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

May 23, 2002 Session

GEORGE WAYNE GREER v. HEILIG-MYERS FURNITURE, ET AL.

Direct Appeal from the Chancery Court for Washington County
No. 33651 Jean A. Stanley, Chancellor

Filed August 19, 2002

No. E2001-01008-WC-R3-CV

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 awarded the employee 70 percent permanent partial disability to the body as a whole. The employer contends the evidence preponderates against the award and that the employee made a meaningful return to work. Judgment of the trial court is affirmed.

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

THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, J., and BYERS, SR. J., joined.

Clint Woodfin and Nick Peterson, of Knoxville, Tennessee, for Appellants, Heilig-Myers Furniture and Kemper Insurance Company.

Anthony Alan Seaton, of Johnson City, Tennessee, for Appellee, George Wayne Greet.

MEMORANDUM OPINION

The employer, Heilig-Myers Furniture, and its insurance carrier, Kemper Insurance Company, have appealed from the trial court's decision awarding the employee, George W. Greer, 70 percent permanent partial disability to the body as a whole.

Facts

The employee was fifty-two years of age at the time of the trial and he had completed the tenth grade in school. He did not have any vocational training and had worked in the retail furniture

industry for more than thirty years. Most of his work experience was that of a warehouse worker delivering furniture to customers. He also had some experience in repairing damaged furniture. His work was classified as unskilled and heavy work by all vocational consultant witnesses who testified. The record indicates he had strained his back several years prior to the incident in question but had recovered from this injury.

On November 11, 1999, he and a co-worker were delivering furniture in Jonesboro, Tennessee. His co-worker was approaching the house to see if the customer was at home. Employee Greer was in the delivery truck near the back entry when he slipped and fell out of the truck. He testified he fell about four to four and one-half feet and injured his back and tail bone. X-rays confirmed he had a fracture of the coccyx. He did not return to work until some time in January 2000 and worked until July 3, 2000. He testified that working with medication and a helper was difficult but a new warehouse manager changed his duties which he could not perform and he stopped working for this reason.

As to his present condition, he stated he was still having a lot of pain, could not sit very long and could not walk for over five to ten minutes. He was examined on February 13, 2000 for a functional capacity evaluation report which was filed in evidence. The report indicated he could perform work in the heavy category. He testified he could not do this type of work anymore and that the individual administering the various tests encouraged him to do more than he normally would have done.

Dr. William E. Kennedy, a retired orthopedic surgeon now engaged in consulting work, testified by deposition and said he performed an independent medical examination on July 24, 2000. He was of the opinion the employee had degenerative disc disease, a fracture of the coccyx, and a sprain to both the lumbar and cervical spines. He also felt the accident had aggravated his prior condition and that his medical impairment was 24 percent to the whole body. He said he should observe restrictions on any work activity such as no bending, stooping, etc. He was of the opinion he could do some work in a light category.

Dr. Norman Hankins, a vocational consultant, testified by deposition and was of the opinion the employee's vocational disability was 78 percent considering Dr. Kennedy's assessment and recommendations. He said if one considered the functional capacity evaluation report, there would be no vocational disability. He was also of the opinion that if Dr. Duncan's finding and recommendations were accepted, his vocational disability would be less than 78 percent but still substantial.

The employer and insurance company presented evidence from a vocational consultant and the treating physician. Dr. Richard Duncan, an orthopedic surgeon, did not testify but his office records were introduced into evidence. These records indicated he saw the employee on four visits and had given a medical impairment rating of 2 percent to the body as a whole. Initially, he recommended certain restrictions on his work activity but later omitted these restrictions after seeing the conclusion of the functional capacity evaluation report.

Michael T. Galloway, a vocational consultant, testified at the trial and was of the opinion the employee had a 50 percent vocational disability considering Dr. Kennedy's findings. He said there would be no vocational disability under the functional capacity evaluation report and Dr. Duncan's revised findings.

In fixing the employee's disability at 70 percent the trial judge accepted the evidence of Dr. Kennedy over other conflicting evidence and the court also found the employee was not able to do heavy type work.

Standard of Review

The case is to be reviewed on appeal *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Issues on Appeal

The defendants contend the evidence preponderates against the 70 percent award of disability. Plaintiff asserts the appeal is frivolous.

Analysis

Defendants' argument that the evidence preponderates against the 70 percent award of disability is based on two reasons. First, it is insisted the trial court was in error in accepting Dr. Kennedy's findings and recommendations over conflicting evidence by Dr. Duncan. In this connection, we must cite the often stated established rule that when the evidence is in conflict, the trial judge has the discretion to conclude that the opinion of a particular expert should be accepted over that of another expert. ***Thomas v. Aetna Life & Cas. Co.,*** 812 S.W.2d 278 (Tenn. 1991); ***Johnson v. Midwesco, Inc.***, 801 S.W. 2d 804 (Tenn. 1990). In our review of the record, we cannot say the evidence preponderates against the court's decision to accept this evidence.

Defendants also argue the award of disability was excessive because the employee made a meaningful return to work and that the provisions of Tenn. Code Ann. § 50-6-241(a)(1) would cap the award of disability at two and one-half times the medical impairment of 24 percent.

In determining whether an employee's return to work was meaningful, the reasonableness test must be applied. ***Nelson v. Wal-Mart Stores, Inc.***, 8 S.W.3d 625 (Tenn. 1999); ***Newton v. Scott Health Care Center***, 914 S.W.2d 884 (Tenn. 1991). In the present case, the employee returned to work after being off some period of time. He worked with assistance for a period of about six months and stopped working because his work duties had been changed and he felt he was unable to perform. Defendants did not present any conflicting evidence on this particular point and we conclude his cessation of work was reasonable under the circumstances of the case and therefore his return to work was not meaningful under our capping statute. Also, we do not find the award to be

excessive under other considerations.

The employee contends the appeal is frivolous. Although we have not agreed with any of the defendants' arguments, we are of the opinion the issues have merit and were not of a frivolous nature.

Conclusion

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

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ROGER E. THAYER, SPECIAL 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the defendants, Heilig-Myers Furniture, and its surety, for which execution may issue if necessary.