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

TIMOTHY WATSON SIPE v. AQUATECH, INC. AND TRAVELERS INSURANCE COMPANIES

Direct Appeal from the Chancery Court for Putnam County
No. 98-11 - Vernon Neal, Chancellor

No. M1999-02030-WC-R3-CV - March 14, 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 Appellant appeals from the amount of the award of permanent partial disability benefits. After a complete review of the entire record, the briefs of the parties, and the applicable law, we affirm the award made by the trial court.

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

Richard E. Spicer, Nashville Tennessee, for the appellant, Aquatech, Inc. and the Travelers Insurance Companies

Donald Dickerson and Margaret Noland, Cookeville, Tennessee, for the appellee, Timothy Watson Sipe

MEMORANDUM OPINION

Timothy Watson Sipe ("Claimant") filed this claim under the Tennessee Workers' Compensation Act on January 15, 1998, alleging that he had developed carpal tunnel syndrome in the right upper extremity in the course and scope of his employment at Aquatech, Inc. ("Employer"). The only issue at trial was the degree of permanent partial disability to the Claimant's right upper extremity. The trial court awarded a sixty percent disability to the right upper extremity, and the Employer in its appeal has raised only one issue, claiming that the award was excessive. We find that the evidence does not preponderate against the trial judge's award, and we affirm the judgment below.

FACTS

The Claimant was twenty-three years of age at the time of trial and is a high school graduate. He has had no additional formal education or vocational or clerical training. The Claimant's first job was that of a stock boy at a Save-A-Lot grocery store, and his second job was with the Employer here. The Claimant went to work for the Employer in 1994 and was still working for the Employer at the time of the trial in this case. The Employer is in the business of prewashing garments, particularly denim garments, for manufacturers.

In the Claimant's original job at a grocery, he stocked shelves and ground and wrapped hamburger. The Claimant was subsequently hired by the Employer, initially as a sorter, sorting pants by size or bundle numbers. He then was assigned to turn pants inside out prior to washing, a job which involved a constant back and forth movement of the wrists. The Employer next had the Claimant loading pants into tumblers and applying air guns to parts in order to stonewash them.

Prior to any injury of his right wrist and hand, the Claimant suffered at work a herniated disc at the L3-4 level. He made a workers' compensation claim, was rated by his doctor as retaining a five percent impairment to the body as a whole, was restricted from lifting over fifty pounds, and was awarded permanent partial disability benefits of twelve and a half percent to the body as a whole. It was while the Claimant was off work from the back injury, in the spring of 1999, when he first began to experience numbness in his right hand.

When the numbness in the right hand began, the Employer sent the Claimant to Dr. Stephen M. Pratt, a plastic surgeon with a specialty in dealing with carpal tunnel syndrome. Dr. Pratt first saw the patient on October 7, 1997, and the doctor diagnosed bilateral carpal tunnel syndrome after having an EMG performed. Dr. Pratt had the Claimant participate in physical therapy, but the symptoms did not improve, and Dr. Pratt performed right carpal tunnel release surgery on November 4, 1997. Even after the surgery, the Claimant continued to experience pain and numbness in the right hand and wrist. An EMG performed on September 28, 1998, almost eleven months after surgery, revealed that the Claimant still had severe carpal tunnel syndrome.

Although Dr. Pratt initially diagnosed bilateral carpal tunnel syndrome, he did not treat or rate the left hand and wrist. The Claimant is right handed.

The Claimant returned to work on December 22, 1997, with the Employer, but between the return to work and the trial, there have been approximately three occasions when he was

involuntarily taken off work for reasons unrelated to his injury. The plant periodically closes departments for business reasons, resulting in temporary layoffs. At the time of trial, the Claimant was working as a tumbler's assistant. He was working fulltime at his regular job, and according to his supervisor, who testified at trial, the Claimant was performing his job satisfactorily. The job includes pushing and pulling pants, working with bags, and handling a couple of thousand pairs of pants each shift.

Dr. Pratt testified by deposition, and his testimony was the only medical evidence in the case. Dr. Pratt initially, on September 28, 1998, issued an impairment rating of forty percent to the right upper extremity. In the doctor's deposition, it was established on cross-examination that the Claimant had not reached maximum medical improvement when the initial rating was given. At the time of the deposition, on May 11, 1999, Dr. Pratt testified that the Claimant had reached maximum medical improvement and that the Claimant retained a fifteen percent permanent partial impairment to the right upper extremity.

The Claimant is still involved in some strenuous hobby activities in which he participated before his development of carpal tunnel syndrome. The Claimant bow hunts and has to sight his bow with multiple arrow shots. The Claimant still rides a four-wheeler and tries to do his own weedeating. Since the surgery, the Claimant has taken up the sport of paintgun shooting, which involves shooting at fellow players with paintguns made for the purpose. However, a close reading of the testimony reveals that the Claimant does not participate in and enjoy the hobbies he previously enjoyed to the same degree he did before the onset of carpal tunnel. He is unable to pull the bow as much now because his hand begins to ache and weaken. He must stop and rest during his hobby activities to a degree that he did not in his pre-injury period. Spasms in his hand force him to cease using the right hand altogether until the spasms cease.

The Claimant's stepsister, with whom he lives, testified about difficulties that he has as a result of the carpal tunnel syndrome. The stepsister has witnessed the hand shaking as a result of muscle spasms. She testified to having seen the Claimant drop glasses of tea and milk on at least four occasions since he developed carpal tunnel syndrome. The stepsister described the difficulties that the Claimant now experiences when he tries to use a weedeater.

SCOPE OF REVIEW

Appellate review of an award of benefits by a trial court in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, until 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 tribunal is required to conduct an independent examination of the trial court's factual findings in order to

determine where the preponderance of the evidence lies. *Wingert v. Government of Sumner County,* 908 S.W.2d 921 (Tenn. 1995).

ANALYSIS

An award of permanent partial disability benefits is based upon the impact of his injury on his capacity to earn wages in work available to the employee, taking into account the worker's physical condition, permanent medical impairment, and the restrictions under which he has been placed by his physicians; the worker's age, education, training, skills, and work experience; and the opportunities available in the labor market. *Orman v. Williams Sonoma, Inc.,* 803 S.W.2d 672 (Tenn. 1991). The extent of the disability is to be determined from all of the evidence, both expert testimony and lay testimony. *Worthington v. Modine Mfg. Co.,* 798 S.W.2d 232, 234 (Tenn. 1990). The extent of vocational disability is a question of fact for the trial court that does not definitely depend on the medical proof regarding the percentage of anatomical disability. *Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 457 (Tenn. 1998). In determining vocational disability, the question is not whether the employee has been able to return to his pre-injury employment, but whether the employee's earning capacity has been diminished in the open labor market. *Clark v. National Union Fire Insurance Company,* 774 S.W.2d 586, 588 (Tenn. 1989).

The Employer argues that the disability award of forty percent was excessive. The Employer argues that Dr. Pratt's actual impairment rating was fifteen percent rather than forty percent, that the Claimant is still employed by the Employer and is meeting "production" at that work, and that the Claimant is still involved in numerous strenuous hobbies which suggest that his disability is minimal. The Claimant argues that carpal tunnel is a medical condition that cycles between periods of greater disability and periods of less disability and that the forty percent impairment should be utilized in setting a disability rating, particularly because the Claimant was again at the time of trial having symptoms that were similar to those that he had when he was assessed as having a forty percent impairment.

Some of the Employer's contentions are supported by the record. A fair reading of Dr. Pratt's deposition is that the forty percent impairment rating was premature and was based on test results conducted before the Claimant had reached maximum medical improvement. The fifteen percent impairment appears to reflect Dr. Pratt's opinion on permanent impairment, but that is a substantial medical impairment, and the statutory caps do not apply to a case where the rating will be to a scheduled member. The doctor recommends that the Claimant avoid repetitive-type work and repetitive use of his hand and wrist, which is a very significant restriction.

The Claimant had a prior disability award of twelve and a half percent. An employer takes an employee as the employer finds him. *Sweat v. Superior Industries, Inc.,* 966 S.W.2d 31 (Tenn. 1995). Dr. Everette Howell, the Claimant's doctor for his back injury, restricted him from lifting greater than fifty pounds. There was virtually no evidence presented at trial in the present case on the impact of the prior back injury on the Claimant's activities at the time of trial.

The Employer gives great significance to the fact that the Claimant is still at work and is performing satisfactorily. The Employer relies on the testimony of a Ronnie Dickson, the

Claimant's supervisor, for the proposition that the Claimant is meeting his production quotas. However, on cross-examination, Ronnie Dickson conceded that there are not any quotas for the Claimant's production in the sense of strict, numerical requirements. The Claimant is simply required to keep up with his tumbler machine.

The Claimant's own testimony reveals that he has had difficulty performing on the job since his carpal tunnel surgery. After the surgery, the Claimant attempted to do a job as a sandblaster at the plant. After using the sprayer for only a short time, the Claimant's hand would become numb and therefore he was not able to perform that job. At the time of trial, the Claimant's job as a tumbler's helper or assistant was causing his right hand and wrist to ache. He does not have the same strength that he had in his hand before the onset of carpal tunnel, and his right hand sometimes becomes numb while he sleeps.

The Claimant's education is limited, a mere high school degree with no additional training and no skills. There is no evidence of any training for clerical work. The Claimant's work experience is very limited, having had only two employers. This employment has not involved on the job training that might be expected to provide transferable skills, and the Claimant has had no supervisory or management work experience, no clerical work experience, and no sedentary work experience. Work with both employers involved repetitive work with the hand and wrist, the kind of work against which Dr. Pratt recommended. Dr. Pratt did not testify that the Claimant could not return to work as a stocker at a grocery, but the Claimant himself testified that he did not believe that he could return to that kind of work because it would overwork his hand and wrist. An employee's own assessment of his physical condition and resulting disability is competent testimony and should be taken into account. *Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452 (Tenn. 1988).

As to the opportunities available to the Claimant in the labor market, the only evidence at trial related to the Claimant's prospects for continued work with the Employer. There was evidence that the Employer's largest source of work for the Tennessee plants had cut back on the work sent to the Employer. During the time that the Claimant has worked with the Employer, the work force at the plant has been reduced by approximately fifty percent. Other plants owned by the Employer have closed or cut back drastically, and a plant has been opened in Mexico. The Employer is on a seniority system for layoffs, and the Claimant has little seniority. At the very least, it must be concluded that the Claimant's continued employment with the Employer is not assured.

In view of the anatomical impairment rating of fifteen percent to the right upper extremity, the doctor's recommendation that the Claimant not do repetitive-type work, the Claimant's pre-existing weight restriction of fifty pounds, his limited education and very limited work experience, and the absence of any specialized skills or training, the evidence in this case does not preponderate against the trial judge's award of sixty percent permanent partial disability to the right upper extremity.

DISPOSITION

The judgment of the Chancery Court is affirmed, and the costs on appeal are assessed against the Appellant.

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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