IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 28, 2000 Session

MARSHALL KEY v. SAVAGE ZINC, INC.

Direct Appeal from the Criminal Court for Smith County
No. 97-336 J.O. Bond, Judge

No. M2000-00306-WC-R3-CV - Mailed - June 5, 2001
Filed - July 6, 2001

This workers' compensation appeal had 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 defendant, Savage Zinc, Inc., appeals the judgment of the Criminal Court of Smith County where the trial court found Mr. Key to have a 14% anatomical impairment and awarded 35% permanent partial disability to the body as a whole for a work-related shoulder injury. For the reasons stated in this opinion, we affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2000); Judgment of the Criminal Court Affirmed.

JAMES WEATHERFORD, SR., J., delivered the opinion of the court, in which BIRCH J., and CATALANO, SP. J., joined.

Mark C. Travis, Cookeville, Tennessee, for the appellant, Savage Zinc, Inc.

Hugh Green, Lebanon, Tennessee, for the appellee, Marshall Key

MEMORANDUM OPINION

Mr. Marshall Key was 58 years old at the time of trial and attended school through the fourth grade. In the past, he has worked for a lumber company stacking and edging lumber; a shirt company stacking shirts; and as a maintenance man fixing machines and doing overhead work.

At the time of trial, he had worked for the defendant for about 18 years. In 1994 he suffered a left shoulder rotator cuff injury while working for the defendant which required surgery performed by Dr. Charles Kaelin, M.D. According to the settlement documents pertaining to the left shoulder injury, "Dr. Charles Kaelin, M.D., rates Mr. Key at fifteen percent (15.0%) permanent partial disability to the body as a whole..." He returned to work for the defendant doing "track work"a very

physically demanding job that involved replacing 200 pound railroad cross-ties and 33 foot long rails.

In June of 1996, Mr. Key injured his right shoulder while pulling and hammering railroad spikes. According to Dr. Kaelin's records, an MRI confirmed a full-thickness rotator cuff tear, significant glenohumeral joint space narrowing and labrum tear. Dr. Kaelin's records also indicated "glenohumeral arthritis " and a thinned anterior glenoid labrum. In July 1996 Dr. Kaelin performed an open rotator cuff repair and acromioplasty on the right shoulder. In his operative report he noted that the glenohumeral ligaments were intact.

Dr. Kaelin assigned restrictions on lifting and upon reaching above shoulder level. After recovery and physical therapy, Mr. Key returned to work for the defendant as a mechanical scaler operator which was much less physically demanding than "track work."

Dr. Kaelin assigned a 15% anatomical impairment rating to Mr. Key's right shoulder or upper extremity equivalent to 9% to the body as a whole based strictly upon loss of range of motion. Dr. Kaelin admitted that a reasonable physician could assign a rating for Mr. Key's impairment anywhere from 5% to 20% to the body as a whole using the AMA Guides. He acknowledged that a different table within the AMA Guides could also be applied to the same impairment which could result in an impairment rating of 14% to the body as a whole but that he "personally" does not do it that way.

Dr. Kaelin also did not include grip strength as a factor in his impairment rating because he felt that on March 7, 1997, the date of maximum medical improvement "he may not have had, quote, all of his strength back, unquote, but I felt like it would come back to not warrant being part of his impairment rating, sir."

Dr. David Gaw, M.D., evaluated Mr. Key and assigned a 17% anatomical impairment rating to the upper extremity equivalent to 10% to the body as a whole. He based this rating upon loss of motion and excisional arthroplasty of the AC joint. Dr. Gaw found significant weakness and loss of movement of the right shoulder and noted that Mr. Key would be unable to use this arm to any degree in an overhead or outstretched position for pushing, pulling or lifting. A C-32 form prepared by Dr. Gaw was submitted to the court.

Mr. Key was not satisfied with these impairment ratings because his workers' compensation claim arising from the 1994 similar injury to the left shoulder settled based on a 15% medical impairment rating to the body as a whole assigned by Dr. Kaelin. Mr. Key stated that Dr. Kaelin had told him that the rating to the right shoulder would be the same. Mr. Key felt that his right shoulder injury was worse than his left shoulder injury because he is right handed and uses that hand more.

On June 10, 1999, Mr. Key saw Dr. Francisca Lytle, M.D., orthopedic surgeon, for an independent medical evaluation. She has performed disability evaluations on and off for the last 20 years for the State of Tennessee, injured workers and insurance companies. She assigned Mr. Key

a 24% anatomical impairment rating to the upper extremity equivalent to 14% to the body as a whole using the AMA guides. Dr. Lytle based her rating upon loss of function of the shoulder joint (both acromioclavicular and glenohumeral), and pain and loss of grip strength as a result of loss of muscle mass.

Prior to trial the parties stipulated: 1) that the only issue was the extent of Mr. Key's permanent vocational disability; and 2) that the 2 ½ times multiplier enumerated in *Tennessee Code Annotated* § 50-6-241 applied to this case.

At the conclusion of the trial, the trial court rendered its findings of fact and conclusions of law. The trial court found Mr. Key's testimony to be credible and stated that the worker could set his disability rating as well as any doctor. The trial court went on to discuss the method by which authorized physicians are chosen by insurance companies and implied that their testimony is very often prejudiced in the insurance companies' favor; although, it stated he did not find this to be so in this case. The trial court also so indicated that it gave little weight to a C-32 Form as he preferred depositions.

The trial court found Mr. Key to have a 35% vocational disability which was 2 ½ times the 14% anatomical impairment rating to the body as a whole.

ANALYSIS

Review 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. *Tenn. Code Ann.* § 50-6-225(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America,* 884 S.W.2d 446, 451 (Tenn. 1994).

The defendant has presented four issues in this appeal.

I. Whether the trial court committed prejudicial error by considering information which was not introduced as evidence at trial in determining the weight which should be accorded the testimony of the employee's treating physician.

II. Whether the trial court committed prejudicial error by improperly considering Mr. Key's testimony with regard to his opinion as to his anatomical disability pursuant to the AMA guides.

III. Whether the trial court committed prejudicial error by giving more weight to the testimony of Dr. Lytle , an evaluating physician, than to Dr. Kaelin, Mr. Key's treating physician, as well as Dr. Gaw, another evaluating physician.

IV. Whether the trial court committed prejudicial error by giving weight to Dr. Lytle's erroneous opinion that Mr. Key's loss of grip strength should be considered in evaluating his impairment.

I. Whether the trial court committed prejudicial error by considering information which was not introduced as evidence at trial in determining the weight which should be accorded the testimony of the employee's treating physician.

At the conclusion of the trial, the court noted that anatomical impairment ratings varied in this case. In discussing the different ratings, the court made several comments regarding physicians authorized by workers' compensation insurance companies:

> Dr. Kaelin was picked by the company to put on their list of medical providers, which in most cases– I don't know in this case and I'm not making that finding that that happened, but in most cases, they talk to these doctors prior to being put on there, and they know, they talk about these things.
>
> They're normally selected, doctors are, through insurance companies based upon some interviews they have. Most of the time it's not about how good you are medically, either. But that's not brought out in the case and the Court can't look at that. Sometimes I wonder if it ought not to be brought out in these cases where we'd know what those initial interviews were, and what people say to them. Because I think these doctors, if ever asked, would tell the truth about it. But we don't know that. All I know is we've got what appears to be a conservative estimate, possibly one not so conservative.

The trial court did indicate that he did not find this to be true in this case and further stated: "Dr. Kaelin's a believable doctor, he's a good doctor. I go to him myself. I don't always, say, agree with him on his comp cases, but that doesn't mean he's not a good doctor...."

It is unfortunate that the trial court made these comments as they could have been grounds for reversal alone. It is inappropriate and generally reversible error for a fact-finder to base its decision on observations outside the particular judicial proceeding. *See Vaughn v. Shelby Williams of Tennessee, Inc.*, 813 S.W.2d 132 (Tenn. 1991) ("Whatever may have been the personal observations and individual views of the judge as a person, these factors have no place whatever in his exercise of judicial discretion.") *Vaughn* at 133-34 quoting *Moore v. Russell*, 294 F. Supp. 615, 620-21 (E.D. Tenn. 1968).

Because we are able to make our own independent assessment of the medical proof as it is presented by depositions and a C-32 Form, we have chosen to review the medical proof in this case *de novo* without any presumption of correctness and therefore any error on this issue would be rendered harmless.

Dr. Kaelin assigned a 15% anatomical impairment rating to Mr. Key's right shoulder or upper extremity equivalent to 9% to the body as a whole based strictly upon loss of range of motion. He acknowledged that other physicians may apply the AMA Guides differently to evaluate the same impairment and that Table 27 on page 61 of the AMA Guides could be used to evaluate Mr. Key's impairment in addition to the range of motion evaluation. Dr. Kaelin explained:

> If you took the extremes of each of the Tables, I think one could go as low as 9 and as high as 33 to the extremity. We looked it up and that would be five to the whole body, to as high as 20. So it would not surprise me nor would I think someone had cheated or anything in using the Guide to come up with any one of those numbers, sir.

He agreed that another reasonable physician could come up with 14% to the body as a whole in evaluating Mr. Key. He also acknowledged that there is a difference of opinion in the medical community about using crepitation as a factor in impairment.

Dr. David Gaw, M.D., evaluated Mr. Key and assigned a 17% anatomical impairment rating to the upper extremity equivalent to 10% to the body as a whole. He based this rating upon loss of motion and excisional arthroplasty of the AC joint.

Dr. Lytle assigned a 24% anatomical impairment rating to the upper extremity equivalent to 14% to the body as a whole. She based her rating upon loss of function of the shoulder joint; and pain and loss of grip strength as a result of loss of muscle mass. Dr. Lytle did not express criticism for Dr. Kaelin's and Dr. Gaw's decision not to consider Mr. Key's loss of muscle mass and grip strength in their evaluation. She explains: "I think they didn't do it and I think that's reasonable. It's not an oversight on their part. It's just something that I [use] , in my personal experience, having done quite a few of these and having done a lot of disability examinations."

From our independent assessment of the medical proof in this case we find that the evidence does not preponderate against the finding of the trial court.

II. Whether the trial court committed prejudicial error by improperly considering Mr. Key's testimony with regard to his opinion as to his anatomical disability pursuant to the AMA guides.

The defendant argues that the trial court based its decision not upon Dr. Lytle's medical opinion but rather upon the testimony of Mr. Key, who believed his medical impairment to be 15% to the body as a whole.

Mr. Key based his testimony upon the fact that he received a settlement for a similar injury to his left shoulder in an amount equal to a medical impairment rating of 15% to the body as a whole. According to the settlement documents pertaining to the left shoulder injury, "Dr. Charles Kaelin, M.D., rates Mr. Key at fifteen percent (15.0%) permanent partial disability to the body as a whole..." Dr. Kaelin was his treating physician for his earlier injury and according to Mr. Key, Dr. Kaelin informed him that the medical impairment rating for his right shoulder would be the same that had been applied to the left.

At trial the court asked Mr. Key what he thought his shoulder should be rated. The trial court did comment "But, you know, sometimes you can go to the workers themselves, and under our law, the worker can set his medical disability rate just as good as the doctor can. He knows what percentage of the body he has." The trial court stated that although he believed Mr. Key to credible and truthful with regard to Dr. Kaelin's statement to him that his rating for his right shoulder would be the same as his left shoulder he could not make an award based upon Mr. Key's testimony: "Fourteen percent is all I can give you on the proof of this case and that's what I'm going to do."

After reviewing the record and based upon our independent review of the medical proof in this case as discussed in the previous issue, we find this issue to be without merit.

III. Whether the trial court committed prejudicial error by giving more weight to the testimony of Dr. Lytle , an evaluating physician, than to Dr. Kaelin, Mr. Key's treating physician, as well as Dr. Gaw, another evaluating physician.

It is well settled that " when medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept." *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996). The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Johnson v. Midwesco Inc.*, 801 S.W.2d 804 (Tenn. 1990).

"As in many worker's compensation cases, there is a conflict of medical testimony as to causation and degree of permanent impairment between a treating and an evaluating physician.

While a treating physician's testimony is entitled to considerable weight, *Blanche Smith v. Bruce Hardwood Floors*, 1996 Tenn. LEXIS 522, 21 TAM 40-4, No. 02S01-9512-CV-00130 (Tenn. 1996), no rule of law requires the trial court to accept the testimony of a treating physician over any other conflicting medical testimony. *Hayes v. School Calendar Co.*, 1997 Tenn. LEXIS 384, 22 TAM 36-7, No. 03S01-9609-CZ-00093 (Tenn. 1997)." 1997 Tenn. LEXIS 622, *Ring v. CKR Industries*. (Tenn. 1997).

After reviewing the medical testimony as discussed earlier in this opinion, we find this issue to be without merit.

IV. Whether the trial court committed prejudicial error by giving weight to Dr. Lytle's erroneous opinion that Mr. Key's loss of grip strength should be considered in evaluating his impairment.

The medical testimony differed with regard to whether grip strength should be included as a factor in Mr. Key's impairment rating.

On March 7, 1997, the date Dr. Kaelin found that Mr. Key had reached maximum medical improvement, Dr. Kaelin felt that although Mr. Key had not gotten all of his grip strength back it would "come back to not warrant being part of his impairment rating." Dr. Kaelin's records do not indicate that he performed a grip strength test on Mr. Key.

On April 20, 1999, Dr. Gaw examined Mr. Key, found significant weakness and loss of movement of the right shoulder, but did not use grip strength as a factor in rating Mr. Key's impairment.

On June 10, 1999, Dr. Lytle examined Mr. Key and found shoulder atrophy, a loss of muscle mass in the right arm and a loss of grip strength. In Dr. Lytle's opinion, loss of grip strength can be significant enough to warrant being a factor in an impairment rating, especially in a manual laborer such as Mr. Key.

After reviewing the record in this case, we find no error upon the part of the trial court pertaining to this issue.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to the appellant.

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JAMES WEATHERFORD, SR. J.

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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