IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 25, 2001 Session

TIMOTHY TIDWELL v. VERPLANK ENTERPRISES, INC.

Direct Appeal from the Chancery Court for Lawrence County
No. 9613-99 Jim T. Hamilton, Circuit Judge

No. M2000-00551-WC-R3-CV - Mailed - January 28, 2002
Filed - March 4, 2002

This workers' compensation appeal has 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.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J. and JOSEPH C. LOSER, JR., SP. J., joined.

Joseph M. Huffaker, Nashville, Tennessee, for the appellant, Verplank Enterprises, Inc.

Robert D. Massey, Pulaski, Tennessee, for the appellee, Timothy D. Tidwell.

OPINION

Facts

At the time of this trial, which was held on January, 4, 2000, the plaintiff was 36 years of age. He had graduated from high school and had vocational training in combination welding. The plaintiff was in the United State Air Force for six years where he worked as a combination welder. The plaintiff's work history and training are almost exclusively as a welder.

On July 28, 1998, the plaintiff was working for the defendant. On that date, he was moving a casket lid from a saw to a table. The plaintiff felt a burning sensation in his shoulder as he did so.

The defendant referred the plaintiff for medical care and the plaintiff was seen by Dr. Lloyd Johnson, an orthopedic surgeon, a physician approved by the defendant. The plaintiff was seen by Dr. John McInnis on one occasion at the request of the defendant for evaluation. The plaintiff was unable to continue working for the defendant because of the injury.

Medical Evidence

Dr. Johnson first saw the plaintiff on September 29, 1998, and determined he had sustained a cervical strain and an injury to his right shoulder. Dr. Johnson saw the plaintiff again on October 13, 1998 after an MRI had been done. The MRI showed the plaintiff had a bulging disc at C4-C5. Dr. Johnson was of the opinion the plaintiff's bulging disc was caused by the injury of July 28, 1998. Dr. Johnson continued to see the plaintiff over the course of several months, during which he found the plaintiff's range of motion was diminished and that he was continuing to have pain as a result of the injury.

Dr. Johnson placed permanent restrictions of lifting up to 50 pounds frequently, 65 pounds occasionally and to not work with a helmet (hard hat) for more than one hour at a time twice a day. Dr. Johnson found the plaintiff suffered a 12 percent whole body permanent disability as a result of the injury.

Dr. John McInnis examined the plaintiff on behalf of the defendant for the purpose of evaluation. The examination was done on April 15, 1999. Dr. McInnis found there was some loss of motion in the plaintiff's spine and that he had a chronic strain of the muscle in the neck and of the trapezius muscle. Dr. McInnis would restrict the plaintiff from lifting more than five or ten pounds above his shoulders and was of the opinion his work as a welder may accentuate the plaintiff's neck pain. Dr. McInnis was of the opinion the plaintiff had sustained a 5 percent permanent medical impairment to the body as a whole.

Discussion

The defendant's first contention that the evidence does not support the finding of the trial court that the plaintiff suffered a worker's compensation disability of 72 percent is because the trial court relied upon the testimony of Dr. Johnson, who, according to the defendant, did not properly evaluate the plaintiff under the A.M.A. guidelines.

The defendant's complaint is that Dr. Johnson's evaluation is not in compliance with the A.M.A. Guidelines because Dr. Johnson did not use an inclinometer in determining the range of motion as set out in the guidelines. Dr. Johnson testified he followed the A.M.A. Guideline and these allowed the use of other methods of determining loss of motion if the injury did not fit within the definition of the Guidelines. He was of the opinion that the plaintiff's injury fit the exception and proceeded accordingly.

The defendant insists that Tennessee Code Annotated § 50-6-204(d)(3), which directs the use of the guidelines is for the purpose of standardizing the method of rating disabilities. *See Corcoran v. Foster Auto GMC, Inc.*,746 S.W.2d 452 (Tenn. 1988). The defendant argues, therefore, that Dr. Johnson's evaluation should be rejected.

The defendant contends that the only reliable medical testimony is that of Dr. McInnis, who used the inclinometer in determining the plaintiff's range of motion. The defendant argues, therefore, that the impairment rating of 5 percent found by Dr. McInnis should control. Based upon this, the defendant says the award should not be more than 30 percent vocational impairment.

We find the defendant's assertions on the issue not to be persuasive. Dr. McInnis found the only

injury the plaintiff suffered was a sprain to the neck and shoulder. He did not find the disc problem to be connected to the injury. Dr. McInnis only saw the plaintiff for approximately 20 minutes. Dr. Johnson, on the other hand, saw the plaintiff for a period of time which encompassed 21 visits which ranged from 20 to 40 minutes each.

Dr. Johnson testified he followed the A.M.A. Guidelines in making the evaluation of 12 percent permanent impairment. There is no testimony in the record to refute Dr. Johnson's testimony.

The trial judge made this observation on the medical evidence:

> The Court is of the opinion that Dr. Johnson [is] eminently qualified. Finally, the court is of the opinion that Dr. Johnson is more familiar with Mr. Tidwell's condition having treated him on twenty-one (21) visits for an average of forty (40) minutes. The court feels after reviewing the C-32 Form and reading the deposition of Dr. Johnson and after having reviewed the deposition of Dr. McInnis that Dr. Johnson's rating of twelve percent (12%) percent [sic] to the body as a whole is correct and his testimony is more credible under the circumstances.

When there is competing testimony between expert witnesses, the trial judge may accept the testimony of one or more of the witnesses over the testimony of others. *Kellerman v. Food Lion Inc.*, 929 S.W.2d 333 (Tenn. 1996). Although we may make an independent assessment of the medical evidence when it is presented on depositions and reach a different conclusion from that of the trial judge, *Cooper v. INA*, 884 S.W.2d 446 (Tenn.1994), we see noting in this case to cause us to reach a conclusion different from that of the trial judge.

The defendant next says the award of six (6) times the impairment rating is not supported by the evidence in this case.

The defendant argues that there is no evidence to support an award of more than five (5) times the impairment rating because the trial court failed to make a finding of fact which detailed the reason for exceeding the five (5) percent limit.

The record in this case shows the trial judge made fourteen (14) findings of why he was making the award to the plaintiff. We do not think it necessary to set them all out. However, we find the following significant.

In the trial court's well-reasoned opinion, the following justifications can be found to justify the its award using the multiple of six (6):

* * * * * *

> (d) Mr. Tidwell had been a laborer or welder during his entire work history all requiring work with his neck in a semi-flexed position and requiring the use of his right arm;

* * * * * *

(f) Mr. Tidwell has no other vocational training or work experience;

(g) Mr. Tidwell had applied for work through numerous personnel services but had not been hired and he had, in fact, followed up with these agencies on two (2) occasions after his initial application but had not been hired for work;

(h) Mr. Tidwell had additionally applied for a specific position as an electrician's helper but could not perform the work due to the physical demands of the job;

* * * * * *

(k) Mr. Tidwell is no longer able to work as a welder due to his doctor imposed restrictions;

(l) Mr. Tidwell's ability to work in an industrial setting has been severely limited by his inability to do repetitive work with his right arm and to hold his neck in a flexed position for a long time;

(m) Mr. Tidwell has no skills or training which allow for him to do less strenuous activity;

and

(n) Local job opportunities and his capacity to [do] work with his work restrictions at the type of employment available are severely limited (All these facts are found at pages 4-5 of the trial court's Order.

Finally, we do not find the trial court erred in ordering the payment of this award in lump-sum.

The trial judge found the plaintiff could wisely manage the money if it were to be paid in a lump sum, that the plaintiff wished to pay off a mortgage in the amount of $14,000.00 and a vehicle lien in the amount of $2,000.00. We do not find the trial judge abused its discretion in this regard., s*ee, Clayton v. Cookeville Energy Inc.*, 824 S.W.2d 134 (Tenn. 1992) and affirm the judgment of the trial court.

The cost of this appeal is taxed to the defendant.

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JOHN K. BYERS, 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 defendant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM