IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 30, 2005 Session

JOHNNY COLLINS v. MID-SOUTH UNIFORM SERVICE, INC., ET AL.

Direct Appeal from the Chancery Court for Coffee County
Nos. 03-246 & 03-247, Consolidated John W. Rollins, Chancellor

---

No. M2005-00264-WC-R3-CV - Mailed - May 12, 2006
Filed - June 13, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court 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. Plaintiff Johnny Collins ("Employee") filed two complaints, one for a shoulder injury and the second for bilateral carpal tunnel syndrome. The complaints were consolidated for trial by agreement. The trial court awarded Employee 200 weeks of compensation for the shoulder injury and 200 weeks of compensation for the bilateral carpal tunnel syndrome. Defendants Mid-South Uniform Service, Inc., and Zenith Insurance Company (collectively "Employer") appeal. We modify Employee's award for the shoulder injury to 60 weeks of compensation. We affirm Employee's award for the bilateral carpal tunnel syndrome.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and ROBERT E. CORLEW, SP. J., joined.

Jennifer L. Williams, Nashville, Tennessee, for appellants, Mid-South Uniform Service, Inc., and Zenith Insurance Company.

Russell D. Hedges, Tullahoma, Tennessee, for appellee, Johnny Collins.

MEMORANDUM OPINION

BACKGROUND

The proof in this case established that Employee worked for Employer for over 20 years as a truck driver/deliveryman. His job duties included lifting, carrying, loading, and unloading bundles of clothing, mats, and towels ranging from 20 to 70 pounds. In performing his job, Employee carried clothes above his head in an extended wrist position.

In July 2002, Employee suffered a torn rotator cuff in his right shoulder while opening his truck door. Employee was over 60 years old at this time. Dr. Michael R. Jordan performed surgery to repair the rotator cuff in October 2002. In June 2003, Dr. Jordan determined Employee to have attained maximum medical improvement and returned him to work without restrictions.

In September 2003, Dr. Jordan diagnosed Employee with bilateral carpal tunnel syndrome, also related to his work. Dr. Jordan performed surgery to Employee's left hand in December 2003 and to his right hand in January 2004. Dr. Jordan assessed Employee to have attained maximum medical improvement in February 2004 and returned him to work without restrictions.

Dr. Jordan initially assessed a 3% impairment to the upper extremity with regard to the shoulder injury but subsequently changed that to 5%. Dr. Jordan initially assessed a 1% impairment to each arm resulting from the bilateral carpal tunnel syndrome, but opined during his deposition that a 3% impairment to each arm was not unreasonable as to this injury.

Dr. Richard Fishbein performed an independent medical exam on Employee in June 2004. He opined that Employee had a 16% impairment to the upper extremity resulting from the torn rotator cuff, which translated into a 10% impairment to the body as a whole. Dr. Fishbein assessed a 3% impairment to each arm resulting from the carpal tunnel syndrome. Dr. Fishbein further assigned restrictions: "no repetitive lifting of any weight greater than 5-8 pounds repetitively, 10 pounds occasionally and a maximum of 15 pounds. [Employee] is to avoid all repetitive overhead and above-shoulder-height work."

Employer required Employee to retire in August 2004, at which time Employee was 62. Both Employer and Employee testified that his retirement was necessary because he could no longer perform his job duties due to his physical limitations.

Employee testified that his shoulder continues to be sore and that he has no strength at above-shoulder height. He testified that when he uses his hands "very much, they get awful sore." He also testified that he has lost significant grip strength in his hands. He takes Aleve every day for pain. He stated that he had wanted to work until he was at least 65 in order to keep his health insurance. He was unable to perform all of his work duties, however. Employee admitted that he still fishes for bass, although not as often and not for as long a time as he used to. He stated that he had to change his "rig" so as not to cast as frequently. He also still goes deer hunting, which requires

climbing into a deer stand and shooting a .30'06 rifle. He shot a deer in the 2004 season; his son helped him gut it and load it into his truck. He stated that, as to his employment history, the only job to which he would be able to return was driving a taxi.[1]

Employee testified that, prior to his retirement, he had been told by Ricky Hereford of Southern Electric that, if he was ever laid off, he could drive a truck for Southern Electric part-time, picking up and delivering parts. This job had been filled by the time Employee left Employer, but Employee candidly admitted that he had not looked elsewhere for employment, explaining, "Well, I figure, a 63-year-old man and got just -- he's got problems anyhow, and had surgery, and my education, wouldn't nobody hire me."

Employee's wife testified and reiterated the number of household chores that Employee can no longer perform because of his shoulder and hand weakness.

Employer's general manager, Randy Johnson, testified that he had known Employee 16 years. He described Employee as a "good employee." Johnson testified that Employee tried to do his job after he was released by Dr. Jordan but that he could no longer "carry his weight." Johnson had no doubt that Employee would have kept doing his job if he had been able to.

The medical proof was presented through depositions. Dr. Jordan criticized Dr. Fishbein's analysis of Employee's shoulder impairment on the basis that Dr. Fishbein had relied on two tables that were designed to assess impairment from injuries involving nerve damage. Dr. Jordan never diagnosed Employee as suffering from a nerve injury in conjunction with the torn rotator cuff. It appeared that Dr. Fishbein relied on these tables without any supporting diagnosis for doing so. During his deposition, Dr. Jordan agreed with Dr. Fishbein's impairment rating as to the carpal tunnel syndrome.

The trial court assessed Employee's credibility as follows:

> Mr. Collins was a very sympathetic plaintiff. I've seen a lot of people come in here and whine and complain and do anything that they could to not have to go back to work, and do everything they could to avoid doing anything other than drawing a check. I have absolutely no doubt that if he could, he would be working at Mid-South as we speak, for a variety of reasons, not the least of which is the health insurance factor, which is obviously critical.

The trial court then adopted Dr. Fishbein's impairment rating as to the shoulder injury and assigned a 10% whole body impairment for that injury. The court then applied a multiplier of five, finding that Employee had only an eighth grade education, no GED, no formal training, and no military training. The trial court found Employee's job market "extremely limited," stating that, "[t]here's

[1] Prior to his job with Employer, Employee had also run a chain saw in the timbering business, operated a printing press, and worked in construction.

no proof in this record about taxi cabs in Coffee County, but living here I've seen maybe one or two in the whole county." The trial court also noted Employee's age in applying the multiplier of five. The resulting award for the shoulder injury (not a scheduled member) was 200 weeks.

As to the bilateral carpal tunnel syndrome, the trial court awarded Employee 200 weeks of benefits based on a 50% vocational disability to both arms. Accordingly, the trial court awarded Employee a total of 400 weeks for both the rotator cuff and carpal tunnel injuries, or $125,440.[2] Employer appeals, arguing that the trial court should have credited Dr. Jordan's testimony over Dr. Fishbein's with respect to the shoulder injury. Employer further contends that the trial court's determination of a 50% disability to both arms resulting from the bilateral carpal tunnel syndrome is excessive.

STANDARD OF REVIEW

In workers' compensation cases, we review the trial court's findings of fact de novo upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Peace v. Easy Trucking Co.*, 38 S.W.3d 526, 528 (Tenn. 2001). In reviewing documentary evidence such as depositions, however, we extend no deference to the trial court's findings. *Ferrell v. Cigna Prop. & Cas. Ins. Co.*, 33 S.W.3d 731, 734 (Tenn. 2000). We review questions of law de novo with no presumption of correctness. *Peace,* 38 S.W.3d at 528.

ANALYSIS

I. Rotator Cuff (Shoulder) Injury

We have carefully reviewed the depositions of Dr. Jordan and Dr. Fishbein, together with all of the exhibits introduced in conjunction therewith. That review convinces us that the trial court erred in crediting Dr. Fishbein's testimony over that of Dr. Jordan with respect to the impairment rating for Employee's rotator cuff injury.

Dr. Fishbein testified that, in evaluating Employee's shoulder injury, he relied on Tables 16-11 and 16-15 of the *AMA Guides to the Evaluation of Permanent Impairment.* The text accompanying Table 16-11 states, however, that "Table 16-11 is not to be used for rating weakness that is not due to a diagnosed injury of a specific nerve or nerves." When Dr. Jordan was questioned about Dr. Fishbein's use of Table 16-11, he replied that Employee "did not have a nerve lesion" at the time Dr. Jordan examined him. There is no proof in the record that a nerve injury had been diagnosed in conjunction with the rotator cuff tear prior to Dr. Fishbein's exam of Employee.

The text accompanying Table 16-11 further states that "[i]f there is doubt about the presence of a nerve injury, electromyographic studies may be necessary in order to confirm the diagnosis." Dr. Fishbein testified Employee "needed an EMG nerve conduction test" and that he had "tried to

[2] The agreed rate of compensation is $313.60 per week.

get [Employee] to have one but he wouldn't." Thus, Dr. Fishbein had neither a preexisting diagnosis of a nerve injury, nor subsequent test results indicating such, at the time he relied on Table 16-11 in rendering his impairment assessment. Dr. Fishbein's assessment is therefore subject to doubt.

Additionally, Employee acknowledged at trial that he had fallen at work in April 2004, spraining or straining his neck. Dr. Fishbein evaluated Employee in June 2004 while Employee was still undergoing physical therapy for this injury. Dr. Jordan testified that Employee's April 2004 fall could have accounted for the increased impairment noted by Dr. Fishbein.

During his deposition, Dr. Jordan opined that Employee's rotator cuff injury "deserves a five percent impairment of his upper extremity." Dr. Jordan relied on AMA Guides Table 16-35 in arriving at this assessment which, he testified, "provides for interpreting weakness through the manual muscle testing not due to nerve deficit." Dr. Jordan explained that Employee "had a muscle weakness due to residual rotator cuff weakness." Dr. Jordan reiterated that he did not think Employee had suffered a nerve injury in conjunction with tearing his rotator cuff.

Based on this evidence, we conclude that Dr. Jordan's opinion about Employee's shoulder impairment is more credible than Dr. Fishbein's. Thus, we further conclude that the trial court erred in crediting Dr. Fishbein's testimony over Dr. Jordan's. Accordingly, we reverse the trial court's assignment of 10% anatomical impairment to the body as a whole for Employee's rotator cuff injury. Rather, we adopt Dr. Jordan's assessment of 5% to the upper extremity, which translates to a 3% whole body impairment.

In determining the extent of Employee's vocational disability arising from this impairment, the trial court recognized that the Employee had not returned to work for the pre-injury Employer. The court therefore applied the provisions of Tenn. Code Ann. §50-6-241(b), using a multiplier of five times the anatomical impairment. The court found that Employee had completed only the eighth grade, had not obtained a GED, had no formal or military training, had limited literacy skills, and faced an "extremely limited" job market. We find no error in the trial court's determination that a multiplier of five is appropriate in assessing Employee's vocational disability. Accordingly, we modify Employee's award for his shoulder injury to 15% to the body as a whole, or 60 weeks, or $18,816.

II. Bilateral Carpal Tunnel Syndrome

Both doctors opined that Employee had suffered a 3% medical impairment to each arm as a result of his bilateral carpal tunnel syndrome. Upon hearing the testimony of Employee, Employee's wife, and Employee's supervisor at Employer, the trial court determined that Employee had suffered a 50% vocational disability to both arms as a result of the bilateral carpal tunnel syndrome. This determination resulted in an award of 200 weeks, *see* Tenn. Code Ann. § 50-6-207(3)(ii)(w), or $62,720. Employer contends that this award is excessive in light of the medical testimony and Employee's hand-intensive activities since his retirement. We disagree.

Both Employee and Employee's wife testified about Employee's loss of grip strength in his hands. Employer's representative testified that Employee was no longer able to do his job as a result of his physical limitations. The trial judge made a specific finding that he had "absolutely no doubt that if he could, [Employee] would be working at [Employer] as we speak." Employee's entire work history consists of manual labor, most of which required significant grip strength. Employee testified that the only job he could resume would be driving a taxi.

We recognize that there is proof in the record that Employee would be able to drive a delivery vehicle, so long as it did not involve activities beyond his physical capabilities. We further recognize that Employee continues to engage in outdoor sporting activities which require some use of his hands. However, these activities are not inconsistent with Employee's inability to continue his work with Employer or to pursue similar employment.

The issue raised on appeal is whether the trial court's award of 50% permanent partial disability to both arms was excessive. The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court and, as stated above, are reviewed de novo, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 170 (Tenn. 2002); *Walker v. Saturn Corp.*, 986 S.W.2d 204, 207 (Tenn. 1998). In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and his capacity to work at the kinds of employment available in his disabled condition. Tenn. Code Ann. §50-6-241(b); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his physical condition and resulting disabilities cannot be disregarded. *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn. 1975); *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

In this case, the trial court found Employee to be a credible witness worthy of belief. There is nothing in this record to indicate that Employee is not credible. Moreover, because of the deference that must be given the trial court who observed the witness and his demeanor while testifying, this court has to agree with the trial court's finding in this regard.

We candidly admit this panel may have reached a somewhat different result with regard to the extent of Employee's permanent injury to the upper extremities resulting from the bilateral carpal tunnel syndrome. It is not our function, however, to replace the trial court's judgment with our own. The legislature has given the trial court the presumption of correctness. Because we cannot find the evidence preponderates against the trial judge's findings, we affirm the trial court's judgment in this regard.

CONCLUSION

We modify Employee's award for his shoulder injury to 60 weeks, or $18,816. We affirm Employee's award for his bilateral carpal tunnel syndrome of 200 weeks, or $62,720. Employee's total award for both injuries is therefore modified to 260 weeks, or $81,536.[3]

The trial court's judgment is affirmed as modified. Costs of this cause are taxed to Employer.

_____

WILLIAM H. INMAN, SENIOR JUDGE

[3] Because this court has modified the award of benefits originally granted by the trial court, it is not necessary to address the Employer's contention that *Vogel v. Wells Fargo Guard Services*, 937 S.W.2d 856, 862 (Tenn. 1996), should be extended to apply the 260 week provision of Tenn. Code Ann. § 50-6-207(4)(A)(i) to schedule member injuries. This issue is pretermitted.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 30, 2005 SESSION

JOHNNY COLLINS v. MID-SOUTH UNIFORM SERVICE, INC., ET AL

Chancery Court for Coffee County
No. 03-246 & 03-247, Consolidated

No. M2005-00264-WC-R3-CV - Filed - June 13, 2006

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 appeals 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 Employer, Mid-South Uniform Service, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM