IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
February 28, 2002 Session

MARY BARNETT v. S&R OF TENNESSEE, ET AL.

Direct Appeal from the Chancery Court for Lauderdale County
No. 11,181 Dewey Whitenton, Chancellor

No. W2001-01984-WC-R3-CV - Mailed April 22, 2002; Filed June 11, 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. In this appeal, the employer insists the evidence preponderates against the trial court's findings (1) that the claimant suffered an injury arising out of and in the course of employment, and (2) the trial court's finding that the injury is permanent. As discussed below, the panel has concluded the award should be modified to one based on 15 percent to both arms, but otherwise affirmed.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which L. T. LAFFERTY, SR. J., and JANICE M. HOLDER, J., joined.

William B. Walk, Jr. and Jeannie M. Kosciolek, Memphis, Tennessee, for the appellant, S&R of Tennessee

Frank Deslauriers, Covington, Tennessee, for the appellee, Mary Barnett

MEMORANDUM OPINION

The employee or claimant, Mary Barnett, is 37 years old with a general education diploma and some vocational training. She began working in September 1997 as a mold operator for the employer, S&R of Tennessee. Her job required repetitive use of both hands. She gradually developed pain and numbness in the right arm and pain in her left shoulder. She began seeing an orthopedic surgeon, John Janovich, in June 1998. During the same month, she was fired from her

job with the employer for excessive absenteeism. Without any positive objective tests, Dr. Janovich diagnosed left carpal tunnel syndrome, which he corrected surgically.

In April 1999, Dr. Janovich began treating the claimant's right arm for carpal tunnel syndrome. Right surgical release was done the following July. Following surgery, she was diagnosed with a ruptured cervical disc. The disc injury is not part of this case. At the trial, Dr. Janovich opined, unequivocally and to a reasonable degree of certainty that the claimant's bilateral carpal tunnel syndrome was causally related to her work for the employer and that she would retain a permanent medical impairment of 5 percent to each arm. The claimant is presently employed as an assistant manager for Dollar General, but is medically restricted from repetitive use of the wrists.

The employer had the claimant examined and evaluated by Mark Steven Harriman. Dr. Harriman opined the claimant's problems were probably related to her cervical disc condition, not carpal tunnel syndrome.

Upon the above summarized evidence, the trial court awarded, inter alia, permanent partial disability benefits based on 15 percent to each arm. Appellate review of findings of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court that had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). The extent of an injured worker's vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999).

The appellant's first argument is that the claimant's injuries did not arise out of and in the course of employment. An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and occurs in the course of one's employment if it occurs while an employee is performing a duty he was employed to do. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). Where a condition develops gradually over a period of time resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). In the present case, the required causal connection was established by the testimony of the claimant and the unequivocal testimony of the treating physician.

We find no merit in the employer's contentions that the treating physician's opinion was not supported by any objective evidence or was contrary to the opinion of Dr. Harriman. When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983). The first issue is resolved in favor of the appellee.

The employer's next and final argument is that the claimant is not permanently disabled because she is able to work. When an injured employee's partial disability is adjudged to be permanent, the employee is entitled to benefits based on a percentage of disability rather than the amount the employee is able to earn in her partially disabled condition. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988). The second issue is also resolved in favor of the appellee.

Where a covered employee suffers permanent disability to both arms, it is proper to determine the claimant's disability to each arm separately, then average those two disabilities to arrive at a single disability for the scheduled injury of "loss of two arms other than at the shoulder," then apply that percentage to 400 weeks. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(w); see also Drennon v. General Electric Company, 897 S.W.2d 243, 247 (Tenn. 1994). We therefore modify the award to one based on 15 percent to both arms.

As modified, the judgment of the trial court is affirmed. Costs are taxed to the appellant.

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JOE C. LOSER, JR.

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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 on appeal are taxed to the Appellant, S&R of Tennessee, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM