IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 10, 2002 Session

JOHNNY A. STEPHENSON v. CONTAINER PRODUCTS CORPORATION

Direct Appeal from the Circuit Court for Anderson County
No. 99LA0361 James B. Scott, Jr., Judge

Filed April 24, 2002

No. E2001-00385-WC-R3-CV

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 found that the plaintiff had suffered a work-related injury and awarded permanent partial disability of thirty percent to the body as a whole. We affirm the judgment of the trial court but reduce the amount of the award to twenty percent (20%) vocational disability.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and ROGER E. THAYER, SP. J., joined.

Jill A. Hanson, Nashville, Tennessee, for the appellant, Container Products Corporation.

Bruce D. Fox and April D. Carroll, Clinton, Tennessee, for the appellee, Johnny A. Stephenson.

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 finding, 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 courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

The plaintiff was thirty-five years of age at the time of this trial. He is a high school graduate and he has attended three years of college.[1] The plaintiff testified that on July 26, 1999, while welding boxes for the defendant, the plaintiff picked up a part and "felt something pop" in his back. When he awoke the next day, he "could barely move," and he contacted his supervisor to inform him that he would not be able to work that day. He then began treatment with Dr. David Fardon. Dr. Fardon later diagnosed the plaintiff with a herniated disc.

On his second visit to Dr. Fardon, the plaintiff was recommended to begin physical therapy. He informed Dr. Fardon that he could not afford physical therapy because his insurer would not approve the visits. Dr. Fardon then performed an MRI which revealed the herniated disc between the seventh and eighth thoracic vertebrae.

When the plaintiff returned to work on July 28, 1999, he was notified by his employer that he was terminated for performing defective welding on some boxes.

At the time of the trial of this case the plaintiff was employed as a welder.

Medical Evidence

The medical evidence for the purpose of the issue raised in this case was presented by the deposition of Dr. David Fardon, the plaintiff's treating orthopedist.

Dr. Fardon testified that an MRI performed on the plaintiff revealed a herniated disc between the seventh and eighth thoracic vertebra. Dr. Fardon also testified that the symptoms the plaintiff was having as they related to this herniated disc were caused by the incident that the plaintiff suffered on July 26, 1999, in the course and scope of his employment for the defendant.

Dr. Fardon testified that according to the AMA Fourth Edition Guidelines, the plaintiff had a 5 percent permanent partial disability to the body as a whole due to the herniated disc. Dr. Fardon also testified that he would place the plaintiff on restrictions involving any heavy lifting (defined by Dr. Fardon as any lifting of a "ballpark figure" of thirty pounds or more), repetitive twisting and any combination of lifting and twisting.

Dr. Fardon did not recommend surgery for the plaintiff and was of the opinion that the defendant can work at some welding job. He did not place any restrictions on the plaintiff's ability to sit, stand or walk.

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[1] The record is not clear on the matter of college which the defendant attended. This is perhaps 3 years of trade school to learn to weld.

Vocational Experts

Dr. Craig Colvin testified that he is employed by the University of Tennessee in the field of disability management, primarily regarding vocational rehabilitation.

Dr. Colvin testified that the restrictions imposed upon the plaintiff by Dr. Fardon would prevent him from doing any work other than light work and some jobs in the category of "moderate" work. Dr. Colvin also testified that thirty-five to forty percent of the jobs for which the plaintiff was qualified prior to the incident on July 26, 1999, were no longer available to the plaintiff because of the restrictions imposed by Dr. Fardon.

Discussion

The defendant asserts the record does not support a finding that the plaintiff suffered a 30 percent vocational disability, that the trial court should not have given any credence to Dr. Colvin's testimony or awarded discretionary costs to the plaintiff for Dr. Colvin's services, and says the trial judge failed to make findings of fact to justify an award which exceeds four times the medical impairment rating as required by Tenn. Code Ann. § 50-24-241(c). We find no merit in the first two issues raised. The testimony of Dr. Fardon that the plaintiff sustained a 5 percent permanent partial medical disability and the testimony of Dr. Colvin, whom the trial judge found to be credible, that the plaintiff had suffered a 35 to 40 percent vocational disability is sufficient to find a 30 percent impairment.

Dr. Colvin testified in person at trial, thus the question of his credibility lay with the trial judge.

The finding of the trial judge on the credibility of live witnesses settles this issue on appeal. The acceptance of the testimony and the allowance of discretionary costs for his services was proper.

We find, however, the issue concerning the failure of the trial judge to make findings of fact on the reason for exceeding the cap of four times the medical impairment rating has merit. Tenn. Code Ann. § 50-6-241(c) requires the trial judge to make specific findings when an award of five times the medical impairment rating or more explaining why the award is more than four times the medical impairment rating.

The application of the "caps" has been so long used that the use thereof and the manner of their application is well settled.

The trial judge is directed by the statute to make specific findings of why an award is more than four times the medical improvement rating. However, the courts have held that the Supreme Court may approve an award of more than four times the medical impairment rating if it is clear in the record that such award is justified.

We have examined the record, and based on the facts above set out and the medical testimony given, we are unable to satisfy the deficiency of the specific findings to justify the award. We, therefore, affirm the judgment finding the plaintiff is entitled to an award of compensation but find the award must be reduced from 30 percent to 20 percent, which is four times the medical impairment finding of Dr. Fardon.

The cost of the appeal is taxed to the plaintiff and the defendant equally.

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

The costs on appeal are taxed to the plaintiff and the defendant equally for which execution may issue if necessary.