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

BONNER McCLUSKEY v. F&M INCORPORATED, ET AL.

Direct Appeal from the Circuit Court for Shelby County
No. 301307-6 T.D. George Brown, Judge

No. 2001-00468-SC-WCM-CV - Mailed December 3, 2001; Filed February 1, 2002

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 appellant insists (1) the trial court erred in dismissing his claim for permanent disability benefits based on a finding that the proof of permanency was insufficient, and (2) the trial court erred in disallowing the appellant's post-trial application for relief. 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 L. T. LAFFERTY, SR. J., joined.

Steve Taylor, Memphis, Tennessee, for the appellant, Bonner McCluskey

R. Scott Vincent and Ronald L. Harper, Memphis, Tennessee, for the appellees, F&M Incorporated d/b/a Domino's Pizza, Inc., and Domino's Pizza, Inc.

MEMORANDUM OPINION

On or about January 13, 1999, the employee or claimant, Bonner McCluskey, was injured at work when a box of pepperoni fell from a freezer shelf, striking him in the left shoulder and neck. He reported the injury to the employer, Domino's, and was provided medical benefits. He lost a few days of work, then returned. The employee was treated for his injuries by Dr. Dawoud, who prescribed physical therapy and released the employee to full duty without restrictions. The only issue presented for trial was the extent of the employee's permanent vocational disability, if any.

His attorney referred the claimant to Dr. Tewfik E. Rizk, whom he saw a number of times.

Although diagnostic testing revealed no evidence of injury, Dr. Rizk diagnosed muscular fibrosis and thoracic outlet delay, provided conservative care and estimated the claimant's permanent whole body impairment to be 25 percent.

The employer's insurer referred the claimant to Dr. John D. Brophy, who reviewed Dr. Rizk's records, diagnosed a soft tissue injury, consulted with another board certified specialist and examined the claimant. Dr. Brophy concluded that Dr. Rizk's diagnoses were erroneous. Dr. Brophy opined at trial that the claimant did not have any permanent impairment. Both doctors testified by deposition.

The claimant testified that he continues to have disabling pain. He is currently working for another employer, earning more than $40,000.00 per year as a service manager.

The trial court rejected the opinions of Dr. Rizk in favor of those of Dr. Brophy and dismissed the claim for insufficient evidence of permanency. Appellate review of findings of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The extent of an injured worker's permanent vocational disability is a question of fact. Collins v. Howmet Corp., 970 S.W.2d 941, 943 (Tenn. 1998).

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 that 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 appellant first contends the trial court erred in accepting the opinions of Dr. Brophy, instead of those of Dr. Rizk, because Dr. Rizk was a treating physician. Trial courts are not required to accept the opinion of a treating physician over any other conflicting expert medical testimony. 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. 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, 676-7 (Tenn. 1983).

From our independent examination of the record, we are unable to find the preponderance of the evidence to be otherwise than as found by the trial court. The first issue is accordingly resolved in favor of the appellee.

The appellant next contends that the trial court erred in disallowing his post-trial motion for

relief based on "newly discovered evidence," particularly contained in an affidavit from Dr. Rizk. Having rejected Dr. Rizk's testimony at trial, we cannot say the trial court abused its discretion by not accepting additional information contained in the doctor's affidavit. Moreover, we cannot say the statements contained in the affidavit constitute newly discovered evidence. Evidence is not newly discovered if it was known at the time of the trial or could have been discovered before trial. Seay v. City of Knoxville, 654 S.W.2d 397 (Tenn. Ct. App. 1983). Information and opinions held by Dr. Rizk could easily have been discovered before trial.

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

____

JOE C. LOSER, JR

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

BONNER McCLUSKEY v. F&M INCORPORATED, ET AL.

Circuit Court for Shelby County
No. 301307-6 T.D.

No. W2001-00468-SC-WCM-CV - Filed February 1, 2002

JUDGMENT ORDER

This case is before the Court upon motion for review filed by the plaintiff-appellant, Bonner McCluskey, 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;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied.

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 and his surety for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating