IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 27, 2006 Session

PHILLIP CROW v. BATESVILLE CASKET COMPANY, INC. and TRAVELERS INSURANCE CO.

Direct Appeal from the Circuit Court for Franklin County
No. 10797-CV, J. Curtis Smith, Judge

No. M2005-02627-WC-R3-CV - Mailed - December 20, 2006
Filed - January 23, 2007

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, findings of fact, and conclusions of law. The trial court awarded the employee benefits based on 17.5 percent permanent partial disability to the whole body for an injury to the left shoulder. On appeal, the employer contends that the award of 17.5 percent should be reduced to 7.5 percent based upon an anatomical impairment rating of 3 percent by the employee's treating physician. After a careful review of the record, we find no error in the trial court's award of 17.5 percent vocational disability. Accordingly, the judgment of the trial court is affirmed.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Trial Court Affirmed.

GARY R. WADE, J., delivered the opinion of the Court, in which J.S. ("STEVE") DANIEL AND DONALD P. HARRIS, Sr. JJ., joined.

Bryan Essary, Nashville, Tennessee, for the defendants-appellants, Batesville Casket Company, Inc. and Travelers Insurance Company.

Mark Stewart, Winchester, Tennessee, for the plaintiff-appellee, Phillip Crow.

OPINION

Factual and Procedural Background

The employee, Phillip Crow, age 57 at the time of trial, has a high school diploma. He studied drafting in college for a period of one year and was a real estate appraiser until he accepted employment with Batesville Casket Company, for whom he has worked for 25 years. During that time, the employee's job duties included driving a tow motor, performing finishing work on caskets, and operating machines that bend and bind together pieces of sheet metal. The employee's most recent work for the employer involved making gaskets. There is no dispute that the various tasks assigned to the employee through the years have required repetitive activity.

On February 27, 1998, the employee filed the first of three suits against the employer seeking workers' compensation benefits for two injuries suffered in 1997–carpal tunnel syndrome in his left arm and a gradual injury to his left shoulder. In 1999, the employee filed a second workers' compensation suit for an injury to his right elbow and, in 2002, he filed suit for a tendon tear in his left arm and a second left shoulder injury. The parties agreed that all of these injuries were compensable. They could not, however, agree on the extent of disability.

The three cases filed by the employee were consolidated for trial. After hearing the evidence, the trial court awarded the employee 12 percent permanent partial disability for the right elbow injury suffered in 1999, plus 15 percent to the whole body for the left arm and shoulder injuries suffered in 2002. The trial court also awarded 17.5 percent permanent partial disability to the body as a whole for the employee's initial left shoulder injury suffered in 1997. Finally, the trial court awarded 30 percent permanent partial disability for the carpal tunnel syndrome in the employee's left arm.

On appeal, the employer challenges only the award of 17.5 percent for the left shoulder injury suffered in 1997. The sole issue, therefore, is whether the evidence preponderates against the award of 17.5 percent permanent partial disability to the body as a whole for the employee's initial injury to his left shoulder.

The employee first sought medical treatment for his shoulder injury in March 1997 from Dr. Gary Stevens, an orthopedic surgeon. His complaints were of pain in his neck and shoulders that radiated down both arms. At that time, the employee's job duties required him to repeatedly lift the tops of caskets. Conservative treatment by Dr. Stevens, which included injections and medication, did not alleviate the pain. Dr. Stevens diagnosed carpal tunnel syndrome in the employee's left wrist and performed corrective surgery. It was his opinion that the repetitive nature of the employee's work caused the carpal tunnel syndrome. He also believed that the pain in the employee's left shoulder was work-related. Through surgery, Dr. Stevens was able to correct the employee's wrist problem. He was unable to help resolve the pain in his shoulder.

The employee next sought treatment for his shoulder injury from Dr. David Jones, another orthopedic surgeon. Dr. Jones, who treated the employee for a significant period of time, confirmed that the employee's shoulder pain was due to the repetitive nature of his work. He diagnosed the employee with impingement syndrome in his shoulder after an MRI ruled out a rotator cuff tear. He performed a surgical procedure on the employee in order to "clean-out" the shoulder. Dr. Jones

imposed a permanent restriction of no repetitive overhead work with the left arm. He assessed the employee with a permanent anatomical impairment rating of 3 percent to the whole body for the shoulder injury.

The employee was subsequently evaluated by Dr. Richard Fishbein, also an orthopedic surgeon, who learned that the employee could not perform any repetitive work without a great deal of pain in his left shoulder. Dr. Fishbein's examination revealed "significant positive impingement with an obvious impingement sign with marked weakness."[1] He testified that the employee's x-rays revealed calcium deposits in his shoulder, which indicated that the impingement was irreversible. Dr. Fishbein concluded that the employee was suffering from residual problems due to the repetitive nature of his work, namely, weakness and loss of motion. He described the surgical procedure performed by Dr. Jones as "[i]n layman's terms, you put in a camera in a fluid medium and you put in a shaver and you clean up the space and give the shoulder room to breath." Based upon his physical examination of the employee and a review of his medical records, Dr. Fishbein assessed a permanent anatomical impairment rating of 7 percent to the body as a whole for the shoulder injury. Dr. Fishbein recommended permanent restrictions on overhead lifting and repetitive use of both arms.[2]

The employee testified that his shoulder injury limited his lifting both at work and at home. He testified that "[t]here's just a lot of things I don't pick up or do any more." The employee stated, for example, that he no longer fished, hunted, or worked in his yard or on his cars. The employee also testified that his lifting restrictions eliminated him from 95 percent of the jobs in the employer's plant. He has taken pain medication daily in order to continue work as a gasket maker.

Analysis

In a workers' compensation case, appellate 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 findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2)(2005). When the trial court has seen the witnesses and heard the testimony, considerable deference is given to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.2d

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[1]Dr. Fishbein testified that impingement "means that the rotator cuff inserts onto the greater tuberosity of the shoulder and overlying the rotator cuff is a . . . bursal sac and this is in a very enclosed space. If you would look at the rotator cuff and what we call the acromion or the bone that sits where you can point on your shoulder when you lift up your arm from the side, the bursal sac squeezes against the tip of the acromion causing pain and weakness and that is the hallmark of rotator cuff impingement."

[2]The record contains the deposition testimony of another orthopedic surgeon, Dr. Malcom Baxter. Dr. Baxter treated the employee for the tendon tear in his left arm and for the rotator cuff tear in his left shoulder suffered in 2002. Dr. Baxter did not treat or evaluate the shoulder injury which is the subject of this appeal.

164, 167 (Tenn. 2002). When, however, medical testimony is presented by deposition, 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. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

The employer asserts that the trial court's award of 17.5 percent for the employee's shoulder injury should be reduced to 7.5 percent based on the 3 percent anatomical impairment rating provided by the employee's treating physician, Dr. Jones.[3] According to the employer, the trial court should have accepted the 3 percent impairment rating given by Dr. Jones over the 7 percent impairment rating given by Dr. Fishbein because Dr. Jones was the treating physician. The employer maintains that Dr. Fishbein's testimony should be discounted because he performed a single evaluation of the employee. The employer argues that Dr. Fishbein's testimony merely outlined the medical treatment received by the employee, described the nature of the evaluation, and provided a "scant" explanation for the impairment rating. In contrast, the employer asserts that Dr. Jones explained in depth his treatment of the employee, his findings, and his recommendations for permanent restrictions. Apart from the expert testimony, the employer does not claim that the trial court misapplied any of the factors used to determine a worker's vocational disability.[4] Rather, the employer's argument is based solely on the trial court's decision to accept the impairment rating given by Dr. Fishbein over that given by Dr. Jones.

We are not persuaded that the trial court erred by accepting Dr. Fishbein's impairment rating. First, we observe that disagreements among treating and evaluating physicians as to the existence and degree of permanent impairment are common in workers' compensation cases. When the medical testimony differs, as it often does, the trial judge must obviously choose among the competing assessments. In doing so, the trial judge may consider the qualifications of the experts,

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[3]The employee continued to work at the employer's plant at a wage greater than the wage he earned at the time of his shoulder injury in March 1997. Therefore, the 2.5 multiplier found in Tennessee Code Annotated section 50-6-241(a)(1)(2005) applies to his claim. Multiplying the 3 percent anatomical impairment rating provided by Dr. Jones by the 2.5 multiplier in the statute would yield an award of 7.5 percent permanent partial disability.

[4]Factors to be considered in determining the extent of vocational disability include the employee's job skills and training, education, age, extent of anatomical impairment, duration of impairment, local job opportunities, and the employee's capacity to work at the kinds of employment available in the worker's disabled condition. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999). The employee's own assessment of his or her physical condition and resulting disability is competent testimony that should be considered as well. Id.

the circumstances of their examination and treatment, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). In some instances, the physician having greater contact with the injured worker "would have the advantage and opportunity to provide a more in-depth opinion, if not a more accurate one." Carter v. First Source Furniture Group, 92 S.W.3d 367, 373 (Tenn. 2002) (quoting Orman, 803 S.W.2d at 677)). The general rule, however, is that the trial court has the discretion to accept the opinion of one medical expert over the opinion of another medical expert. Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990); Dorris v. INA Insurance Company, 764 S.W.2d 538, 542 (Tenn. 1989); Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983).

In this case, both Dr. Fishbein and Dr. Jones are board certified, practicing orthopedic surgeons, who maintain hospital privileges. Both physicians have been practicing medicine for more than 25 years. In terms of credentials and experience, there is little that differentiates the two experts. We do not, however, share the same view as the employer regarding the evaluation by Dr. Fishbein. Dr. Fishbein testified that he carefully considered the medical treatment received by the employee. He specifically described his examination and evaluation of the employee and provided a thorough explanation for the impairment rating given. In our view, Dr. Fishbein supplied at least as much detail as Dr. Jones. Under these circumstances, the trial court did not error by relying upon the anatomical impairment rating given by Dr. Fishbein.

Moreover, we observe that a medical expert's rating of anatomical disability is merely one of a number of relevant factors used to determine vocational impairment. George v. Building Materials Corp., 44 S.W.3d 481, 488 (Tenn. 2001). There is no requirement that the trial court fix vocational disability solely with reference to expert testimony. As noted, the trial court must determine the extent of vocational disability by considering all pertinent factors. Id.; Cleek, 19 S.W.3d at 774. Because the employer has made no claim that the trial court misapplied any of those factors, the judgment of the trial court should be affirmed.

Conclusion

For the reasons stated above, we hold that the trial court did not err in accepting the anatomical impairment rating provided by Dr. Fishbein over the impairment rating provided by Dr. Jones. Accordingly, the judgment of the trial court is affirmed. Costs are taxed against Batesville Casket Company, Inc. and Travelers Insurance Co., and their sureties, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 27, 2004 SESSION

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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 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 taxed against Batesville Casket Company, Inc. and Travelers Insurance Co, and their sureties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM