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

JEFFERY A. WRIGHT v. JOHNSTON COCA-COLA & DR. PEPPER BOTTLING CO., ET AL.

Direct Appeal from the Chancery Court for Bradley County
No. V-99-336 Jerri S. Bryant, Chancellor

Filed March 25, 2002

No. E2000-02542-WC-R3-CV

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. The trial court found the plaintiff suffered a 5 percent permanent medical impairment as a result of an injury sustained while working for the defendant. We affirm the judgment of the trial court.

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 E. RILEY ANDERSON, J., and ROGER E. THAYER, SP. J., joined.

R. Jerome Shepherd, Cleveland, Tennessee, for the appellant, Jeffery A. Wright.

Paul D. Hogan, Jr., Knoxville, Tennessee, for the appellees, Johnston Coca-Cola & Dr. Pepper Bottling Co. and Travelers Property & Casualty Co.

MEMORANDUM OPINION

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in workers' compensation cases. *See*

Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988).

The trial court found the plaintiff suffered a 5 percent permanent medical impairment as a result of an injury sustained while working for the defendant. The plaintiff is still employed by the defendant at the same or greater wage. The trial judge awarded compensation of 12.5 percent. The plaintiff argues the evidence supports a higher award, that the defendant was not entitled to have an independent medical examiner and that the trial court should have ordered the defendant to furnish a list of three new physicians after the case was tried. We affirm the judgment of the trial court.

Facts

The plaintiff, 36 years of age at the time of trial, is married and has four children. He has a high school education. The plaintiff previously worked as an emergency medical technician for two years. He began work for the defendant in 1994 as a truck driver delivering Coca-Cola products to retailers. On September 10, 1999, the plaintiff lifted a tank filled with Coca-Cola from a truck to the ground. As he sat the tank on the ground, he felt a sharp pain in his back.

The plaintiff was seen by various physicians after the event and returned to work in December of 1999. He is still working for the defendant as a truck driver delivering the defendant's products. However, he is working at a job that accommodates the restrictions placed by the physicians by limiting the need to lift. So far as the record shows, the plaintiff has no difficulty performing his work.

Medical Evidence

The medical evidence was supplied by way of the depositions of four doctors: Dr. Donald Gibson, a general practitioner, and Dr. Walter Boehm, a neurosurgeon, on behalf of the plaintiff; and Dr. Scott Hodges, a doctor of osteopathy, and Dr. Robert H. Haralson, III, an orthopedic surgeon, on behalf of the defendant.

Dr. Gibson first saw the plaintiff on October 26, 1999. He testified he observed the plaintiff limp, he found paralumbar muscle spasms and a loss of sensation to sharp stimuli along the outer left thigh that continued into the foot. He also found the plaintiff had loss of motion in lumbar flexing forward and back as well as pain over the lower sacral joint. He was of the opinion it was "too late for surgery" on the plaintiff. Dr. Gibson referred the plaintiff to Dr. Hodges when he did not respond to treatment.

Dr. Gibson next saw the plaintiff on February 16, 2000. He found the plaintiff had made very little progress from October of 1999. He found the plaintiff had a ruptured disc at the L4-L5 level with radiculopathy. He opined the plaintiff had sustained a 33 percent permanent partial medical disability to the body as a whole.

Dr. Boehm first saw the plaintiff on November 3, 1999. He found the plaintiff had post-traumatic back pain with intermittent left lower extremity parathesia caused by a left side disc

rupture at the L4-L5 vertebra. Dr. Boehm found the plaintiff limped and had back pain as a result of the injury. He recommended surgery for the relief of pain. Dr. Boehm next saw the plaintiff on March 13, 2000, at which time he found the plaintiff had sustained a 15 percent permanent medical impairment to the body as a whole as a result of the injury. He recommended the plaintiff not lift more than 20-25 pounds at a time and restricted bending and stooping.

Dr. Hodges saw the plaintiff on November 9, 1999, on referral from a Dr. Charles Arnold who first saw the plaintiff after the injury. Dr. Hodges found the plaintiff walked normally with a slight scoliotic tilt. He conducted a Waddell's test which he interpreted as indicating the plaintiff was magnifying his symptoms. Dr. Hodges found the x-rays showed the plaintiff had a disc protrusion at the L4-L5 level. He found the plaintiff had a 2 percent permanent medical impairment to the body as a whole and was of the opinion he could lift 60 pounds occasionally and 40 pounds frequently. Dr. Hodges felt the plaintiff was not a good candidate for surgery.

Dr. Haralson[1] found the plaintiff tilted slightly forward, had no muscle spasm and had some muscular tightness and no tenderness over the sciatic notches where the nerve in question is located. He found a range of motion test invalid because the plaintiff hardly moved. Dr. Haralson testified the numbness the plaintiff reported in his leg and foot was not in the distribution of a nerve root and could not be explained. At any rate, Dr. Haralson did not relate the reported numbness to the injury. Dr. Haralson found the plaintiff had a disc protuberance at the L4-L5 level, but he opined the plaintiff sustained only a back sprain as a result of the injury. He found the plaintiff suffered a 5 percent permanent partial medical impairment to the body as a whole and was not in need of surgery.

Discussion

The trial judge found the testimony of Dr. Haralson was entitled to the most weight and found the 5 percent medical impairment rating given by him was the most acceptable over the other expert opinions. The trial judge has the discretion to accept the opinion of one medical expert over that of another medical expert or experts. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). We find the trial judge did not abuse her discretion in this matter.

The finding of the trial judge was obviously influenced by a video taken of the plaintiff in the area of his house and at a grocery store. Specifically, the trial judge stated:

> In my opinion the video showed a very slight, if any, limp at home. Didn't show anything at the Food Lion incident. Certainly nothing as pronounced as what was demonstrated in court today. I think that was somewhat bridged with the last witness that testified that said sometimes–Mr. Turbid said sometimes Mr. Wright has a limp and sometimes he doesn't. And that could very well be why these doctors rate him

[1] Dr. Haralson was the editor of the musculoskeletal chapter of the AMA Guidelines.

5 percent one day and 33 percent the other and 2 percent one day and finally Dr. Boehm at 15 percent.

From the record we find the trial judge did not abuse her discretion in making this ruling.

The plaintiff asks us to independently assess the medical evidence because it was all presented by deposition.

We may, of course, make an independent assessment of the depositions because we are in as good a position as the trial judge to determine the credibility of the testimony. *Cooper v. INA*, 884 S.W.2d 446 (Tenn. 1994). However, unless there is something inherent in the depositions which undermines their reliability, we do not reach a conclusion different from the trial judge merely because we may do so.

Independent Medical Examiner

The plaintiff contends the defendant was not entitled to an independent medical examination. The relevant statute, Tennessee Code Annotated section 50-6-204(d)(5), provides: "[i]n case of dispute as to the injury, the court may, at the instance of either party, or on its own motion, appoint a neutral physician . . . to make an examination of the injured person and report such physician's findings to the court . . . ." The facts and the statute support the ruling of the trial judge.

The defendant argues the statute supports its position in this case. The record shows a hearing was held on a motion by the defendant for an independent examination and the trial judge concluded the evidence presented warranted the examination. There is no presentation of the hearing in the record, and we presume the trial court properly exercised its discretion in the matter.

Request of Plaintiff to See a Different Group of Physicians

This issue is for most purposes moot. The plaintiff submitted to back surgery by a Dr. Finelli of Knoxville. Dr. Finelli is one of the three physicians whose names were submitted to the trial court as physicians who are authorized to furnish future medical care; it would seem probable that this physician will provide follow up care for the plaintiff.

If travel to Knoxville becomes too onerous, the plaintiff may request the trial court to modify the order in the best interest of the plaintiff.

Order of Satisfaction of Judgment

The defendant abandoned this position on appeal.

The cost of the appeal is taxed to the defendant.

JOHN K. BYERS, SENIOR JUDGE

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ORDER

This case is before the Court upon motion for review filed on behalf of Jeffery A. Wright 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; 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, Johnston Coca Cola and Dr. Pepper Bottling Company, et al., for which execution may issue if necessary.

PER CURIAM