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

EDWIN H. MADEWELL v. THE TRAVELERS INSURANCE COMPANY

Direct Appeal from the Chancery Court for Coffee County
No. 98-479 L. Craig Johnson, Chancellor

No. M2000-01793-WC-R3-CV - Mailed - July 9, 2001
Filed - October 24, 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's insurer insists (1) the trial court erred in accepting the opinion of Dr. Ray Hester over that of Dr. Roger Zwemer as to the extent of the employee's permanent medical impairment, (2) the trial court erred in awarding permanent partial disability benefits in an amount that exceeds two and one-half times the medical impairment rating, (3) the trial court erred in awarding temporary total disability benefits, (4) the award of permanent partial disability benefits is excessive, (5) the defendant is entitled to a setoff, and (6) the trial court erred in commuting permanent partial disability benefits to a lump sum. As discussed below, the panel has concluded the award of temporary total disability benefits and the lump sum award should be modified, and a setoff allowed for payments made under an employer-funded disability plan, but the judgment otherwise affirmed.

Tenn. Code Ann. § 50-6-225(e) (2000) Appeal as of Right; Judgment of the Chancery 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.

Robert J. Uhorchuk, Chattanooga, Tennessee, for the appellant, The Travelers Insurance Company.

Robert S. Peters, Winchester, Tennessee, for the appellee, Edwin H. Madewell.

MEMORANDUM OPINION

The employee or claimant, Madewell, is 60 years old with a high school education and some college credits and electronics training. He worked for his employer as an instrument technician at Arnold Air Force Base from April 11, 1966 until 1999. He has computer skills and knowledge of both mechanical and electronic blueprints and can build and maintain instruments and machinery. His work required some physical activities.

In August of 1998, the claimant felt a shooting pain in his left leg while at work. When the employer provided a list of physicians, he saw Dr. Zwemer and lost several days of work. Dr. Zwemer provided conservative care for several months and, finding no objective evidence of injury, estimated his permanent impairment at 5 percent to the body and returned the claimant to work. Upon returning to work, the pain recurred and he saw Dr. Bills, who ordered magnetic resonance imaging and referred him to Dr. Hester, a neurosurgeon.

Dr. Hester diagnosed a disc herniation and assessed his permanent impairment at 10 percent to the whole person. Dr. Hester also prescribed permanent restrictions from bending from the waist while standing and from working with his arms out front. The restrictions prohibit him from working as an instrument technician. When he was unable to return to his job, the employer offered and the claimant accepted early retirement. The claimant testified at trial that he continues to suffer disabling pain and is unable to participate in hobbies or perform his former duties. The trial court awarded, inter alia, permanent partial disability benefits based on 40 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). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 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 appellant contends the trial court erred in not accepting the opinion of Dr. Zwemer because he treated the claimant for several months. The claimant responds that the trial court correctly rejected the opinion of a doctor who failed to diagnose a herniated disc. When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he 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. See Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (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). The trial court gave greater weight to Dr. Hester's opinion.

Dr. Hester is a board-certified neurosurgeon with extensive experience. The trial court did not abuse its discretion by accepting his opinions. The first issue is resolved in favor of the appellee.

The appellant next contends the award should not exceed two and one-half times the medical impairment rating because the employer was willing to make accommodations. The claimant insists he was not offered work within his restrictions.

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). When the claimant in this case attempted to return to work, the employer informed him no work was available within the restrictions prescribed by Dr. Hester.

If the offer from the employer is not reasonable in light of the circumstances of the employee's physical disability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the medical impairment. Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 630 (Tenn. 1999). The evidence fails to preponderate against the trial court's finding that the offer of employment was not reasonable. The second issue is resolved in favor of the appellee.

The appellant next contends the award of temporary total disability weeks is excessive. The trial court allowed such benefits from the August 12, 1998 to July 31, 1999, reduced by two weeks of work. The appellant argues that Dr. Zwemer returned the claimant to work without restrictions shortly after the injury. The difficulty with the argument is the trial judge effectively rejected Dr. Zwemer's testimony in favor of Dr. Hester's testimony.

Compensable disabilities are divided into four separate classifications: (1) temporary total disability, (2) temporary partial disability, (3) permanent partial disability and (4) permanent total disability. Tenn. Code Ann. § 50-6-207. Each class of disability is separate and distinct and separately compensated for by different methods. Compensation benefits are allowable for an injured employee, separately, for each class of disability which results from a single compensable injury. Redmond v. McMinn County, 209 Tenn. 463, 467, 354 S.W.2d 435, 437 (1962). Temporary total disability refers to the injured employee's condition while disabled to work because of his injury and until he recovers as far as the nature of his injury permits. Id. Benefits for temporary total disability are payable until the injured employee is able to return to work or, if he does not return to work, until he attains maximum recovery from his injury, at which time his entitlement to such benefits terminates. See Simpson v. Satterfield, 564 S.W.2d 953, 955 (Tenn. 1978) and its progeny.

Dr. Hester testified the claimant was able to work within his restrictions on June 17, 1999. The award of temporary total disability benefits should be reduced accordingly. The award of such benefits is therefore modified to the period beginning two weeks after the injurious occurrence and ending on June 17, 1999.

The appellant contends next it is entitled to a setoff in the sum of $1,984.32 against temporary total disability benefits for occupational disability benefits paid through a policy funded

by the employer, Sverdrup. A covered employer is prohibited from making any agreement, contract, rule, regulation or other device which would operate to extinguish or reduce its obligation under the Workers' Compensation Law. Tenn. Code Ann. § 50-6-114(a). However, any employer may set off from disability benefits any payment made to an employee under an employer-funded disability plan for the same injury, provided the disability plan permits such an offset, such offset does not result in an employee receiving less than the employee would otherwise receive under the Workers' Compensation Law, and, in the event a collective bargaining agreement is in effect, the provision is subject to the agreement of both parties. Tenn. Code Ann. § 50-6-114(b). The claimant concedes the employer is entitled to a setoff of $1,984.32, but inadvertently failed to include it in the final judgment. The judgment is modified to provide for the setoff.

The appellant next contends the award of permanent partial disability benefits based on 40 percent to the body as a whole is excessive. 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. Tenn. Code Ann. § 50-6-241(b). 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. Miles v. Liberty Mut. Ins. Co., 795 S.W.2d 665, 666 (Tenn. 1990). Extent of vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 915 (Tenn. 1999). From a consideration of the pertinent factors, to the extent they were established by the proof, we cannot say the evidence preponderates against the trial court's award of permanent partial disability benefits.

The appellant finally contends the trial court erred in commuting a portion of the award to a lump sum. Permanent disability benefits that are payable periodically may be commuted to one or more lump sum payment(s) on motion of any party subject to the approval of the circuit, chancery or criminal court. Tenn. Code Ann. § 50-6-229(a). In determining whether to commute an award, the courts must consider (1) whether the commutation will be in the best interest of the employee, and (2) the ability of the employee to wisely manage and control the commuted award. Id. Whether to commute a workers' compensation award to a lump sum is discretionary with the trial court and the trial court's decision will not be disturbed on appeal unless the trial court's decision amounted to an abuse of discretion. Edmonds v. Wilson County, 9 S.W.3d 106, 109 (Tenn. 1999). The trial court commuted only the benefits that had accrued since the date of injury. On remand, the trial court will adjust the lump sum award to benefits accrued from June 17, 1999, until the filing of this opinion. We find no abuse of discretion in the commutation of accrued benefits.

As modified above, the judgment of the trial court is affirmed and the cause remanded to the Chancery Court for Coffee County. Costs are taxed to the appellant, The Travelers Insurance Company.

JOE C. LOSER, JR., SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EDWIN H. MADEWELL, Respondent v. THE TRAVELERS INSURANCE COMPANY, Applicant

Chancery Court for Coffee County
No. 98-479

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ORDER

This case is before the Court upon motion fore review filed by the appellant, The Travelers Insurance Company, pursuant to Tenn. Code. Ann. § 50-6-225(e)(5)(B) the entire record, including the order of referral to the Special Workers' Compensation Appeal 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 motion for review is well-taken and should 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 are taxed to the appellant, The Travelers Insurance Company.

PER CURIAM

Birch, J. - Not participating.