IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 31, 2003 Session

JOSE SANTIAGO v. THE HARTFORD, ET AL.

Direct Appeal from the Chancery Court for Warren County
Nos. 801 and 802 Larry B. Stanley, Chancellor

No. M2002-03036-WC-R3-CV - Mailed - October 17, 2003
Filed - November 17, 2003

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. In this appeal, the employer, Powermatic, and its insurer insist the trial court erred (1) in finding that the employee's injury did not progress during his tenure at his last place of employment and (2) in determining the extent of the employee's vocational disability. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JAMES L. WEATHERFORD, SR. J., joined.

Blakely D. Matthews and Nicole R. Paulk, Cornelius & Collins, Nashville, Tennessee, for the appellants, The Hartford, Powermatic Corporation, Powermatic and Devlieg Bullard, Inc.

Michael Gigandet, Ortale, Kelley, Herbert & Crawford, Nashville, Tennessee, for the appellees, Anesthesiologist Professional Assurance Co. and Advanced Machine Technology

Barry H. Medley, Farrar, Holliman & Medley, McMinnville, Tennessee, for the appellee, Jose Santiago

MEMORANDUM OPINION

The employee or claimant, Mr. Santiago, initiated separate civil actions, against a past and present employer, to recover workers' compensation benefits for work related carpal tunnel syndrome, The former employer, Powermatic, and its insurer, and the present employer, Advanced

Machine Technology denied liability. The cases were consolidated for trial. Both sets of defendants argued the injury occurred while the claimant was working for the other. After a trial on the merits, the trial court resolved the issues in favor of the claimant and against Powermatic and its insurer, awarding, among other things, permanent partial disability benefits based on 40 percent to both arms. Powermatic and its insurer have appealed.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225 (e)(2). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998. Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

The claimant worked for Powermatic Corp. as a machine operator from 1986 until 2001, performing jobs which required repetitive use of the hands. He gradually developed carpal syndrome but continued working. On November 9, 2000, he was offered corrective surgery, which he refused. He continued working for Powermatic until April 2000, when the company was sold and its employees, including the claimant, laid off.

Two days later, he began working for Advanced Machine Technology (AMT) as a production foreman. He received a 15 percent raise and increased managerial responsibilities. Duties requiring repetitive use of the hands required only a couple of hours per day at AMT, but the claimant continued having the same pain and numbness as before. His lawyer referred him to Dr. Robert Landsberg for examination and evaluation.

Dr. Landsberg assigned a permanent impairment rating of 5 percent to each arm and opined the condition had not progressed during the claimant's employment with AMT. The doctor advised the claimant to avoid repetitive use of the hands and the use of vibrating and pneumatic tools.

Powermatic first contends the trial court erred in not placing liability on AMT by invoking the "last injurious injury" rule. Where an employee is permanently disabled as a result of a combination of two or more accidents occurring at different times and while the employee was working for different employers, the employer for whom the employee was working at the time of the most recent accident is generally liable for permanent disability benefits. McCormick v. Snappy Car Rentals, Inc., 806 S.W.2d 527 (Tenn. 1991). The trial court, however, relying largely on the claimant's own testimony and that of Dr. Landsberg, found that the severity of the claimant's

condition was not advanced by his work with AMT.

The employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if the employee had not had the pre-existing conditions, but if work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996). To be compensable, the pre-existing condition must be advanced, there must anatomic change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. Sweat v. Superior Industries, Inc., 966 S.W.2d 31, 32 (Tenn. 1998). On those authorities, the claimant did not suffer a compensable injury by accident while working for AMT.

The appellant next contends the award of permanent partial disability benefits based on 40 percent to both arms is excessive because the claimant is able to work at a higher rate of pay than he was earning before the injury. The fact of employment after an injury is a relevant factor in determining the extent of vocational disability but it is not a controlling factor. Corcoran v. Foster Auto GMC, Inc., 746 S.W. 2d 452, 458 (Tenn. 1988). Instead, the assessment is based on the worker's ability to compete in the open market. Id. A trial court may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. McCaleb v. Saturn Corp., 910 S.W.2d 412, 416 (Tenn. 1995). Mr. Santiago is approximately fifty-eight years old with a sixth grade education, limited reading and writing skills and experience as a machine operator.

From our independent examination of the record, giving due deference to the findings of the trial court, we cannot say the evidence preponderates against the findings of the trial court on any issue raised by the appellant. The judgment is affirmed. Costs are taxed to Powermatic.

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Joe C. Loser, Jr.

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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 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 paid by the Appellants, Powermatic, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM