IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 23, 2009 Session

THOMAS MICHAEL ROSS v. DELTA INDUSTRIAL COATINGS, INC. ET AL.

Direct Appeal from the Chancery Court for Shelby County
No. CH-05-1912-2 Arnold B. Goldin, Chancellor

No. W2009-01815-WC-R3-WC - Mailed June 22, 2009; Filed August 6, 2009

Employee was injured when lifting a can of paint at work. Employee's treating physicians recommended surgery, but Employee refused surgical treatment. The trial court found that Employee had sustained a 60% permanent partial disability ("PPD"). The court also found that the date of maximum medical improvement ("MMI") was January 26, 2007, and that Employee was entitled to temporary total disability ("TTD") until that date. Employer appealed, arguing that the trial court erred in its determination of the date of MMI and that the award of PPD is excessive. We conclude that the evidence does not preponderate against the trial court's findings concerning the impairment rating and vocational disability. We reverse the trial court's finding as to the date of maximum medical improvement.[1]

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Chancery Court Affirmed

WALTER C. KURTZ, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, C. J., and WILLIAM C. COLE, SP. J., joined.

Jefferey D. Foster and David E. Goudie, Jackson, Tennessee, for the appellants, Delta Industrial Coatings, Inc. and Bridgefield Insurance Company.

Ronald T. Riggs, Memphis, Tennessee, for the appellee, Thomas Michael Ross.

---

[1] This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

Thomas Ross ("Employee") worked as a production manager for Delta Industrial Coatings ("Employer"), a manufacturer of industrial paints. On September 23, 2003, he lifted a can of paint from the floor to a pallet and felt a popping sensation in his lower back, followed by immediate pain. He was taken to a medical clinic and referred to an orthopaedic surgeon, Dr. Doug Linville. Dr. Linville ordered an MRI scan, which showed an L5 disk rupture. Dr. Linville recommended surgery, but Employee rejected that treatment. Employee underwent two previous surgeries prior to working for Employer for disk injuries at the L4 level and wanted to avoid further surgery. Dr. Linville recommended a lumbar epidural injection, but that treatment was not approved by Employer's workers' compensation insurer.

Employee received no additional medical attention until June 17, 2004. At that time, he was examined by Dr. John Lindermuth, a retired neurosurgeon. It appears that this examination was an independent medical evaluation (IME) arranged by Employer or its insurer. Dr. Lindermuth agreed with Dr. Linville's diagnosis and also recommended surgery. Again, Employee refused surgical treatment. Dr. Lindermuth opined that conservative treatment "such as physical therapy or epidural blocks would be effective in relieving pain only over the short term." He believed that, given the amount of time that had passed since the initial injury, surgery was the only treatment likely to improve Employee's condition. He opined that Employee had a 13% anatomical impairment to the body as a whole as a result of the injury. He stated that Employee "would not be able to do any bending, lifting, or twisting. He could sit only two hours and only stand for about half an hour."

Dr. Lindermuth used the Diagnosis Related Estimate ("DRE") method set out in the AMA Guides to calculate Employee's impairment. The AMA Guides express a general preference for this method with specific exceptions. One such exception is "where there is multilevel involvement in the same spinal region (e.g., fractures at multiple levels, disk herniations, or stenosis with radiculopathy at multiple levels or bilaterally)." In those cases, the range of motion ("ROM") method is to be used. Dr. Lindermuth testified that he understood the term "spinal regions" to refer to separate vertebral levels. The AMA Guides, however, define "spinal regions" as the cervical, thoracic, and lumbar regions of the spine. Dr. Lindermuth did not calculate Employee's impairment using the ROM method. Dr. Lindermuth testified, however, that the AMA Guides provide that where two methods may be used to rate the same condition, the method yielding the larger impairment should be used.

Dr. Lindermuth examined Employee a second time on September 6, 2007. He remained convinced that Employee could improve with surgical treatment. For that reason, he expressed the opinion that Employee had not reached maximum medical improvement ("MMI") and could not do so until he had surgery.

Dr. John Brophy, also a neurosurgeon, performed independent medical evaluations on January 4 and 26, 2007, at Employer's request. Dr. Brophy ordered a new MRI scan. He testified that the results showed that the work-related disk herniation on the right side of L5 had resolved, but that Employee had developed a herniation on the left side of the same disk unrelated to the work injury. Dr. Brophy recommended surgery, but Employee continued to refuse that treatment. Using the ROM method, Dr. Brophy calculated that Employee retained a 5% permanent impairment to the body as a whole. He opined that Employee had reached maximum medical improvement on the date of Dr. Lindermuth's first examination because he had been relatively stable, had declined surgery, and had not received medical treatment since that time.

Employee was forty-eight years old on the date of the trial. He had completed three and one-half years of classes at the University of Memphis. His resume and an information form he had completed when he was hired by Employer, however, stated that he had graduated. He had previously worked as a warehouseman, material handler, supervisor, and warehouse manager for a chemical company. He had also worked as a shipping manager for an apparel distributor. In previous positions, he had supervised as many as many as fifty employees, and his position for Employer required him to supervise approximately ten employees.

Employee testified that he was able to walk about one-half of a mile before pain and cramping in his leg would cause him to stop. He could stand for no more than twenty minutes. He had not worked since 2003, though Employer did not terminate him officially until 2005. Employee had assisted his wife, who ran an employee training consulting business, from time to time.

The trial court found that Employee had sustained a 60% permanent partial disability ("PPD"). The court also found that the date of maximum medical improvement ("MMI") was January 26, 2007, the date of Dr. Brophy's second examination, and that Employee was entitled to temporary total disability ("TTD") until that date. Because the combined TTD and PPD exceeded 400 weeks, the PPD award was reduced to 55%. Employer has appealed, arguing that the trial court erred in its determination of the date of MMI and by finding the testimony of Employee's medical expert to be more credible than that of Employer's medical expert. Employer also contends that the award of PPD is excessive.

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) (2008). When credibility and weight to be given testimony are involved, considerable deference is given to the findings of 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 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

1. Date of Maximum Medical Improvement

Employer's argument is fairly simple and straightforward. Dr. Brophy expressed the opinion that the MMI date was June 17, 2004. The reasons for that opinion were summarized above. Dr. Lindermuth testified that Employee had not reached maximum medical improvement on any date, and that he would not do so until he had the recommended surgery, which he declined. On that basis, Employer contends that Dr. Brophy's testimony was the only competent medical evidence of a date of MMI in the record.

In response, Employee points out that Dr. Brophy initially opined that Employee was not at maximum medical improvement on January 4, 2007, but changed his mind after reviewing the MRI study. He argues that Dr. Brophy chose the 2004 date primarily because Dr. Lindermuth gave an impairment rating on that date. He argues that Lindermuth did so only because an impairment was requested in the documents which were submitted to him by the insurer in connection with the IME. Employee also notes that Dr. Brophy's finding that the original herniated disk had resolved necessarily means that improvement occurred after Dr. Lindermuth's examination.

"'Temporary total disability 'refers to the injured employee's condition while disabled to work by his injury and until he recovers as far as the nature of his injury permits . . . .'" *Smith v. U.S. Pipe & Foundry Co.*, 14 S.W.3d 739, 744 (Tenn. 2000) (quoting *Redmond v. McMinn County*, 209 Tenn. 463, 468, 354 S.W.2d 435, 437 (1962)). In this case, the issue is complicated by Employee's decision not have corrective back surgery. In light of the fact that he had two previous back surgeries, that decision was not unreasonable. Both doctors testified, however, that a surgical procedure was the only treatment that presented a reasonable opportunity to improve Employee's condition. Therefore, the point in time at which Employee decided not to proceed with that treatment was logically the date on which he had recovered as far as the nature of his injury would permit. That date was June 17, 2004, when, as Dr. Linville had previously done, Dr. Lindermuth recommended surgery and Employee, as he had previously done, declined to undergo that treatment.

From that date forward, no new or additional modes of treatment were recommended or undertaken. Employee's medical restrictions remained unchanged. The effects of the injury upon his ability to obtain and hold employment, and upon his activities of daily living, were essentially stable. None of these situations changed appreciably either before or after January 26, 2007. The only event that occurred on that date was Dr. Brophy's follow-up examination, the purpose of which was more legal than medical. Nothing concerning the prognosis of Employee's injury changed on that date. For those reasons, we conclude that the evidence in this record preponderates against the trial court's finding that the MMI date was Janaury 26, 2007, and in favor of the conclusion that Employee reached MMI on June 17, 2004.

2. Medical Opinions

Employer contends that Dr. Lindermuth used an improper method to assess Employee's impairment rating. Specifically, Employer argues that the AMA Guides mandated that Dr. Lindermuth use the ROM method because Employee had previous injuries to his L4 disk. On that basis, Employer contends that his testimony was contrary to Tenn. Code Ann. section 50-6-204(d)(3)(A), which requires an expert to utilize the applicable edition of the AMA Guides to determine the impairment rating.

Employee argues that Dr. Lindermuth gave a reasonable explanation for his use of the DRE method, that he testified live at trial while Dr. Brophy testified by deposition, and that a trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. *See, e.g., Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

The trial court explained its decision as follows:

> With regard to the methodology used in determining . . . permanent physical impairment, the Court believes that Dr. Lindermuth's testimony . . . that the DRE method was the preferred method to use as stated on page 379, section 15.2 of the AMA Guide[s], Fifth Edition which states the DRE method is the principal methodology used to evaluate an individual who has a distinct injury, and that the range of motion method is used in several situations, one of which is when an impairment is not caused by an injury, which is certainly not the case here.
>
> And in the Court's mind, the dispute between which method should be used is resolved . . . where it states on page 380: 'In the small number of instances in which the range of motion and the DRE methods can both be used, evaluate the individual with both methods and award the higher rating. In this case, Dr. Brophy awarded a rating of 5 percent and Dr. Lindermuth 13%. The Court finds that Dr. Lindermuth's method of evaluating this case was appropriate.

The trial court referred directly to the relevant portion of the AMA Guides. The court's interpretation of the applicable language is consistent with both the principles of the AMA Guides and the workers' compensation law. We find that the evidence does not preponderate against the decision of the trial court on this issue.

3. Excessive award

Employer argues that Employee's level of education and experience make the award of 60% PPD excessive. Employer highlights Employee's education, supervisory and managerial experience, and occasional work for his wife's consulting firm.

Employee responds by noting that all of his work experience, including his managerial experience, occurred in an industrial setting and required extensive standing and walking. Employee argues that he is therefore unable to return to his previous type of work because of his injury.

In assessing the extent of an employee's vocational disability, the trial court may consider all pertinent factors including lay and expert testimony, 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) (1999); *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 employee'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). The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all of the evidence, both expert and lay testimony, to decide the extent of an employee's disability. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 677 (Tenn. 1983).

In this case, it is undisputed that Employee has a herniated lumbar disk at the L5 level that limits his ability to lift, bend, or twist, and to sit or stand for extended periods of time. Although he has significant education and managerial experience, all of his work has been in an industrial setting and has required moderate to intense physical exertion. Employee is nearly fifty years old. As a result of his work injury, he is unable to return to most of the jobs he has previously held. Taking these factors into consideration, we are unable to conclude that the evidence preponderates against the trial court's finding regarding permanent impairment.

Conclusion

The judgment of the trial court as to the impairment rating and vocational disability is affirmed. We conclude, however, that the date of maximum medical improvement should be June 17, 2004. The case is remanded to the trial court for entry of an order consistent with this opinion. Costs are taxed to Delta Industrial Coatings, Inc. and Bridgefield Casualty Insurance Company, and their surety, for which execution may issue if necessary.

_____

WALTER C. KURTZ, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 23, 2009 Session

THOMAS MICHAEL ROSS v. DELTA INDUSTRIAL COATINGS, INC.

Chancery Court for Shelby County
No. CH-05-1912-2

No. W2008-01815-WC-R3-WC - Filed August 6, 2009

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 Appellants, Delta Industrial Coatings, Inc., and Bridgefield Casualty Insurance Company and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM