IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 5, 2004 Session

JOSEPH COX v. MCCLANE FOOD SERVICE, INC., ET AL.

Direct Appeal from the Chancery Court for Shelby County
No. CH-021465-3 D.J. Alissandratos, Chancellor

No. W2003-01465-WC-R3-CV - Mailed June 15, 2004; Filed July 20, 2004

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. This is a scheduled injury case in which the trial court awarded the Employee a recovery based on a disability rating of five percent (5%) to the Employee's right lower extremity. The Employee appealed. The issue raised on appeal is whether the trial court's findings with regard to the Employee's proper anatomic impairment rating and vocational impairment rating were contrary to the preponderance of the evidence. We remand the case to the trial court for clarification.

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

LARRY B. STANLEY, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and WILLIAM B. ACREE, JR., SP. J., joined.

Stephen F. Libby, Memphis, Tennessee, for the appellant, Joseph Cox.

Lori Keen, Memphis, Tennessee, for the appellees, McClane Food Service, Inc. and AIG Claims Services, Inc.

MEMORANDUM OPINION

Factual Background

At the time of trial, Employee Joseph Cox was 45 years of age, and had been employed as a truck driver by the Employer for 17 years. Employee had a tenth grade education and no vocational training. Employee sustained an injury to his knee on

December 15, 2000, as a load he was delivering fell on his leg. The parties stipulated that the injury occurred in the course and scope of his employment with McClane Food Service, Inc., Employer, and, therefore, constituted a compensable injury under the Tennessee Workers' Compensation laws.

Following the Employee's injury, he was initially treated by Dr. Lynch, who found that Employee had not sustained any significant injury and released him back to full duty. After subsequent pain and swelling in his knee, Employee was referred to Dr. Owen B. Tabor for additional evaluation and treatment. Through the course of his examination of the Employee Dr. Tabor measured a 5-degree flexion contracture in the right knee, which fell below the Table for the mildest form of knee impairment provided for in the Fifth Edition of the AMA Guidelines. On June 12, 2001, Dr. Tabor performed arthroscopic surgery on Employee's right knee, which revealed nothing unusual. Dr. Tabor also ordered a functional capacity examination of the Employee, and this examination revealed that the Employee's efforts "were not maximum and that performance was self-limited." Dr. Tabor released the Employee back to full duty, with no restrictions, on August 1, 2001, and assigned a permanent impairment rating of 2 percent to the right lower extremity[1]. This rating was interpolated from the mildest case of knee impairment provided for in the AMA Guidelines, which is ten percent (10%) to the lower extremity.

On August 14, 2001, Employee underwent a physical examination by Dr. Melvin Lee for the purpose of renewing his truck driving certification. Dr. Lee noted that Employee's legs were "normal"; however, Employee denied that Dr. Lee conducted any type of examination on his legs.

Following his release to full duty, Employee returned to Employer on a trial basis to see if he would be able to perform the work. Employee continued to suffer pain and swelling in his knee and informed Employer that he would be unable to carry out his normal employment duties and requested a light duty job. At the conclusion of this trial period, the Employer terminated the Employee's services.

Employee was subsequently employed part-time with FedEx as a material handler. This job involved moving boxes onto a conveyor belt and loading/unloading packages from planes. Employer testified that the physical demands of the FedEx job were less strenuous than those associated with being a truck driver for Employer, but his wages were also significantly less than the amount he earned with his previous Employer.

On May 16, 2002, Employee was seen by Dr. Joseph C. Boals, III for the purpose of an Independent Medical Examination. Dr. Boals found a 12-degree flexion contracture difference in the Employee's knees, which translated into a fifteen percent

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[1] The "lower extremity" is not a scheduled member. The leg, however, is a scheduled member. There is no evidence in this case showing that the "right lower extremity" extends any farther than the right leg. *See Wade v. Aetna Casualty & Surety Co.*, 735 S.W.2d 215, 217 (Tenn. 1987). Thus, the award for the injury here must be strictly limited to the amount statutorily established for the "loss of a leg."

(15%) lower extremity impairment. Dr. Boals also opined that Employee would have limitations in activities involving excessive bending, squatting, climbing or stooping.

The trial court assigned a two percent (2%) anatomical disability and a 5 percent (5%) permanent disability rating to the Employee's right lower extremity. In announcing its decision, the trial judge also found that the Employee was not a credible witness, was willfully underemployed, and found Dr. Tabor's anatomical rating to be more credible than the rating given by Dr. Boals.

Standard of Review

The standard of review in an award of workers' compensation benefits is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2003 Supp.); *Walker v. Saturn Corp.*, 986 S.W.2d 204, 207 (Tenn. 1998). The reviewing Court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380,383-4 (Tenn. 2002). As in this case, where the issues involve expert medical testimony and the record contains medical information presented by deposition, then all impressions of weight and credibility must be drawn from the depositions and the reviewing court makes its own assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

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 findings on review, because the trial court had the opportunity to observe the witnesses= demeanor and to hear the in-court testimony. *Long v. Tri-Con Ind.,* 996 S.W.2d 173, 178 (Tenn. 1999). In addition, when there is any doubt as to whether an injury arose out of the course and scope of one's employment or results in disability is to be resolved in favor of the employee. *See Legions v. Liberty Mutual Ins. Company*, 703 S.W.2d 620, 622 (Tenn. 1986); *Tapp v. Tapp*, 192 Tenn. 1, 236 S.W.2d (1951).

Analysis

The issue raised by Employee on this appeal is whether the trial court's findings with regard to the Employee's proper anatomic impairment rating and vocational impairment rating were contrary to the preponderance of the evidence. In support of his contention that the trial court so erred, Employee argues as follows: 1) that the trial court failed to properly consider Employee's skills, training, age, local job opportunities, and capacity to work at the types of employment available, as required by Tennessee Code Annotated § 50-6-241(a) and (b); 2) that Dr. Tabor's anatomical impairment rating was not supported by the AMA Guidelines; and 3) that, if the trial court capped the impairment rating at 2.5 times Employee's anatomical rating, this cap was inapplicable because Employee's anatomical impairment rating was to a scheduled member, and not to the body as a whole.

Determining Anatomical Impairment

Medical causation and permanency of an injury must be established in most cases by expert medical testimony. *See, e.g., Smith v. Empire Pencil Co.,* 781 S.W.2d 833 (Tenn.1989); *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 458 (Tenn.1988); *Seay v. Town of Greeneville,* 587 S.W.2d 381 (Tenn.1979). Where the issues involve expert medical testimony, and all the medical proof introduced at trial was deposition testimony, we may draw our own conclusions about the weight and credibility of the testimony because "we are in the same position as the trial judge." *Laurenzi v. City of Memphis,* 2002 WL 1838143, *2 (Tenn. Ct. App., 2002)(citing *Krick v. City of Lawrenceburg,* 945 S.W.2d 709, 712 (Tenn.1997)). However, when faced, as we are here, with conflicting medical testimony on the issue of the extent and permanency of an injury, "it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation." *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676-77 (Tenn.1983) (citing *Combustion Engineering, Inc. v. Kennedy,* 562 S.W.2d 202 (Tenn.1978)).

In reviewing the medical testimony of Dr. Tabor and Dr. Boals we find that both physicians opined that Employee had a permanent impairment to his right lower extremity, which would cause him pain or limit his ability to, among other things, squat, bend at the knee, stoop, or extend his leg for an extended period of time. The record also indicates that Employer was under the care of Dr. Tabor for approximately three months, and was seen by Dr. Boals on one occasion for the purpose of an independent medical examination. The trial court found that Dr. Tabor was more thorough and ruled that his anatomical disability rating of two percent (2%) was more credible than the fifteen percent (15%) rating assigned by Dr. Boals. We find that the evidence does not preponderate against the trial court's findings, and we are of the opinion that the two percent (2%) anatomical disability rating was reasonable.

Employer has also argued that Dr. Tabor's anatomical rating was not supported by the AMA Guidelines. We have considered Dr. Tabor's testimony and did not find his interpolation downward of the applicable table in the AMA Guidelines to be inappropriate. The trial court found Dr. Tabor's opinion regarding Employee's anatomical disability to be reasonable and there is no evidence that preponderates otherwise.

Determining Vocational Impairment

Employee contends that the trial court erred in failing to make any findings as to the requirements for the determination of Employee's vocational impairment. In support of this contention Employee cites *Corcoran v. Foster Auto GMC, Inc.,*746 S.W.2d 452 (Tenn. 1988), *Downs v. CNA Ins. Co.*, 765 S.W.2d 738 (Tenn. 1989), and Tennessee Code Annotated § 50-6-241(a) and (b). Both the *Corcoran* case and Tennessee Code

Annotated § 50-6-241(a) and (b) are inapposite to this case, as they apply only to body as a whole cases. In the *Downs* case cited by Employer, this Court stated some of the factors to be considered by a trial court in determining the extent of vocational disability are "job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to the anatomical disability testified to by medical experts." *Id.* at 741. While these are factors for the court's consideration in determining vocational disability, there is no requirement for the trial court to make specific findings of fact detailing the reasons for its award in this type of case. Only if a court awards a multiplier of five or greater in a body as a whole case pursuant to the above-cited statute is the court required to make specific findings of fact with regard to its vocational disability finding. *See* Tenn. Code Ann. § 50-6-241(c).

Although there is no requirement in the present case that the trial court make specific findings of fact regarding Employee's skills, training, age, local job opportunities, and capacity to work at types of employment available in Employee's disabled condition, it is impossible to discern whether the trial court considered these factors in determining vocational disability.

In addition, the trial court's repeated remarks concerning "willful underemployment" are troubling. We are unable to find any precedent for the use of this term in a workers' compensation context or as a standard in determining vocational disability.

Finally, Employee contends that the trial court capped his impairment rating at 2.5 times his anatomical disability, despite the inapplicability of Tennessee Code Annotated § 50-6-241(a)(1) to this case. While the trial court's award of a five percent (5%) permanent disability rating is 2.5 times his anatomical impairment rating, the court did not specifically state that this award was capped at five percent (5%). A court may find an Employee's vocational disability rating is 2.5 times his anatomical rating without "capping" the award as such. However, we note that Employer's counsel suggested during her opening statement that an award of 15-20% vocational disability would be appropriate in this case.

It appears that the trial court may have considered improper factors in determining vocational disability and may have erroneously applied the statutory cap. Accordingly, we remand this case to the trial court for clarification. On remand, the trial court should clarify the basis for its decision and, in its discretion, may reconsider the evidence and modify its decision.

Conclusion

This cause is remanded to the trial court for clarification. The costs of this appeal are taxed equally.

LARRY B. STANLEY, JR., SPECIAL JUDGE

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JUDGMENT ORDER

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 on appeal are taxed equally to the Appellant, Joseph Cox, and to the Appellees, McClane Food Service, Inc., and AIG Claims Services, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM