IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 16, 2004 Session

DANNY CAPPS v. ANVIL INTERNATIONAL, INC.

Direct Appeal from the Chancery Court for Chester County
No. 9655 Joe C. Morris, Chancellor

No. W2003-01414-SC-WCM-CV - Mailed June 7, 2004; Filed October 5, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 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 that employee suffered a permanent partial disability of 15% to the right arm. We affirm.

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

JOE H. WALKER, III, SP.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JAMES L. WEATHERFORD, SR.J., joined.

K. Don Bishop, Henderson, Tennessee, for the appellant, Danny Capps.

Zachary C. Luttrell, and Jeffery G. Foster, Jackson, Tennessee, for the appellee, Anvil International, Inc.

MEMORANDUM OPINION

FACTUAL BACKGROUND

At the time of trial, Employee was 53 years of age, a graduate of high school, and an employee of defendant company for the past twenty-five years. He worked in the fabrication department of the plant, reading blueprints and forming parts.

Employee was injured in the course and scope of his employment in April 2000. He was prying a piece of metal from a machine when he "felt something give in his arm." After his elbow started swelling, he was referred to Dr. Warren who treated him conservatively with a splint. A nerve conduction study indicated a problem, and Employee was treated by Dr. Johnson, who diagnosed a carpal tunnel problem and performed surgery. Dr. Johnson treated the elbow for tendonitis and rated Employee with a 5% impairment to his upper extremity as a result of the carpal tunnel surgery.

Employee saw Dr. Johnson in December 2001 and reported problems with his shoulder. A nerve conduction study showed normal results. Dr. Johnson suspected a shoulder strain and testified that the shoulder problem had nothing to do with the injury in April 2000. Dr. Johnson placed no restrictions on Employee, and Employee returned to work.

In June 2001, Employee went to see Dr. Fulbright about pain in his arm and shoulder. Employee had full range of motion in the shoulder the first visit. Dr. Fulbright considered several different diagnoses, and concluded that Employee has a fairly rare shoulder condition. Dr. Fulbright determined that a part of Employee's acromion bone had not fused at birth and that this condition was probably contributing to his pain. This defect is difficult to heal because there is no reason for it to fuse and the muscle that controls the arm continues to irritate it every time the arm is moved. Dr. Fulbright suggested surgery, but could not promise a favorable result. Therefore, Employee elected not to have the surgery. The doctor testified that long periods of use of the arm further the damage. The first observation of any loss of motion in the shoulder was in June 2002. Dr. Fulbright gave Employee a 22% upper extremity impairment based on his shoulder and elbow symptoms and flexion and extension in the wrist.

Employee also was seen by Dr. Joseph Boals for evaluation. Dr. Boals diagnosed impairment to the right upper extremity resulting from the carpal tunnel surgery. He gave an impairment rating of 20% to the right upper extremity secondary to the carpal tunnel release, with an additional 5% to the upper extremity for mild ulnar nerve neuropathy, or 24% to the right upper extremity. At the first evaluation, Employee had full range of motion in his shoulder. After a second evaluation, Dr. Boals added 8% for "impingement syndrome right shoulder with secondary loss of motion."

TRIAL JUDGE'S FINDINGS

The defendant admitted a compensable injury occurred in April 2000. The issues submitted to the trial judge consisted of the extent of vocational disability, and whether the medical expenses of Dr. Fulbright are covered under the workers' compensation statute.

The trial court found that the Employee sustained a 15% vocational disability to the right arm. Some confusion arose as to this finding, because the trial judge stated that Employee "has suffered a permanent partial disability of fifteen (15%) percent to the right upper extremity as a result of his work related accident."

A motion for additional findings was filed, requesting clarification as to what the trial court meant by "right upper extremity." The trial court filed additional findings, stating "the Court is of the opinion that the disability should have been 15% to the right arm."

Our 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 finding, 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).

RIGHT UPPER EXTREMITY

Employee assigns as error that the permanent partial disability award should be to the right upper extremity as first ruled by the Court, resulting in a permanent partial vocational disability award to the body as a whole.

T.C.A. § 50-6-207 prescribes benefits for the loss of a scheduled member. The loss of an arm is worth only 200 weeks. The Code does not address the loss of an upper extremity.

As noted by the Panel in Hatcher v. Rubbermaid, 1999 Tenn. LEXIS 343, the AMA Guidelines, which are contained in the Code by reference, do not assess impairment to the arm, but only to the upper extremity. The anomaly thereby posed, as the appellant observes, is frustrating. In Reagan v. Tenn. Mun. League, 751 S.W.2d 842 (Tenn. 1988), the Supreme Court squarely held that the mere fact a medical impairment may translate for the purpose of the Guides into a disability rating to the body as a whole does not alter the rule that if an injury is to a scheduled member only, the statutory schedules must control the disability award. The operative language in Reagan is "if an injury is to a scheduled member only." In 1976 the Supreme Court, in Continental Ins. Co. v. Pruitt, 541 S.W.2d 594 (Tenn. 1976), held that injuries to the upper extremity which included the shoulder were not equitable to the arm, with concomitant benefits restricted to the loss of an arm. This ruling has been consistently applied in a legion of cases holding that an injury may be apportioned to the body as a whole if the injury extends beyond the scheduled member. See, Wells v. Sentry Ins. Co., 834 S.W.2d 935 (Tenn. 1992).

In this case the trial judge, upon motion, clarified that his opinion was that the injury was to a scheduled member only. We have reviewed the depositional testimony of the medical experts, and find that the evidence does not preponderate against the opinion of the trial judge.

The preponderance of the evidence was that there was no work accident which caused a compensable shoulder injury.

The treating physician, Dr. Johnson, testified that he began treating Employee in April 2000 for the work related injury, and that Employee did not mention shoulder problems until December 2001. There was no evidence of loss of motion in the shoulder, or a torn rotator cuff.

Dr. Boals examined Employee twice. On the first examination in January 2001, Employee had a full range of motion in the shoulder. At the August 2002 examination, Employee exhibited a loss of range of motion in the shoulder. However, Dr. Boals was hesitant about relating this loss of range of motion to the April 2000 injury, stating he could not say that the loss of motion in and of itself was related to the actual injury, but it may have been "a progressive thing over time." He stated that opinion came from the Employee who said it was progressive over time, and the doctor was not presented with any history of injury related to work with regard to the shoulder.

Dr. Fulbright testified Employee had a full range of motion when he first examined him in June 2001. The first observation of any loss of motion in the shoulder was in June 2002. This was a subjective finding that relied on the patient. The doctor felt there had been some reason for the change, but could not relate it to the work accident, stating "it's difficult to explain the -- the change of motion with that except for the fact that I have seen the -- problems such as the os-acromiale tend to cause shoulder stiffness over time."

We find that the evidence does not preponderate against the trial court's finding that the injury was to the arm. This issue has no merit.

MEDICAL EXPENSES

Employee asserts the medical expenses of Dr. Fulbright should be paid by Employer.

When a covered employee suffers an injury by accident arising out of and in the course of his employment, his employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Tenn. Code Ann. section 50-6-204. The injured employee is required to accept the medical benefits provided by the employer and must consult with the employer before choosing a treating physician. Unless the injured employee has a reasonable excuse for the failure to consult with the employer first, the injured employee may be responsible for his own medical expenses. Emerson Electric Co. v. Forrest, 536 S.W.2d 343 (Tenn. 1976).

After the injury in April 2000, Employer provided medical treatment for Employee, who saw Dr. Warren and Dr. Johnson. He continued seeing and being treated by Dr. Johnson throughout the course of medical treatment. In June 2001, Employee went to see Dr. Fulbright after "talking to some friends of mine" who recommended Dr. Fulbright. He consulted with Dr. Fulbright about four times, during the same period of time he was being treated by Dr. Johnson. Employee has made no showing of an excuse for the failure to consult with the employer before seeking medical treatment from Dr. Fulbright. Employee notified Employer of the treatment by Dr. Fulbright after the treatment began.

The evidence does not preponderate against the judgment of the trial judge, who declined to require the Employer to pay the medical expenses of Dr. Fulbright.

The judgment of the trial court is therefore affirmed. Costs are assessed to the appellant.

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JOE H. WALKER, III, SP.J.

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JUDGMENT

This case is before the Court upon a motion for review filed by Danny Capps 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 are incorporated herein by reference.

Whereupon, it appears to the Court that the motion for review is not well-taken and should be DENIED; 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 assessed to Danny Capps for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating.