IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
November 1, 2001 Session

DONALD R. MOORE v. L and D TRANSPORTATION SERVICES, INC., AND JIM FARMER/SECOND INJURY FUND

Direct Appeal from the Chancery Court for Knox County
No. 136523-1 John F. Weaver, Chancellor

Filed April 1, 2002

No. E2000-02779-WC-R3-CV

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 trial court found the plaintiff had suffered a compensable back injury and awarded 35 percent permanent partial disability. The plaintiff has three prior awards of workers' compensation benefits beginning in 1975 with an award of 7 percent for an injury to his left hand, which translates into 2.625 percent to the body as a whole, and, for back injuries, an award in 1980 of 25 percent to the body as a whole and in 1998, an award of 59.718 percent to the body as a whole from the State of Kentucky. The trial court apportioned 12.657 percent to the defendant and the balance to the Second Injury Fund. The employer questions whether the evidence supports a finding that the plaintiff suffered a work-related injury resulting in 35 percent disability. The plaintiff appeals and argues he is permanently and totally disabled. 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 is Affirmed

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J. and W. NEIL THOMAS, III, SP. J., joined.

Norbert J. Slovis, Knoxville, Tennessee, for the appellant, Donald R. Moore.

Debra L. Fulton, Knoxville, Tennessee, for the appellees, L and D Transportation Services, Inc. and Liberty Mutual Insurance Co.

E. Blaine Sprouse, Nashville, Tennessee, for the appellee, the Second Injury Fund

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 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 more depth the factual findings and conclusions of the trial court in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

The plaintiff, who was 44 years of age at the time of trial, has a work history that consists mainly of truck driving. He has also worked previously as a gas station attendant, a welder and a security guard. He does not have a high school diploma or a GED.

The plaintiff has three prior awards of workers' compensation benefits beginning in 1975 with an award of 7 percent for an injury to his left hand, which translates into 2.625 percent to the body as a whole, and, for back injuries, an award in 1980 of 25 percent to the body as a whole and in 1998, an award of 59.718 percent to the body as a whole from the State of Kentucky.

On June 9, 1997, the plaintiff injured his back when he slipped on a rain-slickened step while climbing down from the cab of his truck and fell onto the concrete parking area.

The plaintiff was treated by Dr. Jeffery Kornblum, a neurosurgeon, who diagnosed a disc herniation at L3 and focal stenosis at L3-L4. Dr. Kornblum testified the L3 defect was not present in 1995 and that the injury was caused by the plaintiff's fall. Dr. Kornblum's specific testimony was as follows:

> Q. Assuming that the man's telling you the truth that he fell out of a truck?
>
> A. If I assume the man is telling me the truth, he was pain free for ten years, fell out of a truck and started hurting. And that was true, then yes, I would assume falling out of the truck did something to him. If that's not true, then my opinion, all bets are off. I believe a fall out of a truck could have caused or aggravated a pre-existing condition that I subsequently took him to surgery for.

Dr. Kornblum then testified that given the history he had gained at the taking of the deposition that he could not say with any degree of medical certainty that the fall from the truck caused the plaintiff's injury. However, he testified, in effect, that if the plaintiff's history was true, the fall caused the injury; if the history was false, he could not say it did.

Dr. Kornblum assessed the plaintiff as having a 10 percent medical impairment. The record

does not reflect that Dr. Kornblum addressed restrictions except to note on a C-32 form to refer to the functional capacity evaluation performed by Mike Worley, who is a physical therapist. Mr. Worley performed a functional capacity evaluation on April 19, 1999, in which he noted the following: the plaintiff had no difficulty sitting, had some restrictions but was capable of light work and demonstrated submaximal effort without intentional manipulation.

Finally, Dr. Bertram Henry, a neurologist and pain specialist, who has treated the plaintiff since his back surgery testified the plaintiff is capable of sedentary work.

The plaintiff has not returned to work since the accident. He was assessed by two vocational rehabilitation specialists: Dr. Julian Nadolsky for the plaintiff and Dr. Susan Seylar for the defendants. Dr. Nadolsky initially found the plaintiff to be 90 percent vocationally disabled then amended his findings to 100 percent vocational disability. Dr. Nadolsky testified in a later deposition that he changed his findings after receiving information about additional restrictions–limits on reaching–placed on the plaintiff by Dr. Kornblum.[1] Dr. Susan Seylar found the plaintiff to be 90 percent vocationally disabled. She testified he is capable of light or sedentary work.

The trial court found the plaintiff had sustained a compensable injury and further found he suffered a 35 percent vocational disability as a result. The court apportioned 12.657 percent of the award to the employer with the balance assessed to the Second Injury Fund.

The plaintiff contends he is permanently totally disabled. The defendants argue that the evidence preponderates against the finding of causation and that in any case the plaintiff is not permanently totally disabled. The defendants also argue that the trial court erred in declining to award certain discretionary costs to them.

We affirm the judgment of the trial court in all respects.

Discussion

Causation

The defendants have argued that the plaintiff's credibility is lacking and his medical history indicates the problems may have preceded the claimed accident, which no one else witnessed. The plaintiff claimed that he slipped and fell while climbing down from the cab of his truck. The trial judge heard the plaintiff testify in open court and found the plaintiff's story of falling out of the truck to be credible. Further, the trial judge found also found credible the plaintiff's claim to have experienced an onset of pain as a result of the fall. 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

[1] These restrictions are not documented in the record.

to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). We find, therefore, that the condition for the finding of a disability testified to by Dr. Kornblum has been satisfied, and the evidence supports the finding of the trial judge that the plaintiff sustained a 35 percent disability as a result of the injury.

Extent of Disability

The plaintiff next argues that the evidence preponderates in favor of permanent total disability. Any award of permanent total disability must be in compliance with the statutory definition of total disability contained in Tennessee Code Annotated section 50-6-207(4)(B). The statute defines permanent total disability as follows:

> When an injury not specifically provided for in this chapter as amended, totally incapacitates the employee from working at an occupation which brings him an income, such employee shall be considered "totally disabled," and for such disability compensation shall be paid as provided in subdivision (4)(A) . . . .

TENN. CODE ANN. § 50-6-207(4)(B) (Supp. 1999).

As the statute and case law make clear, the legal definition of permanent total disability does not correlate directly with the meaning of permanent and total medical disability. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). The inquiry must "focus on the employee's ability to return to gainful employment." *Davis v. Reagan*, 951 S.W.2d 766,767 (Tenn. 1997). Accordingly, "[t]he assessment of permanent total disability is based upon numerous factors, including the employee's skills and training, education, age, local job opportunities, and his capacity to work at the kinds of employment available in his disabled condition." *Robertson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

Dr. Kornblum found a 10 percent medical impairment and referred to the functional capacity examination, which showed the plaintiff capable of light work. Dr. Seylar found the plaintiff capable of sedentary or light work and stated there were jobs available for him in the open market. The evidence does not comply by a preponderance of the evidence with the statutory criteria.

Discretionary Costs

The defendants argue that the trial court erred in failing to award certain of their discretionary costs pursuant to Rule 68 of the Tennessee Rules of Civil Procedure.

The defendants made an Offer of Judgment of 15.97 percent to the plaintiff on March 19, 1998. The case was heard on March 28, 2000.

This case apparently comports with Rule 68; however, the Tennessee Rules of Civil Procedure are superseded by the supremacy clause of the Workers' Compensation Act. Within the parameters of the Workers' Compensation Act, the trial court has the discretion to award costs. We find no abuse of discretion in this matter, and we, therefore, affirm the judgment of the trial court on this issue.

The costs of this appeal are taxed to the plaintiff.

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JOHN K. BYERS, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon Applicant's motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be DENIED; 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 assessed to Donald R. Moore for which execution may issue if necessary.

PER CURIAM

Barker, J., not participating