IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 21, 2008 Session

MICHAEL LIMBAUGH v. MUELLER REFRIGERATION CO., INC.

Direct Appeal from the Chancery Court for Trousdale County
No. 6840 C. K. Smith, Chancellor

No. M2007-00999-WC-R3-WC - Mailed - August 26, 2008
Filed - September 26, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee sustained a compensable injury. He subsequently developed a condition known as "winging" of the scapula. Two treating doctors testified that the AMA Guides did not provide for assigning impairment for this condition. An evaluating physician agreed that the AMA Guides did not cover the condition, but assigned 10% permanent impairment to the body as a whole, based upon his experience and judgment. The trial court awarded 15% permanent partial disability to the body as a whole. Employer has appealed, contending the evidence preponderates against the trial court's finding. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Affirmed

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Terry L. Hill, Nashville, Tennessee, for the appellant, Mueller Refrigeration Company, Inc.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee, for the appellee, Michael Limbaugh.

MEMORANDUM OPINION

Factual and Procedural Background

Michael Limbaugh ("Employee") was employed by Mueller Refrigeration Company ("Employer") on September 22, 2004. On that date, he injured his shoulder when he felt a popping sensation while lifting a box. He reported the injury, and the claim was accepted. He was initially treated by Dr. Jack Carey, who prescribed medication. He improved, but his symptoms continued. He selected Dr. Jeffrey Hazlewood, a physiatrist, from a panel of physicians provided by Employer.

He first saw Dr. Hazlewood on November 1, 2004. At that time, he had improved about 70% from the time of the injury. Dr. Hazlewood's diagnosis was "right rhomboid/periscapular pain consistent with strain." He prescribed medication and physical therapy. By November 29, 2004, Employee's pain had improved to one on a scale of one to ten. Dr. Hazlewood released him with no impairment and no restrictions.

Employee returned to Dr. Hazlewood in July 2005. He reported that the pain in his shoulder had gradually worsened over the preceding four weeks. There had been no new accident or injury. Dr. Hazlewood's examination of Employee was normal, except for some slight weakness. Dr. Hazlewood ordered an MRI of the thoracic spine. That test did not reveal any abnormalities. On July 19, Dr. Hazlewood noted crepitus, a grinding or crackling sound, during his examination. He administered trigger point injections, which did not help. On August 12, 2005, Dr. Hazlewood noted winging of the right scapula, which he described as "where the inside aspect of the shoulder blade border next to the spine pops out . . . and slants back." This was the first time that Employee had displayed this symptom. At that time, Dr. Hazlewood referred Employee to Dr. J. Wills Oglesby, an orthopaedic surgeon, for consultation.

Dr. Oglesby examined Employee on August 31, 2005. Like Dr. Hazlewood, he noted crepitus and winging. His examination of Employee was otherwise completely normal. He ordered an MRI of the shoulder blade, and also an EMG of that area. He was concerned that Employee may have injured either the muscle which connects the scapula to the rib cage, or the nerve which controls that muscle. The results of both of these tests were normal. His conclusion was that Employee had "some true muscle weakness that just hasn't corrected yet." He placed no permanent restrictions upon Employee's activities.

Employee returned to Dr. Hazlewood, who prescribed additional therapy and medication. These did not improve Employee's symptoms. Dr. Hazlewood stated that he had "checked everything that I know how to check." He had no additional treatment options to offer. He therefore discharged Employee from his care on October 28, 2005. He thought Employee had "legitimate pain," but because he had no objective findings, he assigned 0% permanent impairment. He placed no permanent restrictions upon Employee.

Dr. Richard Fishbein conducted an independent medical exam at the request of Employee's attorney. He agreed with the diagnoses of Drs. Hazlewood and Oglesby. He further agreed that the AMA Guides did not provide an impairment for Employee's condition of scapular winging. He estimated impairment at 10% to the body as a whole, based upon his own assessment. He did not recommend permanent restrictions, but did testify that certain specific movements of the shoulder and arm would cause pain for Employee.

At the date of trial, Employee was thirty-two years old. He had an eighth grade education. He had some additional technical training which he received through Employer. He had worked for Employer since 2000, and continued to work there as of the date of trial. His prior work experience included shipping and receiving, fast-food management and car detailing. The trial court found that Employee had sustained a permanent injury, and awarded 15% permanent partial disability to the body as a whole, the maximum permissible amount under Tennessee Code Annotated section 50-6-

241(d). Employer has appealed, contending that the trial court erred by finding that Employee had sustained a permanent disability.

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. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Employer argues that the evidence preponderates against the trial court's finding. It points to the absence of any objective findings by any of the examining physicians, including Dr. Fishbein, in support of its position. It also notes that all of the doctors agreed that the AMA Guides do not provide an impairment for this situation. In light of that, Employer argues that Dr. Fishbein's impairment rating violates Tennessee Code Annotated section 50-6-204(d)(3)(A) (Supp. 2007), which requires use of the AMA Guides.

Employee argues that the evidence does not preponderate against the trial court's award. He notes that all three doctors found, using differing terms, that he had sustained an injury at work. He further notes that the court found him to be a credible witness. Finally, he argues that Dr. Fishbein's testimony was sufficient to establish a permanent disability, citing *Barron v. State of Tennessee Dep't of Human Services*, 184 S.W.3d 219 (Tenn. 2006).

Section 50-6-204(d)(3)(A) requires that, when testifying concerning permanent impairment, a qualified witness "shall utilize the applicable edition of the AMA Guides as established in § 50-6-102 or in cases not covered by the AMA Guides an impairment rating by any appropriate method used and accepted by the medical community." The following section, Tennessee Code Annotated section 50-6-204(d)(3)(B) (Supp. 2007), states that impairment rating is not "admissible into evidence at the trial of a workers' compensation matter unless" the same conditions are met.

Employer urges this Panel to apply only the portion of Tennessee Code Annotated section 50-6-204(d)(3)(A) which requires that physicians "shall utilize the applicable edition of the AMA Guides" when assigning impairment rating and alleges for the doctor to do otherwise is to formulate an arbitrary rating. To take this position would simply ignore the entire statute which reads as follows:

> [A] physician, chiropractor or medical practitioner who is permitted to give expert medical testimony in a Tennessee court of law and who has provided medical treatment to an employee or who has examined or evaluated an employee seeking workers' compensation benefits shall utilize the applicable edition of the AMA Guides . . . ***or in cases not covered by the AMA Guides an impairment rating by any appropriate method used and accepted by the medical community***.

Id. (emphasis added).

Three medical doctors testified in this case. All agreed that Employee had a winging scapula as a result of his work injury. Dr. Oglesby was not questioned on the subject of impairment. Dr. Hazlewood and Dr. Fishbein agreed that the AMA Guides do not address this condition. In the absence of an underlying pathology, Dr. Hazlewood assigned no impairment. Dr. Fishbein assigned 10% impairment to the arm based upon "interference with the activities of daily living, excluding work, to the extent that he is in constant pain." He considered the rating to be consistent with the AMA Guides because, "If it's not ratable, and if there's no section ratable, or there's nothing to rate it, an examiner has a right to rate what he thinks is an appropriate rating." This explanation obviously falls short of describing an "appropriate method used and accepted by the medical community." Nevertheless, we cannot find that the trial court erred in admitting and relying upon Dr. Fishbein's testimony. We reach this conclusion based upon several factors: it is undisputed that a compensable event occurred; the medical testimony establishes a causal relationship between that event and Employee's winging scapula; and all doctors found his complaints of continuing pain to be legitimate. In *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 457 (Tenn. 1988), the Supreme Court observed:

> While an anatomical disability rating . . . is preferable and ordinarily, if not uniformly, part of the proof offered by either or both parties, the ultimate issue is not the extent of anatomical disability but that of vocational disability, the percentage of which does not definitively depend on the medical proof regarding a percentage of anatomical disability. Once causation and permanency are shown by medical evidence, "[w]e do not find, either in the statute or in the cases, a mandatory requirement that the trial judge fix permanent partial loss of use . . . solely with reference to expert testimony."

See also, *Hill v. Royal Ins. Co.*, 937 S.W.2d 873, 876 (Tenn. Workers' Comp. Panel 1996).

Viewed in that context, the evidence in this record does not preponderate against the trial court's conclusion that Employee sustained both permanent impairment and permanent disability as a result of his work injury.

On the last three pages of its brief, Employer makes an additional argument that the trial judge who heard this case consistently accredits the testimony of doctors who testify on behalf of employees over that of doctors who testify for employers in workers' compensation cases. In support of this position, a number of appellate decisions are attached to Employer's brief. Employer asserts that these are all of the available appellate decisions concerning workers' compensation cases appealed from this trial court since 1995. It further states that, of a total of twenty-three appeals, two

were initiated by employees and twenty-one were initiated by employers, that twelve of those cases involved conflicting medical testimony, and that in eleven of those, the trial judge accredited the testimony of the employee's evaluating physician. Although it is not clear why this point is being raised, we understand this to be an assertion of bias or partiality by the trial judge, perhaps sufficient to warrant reversal.

We note first that Employer probably has waived this issue because it did not raise it in the trial court. *See Davis v. Tenn. Dep't of Employment Sec.*, 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999) (stating "recusal motions must be filed promptly after the facts forming the basis for the motion become known, and the failure to seek recusal in a timely manner results in a waiver of a party's right to question a judge's impartiality" (citations omitted)). Moreover, a party may lose the right to question a judge's impartiality if he or she attempts to use the impartiality issue as a "ace-in-the-hole" in the event that the case is lost on the merits. *Id.* At the same time, we recognize that "[a]ll litigants have a right to have their cases heard by fair and impartial judges." *Id.* However,

> Parties who challenge a judge's impartiality must come forward with some *evidence* that would prompt a reasonable, disinterested person to believe that the judge's impartiality might reasonably be questioned. Impartiality concerns involve a judge's personal bias or prejudice against a litigant, not a judge's general opinion about the legal or social issues involved in a pending case.

Id. at 313-14 (citations omitted) (emphasis added).

In this instance, Employer has failed to properly present any evidence of the trial court's alleged partiality. Although Employer attached a sizable stack of documents to its appellate brief, these documents do not constitute evidence introduced to and admitted by the trial court. See Tenn. R. App. P. 24; *Carney v. State*, No. M2006-01740-CCA-R3-CO, 2007 WL 3038011, at *4 (Tenn. Crim. App. Oct. 17, 2007) (stating that "documents attached to an appellate brief but not included in the record on appeal cannot be considered by this court as part of the record on appeal" (internal citation omitted)); *Forrest v. Rees*, No. 01C01-9411-CC-00387, 1996 WL 571765, at *3 (Tenn. Crim. App. Oct. 8, 1996) (stating that "attachments to briefs are not evidence and will not be considered by the appellate courts); *Pinney v. Tarpley*, 686 S.W.2d 574, 579 (Tenn Ct. App. 1984) (stating that "[m]erely attaching a document to a pleading does not place that document in evidence"). Accordingly the twenty-three cases attached as Exhibit A to Employer's brief are not actually included in the record on appeal. This Panel, exercising its appellate jurisdiction, may review only the matters included in the record of the trial court in the proceedings below. Tenn. R. App. P. 13(c).

Moreover, we find no merit in Employer's argument. The proposition that bias or partiality towards employees can be demonstrated by means of a statistical analysis of a few decisions of a particular judge is dubious at best. Even assuming *arguendo* that such a method is appropriate, the information which Employer offers does not rise to the level of an analysis. Employer's information provides no basis for a conclusion that the twenty-three appellate decisions represent a fair cross-section of the trial judge's decisions. Even as to the twenty-three attached decisions, Employer does not address basic information such as the nature of the specific issues raised in the trial court or on appeal or how the trial and appellate courts resolved those issues.

After all, workers' compensation statutes must be interpreted "to promote and adhere to their purposes of securing benefits to those workers who fall with its coverage." *Moore v. Town of Collierville*, 124 S.W.3d 93, 97 (Tenn. 2004) (quoting *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 75 (Tenn. 2001)). Further, the workers' compensation statutes must be liberally construed to promote that purpose. *Allen*, 36 S.W.3d at 75. These principles are so important to workers' compensation decisions that mere reference to statistics favorable to employees in a few cases, without any other basis, cannot be deemed to constitute evidence of bias that should be given any consideration. Accordingly, Employer's argument has no basis in either law or fact.

Conclusion

The judgment of the trial court is affirmed. Court costs, including seven hundred dollars ($700.00) for mediation services, are taxed to Mueller Refrigeration Company, Inc., and its surety, for which execution may issue if necessary.

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ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
APRIL 21, 2008 SESSION

MICHAEL LIMBAUGH v. MUELLER REFRIGERATION CO., INC.

Chancery Court for Trousdale County
No. 6840

No. M2007-00999-WC-R3-WC - Filed - September 26, 2008

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.

Court costs, including seven hundred dollars ($700.00) for mediation services are taxed to Mueller Refrigeration Company, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM