IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
October 18, 2001 Session

BETTY LOUISE MOSS v. FINDLAY INDUSTRIES, INC.

Direct Appeal from the Chancery Court for Warren County
No. 7186 Charles D. Haston, Judge

No. M2000-02632-WC-R3-CV - Mailed - January 15, 2002
Filed - February 15, 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. The trial court awarded benefits for vocational impairment of 55 percent to each of the plaintiff's arms. The defendant insists that the award is excessive, because the anatomical rating was only 10 percent, as a result of carpal tunnel release. The judgment is affirmed.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and HOWELL N. PEOPLES, SP. J., joined.

Patrick A. Ruth, Nashville, Tennessee, for the appellant, Findlay Industries, Inc.

William Joseph Butler, Lafayette, Tennessee, for the appellee, Betty Louise Moss.

MEMORANDUM OPINION

At the outset we are constrained to make an observation about the procedure employed in this case. It was referred, on motion of the plaintiff, to a Special Master to "try this workers' compensation matter," to conduct an evidentiary hearing, and file a Report which sets out all issues and make Findings of Fact and Conclusions of Law, pursuant to Rule 53, Tennessee Rules Civil Procedure.

The Special Master heard the case, and filed a form report which was approved and adopted by the trial judge who noted that no objections were made to the Master's Findings of Fact. The

parties recognized that the Special Master,[1] notwithstanding the designation, was, in effect and practice, sitting as a court.

I.

The complaint alleged that the plaintiff sustained injuries to her arms, hands, and shoulders as a result of repetitive job-related activities.

There is no answer in the transcript. We assume this omission to be an oversight, but we glean from the defendant's brief that the dispositive issue is the extent of vocational impairment.

The plaintiff is 44 years old. She began working for the defendant in 1994 as an unskilled worker. In February 1999 she developed problems with her hands and wrists, for which she was given anti-inflammatory medication by Dr. Arms. She next saw Dr. Rogers, who prescribed braces, further medication and finally recommended surgery in July 1999 on both wrists. She returned to work six weeks after the carpal tunnel release with work restrictions lifted. On the day of trial, the plaintiff was in the same job since returning to employment about one year previously, making 140 percent production, the maximum possible. She was earning, at the time of trial, a higher wage than before her injury.

She was released to full duty by Dr. Rogers, her treating physician, in the summer of 1999, who instructed her to return if further problems developed. She returned for treatment of tendinitis, not carpal tunnel syndrome, and she has not sought treatment for her job-related injury, and she has missed no time from her job.

The plaintiff was examined and evaluated, at her attorney's request, by Dr. S. M. Smith who opined that she had a 10 percent permanent impairment to each arm. He recommended certain work restrictions involving repetitive and gripping motions.

The Special Master said, from the Bench, "so I think her vocational disability is 55 percent to the right and 55 percent to the left. . . .", and judgment was entered accordingly. The defendant appeals and presents issues for review which are *de novo* with a presumption of correctness unless the evidence otherwise preponderates. Rule 13(d) T.R.A.P.

II.

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[1] Who is the Clerk and Master. In ***Ferrell v. CIGNA Prop. & Cas. Ins.Co.***, 33 S.W.3rd 731 (Tenn. 2000) the procedure employed was similar to the case at Bar, and was disapproved because the statutory scheme was not followed. The judgment was nevertheless affirmed because the Clerk and Master was a *de facto* judge. So far as we know, the issue of concurrent findings in workers' compensation cases has not been addressed. It is not presented as an issue. We reiterate that the referral by a trial court to a Special Master for the purpose of making findings and conclusions on the main issues in controversy in a workers' compensation case is improper. *See*, ***Frazier v. Bridgestone/Firestone, Inc.*** 2001 WL 1504481 (Tenn. Sp. Workers Comp.).

In the first issue, the defendant insists that the finding of 55 percent vocational disability to each arm is excessive, and unsupported by competent evidence.

Vocational disability is the paramount issue for determination. ***Orman v. Williams Sonoma, Inc.***, 803 S.W.2d 678 (Tenn. 1991). In ***Corcoran v. Foster Auto GMC, Inc.,*** 746 S.W.2d 452 (Tenn. 1988) the point is made that vocational disability is to be distinguished from anatomical disability. The Supreme Court further explained:

> [9-13] In cases of unscheduled injuries, once the threshold issue of permanency is established by competent medical evidence, the inquiry becomes how much the injury impairs the employee's earning capacity, that is the extent of vocational disability. On this issue, nonexpert evidence is also relevant, including the testimony of the injured employee. "In this case, as in all workmen's compensation cases, the claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded." ***Tom Still Transfer Co. v. Way***, 482 S.W.2d 775, 777 (Tenn. 1972). *See also* ***Floyd v. Tennessee Dickel Distilling Co.,*** *supra*, 225 Tenn. at 68, 463 S.W.2d at 686. In determining vocational disability, the question is not whether the employee is able to return to the work being performed when injured, but whether the employee's earning capacity in the open labor market has been diminished by the residual impairment caused by a work-related injury. *See, e.g.*, ***Holder v. Wilson Sporting Goods***, *supra*, at 108; ***Prost v. City of Clarksville Police Dept.***, 688 S.W.2d 425, 427 (Tenn. 1985). As this Court stated in ***Greenville Cabinet Co. v. Ramsey***, 195 Tenn. 409, 416, 260 S.W.2d 157, 160 (1953) (citation omitted; emphasis in original), "'[t]he test is whether or not there has been a decrease in [the employee's] *capacity* to earn wages in any line of work available to the [employee]. . . .'" This is so because "the whole theory of the Workmen's Compensation statute is that compensatory income is substituted for loss of earning capacity." ***Ware v. United States Steel Corp.***, 541 S.W.2d 107, 111 (Tenn. 1976). That an injured worker is re-employed after an injury is a relevant factor to the determination of the extent of vocational disability, regardless of whether the employee returns to the same employment or to some other work. Nevertheless, this factor is not controlling and is only one of many that must be considered. Despite the employee's return to any employment, if the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury, then that is what is meant by vocational disability for the purposes of Workers' Compensation. The assessment of the extent of vocational disability is based on all pertinent factors taken together. "The assessment of permanent . . . disability is based upon numerous factors, including the employee's skills and training, education, age, local job opportunities, and his capacity to work at the kinds of employment available in his disabled condition." ***Robertson v. Loretto Casket Co.***, 722 S.W.2d 380, 384 (Tenn. 1986).

It is uncontroverted that the plaintiff is markedly unskilled, and barely literate. She has performed a variety of jobs for Findlay, and apparently was a dedicated, loyal employee. All of the

jobs were hand-intensive, and she testified that she could no longer perform most of the tasks required because of her hand limitations. After six-weeks off because of surgery, the plaintiff returned to work on a cutting machine. The thrust of her testimony is that she simply toughed it out, although she had a great deal of problems with hand pain, swelling and numbness. She also testified that she continued to have problems with her daily living activities; driving an automobile, operating household appliances, performing traditional tasks at her residence, and the like.

A vocational expert, Pat Hyder, whose qualifications are not questioned, testified that he considered a history of the plaintiff's work experiences, education, and physical limitations, and reviewed all of her medical records. Aptitude testing revealed bare literacy. The computer program developed by the Department of Labor was utilized by Mr. Hyder; from it he concluded that while the plaintiff had 35 available jobs she could do with no restrictions the program was unable to match the plaintiff with any job when her permanent restrictions were taken into account. For this reason Mr. Hyder was of the opinion the plaintiff had sustained a 100 percent vocational disability.

Cross-examination of Mr. Hyder cast many thoughtful doubts on the value of his testimony, especially when superimposed upon the fact that the plaintiff, as stated, returned to work at 140 percent of quota. But this factor is not controlling, ***Corcoran***, *supra*; if the plaintiff's ability to earn wages in any form of employment that would have been available to her in an uninjured condition is diminished by an injury, she is vocationally disabled.

The defendant offered no countervailing testimony to that of Mr. Hyder.

We are unable to find that the evidence preponderates against the finding of 55 percent vocational disability to each arm.

III.

The appellant presents for review the issue of whether the plaintiff's compensation rate was accurately determined.

The trial court determined the rate to be $258.51, which was based upon wages of $19,000.00 during the preceding 52 weeks.

The plaintiff testified that she missed 16 days of work during the 52 weeks preceding her injury. The trial court deducted 16 days [three weeks] from 52 and divided $19,000.00 by 49, thus arriving at $258.51. The trial court relied on T.C.A. §50-6-102(a)(1) which provides that if the employee lost more than seven days during such period when he did not work, the earning for the remainder of 52 weeks shall be divided by the number of weeks remaining after the time lost has been deducted.

The operative words of the statute are "if the employee lost more than seven days." It was the legislative intent, ***Russell v. Genesco, Inc.***, 651 S.W.2d 206 (Tenn. 1983) that "lost" days are those due to "sickness, other disability and fortuitous events." The plaintiff lost work apparently owing to the sickness of her husband, which she argues is a "fortuitous event." We agree.

IV.

The appellant next complains of the allowance of certain discretionary costs associated with the evaluation of the plaintiff by Dr. S. M. Smith and the taking of his deposition.

We note that Dr. Smith was not a treating physician. He was simply a hired expert, but the only one who testified in this case.

The treating physician, Dr. Rogers, did not testify, and did not file a Form C-32, although it was established that he gave the plaintiff a 10 percent vocational disability rating, the same as Dr. Smith. The trial court stated that "if someone had filed a C-32 from Dr. Rogers, I would have excluded Dr. Smith's deposition. . . ."

The only proof presented was the testimony of Dr. Smith, and we are somewhat baffled by the argument that his testimony was unnecessary. Rule 54 allows the court to award costs for reasonable and necessary expert witness fees, reversible only if the reviewing court finds an abuse of discretion. We can find no abuse of discretion. ***Seals v. England/Corsair Uph. Mfg. Co.***, 984 S.W.2d 912 (Tenn. 1999).

The judgment is affirmed. Costs are assessed to the appellant, Findlay Industries, Inc. The case is remanded for all appropriate proposes.

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WILLIAM H. INMAN, SENIOR JUDGE

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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, Findlay Industries, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM