IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
December 8, 2005 Session

DANNY CONGER v. U. S. FOOD SERVICE, INC.

Direct Appeal from the Circuit Court for Carroll County
No. 03CV 190 Hon. C. Creed McGinley, Judge

No. W2005-00123-WC-R3-CV - Mailed March 31, 2006; Filed May 1, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with the provisions of 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 Employer has appealed the findings of the trial court, which determined that the Employee is entitled to recover permanent partial disability of 55% apportioned to the body as a whole. We conclude that the trial court erred in denying the Employer the right to obtain an independent medical evaluation, and, under the facts of this case, that decision was so prejudicial that it constitutes reversible error. We remand the case to allow the Employer to obtain an independent medical evaluation and for retrial.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right;
Judgment of the Circuit Court is Reversed; Remanded

ROBERT E. CORLEW, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ALLEN W. WALLACE, SR. J., joined.

B. Duane Willis, Allen, Kopet & Associates, PLLC, Jackson, Tennessee, for the Appellant, U. S. Food Service, Inc.

Scott G. Kirk (on appeal) and George L. Morrison, III (at trial), Jackson, Tennessee, for the Appellee, Danny Conger.

MEMORANDUM OPINION

The facts show that the Employee, Danny Conger, was fifty-eight years of age at the time of trial. He is a high school graduate. He has no other formal training other than courses in refrigeration and air conditioning which he commenced but did not complete. His employment history included working in a small number of jobs for the Employer herein, a brief history of working in the construction industry, another brief period in which he had his own business repairing

small appliances, some twenty-six years working for a company which built mobile homes, and further experience in the military. After the Employee recovered from an injury which will be described below, he returned to his pre-injury job, earning the same wage he earned at the time of his injury. Subsequently, he received two raises. Then, some twelve months after he returned to work, the Employee was subject to a reduction in force; his job was eliminated; and he was forced to take a less significant job at a lower rate of pay. At the time of trial, he continued working in a job for the pre-injury Employer which was somewhat physically demanding. It required repetitive bending and occasional lifting of fifty pounds or more. The evidence further showed that the Employee continued to perform his duties without assistance or accommodation and that he did not require excessive breaks. He had no record of excessive absenteeism. He continues to enjoy activities outside the workplace that he enjoyed previously, including hunting and fishing on a regular basis.

It is undisputed that the Employee sustained an injury on March 22, 2002, while in the course and scope of his employment for the Employer. The Employee was driving a motorized vehicle known as a "slip sheeter" in the Employer's food warehouse. He collided with a set of shelves or a "rack" which resulted in a nondisplaced fracture of his sacrum. This was not the Employee's first injury to his sacrum. For the injury, conservative treatment, including bedrest, was ordered. The treating physician determined that the Employee had suffered a permanent injury with 1% anatomical impairment apportioned to the body as a whole. A physician who conducted an independent medical evaluation (IME) upon request of the Employee found that the Employee had sustained 8% anatomical impairment.

Additionally, the Employee experienced nerve damage as a result of his sacral injury which resulted in difficulty urinating. Although none of the treating physicians nor those who had conducted independent medical evaluations had seen the Employee for some considerable period of time before the trial, all were of the opinion that he had suffered a permanent nerve injury which affected his bladder. Nonetheless, shortly before the trial, the Employer sought a court order requiring that the Employee return to one of the treating physicians to allow for further examination and testing. The motion was granted by the trial court. The result of those tests unmistakably showed that the Employee's bladder injury had been only temporary. Presented with all of the proof, the trial court found that the Employee had suffered no permanent bladder injury. That finding is not now before us, inasmuch as the Employee did not seek our review of that issue.

Further, the Employee presented evidence that he had suffered a bowel injury when he suffered the collision at work. The undisputed evidence shows that for a short period of time, defecation was so difficult that the Employee was hospitalized for two days in order that an enema might be performed. Subsequently, the evidence shows that he began to perform enemas for himself. At the time of trial, however, the proof showed that the Employee had not needed an enema for some period of time. After each time that he defecated, he experienced a circumstance where his bowels were loose; leakage occurred; and he was required to reclean himself some one-half hour after defecation. The evidence shows, however, that this was a minor issue, inasmuch as defecation occurred for the Employee only two to three times per week, and the steps to reclean himself took

less than five minutes each time. Thus, the evidence showed that the vocational impact of this problem upon the Employee was slight.

More importantly, however, the problem was one which had never been treated by a physician. Further, no mention of bowel issues were made to any physician in excess of a year prior to trial.[1] In fact, three physicians were questioned about the leakage issue. Two testified that they were unable to determine whether there was a permanent impairment due to a bowel injury without examining the patient again. Only Dr. Sergio Salazar, an internist, who was the Employee's primary case physician, testified that the Employee suffered a permanent bowel impairment. Dr. Salazar did so in answer to a hypothetical question posed by counsel, and his testimony was that the Employee had suffered 15% anatomical impairment to the body as a whole as a result of this injury.

Based upon these facts, the trial court found that the Employee suffered 55% vocational disability. The Employer appeals.

ANALYSIS

Our review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Conclusions of law established by the trial court come to us without any presumption of correctness. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825 (Tenn. 2003). Thus, we are required to conduct an independent examination of the record to determine the preponderance of the evidence, applying the presumption of correctness, and then determine the issues of law without according any presumption of correctness to the decisions of the trial court.

The record demonstrates that the Employee sought compensation for three separate categories of permanent injury all of which, it was alleged, were caused by his work-related injury: vocational disability for a permanent injury resulting from a fracture of the sacrum, vocational disability for a permanent injury to the bladder, and vocational disability for a permanent injury to the bowels.

Two medical opinions were presented with regard to the anatomical impairment resulting from the fractured sacrum. One of the opinions was presented through the deposition testimony of Dr. B. Martin Fulbright, an orthopedic surgeon. Dr. Fulbright was the treating physician who prescribed conservative treatment for the Employee for the fracture and then released him to full duty without restrictions. He opined that the Employee sustained 1% anatomical impairment for the fracture. When asked to consider the anatomical rating provided by Dr. Joseph C. Boals, III, Dr.

[1]Approximately a year prior to trial the Employee complained of fullness of his bowel; however, this condition was relieved upon defecation. No mention of issues of leakage were raised at that point. The only evidence concerning the issue of leakage was a discussion from the treating internist, Dr. Sergio Salazar, who initially opined that the Employee suffered approximately 50% anatomical impairment, but later revised that rating to 15% after pages of the *Guides to the Evaluation of Permanent Impairment* were furnished to him by counsel for the Employee. The record reflects that some seventeen months prior to trial, Dr. Salazar had considered that the Employee was experiencing a leakage problem in assigning the 50% impairment rating, but had not treated the Employee for that complaint.

Fulbright opined that Dr. Boals' ratings were "a bit excessive." The opinion of Dr. Boals, also a Board Certified orthopedic surgeon, was presented by Form C-32[2]. He opined that the Employee has an 8% impairment and placed restrictions on the Employee, including restrictions on climbing, balancing, stooping, kneeling, crouching, crawling, and twisting. Dr. Boals also restricted the Employee's use of foot controls. Because of the nature of the Form C-32, Dr. Boals was not able to explain the basis of his rating, as did the treating physician, Dr. Fulbright.

With regard to the bladder injury, the Employer sought an order of the trial court requiring further examination and treatment by Dr. Donald McKnight. The motion for this treatment was filed by the Employer on May 24, 2004, which was opposed by the Employee, and then filed again on August 26, 2004, before any medical proof was taken, but one week after the order setting the case for trial was entered and only some seven weeks prior to trial. The trial court granted this motion in a hearing conducted by telephone conference call. The record does not contain an order granting the motion, nor does the file show the date on which the order was granted. As a result of the further testing which was ordered, the physician found, contrary to his prior opinion, that the Employee's bladder difficulties had resolved. The trial court found no permanent bladder injury. Because no appeal of that finding was sought, we do not consider the bladder injury further.

Finally, the Employee complains of permanent injury to his bowel as a result of the accident at work. Despite the large anatomical impairment rating given for the bowel problem, the more significant portion of the testimony, both lay and expert, dealt with the bladder injury. Even with respect to the bowel problem, by far the greater portion of the evidence dealt with the temporary problems that the Employee experienced immediately after his injury involving extreme constipation. The only physicians who treated the Employee for his bowel problem were Dr. Donald McKnight and Dr. Joe D. Mobley, both of whom specialize in the field of urology. They treated the temporary problem of constipation while concentrating primarily on the bladder problem. Neither of these physicians expressed an opinion concerning permanency of the bowel problem. Both physicians testified that they would be unable to form an opinion concerning this question without further examination and testing of the Employee.

Dr. Sergio Salazar had treated the Employee for various medical issues since 1998. He never treated the Employee for the bowel problem, even though it was his testimony of permanence of the injury upon which the Employee relied at trial. Dr. Salazar testified, based upon a hypothetical question asked of him at deposition, that the Employee suffered a permanent bowel injury. The

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[2]Objections were raised by the Employer with respect to both C-32 Forms. Although the deposition of Dr. Salazar was taken twice, on September 20, 2004, and on October 5, 2005, the deposition of Dr. Boals was never taken. Pursuant to the provisions of Tennessee Code Annotated section 50-6-236(c)(2), opinions in the form of a written report made on the prescribed C-32 Form are admissible in court in lieu of deposition, if notice of intent to use the report is provided to the opposing party at least twenty days before trial, which was done in this case. Objections to the consideration of a Form C-32 may be filed within ten days of receipt of such notice, but it is then incumbent upon the objecting party to depose the author of the C-32. When the objecting party fails to do so "within a reasonable period of time," the Form C-32 may be entered into evidence as though no objection were made. Tenn. Code. Ann. § 50-6-236(c)(2). Thus, the opinions of Dr. Boals submitted by Form C-32 were properly considered by the trial court.

evidence shows that there was never any surgery or medication ever prescribed, and no one had ever even directed the use of protective clothing. When asked in his deposition, Dr. Salazar responded, concerning a question of treatment for the leakage problem that, "[The Employee] does not require treatment from me, because he has not complained to me. And over the last few visits. I cannot treat him, because he has had no complaints." Dr. Salazar continued, however, to defend his position that the Employee had sustained a permanent leakage issue by testifying, "That does not mean he does not have the problem." The trial court then determined, based upon the opinion of the Dr. Salazar, that the Employee had a substantial disability.

The Employer had sought to have the Employee examined by a physician who specialized in the type of bowel problem of which the Employee complained. The Employee resisted, and the trial court summarily denied the Employer's request. The law provides that an employer is entitled to obtain a medical evaluation without leave of court:

> The injured employee must submit to examination by the employer's physician at all reasonable times if requested to do so by his employer, but the employee shall have the right to have the employee's own physician present at such examination, in which case the employee shall be liable to such physician for such physician's services.

Tenn. Code Ann. § 50-6-204(d)(1).[3]

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[3]Reference has been made by parties to a local rule prevalent in the judicial district in which this cause was tried. It was explained that a local rule forbids the taking of depositions without permission of the trial court and further forbids independent medical evaluations without leave of Court. The local rule, as we understand, forbids the taking of any medical proof after the completion of a Benefit Review Conference (BRC). We have not reviewed the local rules to which the briefs make reference. In fact, to be effective, local rules of court must be established by following a procedure outlined in Tennessee Supreme Court Rule 18. Rule 18 requires, among other things, that local rules of court, when proposed, must be filed with the Administrative Director of the Courts. Rule 18 further provides that local rules inconsistent with statute or rules of procedure are invalid. The Administrative Office of the Courts has no local rules of court on file for the judicial district where this case was tried. Thus there are no valid local rules in that district.

Further, reference has been made to the fact that the trial court in this district sets worker's compensation cases for trial within a very brief period of time after the completion of a BRC. In this case, apparently with leave of court, the parties took a number of depositions within a very few days prior to trial. One deposition was taken at a time when counsel for one of the parties was available only by telephone, presumably because of the pressure to conclude depositions within the short time after permission was granted by the court for the deposition and the trial. Because of a poor telephone connection or difficulty in understanding the testimony of the physician, or for some other reason, the deposition had to be stopped and continued at a later date when counsel was able to be present in person, and a two-week continuance was granted by the trial court for this purpose. The trial was conducted on October 15, 2004. Depositions were taken on the following dates: September 8, September 17, September 20, September 21, October 5, and October 13, 2004. Thus, the first deposition was taken some thirty-seven days before trial, and the last deposition was taken a mere two days prior to trial.

Finally, reference was made by the trial judge to an in camera discussion between the trial court and counsel, outside of the presence of the parties. Such in camera discussions should be avoided, particularly in bench trials, in favor of open discussions in the courtroom where parties and counsel are present and the appearance of impropriety is avoided.

The wording of the statute appears to provide the Employer the opportunity to have independent medical evaluations conducted. At the same time, we recognize that the opportunity for such evaluations should not be without limitation. *Martin v. Lear Corp.*, 90 S.W.3d 626, 632 (Tenn. 2002). Further, when conduct of the IME would require a continuance of the trial, the issue of continuance lies within the sound discretion of the trial court. However, when an Employee alleges the occurrence of an injury which has not been treated, where the services of a specialist would assist the court, and where the Employee does not present the testimony of a specialist in that field, we find that the testimony of such a specialist and presentation of an IME would greatly assist the trier of fact.

Because of the circumstances of this case, we find that the denial of the IME was so prejudicial to the Employer that it constitutes reversible error. The Employee never sought treatment for the injury or the symptoms which now are the subject of a 15% anatomical impairment rating. Complaints concerning the injury always were a secondary, and never a primary, concern of any physician, nor did the Employee voice any significant concern with regard to the injury; yet now it is of primary concern. The only physician who testified of the existence of a permanent bowel injury was one who was an internist and had no special knowledge of bowel or neurological injuries. Two other physicians, both urologists who had treated related issues, testified that they could not determine the existence of a permanent injury, or lack thereof, without further tests being performed. No treatment was ever prescribed for the alleged injury. Dr. Salazar, the physician who opined the existence of a permanent injury, testified that the Employee's anatomical impairment was to a certain extent and then changed his mind and modified that anatomical impairment. Dr. Salazar did not demonstrate familiarity with the *Guides to the Evaluation of Permanent Impairment*. The *Guides to the Evaluation of Permanent Impairment* provides for a wide range of impairments for the alleged injury: 0-9% for Class 1, and 10-24% for Class 2 into which class Dr. Salazar placed the Employee, which provide for considerable discretion within each category.[4] In making this assessment, a physician must consider factors other than examination of the anatomy. Despite the opinion of the physician of 15% anatomical impairment, Dr. Salazar placed no work restrictions on the Employee. Without the IME, the Employer has no medical proof as to the bowel issue despite the fact that a number of factors merit placement of the Employee in Class 1, 0-9% anatomical impairment, rather than Class 2, 10-24% impairment. Without the IME, the trial court has no evidence as to whether the issue is treatable, and the trial court has the opinion of no one who has actually examined the Employee's condition rather than addressing only hypothetical questions about it.

The record shows that the Employer first petitioned the trial court for an independent medical examination "outside the parameters of . . . local rule" on May 24, 2004, to which the Employee objected in a response filed June 8, 2004. That motion dealt with the issue of "incontinence" without further specificity. With some reluctance, the record shows, the trial court required the Employee

[4]Dr. Salazar candidly acknowledged the difficulty in evaluating the injury he found when he was asked, "So, in that category, Class 2, which ranges from 10 to 24 percent, where would this gentleman fall?" he testified, "You know, this kind of question leads you to give a subjective answer, which is not accurate. I would say somewhere in the middle between 10 and 24, say 15 percent. It's hard for me to tell."

to return to Dr. McKnight, one of the original treating physicians, for further testing of the bladder issues. That test was concluded immediately before trial, with Dr. McKnight's deposition on that issue was taken two days before trial. The record is unclear as to whether the Employer contemplated that Dr. McKnight would also further conduct bowel tests. We concur with the trial court that independent medical examinations should be scheduled and accomplished in a timely manner so as not to delay the trial of the cause. At the same time, the atmosphere established by the terms of the local rules, requiring permission of the court to conduct independent medical examinations, is such that the opportunity for an earlier IME was not available.

We recognize the merits of promptly concluding worker's compensation cases, and for attention to that issue, we heartily commend the trial court. So much of the law deals with the issue of expediting worker's compensation cases. *See, e.g., Jefferies v. McKee Foods Corp.*, 145 S.W.3d 551, 557 (Tenn. 2004)*; Hickman v. Cont'l Baking Co.*, 143 S.W.3d 72, 74 (Tenn. 2004); *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 290 (Tenn. 2004). At the same time, courts should not expedite matters to such an extent that the case is tried without the evidence necessary so that a fair and proper decision might be reached.

In this case, we conclude that it was error on the part of the trial court to deny the Employer the opportunity to have the evidence of an independent medical examiner concerning the bowel incontinence issue. Inasmuch the greater portion of the anatomical impairment ratings were presented for this issue, and understanding the ruling of the trial court to have dealt with the bowel injury in a substantial way, we conclude that the error was, in fact, reversible. We remand the cause to permit the Employer to obtain an independent medical examination and for further proceedings consistent with this opinion.

The costs on appeal will be taxed against the Employee and his surety, for which execution may issue if necessary.

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ROBERT E. CORLEW, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
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Circuit Court for Carroll County
No. 03CV 190

No. W2005-00123-WC-R3-CV - Filed May 1, 2006

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 employee/Appellee, Danny Conger, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM