IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE, TENNESSEE
February 24, 2005, Session

BRIAN KEITH VOWELL v. CLINTON HOME CENTER

Direct Appeal from the Circuit Court for Anderson County
No. A2LA0005, James B. Scott, Jr., Circuit Judge

Filed June 22, 2005

No. E2004-01477-WC-R3-CV - Mailed May 16, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated §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 asserts that the trial court erred in awarding to the employee a 30% permanent partial disability to the whole body as a result of his employment with Clinton Home Center. We conclude that the evidence presented supports the findings of the trial judge with regard to the extent of the disability sustained but find that the employee refused a reasonable offer of return to work and is subject to the maximum benefit set forth in Tenn. Code Ann. §50-6-241(a)(1). In accordance with Tenn. Code Ann. §50-6-225(e)(2), we affirm the judgment of the trial court but modify the award to the employee to provide for a 17.5% permanent, partial disability to the whole body.

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

DONALD P. HARRIS, SENIOR JUDGE, delivered the opinion of the court, in which E. RILEY ANDERSON, JUSTICE, and ROGER E. THAYER, SPECIAL JUDGE, joined.

Roger L. Ridenour, Clinton, Tennessee, for the appellee, Brian Keith Vowell.

Beverly Dean Nelms, Knoxville, Tennessee, for the appellant, Clinton Home Center.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND.

At the time of trial Bryan Vowell was twenty-two years of age, married and had completed the eleventh grade. He dropped out of school and started working at the Clinton Home Center in June of July 1999.

The Clinton Home Center is a building supply store. Mr. Vowell operated a fork lift and a bobcat loading lumber and building supplies onto trucks and delivering the supplies to job sites. For smaller orders, some trucks were loaded by hand. At the job site the supplies would be unloaded either by dumping or by hand.

On April 16, 2001, Mr. Vowell and another employee were loading 6 x 6 x 16 timber onto a truck when the person who was helping dropped his end jerking Mr. Vowell's shoulder and causing an injury. He reported the injury and was sent by Clinton Home Center to see Dr. Jose Malagon. Dr. Malagon, in turn, referred Mr. Vowell to Dr. Clifford Posman. Dr. Posman performed surgery on Mr. Vowell's shoulder. According to Mr. Vowell, following this surgery, he returned to work for three to four days on light duty, sweeping and counting stock.[1] Mr. Vowell stated he could not sweep because it hurt his shoulder and when he reported that to the supervisor, he was told to go home.

Mr. Vowell has undergone a total of three surgeries on his left shoulder. The first was during the fall of 2000 after being involved in a 4-wheeler accident. He has had two additional surgeries following the incident at the Clinton Home Center, the second of the three surgeries in May 2001 and the third in April 2002. Once Dr. Posman told him that he could return to work following the third surgery, he did so and was told he would be working up front sweeping, dusting, and cleaning. Charles Rochell, one of the owners of Clinton Home Center, told him that they would put him back to work at the same pay, working the same hours and within the restrictions imposed by Dr. Posman. Mr. Vowell refused the employment. He didn't work anywhere from September 2002 until June of 2003 when he went to work for Lake City operating a commercial weed eater. He worked there for three months as a seasonal employee. Since that time, he has made application to fast food restaurants, factories and a boat trailer company but has not found employment.

Mr. Vowell testified he hardly uses his left shoulder at all because of the pain. It wakes him during the night and is stiff during the mornings. He tries not to use it because simple movements such as picking up a carton of milk cause him pain.

II. MEDICAL EVIDENCE.

Testifying by deposition for the plaintiff was Dr. Clifford L. Posman. Dr. Posman is a board certified orthopaedic surgeon practicing in Oak Ridge, Tennessee. He saw Mr. Vowell in 2000 following a non work related injury and in November 2000 did a thermal capsular shrinkage which is an arthroscopic procedure to stabilize the shoulder. He was released following this procedure on December 11, 2000, with some limitation of his external rotation. Mr. Vowell may have retained 2-3 % permanent impairment to his left shoulder based on the limited range of motion.

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[1] Mr. Vowell testified at a deposition on December 22, 2003, that he had never returned to work at Clinton Home Center after April 16, 2001. Mr. Vowell explained that after he returned home from the deposition he realized that was a mistake and that he had gone back to work for three or four days.

Dr. Posman next saw Mr. Vowell on April 25, 2001, when Mr. Vowell reported that he was working at the lumber yard and re-injured his left shoulder. He examined Mr. Vowell and determined he had an anterior left shoulder dislocation and recurrent instability. Dr. Posman recommended bankart repair, which is an open surgical procedure. That was performed on May 1, 2001, at the Methodist Medical Center. In that procedure the doctor made a surgical incision, actually peeled off the rotator cuff, exposed the joint capsule of the shoulder and re-attached it to the bony rim of the shoulder socket.

Following this surgery, Mr. Vowell initially reported that his pain was better and his motion was improving. He was referred to physical therapy. At five weeks, Mr. Vowell complained of more pain with his therapy sessions and had some improvement in his range of motion. At two months the pain was increasing and his shoulder was popping and had less than a normal range of motion. At three months he was not complaining of much shoulder pain and told the doctor that his range of motion was improving. At that time Dr. Posman felt that his range of motion was nearly normal but noted that he had some rotator cuff weakness. Dr. Posman referred him back to therapy and told him he could return to work with restrictions.

Mr. Vowell returned to Dr. Posman on August 6, 2001, and stated he had been doing well until the previous Monday when he noticed popping and instability which began spontaneously. He denied any subsequent injury. He reported that his left shoulder seemed to come out of place. Dr. Posman's impression was that he had recurrent instability. Thereafter, Mr. Vowell apparently saw another orthopaedic surgeon recommended by family members.

Dr. Posman next saw Mr. Vowell on March 25, 2002. He had undergone 24 sessions of physical therapy without significant improvement in his shoulder. He reported that his shoulder was still unstable and painful. Dr. Posman recommended revision surgery with repair of the glenoid labrum and anterior capsule. That surgery was performed on April 2, 2002. Following this third surgery, Mr. Vowell progressed rather slowly but did not have symptoms of instability. To the contrary, he began having symptoms of a frozen shoulder. Dr. Posman last saw Mr. Vowell on October 7, 2002. Mr. Vowell reported that his left shoulder was doing much better with respect to pain. He still had some decreased strength and stiffness, particularly when reaching overhead and behind his back. At that time, his range of motion was less than normal. Dr. Posman told Mr. Vowell that he could return to work with the restriction of no overhead work. Dr. Posman has not seen Mr. Vowell since that time.

Dr. Posman stated that in his opinion the cause of the injury to Mr. Vowell was the incident that occurred on April 16, 2001, at the Clinton Home Center. He further believed that in accordance with the *5th Edition of the AMA Guidelines*, he would retain a 15% impairment to the left upper extremity for the latest injury. His impairment for the first surgery not related to his employment was 3-4 %. To the body as a whole the impairment would be 9% aggregate and 7% additional because of the recent injury. The permanent restrictions for Mr. Vowell are no overhead lifting. Mr. Vowell reached maximum medical improvement on October 7, 2002. Dr. Posman also indicated that with three shoulder surgeries and multiple dislocations, it is quite common to have some arthritis so he

may develop osteoarthritis in the future and will require additional treatment.

III. RULING OF THE TRIAL COURT.

The trial court determined that the plaintiff had sustained a 7% impairment according to the testimony of Dr. Posman and a 30% permanent partial disability to the body as a whole as a result of his employment with Clinton Home Center.

IV. STANDARD OF REVIEW.

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. ***Lollar v. Wal-Mart Stores, Inc.***, 767 S.W.2d 143 (Tenn. 1989); Tenn. Code Ann. § 50-6-225(e)(2). 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 afforded those circumstances on review since the trial court had the opportunity to observe the witness' demeanor and to hear the in-court testimony. ***Long v. Tri-Con Industries, Ltd.***, 996 S.W.2d 173 (Tenn. 1999). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions and the reviewing court may draw its own conclusions with regard to those issues. ***Orman v. Williams Sonoma, Inc.***, 803 S.W.2d 672 (Tenn. 1991).

V. ANALYSIS.

Tenn. Code Ann. §§50-6-241(a)(1) and (2) provide the amounts of permanent disability benefits that can be awarded to eligible injured employees. Tenn. Code Ann.§50-6-241(a)(1) provides as follows:

> For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 1/2) times the medical impairment rating . . . .

In cases where application of this code section is an issue, the court's inquiry must focus on "the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to return to work." ***Nelson v. Wal-Mart Stores, Inc.***, 8 S.W.3d 625 (Tenn. 1999).

While the issue of the statutory cap was raised below, the primary focus of the trial of this case was whether the plaintiff's claim for benefits was barred due to an intentional violation of a safety rule established by the employer as provided in Tenn. Code Ann. §50-6-110. Perhaps, it is for that reason

that the trial court made no finding with regard to whether the employee's failure to return to work was reasonable.

After his third surgery, Mr. Vowell was released to return to work by Dr. Posman with the single restriction of no overhead work. Both Mr. Vowell and the employer testified that he was offered a job within his restrictions, at the same hourly rate of pay and for the same hours as he had previously worked. The job offered was working in the front of Clinton Home Center sweeping, dusting and cleaning. Mr. Vowell testified, "I told him I'm sorry, I couldn't do it, I was going to find me employment somewhere else." Some months later he obtained a job operating a commercial weed eater for Lake City.

The only explanation for Mr. Vowell's refusal to return to work was that he had attempted to return to light duty on an earlier occasion and could not sweep because it pulled on his shoulder. When he relayed this fact to his employer, he was instructed to go home and, thereafter, Mr. Vowell returned to see his doctor. While it is not absolutely clear from the record when this earlier attempt at light duty occurred, it would appear that it was prior to Mr. Vowell's third surgery. According to the deposition of Dr. Posman, about three months following Mr. Vowell's second surgery (May 1, 2001), Dr. Posman released him to return to work with restrictions. That would have been about August 1, 2001. Mr. Vowell returned to Dr. Posman on August 6, 2001, with additional complaints about his shoulder. The third surgery was performed on April 2, 2002, and Mr. Vowell was not released to return to work thereafter until October 7, 2002. Thus a clear preponderance of the evidence would indicate the plaintiff made no effort to return to the offered employment following the third surgery, the completion of his treatment and his achieving maximum medical improvement. We conclude Mr. Vowell's refusal to accept the offer of a return to work within the restrictions imposed by his physician was not related to the injuries he sustained during the course of his employment with Clinton Home Center and was, therefore, unreasonable. While the trial court did not specifically address the issue, we believe a finding that the employee reasonably refused the offer of employment would be contrary to the preponderance of the evidence. We therefore find Mr. Vowell's award is subject to the maximum benefit of two and one-half times the impairment rating (7%) found by the trial court as provided in Tenn. Code Ann. §§50-6-241(a)(1).

VI. CONCLUSION.

The judgment of the trial court is affirmed, as modified, and the cause is remanded for the entry of an order awarding Mr. Vowell a 17.5% permanent, partial disability to the whole body. The costs of this appeal are taxed to the appellee, Brian Keith Vowell.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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BRIAN KEITH VOWELL V. CLINTON HOME CENTER
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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 appellee, Brian Keith Vowell, for which execution may issue if necessary.