IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 30, 2000 Session

DONNIE WALTON v. CREDIT GENERAL INSURANCE COMPANY

Direct Appeal from the Chancery Court for Lauderdale County
No. 10,494 Martha Brasfield, Chancellor

No. W1999-01769-SC-WCM-CV - Mailed April 5, 2001; Filed June 28, 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 § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found the Plaintiff, Donnie Walton ("Walton"), suffered a permanent partial impairment of fifty percent to the body as a whole. The Defendant, Credit General Insurance Company ("General Credit"), stated the evidence does not support the finding. We affirm and modify the judgment of the trial court.

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

DON R. ASH, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOHN K. BYERS, SR. J., joined.

Jeffery P. Boyd, Jackson, TN, for the appellant, Credit General Insurance Company.

Michael W. Whitaker, Covington, TN, for the appellee, Donnie Walton.

MEMORANDUM OPINION

History

This case was tried on April 27, 1999, before the Honorable Martha Brasfield at Lauderdale County, Tennessee. At the conclusion of proof, the trial judge found Walton sustained a compensable injury to his back while in the scope and course of his employment. The court held that said injury resulted in a two percent permanent medical impairment to the body as a whole. Further, after considering all the factors the judge found Walton suffered a permanent partial impairment of fifty percent to the body as a whole and awarded Walton $49,542.00 for permanent partial disability

and future medical care for his back injury. For the reasons discussed below, we affirm and modify the decision of the trial court.

Facts

It is undisputed that Walton suffered an injury to his back arising out of and in the course and scope of his employment. The issues before this court are whether Walton is entitled to an award in excess of the two and one half times multiplier and whether the trial court's award of greater than six times the impairment rating was proper.

The plaintiff, Donnie Walton, is a 48 year-old male with a ninth grade education. Walton's adult life has been a mix of physical labor and prison. In total, Walton has spent about eighteen years in prison. He is also a recovering alcoholic.

In 1996, Walton was hired by the RBT as a truck driver to operate a pickup truck. At the time of his employment, Walton's medical history included a back injury and surgery in 1983 and a knee injury with surgery in 1995. He received a workers' compensation settlement for the knee injury but was not compensated for the back injury. On October 11, 1996, Walton injured his back while offloading a pallet of merchandise.

Medical Evidence

Numerous company doctors examined Walton before he was examined by Dr. D.J. Canale. Dr. Canale reviewed an MRI, which revealed Walton had a recurrent herniated disk at the L5 level. On July 1, 1997, a lumbar myelogram was performed and confirmed a right paracentral disc herniation at the L5 level on the right. On July 10, 1997, a hemilaminectomy and discectomy on the right L5 disc were performed to remove the recurrent ruptured disc. Dr. Canale determined Walton reached maximum medical improvement on January 29, 1998. Further, Dr. Canale opined that Walton retained a two percent permanent medical impairment to the body as a whole associated with the October 11, 1996 injury. Conversely, Dr. Canale stated that Walton had a twelve percent anatomical impairment, ten percent of which was from his original surgery in 1983 with the other two percent coming from his 1996 injury.

Later Walton went to his personal physician, Dr. Johnson, who referred him to a neurosurgeon. Subsequently, Walton was treated by the neurosurgeon before being released to return to work at light duty.

After being released for light duty work, Walton was to meet with RBT management to discuss employment options. Walton failed to attend the meeting and never returned to work for RBT.

Discussion

First, we are to presume the correctness of the trial court's findings unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Humphrey v. Witherspoon, 734 S.W.2d 315 (1987). In the instant case, it is undisputed that Walton suffered a compensable injury. Further, the evidence establishes that Walton's vocational opportunities have somewhat been affected by the impairment. However, the evidence in this case does not support an award of greater than six times the applicable impairment rating.

In considering an award, the courts must consider "whether the employee's earning capacity in relation to the open labor market has been diminished by the residual impairment caused by a work-related injury and not whether he is able to return and perform the job he held at time of injury." Clark v. National Union Fire Ins. Co., 774 S.W.2d 586, 588 (Tenn. 1989). Claimant could not perform a job now that he could have performed if he was in an unimpaired state. This is considered a vocational impairment. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn. 1988). Because the claimant would have difficulty competing in the open labor market against similarly qualified candidates who have not sustained physical impairments due to injuries, the claimant has sustained a vocational impairment, and his ability to earn wages has been affected by this injury.

The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor 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. Pittman v. Lasco Industries, Inc., 908 S.W.2d 932 (Tenn. 1995). In order to establish that an injury was one arising out of the employment, the cause of the death or injury must be proved; and if the claim is for permanent disability benefits, permanency must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873 (Tenn. 1996). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Thomas v. Aetna Life and Cas. Co., 812 S.W.2d 278 (1991). Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award; expert opinion must always be more or less uncertain and speculative; Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996); and, where equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn under the case law. White v. Werthan Industries, 824 S.W.2d 158 (Tenn. 1992).

Dr. Canale found Walton sustained a twelve percent anatomical impairment to the body as a whole, ten percent for the 1983 surgery and two percent for the 1987 surgery in July. Medical records indicate that Dr. Canale performed the back surgery in 1983 and gave Walton a fifteen percent anatomical impairment to the body as a whole. Dr. Canale opined that, regardless of the impairment rating as it pertained to the first surgery, the second surgery only increased the impairment rating.

In Riley v. INA/Aetna Insurance Company, 825 S.W.2d 80 (Tenn. 1992), the court stated, "We hold that the last injurious rule injury does not apply to the instant case, because unlike the

situations in Baxter, Bend and McCormick, there is an assessment of plaintiff's first injury of permanent disability before the occurrence of the second injury." (Supra at 82). In the case of Lawson v. Berg Profiles, Inc., 1995 TN Lexis184 Supreme Court, 1995, #03-SO1-9406-00060, relying on the ruling in Riley (supra), the court stated:

> The last injurious injury rule does not apply when there has been an assessment of the permanent disability as a result of the first injury … the last injurious injury rule genesis was because of the inability to separate the amounts of disability attributable to a previous injury and the extent of the disability suffered in a subsequent injury when there has been no medical assessment of the extent of disability suffered in the previous injury.
>
> When there has been a previous determination of the medical impairment from the previous injury, there is no basis for application of the last injurious injury rule.

Therefore, this Court finds that, because an assessment of a fifteen percent anatomical impairment was made for Walton's first injury of 1983, only the two percent assessment of Dr. Canale can be used to determine Credit General's liability with regard to Walton's permanent disability. We affirm the trial court on this issue.

The next issue this Court considered, is whether the permanent partial impairment rating given to Walton in this case should be limited to the two and one-half times the anatomical impairment rating of two percent given by Dr. Canale for the 1986 injury. (See T.C.A. § 50-6-241(a)(1)). To determine which statutory cap applies, a court must decide whether a plaintiff made a meaningful return to work. What constitutes a meaningful return to work is a highly fact specific analysis:

> If the offer from the employer is not reasonable in light of the circumstances of the employee's physical ability to perform the offered employment, then the offered employment is not meaningful and the injured employee may receive disability benefits up to six times of the medical impairment. On the other hand, an employee will be limited to disability of two and one half times the medical impairment if his refusal to return to an offer of work is unreasonable. The resolution of what is reasonable must rest upon the facts of each case and be determined thereby. Newton v. Scott Healthcare Ctr., 914 S.W.2d 884, 886 (Tenn. 1995).

The ultimate resolution of these cases falls into a two-pronged test. The first prong requires an assessment of the reasonableness of the employer in attempting to return the employee to work. The second prong considers the reasonableness of the employee in failing to return to work. In this case, Walton admitted that he did not know what jobs were available at Reeves Trucking. Further,

Walton admitted that he never went back to talk to Reeves and admitted that he talked to the president of the company. The president of the company asked him that once he was released from the doctor that he should bring his work restrictions and discuss employment opportunities. Mr. Walton never returned to RBT to discuss future employment opportunities. Mr. Walton simply chose not to go back nor call his employer. His efforts prevented the employer from attempting to return the employee to work; which subsequently precluded the court from making the determination as to whether or not the reasonableness of the employee in failing to return to work was adequate.

Because of this, we find Walton's refusal to return to work to be unreasonable. Therefore, under T.C.A. § 50-6-241(a)(1), his disability must be limited to two and one half times the medical impairment rating. The awarded disability is modified from fifty percent to two and one half times the two percent rating given by Dr. Canale, namely five percent.

The costs on appeal are to be split equally between the parties.

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DON R. ASH, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

DONNIE WALTON v. CREDIT GENERAL INSURANCE COMPANY

Chancery Court for Lauderdale County
No. 10494

No. W1999-01769-SC-WCM-CV - Filed June 28, 2001

ORDER

This case is before the Court upon Credit General Insurance Company's motion to dismiss and Donnie Walton's 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;

The Court has considered the motion to dismiss and finds that it is without merit and should be denied. It appears to the Court that the motion for review is not well taken and should likewise 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 paid equally by the parties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

HOLDER, J. - NOT PARTICIPATING