IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT NASHVILLE
October 18, 2001 Session

JOHN MARSHALL V. SVERDRUP TECHNOLOGIES, INC.

Direct Appeal from the Chancery Court for Franklin County
No. 14470 Jeffrey Stewart, Chancellor

No. M2000-02951-WC-R3-CV - Mailed - February 1, 2002
Filed - May 9, 2002

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The employer appeals an award of permanent total disability benefits to age 65, and the Second Injury Fund appeals the apportionment of liability for 30 percent of the benefits to the Fund. We affirm the judgment of the trial court.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., JUSTICE, and WILLIAM H. INMAN, SR. J., joined.

Robert J. Uhorchuk, Spicer, Flynn & Rudstrom, Chattanooga, Tennessee, for the Appellant, Sverdrup Technology, Inc.

Jerre M. Hood, Winchester, Tennessee, for the Appellee, John Marshall

MEMORANDUM OPINION

Facts

John Marshall sustained an injury to the lumbar spine while working at Sverdrup Technology, Inc ("Sverdrup") on December 18, 1987. Following surgery, he received a court-approved workers' compensation settlement of 18 percent to the body. On April 24, 1994, Marshall was working for Sverdrup when a ¾ to 1 inch braided steel cable snapped, striking Marshall across his mid-back area and left shoulder and arm. Dr. Paul R. McCombs treated Marshall for this injury and eventually performed surgery in January 1997 for a disc herniation at T7-T8 after conservative treatment failed. With accommodations by his employer, Marshall continued to work following the injury and his wages increased each year until February 8, 1999 when he stopped working. Dr. McCombs assessed Marshall with a nine percent medical impairment to the body as a result of the 1994 injury. When Dr. McCombs imposed permanent restrictions on repetitive bending, stooping and lifting, Marshall was sent home and never called back to work. Marshall was also seen by Dr. Ronald T. Zellem, who assessed him with a five percent impairment, and by Dr. M. Craig Ferrell, who opined that an impairment rating from five to nine percent was reasonable for the 1994 injury. Marshall was 43 years old at the time of the injury and 50 years old at the time of the trial of this case. He dropped out of school in the tenth grade, but earned a GED. He has been employed in construction work, as an automobile mechanic, and as a machinist.

The trial court awarded Marshall permanent total disability benefits to age 65 and ordered that Sverdrup be liable for 70 percent of the award and that the Second Injury Fund be liable for the remaining 30 percent.

Standard of Review

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 depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452 456 (Tenn. 1988). Conclusions of law are subject to *de novo* review with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997). Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *Humphrey v. David Witherspoon, Inc.*, 734 S.W2d 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. INA*, 884 S.W.2d 446, 451 (Tenn. 1994).

Issues

The employer, Sverdrup, submits the following issues for review:

1. Did the trial court err in awarding Marshall permanent total disability benefits?
2. Did the trial court err in not limiting Marshall's award to two and one-half times the impairment rating?
3. Did the trial court err in not limiting Marshall's award to six times the medical impairment rating?
4. Did the trial court err in awarding benefits beyond 400 weeks?

As a fifth issue for discussion, the Second Injury Fund maintains the trial court erred in apportioning more than 18 percent of the award to the Fund.

Discussion

I.

Sverdrup contends that Marshall did not prove he was entitled to permanent total disability benefits because (a) he worked almost five years after the injury as an outside machinist and earned income that was substantially more than he was earning at the time of the injury, (b) he has training and job experience in supervisory or management positions, and (c) Sverdrup was willing to accommodate him in modified or light duty jobs within his medical restrictions. Marshall testified that his condition gradually deteriorated to the point that he was physically unable to do anything. He had previously operated an automobile repair business at his home, but had ceased that work also. Charles W. Syler, his supervisor at Sverdrup, testified that he told management, to no avail, that Marshall could not do his job and that they needed to give him a salaried job. John Bramlett, another Sverdrup supervisor, testified that Marshall was a stellar employee who supervisors "fought over" to get him to work for them, but after the injury and Marshall's deterioration, the supervisors conducted regular meetings at which Marshall would be discussed and no one had anything that Marshall could do considering his physical limitations and pain. He also testified that sedentary jobs at Sverdrup, such as planner/scheduler, required attention to detail that would be hampered by pain medication. Robert Grimes testified that other people on the shift with Marshall would cover for him, but, as time passed, Marshall missed more and more work. Thomas Quatrini, Sverdrup's Human Resource Manager, testified that the company had a policy of providing employment within an employee's restrictions, but did not testify that Marshall had been offered employment within his medical restrictions.

Kenneth Anchor, Ph.D., a vocational expert, testified that Marshall was 100 percent vocationally disabled. Pat Hyder, also a vocational expert, testified that Marshall had only a 55 percent vocational disability. We note that the trial court gave greater weight to the testimony of Dr. Anchor based on his education and qualifications and the

fact that Mr. Hyder did not interview Marshall or perform any tests and because Hyder's computer program for determining disability did not consider Marshall's pain or depression.

Employment after injury is only one factor to be considered in determining whether an employee is permanently and totally disabled, and when it is clear that an employee is unable to continue in his employment because of the injuries and is not employable in the open job market, a finding of permanent total disability is warranted. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770. 775 (Tenn. 2000). We find the trial court did not err in awarding permanent and total disability benefits.

II.

Sverdrup contends that the trial court erred in not limiting the award to two and one-half times the impairment rating. The limitation does not apply if the employee's return to work is ended less than 400 weeks after the employee returns to work. Tenn. Code Ann. § 50-6-241(a)(2). In this case, the testimony clearly establishes that Marshall's employment ended less than 250 weeks after his injury when supervisory personnel at Sverdrup were unable to find any job he could do considering his pain and physical limitations.

III.

In this case, Marshall is permanently and totally disabled. The limitations set out in Tenn. Code Ann. § 51-6-241(a) and (b) do not apply to permanent total disability awards. *Davis v. Reagan*, 951 S.W.2d 766, 769 (Tenn. 1997). Therefore, in the present case, the contention of Sverdrup that the trial court erred in not limiting the award to six times the impairment rating also is without merit.

IV.

Sverdrup next contends, citing Tenn. Code Ann. § 50-6-242, that the trial court erred in awarding benefits beyond 400 weeks. We would point out that this statute deals with permanent partial disability and, in the present case, the employee was awarded permanent total disability pursuant to Tenn. Code Ann. § 50-6-207(4)(A)(i), which provides for benefits payable during his disability to age 65. *Warren v. American Holding Co.*, 20 S.W.3d 621, 624 (Tenn. 1999). This holding of the trial court is affirmed.

V.

The Second Injury Fund asserts that: (1) in a case where the employee's only preexisting disability is a work-related injury for which he received a court-approved settlement of 18 percent to the body, the liability of the Second Injury Fund cannot exceed the amount of the prior award; (2) judicial economy and the finality of settlements require the extent of disability resulting from prior injuries not be re-litigated

in subsequent proceedings. *Minton v. State Indus., Inc.*, 825 S.W.2d 73 (Tenn. 1992). In an opinion released after argument in the present case, the Supreme Court pointed out that it had departed from the analysis used in *Minton.* In *Watt v. Lumbermens Mutual Casualty Insurance Co.*, 62 S.W.3d 123 (Tenn. 2001), the Court stated that, in *Bomely v. Mid America Corp.*, 970 S.W.2d 929 (Tenn. 1998) and *Perry v. Sentry Ins. Co.*, 938 S.W.2d 404 (Tenn. 1996), it directed trial courts to make a specific finding of fact regarding the disability caused by the second injury without consideration of any prior injury. This requirement was reiterated in *Allen v. City of Gatlinburg*, 36 S.W.2d 73 (Tenn. 2001). Recognizing that the combined effects of two injuries can create a disability greater than the effects of each separate injury, *Watt* dismissed concerns about re-litigating prior disability awards and specifically rejected "the premise that the individual disability percentages attributed to an employee's injuries must total 100 percent before he or she may be permanently disabled." *Watt*, 62 S.W.3d at 131. In Second Injury Fund cases, trial courts were directed to "first determine whether the employee has been permanently and totally disabled by the combination of two or more injuries." *Watt, 62* S.W.3d at 131. In the present case, the trial judge made an initial finding that Marshall was permanently and totally disabled as a result of the injuries; he then made a finding that the last injury standing alone would produce a 70 percent disability for which the employer is liable. The Second Injury Fund was ordered to pay the balance of 30 percent. We find no error in the actions of the trial court.

Conclusion

The judgment of the trial court is affirmed. Costs of the appeal are taxed one –half to Sverdrup Technology, Inc. and one-half to the Second Injury Fund.

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Howell N. Peoples, Special Judge

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ORDER

This case is before the Court upon the motion for review filed by Sverdrup Technologies, Inc. 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Sverdrup Technology, Inc.'s motion to consider post-judgment facts is denied.

Costs are assessed to Sverdrup Technology, Inc., for which execution may issue if necessary.

PER CURIAM

BIRCH, J., NOT PARTICIPATING