IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 26, 2001 Session

DONALD PICKLESIMER v. MCKEE FOODS CORPORATION

Direct Appeal from the Chancery Court for Hamilton County
No. 99-0435 W. Frank Brown III, Chancellor

No. E2000-02694-WC-R3-CV - Filed January 7, 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. The trial court awarded the employee 72 percent permanent partial disability to the body as a whole. The employee appealed insisting his disability was 100 percent. Judgment of the trial court is affirmed.

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

THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, J. and BYERS, SR. J., joined.

Robert D. Bradshaw, of Chattanooga, Tennessee, for appellant, Donald Picklesimer.

J. Bartlett Quinn and Charles D. Lawson, of Chattanooga, Tennessee, for appellee, McKee Foods Corporation.

MEMORANDUM OPINION

In this case, the trial court awarded the employee, Donald Picklesimer, 72 percent permanent partial disability to the body as a whole. The employee has appealed contending his disability should be fixed at 100 percent.

Factual Background

At the time of the trial, the employee was 39 years of age and was a high school graduate. Most of his work experience had been as a truck driver. On November 30, 1998, he was employed as a long-haul truck driver for the defendant, McKee Foods Corporation, when he was driving in the state of Ohio and stopped to make a delivery. He injured his back when he raised the wooden door to unload the truck. He described the incident as feeling sharp pain in his low back with later

numbness in his left leg.

The employee eventually came under the care of Dr. Hodges who determined he had a ruptured disc and surgery was performed on about January 29, 1999. His leg continued to swell and never did stop hurting. It was later determined he had a blood clot and he was hospitalized several times for treatment of this condition. He returned to work on about June 1, 1999 and was placed in a transition program where he worked at different light duty jobs until October 8, 1999, when Dr. Hodges stopped him from working.

During the trial, the employee testified his back still bothered him; that he could not sit or stand for a very long period of time; and that he was not able to do any kind of work.

Medical Evidence

Dr. Scott D. Hodges, an orthopedic surgeon, testified by deposition and stated a MRI examination showed a small ruptured disc to the left at L5-S1, which was causing some impingement on the S1 nerve root; that his medical impairment was 10 percent to the body as a whole; and that he could not return to work as a truck driver because he could not sit for long periods of time and because of his susceptibility to have blood clots. The doctor indicated he still continued to have problems after surgery and during October 1999 x-rays revealed the L5-S1 disc had collapsed. He testified further surgery was not recommended primarily because of his risk for more clotting problems.

As to the employee's ability to work, Dr. Hodges stated at one point during his examination that he did not think he would be able to work. He imposed restrictions in lifting, bending, stooping, etc. On the lifting restriction, he said he should not lift more than 15 pounds occasionally and not more than 10 pounds on a frequent basis. On sitting and standing, he said he should not sit or stand longer than 30 minutes without moving around. At another point during his cross-examination testimony, he was asked:

> Q. And Doctor, to make sure that I understand your testimony correctly, you're not testifying that there is no job in the community that Mr. Picklesimer can perform?
>
> A. No, I'm not testifying to that.
>
> Q. You're just saying that it would be an employer that would be able to accommodate those restrictions that you have assigned, those as well as Dr. Jolley?
>
> A. Correct.

Dr. Kellie A. Jolley, an internal medicine physician, treated the employee for his blood clots and also testified by deposition. She stated he had a clot in his left leg that was probably due to the

disc surgery and he was hospitalized for this condition as well as a pulmonary embolism which later developed. She said his clots eventually resolved and he should remain on blood thinner for about one year. She was of the opinion his medical impairment was 2 percent to the body as a whole from this condition and indicated he should avoid long periods of sitting which probably meant he could not resume his truck driving work.

Vocational Evidence

Dr. Kenneth Smith, a rehabilitation consultant, who maintains his residence and office in Dalton, Georgia, testified orally and told the court he was of the opinion the employee was unemployable and that he based that on the medical records of Drs. Hodges and Jolley and two other physicians who had seen the employee along with the interview of the employee. He stated he reached this conclusion as a result of the medical testimony which indicated the employee could not work 8 hours a day for a five-day week.

Dorothy Edwards, also a vocational consultant, testified orally and told the court she was of the opinion the employee had a 67 percent vocational disability and that he would be able to work under the medical restrictions for sedentary-light jobs. She said she performed a local job survey and found there were positions available with his limitations and restrictions.

Findings of Trial Court

The trial court found the employee was not totally disabled from earning an income; that his total medical impairment was 12 percent to the body as a whole; that the statutory provisions of Tenn. Code Ann. § 50-6-241 placed a cap of six times the medical impairment which resulted in 72 percent disability to the body as a whole; and that the employee did not qualify for an increased award under the provisions of section 242 as he could not qualify under the first and second factors of the statute.

Issues on Appeal

Two questions are raised in the appeal. First, it is insisted the evidence preponderates against the finding of 72 percent permanent partial disability and in favor of a finding of permanent total disability. In the second issue, the employee assigns error on the trial court in refusing to grant motions to alter or amend the judgment or grant a new hearing based upon an affidavit of Dr. Scott D. Hodges.

Standard of Review

An appellate review in a workers' compensation case is *de novo* with a presumption of the correctness of the findings of the trial court unless we find the preponderance of the evidence is against the conclusion of the court. Tenn. Code Ann. § 50-6-225(e)(2). However, the *de novo* review does not carry a presumption of correctness to a trial court's conclusions of law but is confined to factual findings. ***Union Carbide v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993).

Analysis

As to the preponderance of the evidence question, we find the trial court was faced with conflicting evidence with regard to the extent of the employee' disability. The employee and vocational witness Smith concluded the disability was 100 percent. Dr. Scott and Dr. Jolley did not go that far in expressing an opinion. Both doctors agreed the employee could not return to his job of driving a truck. Dr. Scott and vocational witness Edwards believed he could do work where his restrictions were accommodated. The trial court concluded the employee was not totally disabled but awarded the highest percentage of disability under the provision of the statute. In our review of the record, we cannot say the evidence preponderates against the award of disability.

The issue with regard to the court's denial of the Rule 59 motions to alter the judgment or grant a new hearing is also without merit. The affidavit in support of these motions contained additional evidence from Dr. Hodges which attempted to explain or clarify some of his statements in his deposition. This affidavit apparently resulted from a different interpretation by the two vocational witnesses as to the restrictions imposed on the employee's ability to work. The trial court held the evidence was not sufficient under the "newly discovered evidence" rule. The employee argues the court misapplied the law and cites the case of ***Harris v. Chern***, 33 S.W. 3d 742 (Tenn. 2000) as authority for requiring a more relaxed rule.

In ***Harris*** the Supreme Court was dealing with Rule 54 which applies to summary judgment proceedings. In that case the court set forth the standard in determining whether a grant of summary judgment should be revised. In the present appeal, we are dealing with a motion to revise a judgment under Rule 59 T.R.C.P., which has been filed after a hearing on the merits of the case. We find the court was correct in its ruling to deny the witness a second opportunity to clarify statements made during the course of the deposition and that the ***Harris*** ruling does not apply to the facts of this appeal.

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

_____

ROGER E. THAYER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

DONALD PICKLESIMER V. MCKEE FOODS CORPORATION
Hamilton County Chancery Court
No. 99-0435

No. E2000-02694-WC-R3-CV - Filed: January 7, 2001

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the employee appellant, Donald Picklesimer for which execution may issue if necessary.

1/7/02