any case which has required a trial judge to select only from among the specific numerical impairment ratings given by various medical experts who testified. There is abundant case law holding that even where a numerical impairment rating has not been given by any physician, where the permanency of the injury has been established by expert medical evidence, the trial court can award permanent partial benefits. *Worthington v. Modine Manufacturing Company,* 798 S.W.2d 232, 234 (Tenn. 1990); *Corcoran v. Foster Auto GMC, Inc.,* 746S.W.2d 452, 457 (Tenn. 1998).

The trial judge in the case *sub judice* did not apply the *AMA Guidelines* to the physical findings and diagnostic test results of the doctors; the trial judge simply modified the rating of one of the doctors, for reasons specified in his findings. The trial judge evaluated the relative credibility of the three doctors who testified, carefully explained his reasons for choosing to rely most heavily on one of them, and modified slightly the impairment rating given by that doctor, for reasons that the trial judge examined.

Dr. Jestus was the Claimant's treating physician for most of the Claimant's recovery period. Substantial deference should be given to the opinions of treating physicians because the lengthier and more varied contact of a treating physician should generally provide them with the "opportunity . . . to provide a more in-depth opinion, if not a more accurate opinion." *Orman v. Williams Sonoma, Inc.,* 803 S.W.2d 672, 677 (Tenn. 1991). However, the opinions of non-treating physicians should not be ignored and should be given due consideration, with the trial and reviewing courts considering "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* at 676. When all of the medical evidence at trial was introduced by deposition or in documentary form, the reviewing court is in a position to and indeed must make an "independent assessment of the medical proof to determine where the preponderance of the evidence lies. . . ." *Henson v. City of Lawrenceburg,* 851 S.W.2d 809, 812 (Tenn. 1993).

The trial judge examined the qualifications of the three doctors and noted the lengthy experience of Dr. Hester not only as a physician but also as a professor on the faculty of the Vanderbilt University Medical School. The trial judge noted Dr. Hester's vast experience applying the *AMA Guidelines.* There were no negative findings made about the qualifications of Dr. Jestus

and Dr. Weiss as physicians, but this testimony by Dr. Jestus supports the trial judge's conclusion that Dr. Hester's application of the *Guidelines* is more reliable than Dr. Jestus' application of them:

> Q. At the time that [the Claimant] reached maximum medical improvement, did you perform -- or it appears you did, in fact -- an impairment assessment?

A. Correct.

Q. Was that requested by [the registered nurse assigned to the case by INTRACORP]?

A. Correct. And again, when people ask me to do these, I speak with [the INTRACORP registered nurse] about these. I tell her that I have not been trained to do these. I'm willing to do them. No, and I have a copy of the newest edition of the *AMA Guides,* and I look them up, as most of us do. I do not pretend to be an expert in impairment ratings. And I do offer everybody a referral to Dr. Talmage, who is an expert in impairment ratings, and he works right up the street.

. . . .

Q. Doctor, I think you started off by telling us that you don't feel that you are an expert in the *Guides,* and actually feel more comfortable when offering opinions regarding impairment ratings is really to refer to somebody else or to defer to somebody else. For example, Dr. Talmage.

A. I have not had specific training in the *AMA Guides,* and many surgeons haven't, and it's something that you get practice with, and you get better knowledge of doing it as you go along. I've only been in private practice for a year and a half. It's not something we do in residency . . .

In reading this through, this is pretty straight forward. And I guess, as I'm not an expert, I think this is pretty straight forward. I stand behind that DRE II.

Q. At the time that you did this one, you had only been in practice less than a year?

A. At the time I first saw Ricky Short, that would have been in November '97, I had been in practice about four months. I've been doing neurosurgery at that point for over six years, and I'd been in medicine for over eleven.

Another factor to be considered in weighing conflicting opinions of medical experts is the quality of the information available to each expert. It is very clear from the deposition of Dr. Jestus that he relied very heavily on the functional capacity evaluation of the Claimant performed by physical therapist Fred Bowen on June 26 and June 30, 1998. On June 22, 1998, just prior to the evaluation, Dr. Jestus' notes reflect that the doctor was dealing with the possibility that the Claimant would experience life-long pain. In contrast, on July 10, 1998, two weeks later, Dr. Jestus had received the Bowen report and released the Claimant to return to work without any restrictions whatsoever. Dr. Jestus conceded that the Bowen report was the major factor in the doctor's decision not to place the Claimant under any restrictions and that the Bowen report was a significant factor, though only one factor, in Dr. Jestus' discounting of many of the Claimant's complaints of pain.

Fred Bowen testified at trial, and there is a marked contrast between the narrow interpretation that Fred Bowen made of his own test results and the broader interpretation that Dr. Jestus gave those same results. This testimony given by Mr. Bowen suggests the limits on the proper use of his test results:

> Q. It used to be in the old days that physical therapists such as yourself might conclude from Functional Capacity Exams that an individual might be not performing up to maximum because of secondary gain.
>
> A. Yeah. I think that would be an accurate statement, yes, sir.
>
> Q. But that's not the situation any more, is it?
>
> A. Some therapists may do. I can't really say that.
>
> Q. But you don't do that, do you?
>
> A. No, I don't.
>
> Q. And in Ricky's case, you're not saying that what happened on the Functional Capacity Exam means that he wasn't performing up to maximum for any secondary gain.
>
> A. I'm not saying it is or isn't; right.
>
> Q. And, also, it used to be in the old days back in the beginning when you first started that at times you would think and write that an individual might fail a validity testing, and you might call it game-playing or you might call it symptom magnification.
>
> A. That's correct.
>
> Q. But that's also changed, hasn't it?
>
> A. In my practice it has, yes.
>
> Q. In your practice because you don't say that any more, do you?
>
> A. No, I don't.
>
> Q. And you're not saying it in this case, are you?
>
> A. No, I'm not.

Q. Okay. You're not saying that these tests that were conducted that Ricky, according to your opinion, didn't perform up to maximum means that he is seeking secondary gain; that it's symptom magnification or he was game-playing with you. Is that correct?

A. No, I'm not saying any of those things.

Q. All right. Basically, what you're saying is that the test was not valid.

A. That's correct; that the results of the testing indicate that we cannot use the data to establish safe and reliable levels.

Q. And that's all that means, really, isn't it?

A. That's correct.

Mr. Bowen went on to suggest that the Claimant's limited education, the medications he was taking, the amount of pain he was experiencing, the nature and location of his injury, and the anxiety the patient was experiencing might all have influenced the Claimant's performance on the functional capacity test. Mr. Bowen conceded that it is possible that the Claimant "pushed, pulled, lifted, and moved up to his pain threshold" during the test.

Review of the extensive medical testimony in this case suggests that the preponderance of the evidence is in favor of Dr. Hester's anatomical impairment rating and the restrictions that he and Dr. Weiss imposed. Dr. Hester had more experience as a neurosurgeon, but more importantly, had vastly more experience at applying the *AMA Guidelines*. After keeping the Claimant entirely off work for eight months, and taking the Claimant's complaints of pain very seriously, as reflected in Dr. Jestus' notes, Dr. Jestus suddenly in July of 1998 released the Claimant without any restrictions whatsoever and ceased to find the Claimant's complaints of pain to be sincere. Dr. Jestus gave undue significance to the physical therapist's functional capacity test. The trial court was justified in assessing the Claimant with at least a fifteen percent anatomical impairment rating.

B. STATUTORY CAPS

Tennessee Code Annotated § 50-6-241(a)(1) caps the award of permanent partial disability benefits for injury to the body as a whole at two and a half times the medical impairment rating if the employee is allowed to return to work ". . . at a wage equal to or greater than the wage the employee was receiving at the time of the injury . . . ." Without a meaningful return to work, the cap is six times the rating. An injured employee may not avoid the caps by declining to undertake a reasonable return to work. *Newton v. Scott Healthcare Center*, 914 S.W.2d 884 (Special Workers Compensation Appeals Panel 1995). An offer by an employer is not meaningful and does not trigger application of the four times cap if the offer is not reasonable in light of the employee's injuries and physical limitations when compared to the requirements of the job or jobs proffered.

The Claimant did attempt to return to work in July of 1998. The demands of driving a truck, which was not the most taxing part of the Claimant's ordinary work, almost immediately rendered the Claimant symptomatic and unable to continue. If Dr. Jestus' unrestricted release were accepted, then the Claimant should have been able to do his prior job. However, it has been concluded, for reasons already set out, that Dr. Jestus' unrestricted release was unfounded and that the restrictions imposed by Drs. Weiss and Hester were more appropriate. The owner of the Employer company conceded at trial that he did not have work available for the Claimant within the Weiss and Hester restrictions. The Claimant simply could not drive the necessary two to three hours at a time and could not do the required work underneath the mobile homes. There was no meaningful return to work, and the only caps that apply are the limit of six times the medical impairment.

C. PERMANENT PARTIAL DISABILITY

As previously discussed, the anatomical impairment is only one factor to be considered in making an award of permanent partial disability. Other factors include the employee's age, education, skills, and training, the testimony of lay as well as expert witnesses, local job opportunities, and the capacity of the employee to work at types of employment available in the employee's disabled condition. Tennessee Code Annotated § 50-6-241(a)(1).

The Claimant was thirty-three years of age at the time of trial and has only a tenth grade education, with below average grades during his schooling. He has no GED. The Claimant has done farm labor, and he worked for fifteen years for the Employer. The Claimant has no specialized training and little work experience that did not depend on heavy manual labor. He could not return to his duties at the Employer for the reasons already set forth.

The Claimant's past work experience and his limited education and lack of specialized training make it unlikely that he can find employment that does not involve manual labor. The restrictions placed on the Claimant by Drs. Weiss and Hester and the pain that the Claimant continues to experience will make it difficult for him to obtain employment that involves significant manual labor. The Claimant's capacity to earn wages in work that will be available to him has been severely reduced by the compression injuries that resulted from the mobile home being lowered

down onto him. The evidence, expert and lay, does not preponderate against the award of sixty percent permanent partial disability benefits to the body as a whole.

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

DISPOSITION

Judgment of the Circuit Court is affirmed.

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LEE RUSSELL, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

RICKY SHORT v. DIETZ MOBILE HOME TRANSPORT, ET AL.

Circuit Court for Putnam County
No. 98N-0007

No. M1999-01460-WC-R3-CV - Filed - April 16, 2001

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 Appellants, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM