

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

March 27, 2002 Session

**CHARLES THOMAS HUFF v. SAVAGE ZINC, INC (now known as
Pasminco Zinc, Inc.)**

**Direct Appeal from the Circuit Court for Montgomery County
No. 5000285 John H. Gasaway, Judge**

**No. M2001-01890-WC-R3-CV - Mailed - May 22, 2002
Filed - June 21, 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. The trial court found that the plaintiff had sustained a compensable injury and awarded him eighty percent (80%) permanent partial disability to the body as a whole. We reverse the judgment of the trial court and remand this case for further proceedings.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court
Reversed and Remanded**

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

Daniel Lynch Nolan, Jr., Clarksville, Tennessee, attorney for the appellant, Savage Zinc, Inc. (now known as Pasminco Zinc, Inc.)

Mark Allen Rassas, Clarksville, Tennessee, attorney for the appellee, Charles Thomas Huff.

MEMORANDUM OPINION

Facts

The plaintiff was fifty-five (55) years of age at the time of the trial. He completed seven grades of school, does not have a GED, is married and the father of two children who are adults.

On September 1, 1999, the plaintiff was walking along a walk way at work. He stepped from

the walk way and as he did so his ankle turned. The plaintiff experienced a sharp pain in his ankle.

The plaintiff reported the event to his supervisor and subsequently was told by the plant nurse to obtain a physician. The nurse did this because she was unable to obtain a referral.

The plaintiff was treated by Dr. Michelle Caron, a podiatrist, who referred him to Dr. Joseph Huston, a rheumatology specialist. The defendant referred the plaintiff to a Dr. Kent and later was seen by Dr. Blake Garside, an orthopaedic surgeon.

Medical Evidence

_____All of the medical evidence was submitted by deposition.

Dr. Caron testified the plaintiff had suffered a fracture of the fifth metatarsal bone of his right foot. In addition she found lytic lesions and distortion of the bone, which was found in later examination by Dr. Huston to be fibrous dysplasia, a bone disease of genetic origin.

Dr. Caron was of the opinion the plaintiff had suffered a seven and a half percent (7.5%) permanent medical impairment to the right lower extremity as a result of the fracture. Dr. Caron did not assign any impairment for the fibrous dysplasia. Dr. Caron was of the opinion the plaintiff could not continue to do the type of work he was doing prior to the fracture because of the pain he was suffering. She further expressed the opinion that the plaintiff could have continued to do his work if he had not become injured even though he had the underlying problem [fibrous dysplasia]. She testified the condition is not related to the fracture. That he is at the same risk for fracture now as he was prior to the injury.

Dr. Huston testified the plaintiff could possibly continue work indefinitely with the condition without a fracture. He conceded, however, that this was speculative. Dr. Huston did not make a determination as to medical impairment because he was not asked to do so.

Dr. William Blake Garside, an orthopaedic surgeon, first saw the plaintiff on November, 15, 1999. His examination showed an unhealed fracture of the fifth metatarsal bone. The plaintiff was kept on a previously prescribed boot walker with crutches and weight bearing restrictions.

The fracture was not healing sufficiently by December 1999 and Dr. Garside did surgery to place a screw in the bones to effect union thereof.

Dr. Garside continued to see the plaintiff and ultimately released him to return to work without restrictions. He was of the opinion the plaintiff suffered no permanent impairment as a result of the injury.

Discussion

There is no question the fracture sustained by the plaintiff is compensable. The real issue in this case is whether there is an injury to the body as a whole or whether it is an injury to a scheduled member.

The nature of the plaintiff's injury requires that it be shown by expert testimony to be compensable. *Thomas v. Aetna Life & Casualty Co.*, 812 S.W.2d 278 (Tenn. 1991). Unquestionably the expert testimony shows the plaintiff suffered a fracture to his right foot which is compensable. We are unable, however, to find from the expert testimony in this case that the injury extended to a whole body injury.

The fibrous dysplasia disease that the plaintiff suffered from birth is located in the plaintiff's right foot and one rib according to the testimony in this case. The expert testimony further shows the fracture did not cause the disease, nor so far as we can discern from the evidence, did it advance the disease or make it worse. Even if it did, the medical evidence does not show any effect upon the disease other than in the foot, if at all.

At most, the medical evidence indicates that the disease was asymptomatic before the injury. The symptoms of pain which the plaintiff now complains of are limited to the foot according to the expert testimony.

We draw from the medical testimony in this case that the basic tenor of the medical experts is that the plaintiff now must use caution because he knows he had a non work related disease which makes him more susceptible to fractures. The medical evidence is speculative as to whether he could have worked a lifetime without a fracture, but we draw from this that the same level of susceptibility exists whether at work or other pursuits in life. The medical evidence only shows the plaintiff cannot continue to do the work he was previously doing because it required him to climb stairs and carry heavy loads. As we construe this testimony this type work makes him more susceptible to fracture because of the underlying disease.

If there is an injury to a scheduled member that extends beyond the scheduled member to the body as a whole, then recovery is not limited to a scheduled member and may be properly awarded to the body as a whole. *Wells v. Sentry Ins. Co.*, 834 S.W.2d 935 (Tenn. 1992).

As a general rule, permanent partial benefits to a "scheduled member," are exclusively controlled by the schedule established by the General Assembly and may not be apportioned to the body as a whole unless the injury affected a particular combination of members not statutorily provided for or when scheduled members cause a permanent injury to an unscheduled member of the body not provided for. *Thompson v. Leon Russel Enterprises*, 834 S.W.2d 927 (Tenn. 1992). The foot or "lower extremity" is provided for in Tenn. Code Ann. § 50-6-207(3)(A)(ii)(n).

There is no evidence in this case to show the fracture sustained by the plaintiff or the aggravation of the underlying bone disease, if any, extended beyond the foot of the plaintiff.

The testimony of the plaintiff that he had pain in his back is not shown by any medical evidence to have existed or to be permanent if it did. The claim is, therefore, not supported in the record. *Thompson, supra*.

We find the injury in this case is limited to the plaintiff's lower leg. We therefore reverse the judgment of the trial court and remand the case thereto for further proceedings.

The appellant's issues III and IV are settled by this opinion and need not be addressed.

The cost of this appeal is taxed to the plaintiff, Charles Thomas Huff.

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 plaintiff, Charles Thomas Huff, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM