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

TAMMIE ROSE SIMONS V. FINDLAY INDUSTRIES, INC.

Direct Appeal from the Chancery Court for Warren County
No. 7121 Charles D. Haston, Sr., Chancellor

No. M2000-02956-WC-R3-CV - Mailed - March 11, 2002
May 17, 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 partial disability benefits on the basis that the employee suffered no permanent medical impairment. We affirm the judgment of the trial court.

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

Patrick A. Ruth and K. Melissa Howard, Ruth, Howard, Tate & Sowell, Nashville, Tennessee, for the Appellant, Findlay Industries, Inc.

Barry H. Medley, Farrar, Holliman & Medley, McMinnville, Tennessee, for the Appellee, Tammie Rose Simons

MEMORANDUM OPINION

Facts

On October 19, 1999, Tammy Rose Simons ("Ms. Simons") filed a Complaint seeking workers' compensation benefits for injuries to her shoulders, arms, hands and fingers of each hand caused by repetitive and/or frequent use or her shoulders, arms, hands and fingers arising out of and in the scope of her employment with Findlay Industries, Inc. ("Findlay"). Ms. Simons, age 41, completed the 12th grade and worked for Findlay for approximately 13 years. She has no special skills or special training and has never served in a supervisory capacity. Before 1996, she had no prior injury to, or problems with, her shoulders, wrists and hands. She reported to her supervisor that she was having problems with her hands and wrists. She was seen by a series of doctors, two of whom testified by deposition in this case.

Dr. Robert Clendenin testified that he first saw Ms. Simons on June 1, 1999 with complaints of bilateral wrist and arm pain commencing around 1997. She reported that due to a low back injury, she was off work from November 1998 to March 1999 and her arm symptoms disappeared. Within a couple of days after she returned to work, she again developed pain over the dorsal aspect of both wrists with some radiation into the shoulders. Dr. Clendenin examined her and found no objective signs of injury. He concluded that she had tendonitis of the wrist extensor muscles, and recommended that she take prednisone and engage in a physical therapy program to reduce any inflammation in the tendons in her hands. He recommended to her employer that she be placed on light duty with no repetitive gripping or grasping, pushing or pulling over ten pounds. Dr. Clendenin saw her again on June 25, 1999, and her wrist examination was normal with good motion. He performed a nerve conduction test of the median nerve that was normal. He returned Ms. Simons to regular duty on June 27, 1999, but indicated she might need some type of rheumatologic treatment. Dr. Susan Jacobi, a rheumatologist, reported to Dr. Clendenin that Ms. Simons had episodic joint pain, which Dr. Jacobi concluded was tendonitis, and recommended Ms. Simons use Celebrex when she had flare-ups in pain.

Dr. Clendenin last saw Ms. Simons on December 3, 1999 at which time she had no complaints of pain, tested normal in both wrists and had normal sensation. Dr. Clendenin testified that Ms. Simons should find a job that required less repetitive motion of her arms, but assessed her at a zero impairment rating based on the American Medical Association Guides to the Evaluation of Permanent Impairment. He testified that the AMA Guides provide that "a patient with wrist or hand pain or other symptoms may not have evidence of a permanent impairment. Alteration of the patient's daily activities or work-related tasks may reduce the symptoms. Such an individual should not be considered permanently impaired under the Guide's criteria." Dr. Clendenin testified that Ms. Simons was having no shoulder-related symptoms when he saw her, but his office notes introduced as exhibits at his deposition reflect that on June 1, 1999, she complained of pain in her back, hands, and shoulders.

Ms. Simons was seen by Dr. Francisca Lytle, a board certified orthopedic surgeon on March 15, 2000 for evaluation. Dr. Lytle diagnosed Ms. Simons as having recurring tenosynovitis in the wrists and hands based on history. She also found impingement testing on the shoulders to be positive and diagnosed impingement syndrome. She testified that the

tenosynovitis and the impingement syndrome were more likely than not related to repetitive activity at work. Dr. Lytle recommended that Ms. Simons seek employment that did not require her to grip or reach repetitively, manipulate repetitively with any kind of force, use vibratory tools, or work over shoulder level. Ms. Simons could pull 50 pounds on occasion, lift 30 pounds fairly frequently and lift 10 pounds repetitively. Dr. Lytle agreed with Dr. Clendenin that the AMA Guides do not provide an impairment rating for tendonitis, but opined that Ms. Simons had a six percent to the body impairment for each shoulder, or a total of twelve percent impairment, to the body.

All of the issues in this case were referred to a Special Master, who conducted a trial and the Chancellor adopted the findings of the Master as the judgment of the Court. Ms. Simons was awarded 15 percent disability to the body as a whole.

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 or on written reports, 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).

Issue

The employer, Findlay Industries, Inc., contends that the AMA Guides do not provide for an anatomical impairment rating for Simons' injury, but provide that her injury should not be considered permanent, and that the preponderance of the medical testimony proved she suffered no permanent impairment.

Discussion

I.

We first address the propriety of referring workers' compensation cases to a special master pursuant to Rule 53 of the Tennessee Rules of Civil Procedure. Only collateral, subordinate, and incidental issues and the ascertainment of ancillary facts may properly be

referred to a special master. *Ingram v. Stein*, 23 Tenn. App. 105, 126 S.W.2d 891, 892 (1938). "The main issues of a controversy and the principles on which these issues are to be adjudicated must be determined by the trial court." *Archer v. Archer*, 907 S.W.2d 412, 415-16 (Tenn. App. 1995). In the case before us, the trial judge entered an order on June 2, 2000 appointing J. Richard McGregor, Clerk and Master, as special master to "try this workers' compensation matter and to do all necessary things to that end as is set out below." The order then set out a list of issues generally arising in workers' compensation suits to be determined by the master, and provided: "This form may be modified by the Special Master if the interests of justice require such modification." Very clearly, this order of reference of all the issues in the case was improper. *See Gibson's Suits in Chancery* § 253, Inman 7th Ed.

The Findings of Fact of the Special Master was filed on October 24, 2000. A transcript of the proceedings before the master was not filed at that time. On November 9, 2000, the trial judge entered an order reciting:

> This Court has reviewed the Finding of Fact of the Special Master, has reviewed the appropriate information in the Court file, and finds that the Finding of Fact of the Special Master is proper and correct in all regards and according (sic), it is adopted by this Court as the Final Judgment in this matter.

It has long been the rule in this state that a concurrent finding by a master and a trial judge is conclusive on appeal, except where it is upon an issue not proper to be referred, where it is based on an error of law or a mixed question of fact and law, or where it is not supported by any material evidence. *Coates v. Thompson*, 713 S.W.2d 83, 84 (Tenn. App. 1986); *Glenn v. Gresham*, 602 S.W.2d 256, 258 (Tenn. App. 1980). In the present case, we have determined that the issues were not proper to be referred and therefore, the recitation in the judgment of a concurrent finding of fact is not conclusive on the issues in this appeal. In addition, the statutory provision for *de novo* review of workers' compensation appeals differs from the usual standard of review of concurrent findings, and further supports the conclusion that workers' compensation cases should not be referred to a special master.

We find other problems associated with the reference to a special master in this case. As noted, the transcript of the proceedings before the special master was not filed with the master's report. Unless the order of reference directs otherwise, the master must file with the master's report a transcript of the proceedings, evidence and any exhibits, and any failure to do so is error. Tenn. R. Civ. P. 53.04(1); *In re Estate of Tipps*, 907 S.W.2d 400, 403 (Tenn. 1995). The transcript of the evidence, which was filed in the trial court on February 7, 2001 is not authenticated by the special master and was not available to the Chancellor when the Finding of Facts of the Special Master was confirmed on November 9, 2000; nor is there any other material in the technical record that would bear on the validity of the findings of the special master or support the judgment entered in this case.

There is no indication in the record that counsel for Findlay contested the reference to the special master, or that counsel objected to the Finding of Facts as provided in Tenn. R. Civ. P. 53.04(2). Indeed, the transcript of the proceedings before the special master was filed as the

record of the evidence on which Findlay's appeal is based. In effect, Findlay complains of the actions of the special master rather than the actions of the trial judge, and counsel for both parties have treated this appeal as if the special master was the trial judge.

Because neither of the parties raised the propriety of referring the main issues in a workers' compensation case to a special master, we will address the merits of the appeal. It is a procedural error and does not require reversal under the facts of this case. *Ferrell v. Cigna Property & Casualty Ins. Co.*, 33 S.W.3d 731, 739 (Tenn. 2000). The present case was disposed of at the trial level prior to the decision in *Ferrell.* Counsel should be aware that in the future, reversal of cases improperly referred to a special master may be necessary.

II.

Findlay relies on the zero impairment assigned by Dr. Clendenin to assert that Ms. Simons failed to establish by a preponderance of the evidence that her injury is permanent. While Dr. Clendenin assigned a zero impairment rating based on the AMA Guides for the complaints associated with her wrist, he testified: "If an alteration of her activity resolves the pain, it's not a permanent condition." He then said that she should avoid the type of work that has caused her pain. Dr. Lytle also assigned a zero impairment rating for the problems in the wrists and hands, and testified Ms. Simons should seek employment that does not require her to grip, reach, or manipulate repetitively. Vocational disability may be based on permanent restrictions even though no anatomical impairment is given. *Walker v. Saturn Corp.*, 986 S.W.2d 204, 207; *Hill v. Royal Ins. Co.*, 937 S.W.2d 873, 876 (Tenn. 1996). Like Dr. Clendenin, Findlay ignores the complaints of Ms. Simons concerning pain in her shoulders. Dr. Lytle tested for tendonitis or impingement syndrome in the shoulders and found the kind of symptoms that occur with patients who do repetitive work activity among other things. Dr. Lytle assigned a twelve percent permanent medical impairment for the impingement syndrome in the shoulders that she attributed to Ms. Simons's employment. With evidence in the record of permanent physical restrictions and permanent medical impairment, we find the contentions of Findlay to be without merit.

CONCLUSION

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the Appellant, Findlay Industries, Inc., and the case is remanded for any necessary proceedings.

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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 Findlay Industries, 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.

Costs are assessed to Findlay Industries, Inc., for which execution may issue if necessary.

PER CURIAM