IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 9, 2002 Session

HAROLD J. GARTH v. SISKIN STEEL & SUPPLY COMPANY, ET AL.

Direct Appeal from the Chancery Court for Hamilton County
No. 00-1363 W. Frank Brown, III, Chancellor

Filed December 9, 2002

No. E2002-00090-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 found the plaintiff suffered 75 percent disability to his right hand as a result of an on-the-job injury, which occurred on March 10, 2000. The defendant says the trial judge erred in not finding the plaintiff's recovery for the injury should be limited to the thumb or the first phalange of the thumb. The plaintiff says the trial court properly found the plaintiff suffered an impairment to his right hand but says the trial court should have granted a higher award. 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 Affirmed

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J. and JOSEPH M. TIPTON, SP. J., joined.

Kent T. Jones, Chattanooga, Tennessee, attorney for appellant, Randstand Staffing Services.

David D. Moore, Chattanooga, Tennessee, attorney for appellant, Siskin Steel & Supply Company.

Richard H. Winningham, Chattanooga, Tennessee, attorney for appellee, Harold J. Garth.

MEMORANDUM OPINION

Plaintiff, Harold Garth, is a high school graduate with vocational training as a bricklayer. After serving in the military, he attended Draughon's Junior college where he received a degree or diploma in trucking and has past experience in both trucking and construction.

The undisputed evidence shows the plaintiff sustained an injury to his right thumb or hand on March 10, 2000 while working as a materials handler with Siskin Steel & Supply Company through Randstad Staffing Services.[1]

Medical Evidence

Dr. Daniel Labrador, Jr., a plastic surgeon, saw the plaintiff at the emergency room on March 10, 2000, shortly after he was injured. He testified that the tip of the plaintiff's right thumb had been torn off. The portion of the thumb was reattached to the plaintiff's thumb and treatment began. Dr. Labrador saw the plaintiff on several occasions and last saw him on April 3, 2000. Dr. Labrador denied that the plaintiff's hand injury had developed gangrene. Dr. Labrador concluded that the plaintiff's injury had healed on April 2, 2000, and testified the plaintiff sustained a 10 percent permanent medical impairment to his right thumb. Dr. Labrador testified he was somewhat limited in his finding because Mr. Garth did not return for a final appointment after April 3, 2000.[2]

Dr. Robert Mastey, a hand and upper extremities specialist, saw the plaintiff on July 27, 2001 at the request of the defendant for purposes of evaluation. He found the plaintiff had no bone loss and had normal nerve function in the hand, which was based upon a review of an EMG and CV done previously. He also found the plaintiff had loss of motion in the thumb and loss of digital height. Dr Mastey determined the plaintiff had sustained a 14 percent medical impairment to the right thumb. Dr. Mastey did not consider a loss of grip finding because he felt it was unreliable.[3]

Dr. Cauley W. Hayes, a hand surgeon, saw the plaintiff on April 6, 2000. He testified that the tip of the plaintiff's thumb had been amputated (soft tissue), that the soft tissue had been reattached and that the wound had become necrotic and gangrenous. Dr. Hayes found the plaintiff's right thumb was numb almost past the metacarpal phalange joint and that the plaintiff was experiencing swelling of the hand. Dr. Hayes opined the plaintiff would have a permanent partial medical impairment of 33 percent to his hand, with loss of motion and "fine manipulation."

Lay Testimony

The plaintiff and other witnesses testified at trial that his right hand continues to swell. On two occasions the plaintiff exhibited his hand to the trial judge for observation, once at the request of counsel and once at the request of the trial judge. The only response by the judge on these

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[1] Randstad Staffing and Siskin Steel stipulated at trial that Randstad was the actual statutory employer of the plaintiff at the time of the alleged injury and, by agreement, Randstad Staffing Services took on sole responsibility for the judgment.

[2] The plaintiff testified he did not return to Dr. Labrador because his finger was swollen and infected and he did not think he was being properly treated.

[3] Dr. Mastey appeared antagonistic to questions from plaintiff's counsel and also interjected his legal opinion into his testimony by citing a compensation decision by the Supreme Court.

occasions was "all right." There was no testimony to refute the testimony about the plaintiff's hand swelling.

Discussion

Whether the injury to the plaintiff is limited to the thumb or the phalange of the thumb or whether it is properly proportioned to the plaintiff's right hand is to be resolved by the evidence in the case and whether the preponderance of the evidence supports the finding of the trial judge.

If the evidence preponderates in favor of the defendant's claim the injury is to the thumb then the award must be limited to the thumb, Tenn. Code Ann. § 50-6-207(3)(A)(ii)(a), or if it preponderates in favor of an injury to the first phalange of the thumb the award must be to that portion of the thumb, Tenn. Code Ann. § 50-6-207(3)(A)(ii)(f). If, however, the evidence preponderates in favor of a showing the injury to the plaintiff's thumb extended beyond the thumb, the award is properly apportioned to the plaintiff's right hand. ***Carney v. Safeco Ins. Co.***, 745 S.W.2d 868 (Tenn. 1988), ***Eaton Corporation v. Quillen***, 527 S.W.2d 74 (Tenn. 1975). *See also* ***Metissu Suzanne Dew v. Pro-Temp*** (Workers Comp. Panel No. 98-LAU 253, filed at Knoxville April 8, 2002).

In reaching the judgment in this case, the trial judge reviewed the testimony of the three experts and determined that the testimony of Dr. Hayes was the most credible and based upon this found that the plaintiff had sustained an injury to his right hand and fixed the award at 75 percent.

The trial judge has the discretion to accept the testimony of one expert over that of another or other experts, ***Kellerman v. Food Lion Inc.***, 929 S.W.2d 333 (Tenn. 1996), and though we may make an independent assessment of the medical proof when it is presented by deposition, as it is this case, ***Cooper v. ICA***, 884 S.W.2d 446 (Tenn. 1994), we are not likely to disagree with the finding of the trial judge on the medical evidence unless there is some reason inherent in the depositions themselves to lead us to conclude one relied upon by the trial judge is not credible. We find no reason in this case to reach this conclusion.

The medical evidence and the lay testimony in this case is sufficient to support the finding of the trial judge and we affirm the judgment.[4] The costs of this appeal are taxed to the appellant.

JOHN K. BYERS, SENIOR JUDGE

[4] The court finds that the plaintiff's request that the amount for the injury be increased is not supported by the record.

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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 appellant, Siskin Steel & Supply Company and Randstad Staffing Services, and its surety, for which execution may issue if necessary.