IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 22, 2005 Session

EUGENE PIRTLE v. SHONEY'S

Direct Appeal from the Chancery Court for Madison County
No. 60246 James Butler, Chancellor

No. W2004-01333-WC-R3-CV - Mailed June 10, 2005; Filed July 14, 2005

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 the employee had sustained a 14% permanent partial disability to the body as a whole for a work related shoulder injury. The employer contends that the trial court erred in accepting the evaluating physician's higher impairment rating over that of the treating physician who gave the employee a 6% permanent partial impairment rating. For the reasons discussed below, 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.

JAMES L. WEATHERFORD, SR.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and DONALD PAUL HARRIS, SR.J., joined.

Alex C. Elder, Memphis, Tennessee, for the appellant Shoney's.

Greg A. Petrinjak, Jackson, Tennessee, for the appellee Eugene Pirtle.

MEMORANDUM OPINION

Mr. Eugene Pirtle was fifty-three years old at the time of trial. He attended school until the ninth grade but cannot read or write. He cannot drive a car. He has worked at Shoney's for thirty-five years as a busboy and dishwasher. He also unloaded delivery trucks for Shoney's.

On June 4, 2002, Mr. Pirtle injured his left shoulder while unloading a truck at Shoney's. On August 30, 2002, Dr. Keith Nord, an orthopedic specialist, performed rotator cuff surgery, acromioplasty, arthroscopy and debridement on Mr. Pirtle's left shoulder.

Dr. Nord assigned Mr. Pirtle a 6% permanent partial impairment rating to the body as a whole under the AMA Guides. He assigned permanent restrictions of no repetitive overhead work and no lifting greater than forty pounds with the left arm.

Dr. Joseph Boals assigned Mr. Pirtle a 14% permanent partial impairment rating according to the AMA Guides based upon range of motion loss and considerable strength loss resulting from the rotator cuff repair. Dr. Boals found that Mr. Pirtle should avoid overhead work, work away from his body, and work that requires repetitive flexion, extension or rotation of the left shoulder. He stated that the one time weight lifting restriction should be determined through work trial.

Although he has returned to his job with accommodations, Mr. Pirtle still has problems with his shoulder. He has pain everyday especially when he tries to reach overhead. His left arm is weak and he can no longer pick up or carry things with his left arm. He can no longer unload delivery trucks. He has never worked anywhere else other than Shoney's.

The trial court found that Mr. Pirtle had a 14% anatomical impairment rating to the body as a whole. The trial court applied the 2.5 statutory multiplier contained in Tennessee Code Annotated section 50-6-207(3)(f) and assigned a 35% vocational disability rating.

ANALYSIS

Review of findings of fact by the trial court shall be *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). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988). Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). When the medical testimony is presented by deposition or C-32, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Ins. Co. of N. Am.*, 884 S.W.2d 446, 451 (Tenn. 1994).

The sole issue raised by the employer is whether the trial court erred in determining that the medical impairment rating of Mr. Pirtle should be based on the recommendation of a doctor that was hired for litigation purposes. The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Tenn. Code Ann.* § 50-6-241(c); *Worthington v. Modine Mfg. Co.,* 798 S.W.2d 232, 234 (Tenn. 1990). The assessment of this disability is based on all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at the types of employment available in his disabled condition. *Orman v. Williams Sonoma, Inc.,* 803 S.W.2d 672, 678 (Tenn. 1991). The test is whether "there has been a decrease in [the employee's capacity] to earn

wages in any line of work available to the [employee]." *Corcoran*, 746 S.W.2d at 459 (citation omitted).

The medical testimony was presented by C-32 forms. Dr. Nord, the treating physician, assigned a 6 % rating based on the rotator cuff repair and assigned permanent restrictions. Dr. Boals found that Mr. Pirtle had markedly less range of motion compared to Dr. Nord's tests results[1] and assigned a 14% rating based on range of motion and strength loss. When medical testimony differs, the trial court has the discretion to determine which medical testimony to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996). In doing so, a court should consider, among other things, "the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." *Orman*, 803 S.W.2d at 676.

Mr. Pirtle testified at trial about his condition and how it affects his ability to work and do chores around the house. He cleans the tables but cannot pick up anything heavy with his left hand. He washes dishes with one hand now. He does not unload the delivery trucks anymore. The trial court found Mr. Pirtle to be a competent and credible witness. The employee's own assessment of his physical condition and resulting disability is competent testimony that should be considered. *McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179, 183 (Tenn. 1999).

The trial court considered Mr. Pirtle's testimony about his condition together with the C-32 forms of the two physicians in deciding the impairment rating. After reviewing the record in this case we find that the evidence does not preponderate against the trial court's finding that Mr. Pirtle sustained a 14% anatomical impairment to the body as a whole for his work related injury.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to the employer.

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JAMES L. WEATHERFORD, SR.J.

[1]The employer argues that Dr. Boals' rating should be disregarded because he indicated that testing was "somewhat difficult" as Mr. Pirtle was drowsy from taking medication for an unrelated problem. The trial court noted this fact in its findings at the conclusion of trial and therefore took this factor into consideration in rendering its decision.

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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 to the Appellant, Shoney's, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM