IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(March 27, 2001 Session)

BILLY DON GEORGE, SR. v. CLARENDON NATIONAL INSURANCE, et. al.

Direct Appeal from the Chancery Court for Warren County
No. 7202 Charles D. Haston, Chancellor

No. M2000-02125-WC-R3-CV - Mailed - April 2, 2002
Filed - May 10, 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. The defendants contend that the trial court erred in awarding the plaintiff 50% permanent partial disability to the right arm and 65% permanent partial disability to his left arm for injuries sustained when he slipped on ice and fell while stretching a tarpaulin over a flatbed trailer which led to diagnoses and surgery for carpal tunnel syndrome in both wrists and chronic lateral epicondylitis (tennis elbow) of his left elbow. The defendants also contend the trial court abused its discretion in commuting a portion of the award to Mr. George to a lump sum amount. After a complete review of the entire record, the briefs of the parties, and the applicable law, 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 Affirmed.

JAMES L. WEATHERFORD, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR. J., and JOE C. LOSER, JR., Sp. J., joined.

Joseph M. Huffaker, Nashville, Tennessee, for the appellants, Clarendon National Insurance Company and Weaver Transport, Inc.

William Joseph Butler and Frank D. Farrar, Lafayette, Tennessee for the appellee, Billy Don George, Sr.

MEMORANDUM OPINION

Mr. Billy Don George, Sr. was 43 years old at the time of trial. He had finished the 7th grade after having failed the 3rd and 5th grades. He did not have any education after leaving the 7th grade and had never taken the GED exam. He admitted that he was a slow reader and a slow writer.

Mr. George had done "just labor" work during his adult life. At 16, Mr. George had worked at Forest Nursery digging and hauling trees for 6 months. Next, he drove a truck hauling and unloading cases of poultry and eggs weighing 50 to 70 pounds each. He then worked for his brother in the nursery business driving a truck and loading and unloading nursery items weighing 40 to 100 pounds each. He returned to his job at the nursery for a short while digging and hauling trees, and then had another job driving a truck for 7 months.

Mr. George then went to work for Weaver Transport, Inc., driving a milk tanker truck and worked there for 7 to 8 years. He left Weaver Transport to take a job driving a truck and unloading food products weighing 10 to 60 pounds at restaurants. After being fired from this job after one year, Mr. George returned to Weaver Transport where he started pulling flatbeds hauling steel or lumber.

Mr. George explained that usually anything that was hauled on a flatbed had to have a tarpaulin which weighed between 140 to 170 pounds placed over it. Before hauling a load of lumber, two lumber tarpaulins have to be stretched and straightened out over the lumber and then secured with a bungee cord so they won't blow off or tear up and get the lumber wet. When hauling steel, chains and binders were used to secure the load. Mr. George stated that snap binders were "pretty hard on your hands" and required a lot of pressure to "snap them down."

On January 15, 1998, Mr. George had pulled a flatbed trailer to Camden, New Jersey. While he was stretching a tarpaulin across the trailer, he lost his footing on some ice and injured his arms while trying to hold onto the trailer to keep from falling backwards. When he fell and hit his head on the concrete, his arms were stretched out and he had "terrible pain just all at once." Mr. George reported his injury to Bobby Jones, a dispatcher. Mr. George was first seen by Dr. Rodger Zwemer, but was soon referred to Dr. John Cameron McInnis, M. D., a board certified orthopedic surgeon, through the workers' compensation insurer. Dr. McInnis examined Mr. George who complained of pain in both wrists and over his left thumb. He also had numbness and tingling in the fingers of left hand and occasionally in his right hand.

Dr. McInnis diagnosed "some tendinitis of both wrists with possible carpal tunnel syndrome", and ordered EMG's of the upper extremities. Dr. McInnis allowed Mr. George to drive a truck but restricted him from loading or unloading the truck.

The EMG tests showed "fairly severe slowing of the median nerve conduction across his left wrist and some mild slowing of median nerve conduction across his right wrist." Dr. McInnis found "in view of the severe changes I felt he would benefit from surgery on his left wrist to improve numbness and tingling". Mr. George also complained of some pain over the lateral aspect of his left elbow at the lateral epincondyle for which Dr. McInnis gave him a cortisone injection.

On November 25, 1998, Dr. McInnis performed carpal tunnel surgery on the left wrist. In follow up appointments, Dr. McInnis noted that Mr. George had good relief of the numbness and tingling in the fingers and had already regained reasonably good grip strength in his left hand.

On December 17, 1998, Dr. McInnis performed surgery on the right wrist. He found that the right wrist had less thickening of the transverse carpal ligament and less nerve compression than that of the left wrist. On January 11, 1999, Mr. George reported tenderness over the incision of the right wrist and some decreased sensation in his right hand. By February 1, 1999, Dr. McInnis noted he was doing quite well, had developed extremely good grip strength of both hands, but was still tender over the previous incision of his right wrist. He released Mr. George to return to work without restrictions on February 5, 1999.

According to Dr. McInnis, on February 18, 1999, Mr. George was doing reasonably well, had regained excellent grip strength but he was still complaining of some pain over both incisions. Mr. George's main complaint on this visit was pain over the lateral aspect of his left elbow. Dr. McInnis found that Mr. George had reached maximum medical improvement as far as his wrists were concerned and gave him a five percent (5%) permanent physical impairment to each arm.

On May 6, 1999, Mr. George returned to Dr. McInnis complaining of moderate pain of his left elbow that made it difficult for him to tarp his trucks at work. Mr. George stated that the last injection of cortisone had only lasted about ten days.

Dr. McInnis diagnosed chronic lateral epicondylitis, also known as tennis elbow, and recommended surgery. He explained to Mr. George that this surgery was not 100% effective but was generally helpful in alleviating symptoms. On May 18,1999, Dr. McInnis performed surgery on the left elbow.

On June 16, 1999, Mr. George complained of continued pain in his left elbow and Dr. McInnis started him on some physical therapy. On July 14, 1999, Mr. George still reported having some pain. Dr. McInnis found that Mr. George would reach maximum medical improvement, concerning the left elbow on July 25, 1999, and released him to return to work at that time. Dr. McInnis felt that Mr. George would retain an additional 5% permanent impairment to his left arm for the elbow injury.

Dr. McInnis saw Mr. George for the last time on October 6, 1999. Mr. George had been working up until September 26, 1999, but was complaining of a lot of pain in his left elbow and some numbness and tingling in his left forearm. Dr. McInnis found "full motion of his left arm, good grip strength, had some tenderness over, predominately over the extensor muscle mass, mild tenderness over the lateral epicondyle. Negative Tinel's sign, negative Phalen's test." Dr. McInnis concluded that there had been an overuse of the extensor muscle mass of the left arm and had no other suggestions other than an anti-inflammatory medication known as Celebrex.

On November 1, 1999, Mr. George saw Dr. Douglas Ray Weikert, M.D., a board certified orthopedic surgeon, for a second opinion evaluation. Dr. Weikert examined Mr. George and "estimated" Mr. George's permanent partial impairment at 6 to 7% to the left arm and 5% to the right arm for carpal tunnel syndrome conditions.

Dr. Weikert found no ongoing nerve compression. Dr. Weikert did not find any thenar atrophy (shrinkage of the muscle along the base of the thumb) a sign of " the end stage of carpal tunnel compression." He also testified that "the nerve can continue to show signs of irritability even after carpal tunnel surgery." He did not assign permanent restrictions but advised using the less affected hand more often, modify lifting and avoid using jarring, shaking tools or equipment if possible.

Dr. Weikert attributed Mr. George's residual pain after elbow surgery to failure of the "muscle or tendon [to] heal back to the bone." Dr. Weikert felt that Mr. George was close to maximum improvement with respect to his left elbow. He did not give a specific rating concerning the left elbow, but stated that most people that have this type surgery will have a range of 5 to 7% permanent impairment to the arm.

On March 4, 2000, Mr. George saw Dr. S. M. Smith, M.D., an orthopedic surgeon, for an independent medical examination performed in Mr. George's attorneys' office. Mr. George's attorney had represented Dr. Smith on two occasions prior to his examination of Mr. George.

As to Mr. George's condition at that time Dr. Smith reported:

> Well, when [Mr. George] returned to work, with the constant pulling and yanking on the tarp, his fingers swelled and his hands felt like they were asleep all the time. And on the left arm, this hurt from the elbow down. On the right it was mainly confined to the fingers.
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> ...[H]e's having trouble with his chores around the house. The vibration of the lawn mower made hands so uncomfortable that he cannot bear to use it. He cannot paint or lift anything or work with something over his shoulders or overhead. All of the activities that he tried caused increased tingling in both hands and he has to lower them down to his side and shake them to get the feeling back in them.
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> He was also awakening at night with numbness and tingling. He was having trouble dropping things, especially with the left hand. He never had any normal feeling in his hand.
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> His surgery on his elbow had not given him any relief whatsoever. He said he couldn't tell any difference before or after the procedure.

Dr. Smith performed Phalen's and Tinel's tests, which indicate nerve irritation, range of motion tests with a goniometer, two point discrimination tests, pinch strength and grip strength tests using a Jaymar Dynamometer to arrive at his impairment ratings.

Dr. Smith did find the Tinel's test indicated irreversible changes in the nerve that's causing symptoms in his left arm. He found thenar atrophy in his left hand indicating a worsening of carpal tunnel syndrome. He further found that Mr. George had "an area of point tenderness" near the left elbow which "coincides with the area where the posterior interosseous nerve goes through the arcade of Frohse in the supinator muscle" which indicated a constriction in that nerve. He also found tenderness "in the first webspace dorsally, which could coincide with the radial sensory nerve". Comparing Dr. Weikert's report to his own, Dr. Smith indicated that Mr. George's symptoms "would appear to be becoming worse."

Dr. Smith diagnosed (1) posterior interosseous nerve entrapment, left elbow, moderate; (2) residual median nerve entrapment, left wrist, status post decompression, moderate to severe; and (3) residual median nerve entrapment, right wrist, status post decompression, moderate according to Table 16 page 57 of the 4th Edition of the AMA Guides.

Dr. Smith found that Mr. George would retain a 20% permanent impairment to his right arm. He found that Mr. George would retain a 25% permanent impairment for the elbow injury and a 30% permanent impairment for the left wrist for a total 49% permanent impairment to his left arm using the combined values chart in the AMA Guides. He further testified that his opinion was based on his 21 years of practicing orthopedic surgery.

Dr. Smith also placed permanent restrictions on Mr. George including no repetitive flexion or extension of the wrists or fingers or the left elbow, no working with vibratory tools , no working with the wrists in a static flexed position. He also assigned lifting restrictions of no more than 20 pounds maximally or 10 pounds frequently with the right arm; and 10-15 pounds maximally or 5 pounds frequently with the left arm.

All the physicians who testified in this case found Mr. George to be trustworthy with no signs of malingering or symptom magnification. Mr. George testified that his condition had gotten worse since he saw Dr. McInnis and Dr. Weikert. Dr. McInnis and Dr.Weikert conceded that their opinion might change if Mr. George's condition had worsened since their examination.

When Mr. George was released to return to work by Dr. McInnis, he continued pulling a flatbed and tarping his load, but he was considerably slower in placing a tarpaulin on a load. He stated that before his injury, this was a 30 to 45 minute job, but now it took from 3 to 3 ½ hours and that he had difficulty getting up and down off the truck. Before his injuries he drove two trips per week while after his injuries he drove one trip per week, effectively cutting his income in half. He described his difficulties with driving as follows:

> You know, anytime you drive 1100 miles or 900 miles.. you're just constantly shaking one hand and driving with the other one. You're shaking it. It's a numb and dead feeling. You have to stop for three, four, five hours and just get out and shake your hands off...

At the time of trial Mr. George worked for Burton Brothers, pulling a flatbed trailer and that he received help putting the tarp over the loads in this job. Mr. George testified that considering his current condition, he would be unable to return to the majority of his former jobs as they required repetitive lifting. He has difficulty or is unable such daily life activities as using a mower, using a hammer, digging post holes for a fence, or doing other yard work.

He continues to experience sharp pain in his left arm and wrist; numbness, tingling, cramping in his hands; and swelling in his left wrist. Mr. George takes 8 to 12 non-prescription pain killers per day and stated that "it's just total everyday pain... I have no grip hardly in my left hand at all."

Mr. George testified that he had never filed bankruptcy, and was able to manage his money well, but did owe money on his house and vehicles. He testified that if the Judge ordered his award paid in a lump sum, "I would pay my bills off and put the rest in the bank if there was any left."

The Special Master awarded 50% vocational disability to the right arm equating to $44,800.00 and 65% vocational disability to the left arm equating to $58,240.00[1] and commuted the award for the left arm to a lump sum to be applied to the home mortgage.

The Special Master gave more weight to Dr. Smith's testimony than he did to the treating surgeon, Dr. McInnis, and the orthopedic surgeon, Dr. Weikert, who examined Mr. George to give a second opinion. The Special Master based this decision on the fact that 1) Dr. Smith used more tests to arrive at his impairment ratings; and 2) Dr. Smith's evaluation was over one year after Mr. George's carpal tunnel surgery and 10 months after his elbow surgery, and therefore gave a more

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[1]Although we do not find this to be reversible error, the award should have been based on disability to both arms rather than to each arm individually. The proper method for calculating a claimant's disability to both arms is to 1) determine the disability of each arm separately; 2) then average those disabilities to arrive at a single impairment rating for the "loss of two (2) arms, other than at the shoulder"; and 3) then apply that percentage to 400 weeks. *Tenn. Code Ann. §* 50-6-207 (3)(A)(ii)(W); *see also Drennon v. Gen. Electric Co.*, 897 S.W.2d 243, (Tenn. Sp. Workers' Comp 1994).

accurate assessment of Mr. George's final condition. The court acknowledged that Dr. Smith's ratings were "rather high" but that Dr. Smith had made findings to support his ratings. The Special Master also found Mr. George to be a "credible witness."

On September 15, 2000, the trial court entered a judgment adopting the findings of fact of the Special Master.

In December 2000, the Supreme Court issued an opinion condemning the Warren County trial court's issuance of a standing order appointing the Clerk and Master to hear all workers' compensation cases arising in the county. *See Ferrell v. Cigna Property Cas. Ins. Co.,* 33 S.W.3d 731 (Tenn. 2000). The case under submission was tried in June 2000, and judgment was entered in September 2000; thus, the appointment of the Special Master here predates this Court's release of *Ferrell.* As in *Ferrell*, we conclude that the appointment does not necessitate reversal in this case.

However, it should be noted that the Tennessee Special Workers' Compensation Panel in *Frazier v. Bridgestone/Firestone, Inc.* _____S.W.3d _____(Tenn. 2002) No. M2000-02126-WC-R3-CV (Tenn. Sp. Workers' Comp. filed October 19, 2001), recently held as follows:

> [W]e now hold that referral by a trial court to a special master for the purpose of making findings and conclusions on the main issues in controversy in a workers' compensation case is prohibited. Findings relative to those issues and conclusions on which they are to be adjudicated must be determined by the trial court and may not be referred to a special master. As in *Ferrell,* the error in this case is procedural and does not require reversal or affect the finality of the trial court's judgment. However, referrals on the main issues in the future may indeed require reversal and remand to the trial court, if the issue of the special master is raised in the court below.

Frazier v. Bridgestone/Firestone, Inc. at p. 3. (Citing *Ingram v. Stein*, 126 S.W.2d 891, 892 (Tenn. Ct. App. 1938); *Archer v. Archer*, 907 S.W.2d 412, 415 (Tenn. Ct. App. 1995).

ANALYSIS

Review of findings of fact by the trial court shall be *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). However, as the trial court adopted the findings of the Special Master, appellate review shall be *de novo* without any presumption of correctness. *Frazier* at p. 3 (citing *Archer v. Archer*, 907 S.W.2d at 416).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to

those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

The first issue raised by the defendants is:

Whether the evidence presented at trial preponderates against the trial court's award of 50% permanent partial disability to the plaintiff's right arm and 65% permanent partial disability to the plaintiff's left arm.

The employee has the burden of proving every essential element of his claim. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992).

"While causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition." *Thomas v. Aetna Life and Casualty Insurance Co.*, 812 S.W.2d 278, 283 (Tenn.1991). Further, the claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

The medical testimony is in dispute, a common occurrence in workers' compensation cases. Dr. McInnis rated Mr. George's anatomical disability at 5% to each arm due to carpal tunnel syndrome and additional 5% to the left arm for his elbow injury. Dr. Weikert estimated Mr. George's impairment at 5% to the right arm for carpal tunnel; 6-7% to the left arm for carpal tunnel; and 5-7% impairment for the elbow injury.

Both Dr. McInnis and Dr. Weikert conceded that their opinion might change if Mr. George's condition had worsened since their examination. Mr. George testified that his condition had gotten worse since he had seen Dr. McInnis and Dr. Weikert.

Dr. Smith found that Mr. George would retain a 20% permanent impairment to his right arm. He found that Mr. George would retain a 25% permanent impairment for the elbow injury and a 30% permanent impairment for the left wrist for a total 49% permanent impairment to his left arm using the combined values chart in the AMA Guides.

The Special Master choose to give more weight to Dr. Smith's testimony because: 1) he performed more tests to arrive at his impairment rating; and 2) the fact that his exam being the last in time gave a more accurate assessment of Mr. George's ultimate condition.

It is well settled that " when medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept." *Kellerman v. Food Lion, Inc*., 929 S.W.2d 333, 335 (Tenn. 1996). The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Johnson v. Midwesco Inc*., 801 S.W.2d 804 (Tenn. 1990).

In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and his capacity to work at the kinds of employment available in his disabled condition. *Tenn. Code Ann.* § 50-6-241(b) *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990), *Roberson v. Loretto Casket Co.,* 722 S.W.2d 380, 384 (Tenn. 1986).

Mr. George only completed the 7th grade. He had failed the 3rd and 5th grade. He admitted that he was a slow reader and a slow writer. Mr. George testified that he could make only half of the trips after his injury than he made before his injury. Mr. George stated he could not return to the majority of jobs he had in the past because they required repetitive lifting. He continues to have pain that affects his work and everyday activities. The Special Master found him to be a credible witness.

After reviewing the record and the medical proof in this case, we find that the evidence preponderates in favor of the trial court's award as to Mr. George's vocational disability.

The second issue raised by the defendants is:

Whether the trial court abused its discretion in commuting a portion of the award to Mr. George to a lump sum amount.

Tennessee Code Annotated § 50-6-229(a) provides:

> The amounts of compensation payable periodically hereunder may be commuted to one (1) or more lump sum payments. ...In determining whether to commute an award, the trial court shall consider whether the commutation will be in the best interest of the employee, and such court shall also consider the ability of the employee to wisely manage and control the commuted award irrespective of whether there exist special needs...

The trial court commuted the award to Mr. George's left arm and directed that after deducting attorney's fee and expenses the balance would be applied to Mr. George's home mortgage. Mr. George testified that while he owed money on his home and vehicles, he had never filed bankruptcy and was a good money manager.

After reviewing the record, we find no error upon the part of the trial court in commuting

a portion of the award to a lump sum to be paid on the home mortgage. By the time this case is concluded, practically all of the benefits will have already accrued. This issue is without merit.

CONCLUSION

The judgment of the trial court is affirmed. Costs of this appeal are taxed to defendants.

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James L. Weatherford, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

BILLY DON GEORGE, ST. v. CLARENDON NATIONAL INSURANCE, ET AL.

Chancery Court for Warren County
No. 7202

No. M2000-02125-WC-R3-CV - Filed - May 10, 2002

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 defendants, Weaver Transport, Inc. and Clarendon National Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM