IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 9, 2001 Session

MARY REGINA BLALOCK v. TRAVELERS INSURANCE COMPANY, ET AL

Direct Appeal from the Circuit Court for Shelby County
Nos. 97684 and 301292 Karen R. Williams, Judge

No. W2000-01616-WC-R3-CV - Mailed June 4, 2001; Filed July 12, 2001

This workers' compensation appeal of consolidated cases has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to 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 appellant, Travelers, insists (1) the trial court improperly applied the last injurious injury rule, (2) the trial court erred by assuming certain facts and taking judicial notice of matters not in evidence, (3) the trial court erred by giving deference to the opinion of an evaluating physician instead of a treating physician and (4) the award of benefits based on 25 percent to both arms is excessive. 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 Circuit Court Affirmed.

JOE C. LOSER, JR., SP. J, delivered the opinion of the court, in which JANICE M. HOLDER, J., and W. MICHAEL MALOAN, SP. J., joined.

Howard B. Hayden, Memphis, Tennessee, for the appellant, Travelers Insurance Company.

P. Allen Phillips, Jackson, Tennessee, for the appellee, Kemper/Lumbermen's Mutual Casualty Company.

Richard D. Click, Memphis, Tennessee, for the appellee, Mary Regina Blalock.

MEMORANDUM OPINION

The employee or claimant, Blalock, was 51 years old on the day of the trial with a high school education. She has worked for Bartlett Internal Medicine Group as its office manager for more than sixteen years. Her work requires her to use a keyboard more than six hours per day. In mid-1997, she began to notice pain, tingling and numbness in both hands and, on July 28, 1997,

visited Dr. Charles Munn.

Dr. Munn diagnosed bilateral carpal tunnel syndrome and prescribed wrist splints and medication. When her discomfort persisted, Dr. Munn ordered a nerve conduction study, which confirmed his diagnosis. The claimant sought medical benefits but continued working until November 4, 1999, when she lost half a day because of her hand problems and frustration with hand problems.

Dr. William Bourland, who performed the nerve conduction study, treated her on July 12, 1999 and October 4, 1999. He recommended surgery, but the claimant declined and has continued to work. Dr. Bourland discharged her on October 20, 1999, with maximum medical improvement. He estimates her permanent medical impairment at 2 percent to each arm. Dr. Joseph Boals, III, saw her on June 21, 1999 for a medical evaluation. Dr. Boals estimates her permanent impairment at 10 percent to each arm. Both doctors followed AMA guidelines in making their estimates.

Kemper provided coverage from November 30, 1996 to November 30, 1997. Travelers provided it from December 15, 1997 to December 17, 1999. There is a dispute over the date of injury and which insurer is liable for permanent disability benefits.

Upon the above summarized facts, the trial court found Travelers liable for permanent partial disability benefits based on 25 percent to both arms.[1] Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The panel is not bound by the trial court's findings but conducts an independent examination of the evidence to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. Sp. Workers' Comp. 1995). 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, 177 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Orman v. Sonoma, Inc., 803 S.W.2d 672, 676-77 (Tenn. 1991). The extent of an injured worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 917 (Tenn. 1999).

---

[1] In fact, the trial court awarded "25% impairment to each arm." The terms "disability" and "impairment" have different meanings in the context of the Workers' Compensation Act. Impairment refers to medical and clinical limitations; disability refers to lost capacity to earn money. Tenn. Code Ann. § 50-6-207(3)(F); see also Parks v. Tennessee Municipal League Risk Management Pool, 974 S.W.2d 677, 679-80 (Tenn. 1998). Since the record contains no expert medical evidence of a 25 percent medical or clinical impairment rating to each arm, we construe the award to be one based on 25 percent permanent partial disability to both arms, as the parties have done. An injury to both arms is a scheduled injury. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(w).

Where a condition develops gradually over a period of time resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65, 69 (1961). In such cases, however, unless the date of injury can be determined, compensation may be denied. For disability purposes, the date of injury has been fixed as of the date on which the claimant was forced to quit work because of severe pain. Barker v. Home-Crest Corp., 805 S.W.2d 373, 374 (Tenn. 1991). Travelers Insurance Company was the insurer on November 4, 1999, when the claimant was forced to quit working and seek medical care because of pain.

Where an employee is permanently disabled as a result of a combination of two or more accidents occurring at different times and while the employee was working for different employers, the employer for whom the employee was working at the time of the most recent accident is generally liable for permanent disability benefits. McCormick v. Snappy Car Rentals, Inc., 806 S.W.2d 527, 530-31 (Tenn. 1991). The same doctrine applies where the employee's permanent disability results from successive injuries while the employee is working for the same employer, but the employer has changed insurance carriers. The carrier which provided coverage at the time of the last injury is liable for the payment of permanent disability benefits. Bennett v. Howard Johnson's Motor Lodge, 714 S.W.2d 273, 280 (Tenn. 1986). Such is the last injurious or successive injury rule. We are not persuaded that the trial court erred in its application to the present facts. Gradually occurring injuries result from repetitive trauma and the successive injury rule is well suited to such cases. The first issue is accordingly resolved in favor of the employee.

The employer argues that the award is excessive because the trial court gave greater weight to the opinions of Dr. Boals than those of Dr. Bourland. When the medical testimony differs, the trial judge must choose which view to believe. In doing so, she is allowed, among other things, to consider 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 v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). 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, 415 (Tenn. Sp. Workers' Comp. 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. Yount v. Henrite Products, Inc., 754 S.W.2d 47, 52-53 (Tenn. 1988). From our independent examination of the record and a consideration of the pertinent factors, to the extent that they are supported by proof in the record, we cannot say the evidence preponderates against the finding of the trial court with respect to the extent of permanent vocational disability.

The appellant further contends that the trial court improperly took judicial notice (1) that June 21, 1999 was a Monday and that the claimant may have had two days away from the office and her repetitive typing job immediately prior to her visit with Dr. Boals, and (2) with respect to the

claimant's employment opportunities. The trial court's findings included the following:

> "Dr. Boals saw Plaintiff for an evaluation on June 21, 1999. He found that she had a mild case of carpal tunnel syndrome to both wrists and rated her as 10% to each upper extremity based on neuropathy. He found a negative Phelan's test but said that a negative test is not conclusive. Additionally, the Court notes that June 21st is a Monday and Plaintiff may have had two days away from the office and her repetitive typing job immediately prior to this visit."
>
> "... The Court finds that based on her age, education, training, skills and employment opportunities that Plaintiff has suffered a 25% permanent impairment to each arm."

The record contains no medical proof that the negative Phelan's test was caused by the claimant's inactivity preceding her visit to Dr. Boals and the claimant made no such argument. Additionally, there is no expert evidence in the record concerning the claimant's employment opportunities. The opinion of a vocational expert is generally necessary to establish that the employee had no reasonable transferable job skills from prior vocational background and training or the employee had no reasonable employment opportunities available locally, considering the employee's permanent medical condition, or both. Tenn. Code Ann. § 50-6-242; see also Ingram v. State Industries, Inc., 943 S.W.2d 381, 383 (Tenn. Sp. Workers' Comp. 1995). However, expert testimony is not required to establish the extent of an injured worker's permanent partial disability, because vocational disability can be established by lay testimony. Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995).

A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process. T.R.A.P. 36(b). From our independent examination of the record, we conclude that the trial court's error in taking judicial notice of facts not in evidence was harmless in that it probably did not affect the judgment or result in prejudice to the judicial process.

The judgment of the Circuit Court for Shelby County is therefore affirmed. Costs are taxed to the appellant, Travelers Insurance Company.

_____

JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 9, 2001

MARY REGINA BLALOCK v. TRAVELERS INSURANCE COMPANY, et al.

Circuit Court for Shelby County
Nos. 97684 and 301292

No. W2000-01616-WC-R3-CV - Filed July 12, 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 on appeal are taxed to the Appellant, Travelers Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM