IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 27, 2001 Session

DENNY CAIN v. WHIRLPOOL CORPORATION, ET AL.

Direct Appeal from the Criminal Court for Wilson County
No. 98-2223 J. O. Bond, Judge

No. M2000-01688-WC-R3-CV - Mailed - June 27, 2001
Filed - August 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. In this appeal, the employer insists (1) the trial court erred in admitting into evidence the testimony of a chiropractor in an action involving a shoulder injury, (2) the award of permanent partial disability benefits is excessive and (3) the trial court erred in awarding as discretionary costs expenses for the taking of the chiropractor's deposition. As discussed below, the judgment is modified by reducing the award of permanent partial disability benefits to one equal to two and one-half times the clinical impairment rating, but otherwise affirmed.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JAMES WEATHERFORD, SR. J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellant, Whirlpool Corporation.

B. Keith Williams, Lebanon, Tennessee, for the appellee, Denny Cain.

MEMORANDUM OPINION

The employee or claimant, Denny Cain, is 52 years old with a high school education and a history of unskilled working experiences. He injured his left shoulder while working for the employer, Whirlpool, and was referred to Dr. Joseph Wieck. Dr. Wieck surgically repaired the injured shoulder. When the pain persisted, the claimant saw Dr. Charles Kaelin, who performed a second surgical procedure, a distal clavicle resection, on the injured shoulder. The injury occurred on March 31, 1998 and the claimant was returned to work by Dr. Kaelin on October 18, 1999 with

a ten-pound weight lifting restriction. Dr. Kaelin estimated the claimant's permanent medical impairment at 6 percent to the whole body, using AMA guidelines.

The claimant's attorney referred him to Dr. Frank Etlinger, a chiropractor, for an examination and evaluation. Dr. Etlinger testified chiropractors normally treat injuries related to the muscular-skeletal system. By the use of range of motion tests, Dr. Etlinger estimated the claimant's permanent impairment at 16 percent to the shoulder or 10 percent to the body as a whole.

The claimant returned to work at a wage equal to or greater than what he was earning before the accidental injury, was laid off along with other workers, then refused to return following the layoff, though invited to do so.

The trial court gave equal weight to the two estimates of permanent medical impairment and awarded permanent disability benefits based on two and one-half times the average of the 16 percent and 6 percent, or 27.5 percent, to the body as a whole. 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). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). 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, 178 (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). Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999).

The appellant first contends the chiropractor's testimony is incompetent because shoulder injuries are not within the parameters defined for chiropractors in Tenn. Code Ann. § 63-4-101(b).[1] The appellee disagrees. The decision to admit scientific evidence is within the discretion of the trial court and will not be disturbed on appeal except for an abuse of that discretion. Coe v. State, 17 S.W.3d 193, 227 (Tenn. 2000). Our review of the issue is thus to determine whether the trial court abused its discretion. From our independent examination of the record, we cannot say the trial court abused its discretion by allowing a chiropractor to express his opinion of the extent of the claimant's permanent clinical impairment. Chiropractors are regularly allowed to do so where the injury is to the muscular-skeletal system. See, e.g., Smith v. Hale, 528 S.W.2d 543 at 545 (Tenn. 1975). The

[1] (b) The practice and procedures used by the doctor of chiropractic shall include the procedures of palpation, examination of the spine and chiropractic clinical findings accepted by the board of chiropractic examiners as a basis for the adjustment of the spinal column and adjacent tissues for the correction of nerve interference and articular dysfunction.

first issue is resolved in favor of the appellee.

The appellant contends the award is excessive because the trial court improperly gave weight to the chiropractor's opinion, splitting the difference with the medical doctor's opinion. The maximum award, the appellant argues, should be two and one-half times the medical doctor's 6 percent impairment rating. The appellee concedes the award is excessive because of an arithmetic mistake by the trial court, but argues that the chiropractor's opinion should be given at least equal consideration with the medical doctor's opinion, considering other relevant factors, as the trial court apparently intended to do.

In cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. Tenn. Code Ann. § 50-6-241(a)(1). In making determinations, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1).

From our independent examination of the record, we are unable to say the evidence preponderates against the trial court's finding that the two opinions should be given equal weight. Both experts appear well qualified and both used appropriate guidelines. The trial judge inadvertently averaged 16 percent (Dr. Etlinger's impairment rating to the shoulder) and 6 percent (Dr. Kaelin's impairment rating to the body as a whole) to arrive at a disability award of two and one-half times 11 percent, or 27.5 percent, to the body as a whole. He should have averaged 10 percent (Dr. Etlinger's impairment rating to the body as a whole) and six percent, which would result in an award of two and one-half times 8 percent, or 20 percent to the body as a whole. The judgment is modified accordingly.

The appellant finally argues that discretionary costs associated with the chiropractor's deposition should be omitted from the award because the testimony was not competent. The chiropractor's deposition was not only competent, but contained evidence vital to the injured worker's claim. The trial court did not err in its assessment of discretionary costs.

For the above reasons the judgment of the trial court is affirmed as modified. Costs are taxed to the appellant, Whirlpool Corporation.

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JOE C. LOSER, JR., SPECIAL JUDGE

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

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Criminal Court for Wilson County
No. 98-2233

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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, Whirlpool Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM