

IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

FILED

October 17, 1996

Cecil W. Crowson
Appellate Court Clerk

KERRY ALAN NAPIER,)
)
Plaintiff/Appellee)
)
v.)
)
CINCINNATI CASUALTY INSURANCE)
COMPANY and NORTH CENTRAL)
TELEPHONE COOPERATIVE,)
)
Defendants/Appellants)

MACON CHANCERY

NO. 01S01-9604-CH-00063

Hon. C.K. Smith,
Chancellor

For the Appellants :

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

Adolpho A. Birch, Chief Justice
William H. Inman, Senior Judge
William S. Russell, Special Judge

**AFFIRMED AS MODIFIED
AND REMANDED**

INMAN, Senior Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The issue in this case is whether the award of 75 percent disability to the plaintiff's right hand is in accord with the preponderance of proof. Appellate review is confined to a review *de novo* on the record, accompanied by a presumption that the trial judge's findings of fact are correct unless the evidence otherwise preponderates. T.C.A. § 50-6-225(e)(2). A concomitant rule is that we are as enabled as the trial judge to judge the probative worth of depositional testimony. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

The plaintiff's job with the telephone company was that of a cable splicer and repairman. During the course of his employment, he sustained a laceration to the extensor tendon of his right hand, on October 25, 1994, involving the index, middle and ring fingers, which was repaired by Dr. Keith Morrison, an orthopedic surgeon in Bowling Green, Kentucky, under whose care he remained until February 22, 1995. On that date, Dr. Morrison noted:

Mr. Napier is now 4 months status post extensor tendon repair on his right hand. Four tendons repaired to the index finger, slips to the middle and ring finger on the right hand. His EXAM today shows some improvement. He still lacks full extension on the index finger by about 20dg when his wrist is brought into extension. With the wrist in the flexed position, he has full extension of the hand. He has full flexion of all the digits with his only limitation being the lack of full extension on the index finger with his wrist in the above mentioned extension position. They would like to get a second opinion for insurance reasons so we are going to see him back in 1 month. At that time he will be 5 months out. I recommend tenolysis exploration. If he is still dissatisfied with the result. Overall, he has made a big improvement, having had no active extension of the fingers on repair. He remains neurovascularly intact. Otherwise, no loss of sensation.

The plaintiff was later seen, on March 15, 1995 by Dr. Stephen Pratt, a specialist in reconstructive hand surgery, because of a 30 degree lag in the index finger. Further tendon repairs were undertaken to correct the lag. Dr. Pratt testified

that the plaintiff "did very well in the post-operative period. Was fairly cooperative with his therapy. Seemed to heal okay."

He saw the plaintiff last on May 2, 1995 "to see what type of impairment I thought he would have." He testified, "The EIP joint of the second, third and fourth were okay except for the third finger. And I said he had a lag of five degrees there, although I did not rate him based on that thinking that this would gradually resolve." When asked about the future condition of the hand, Dr. Pratt testified, "Well I would think that he should do very well. Extensor tendon repairs or problems are usually not very limiting." He recommended that the plaintiff return to his job with no restrictions and was of the opinion that he had no impairment.

The plaintiff was thereupon referred by his attorney to Dr. Robert Paul Landsberg, an orthopedic surgeon practicing in Goodlettsville, Tennessee for evaluation. In a manner not entirely clear, Dr. Landsberg parlayed the hand injury to "right upper extremity." He testified:

Q. Doctor, as I understand it, what you've stated here is that you found a total of 4 percent to the hand as a result of his flexion loss of his fingers; is that correct?

A. Well, using the guidelines, it's a 4 percent "upper extremity impairment rating," not a 4 percent hand impairment rating.

Q. It's also 4 percent to the hand impairment rating too, is it not, using the guidelines?

A. Well, let me see.

Q. Being fair with everybody, just let me back up just a minute. The fact is, this is a hand injury, is it not?

A. Yes.

Q. I mean, the arm wasn't injured, the shoulder wasn't injured, his elbow - it was the outer part of his hand, as I understand it; is that correct?

A. Yes.

Q. And that was the only part that was, in fact, injured, wasn't it?

A. Yes.

Q. Okay. At that level is 4 percent to the hand. Now, you also use a loss of grip strength -- what is the loss of grip strength[sic] AMA Guidelines percentage of disability to the hand?

A. Well, it only -- you see, the AMA Guides only gives an upper extremity impairment rating. The AMA Guidelines doesn't know what the tendency to -- whether it's concerned with the hand or upper extremity, so it just gives an upper extremity kind of rating. One can extrapolate backwards to give an impairment rating to the hand, if one really wanted to, because it's his hand that's non-functioning that's causing the impairment in the grip strength.

Q. But you've not done that, is that correct?

A. No. I have not, but I could. That would be an 11 percent to the hand. A 10 percent upper extremity impairment rating is an 11 percent hand impairment rating.

Q. Okay. So 10 percent -- so what you're saying, again, then effectively to his hand a 15 percent AMA Guideline; is that what we're saying? I'm not trying to tell you what you're saying. Is that correct?

A. Yes.

Q. Or is it 11 percent?

A. It's 11 and a 4 combined for a 15 percent impairment rating to the hand.

Q. Okay. Now, how many surgeries of this type have you done, Doctor?

A. In the last 15 years?

Q. Yes. Give me a rough ballpark.

A. Probably repair extensor tendons -- we take call in the emergency room, you know, every 6th or 7th night. And you can expect one of the -- an extensor tendon laceration to a hand to show up every other time. You could average about one a month of these for the last 15 years or more. I don't know.

Q. Now, Dr. Pratt, you recognize him as an expert in hand injuries, do you not?

A. Yes.

Q. And he indicated that this injury did not cause any - would not cause any grip strength loss. Why the difference of opinion?

A. I don't know why Dr. Pratt came up with that.

Q. He indicated the tendon in the back of the hand had nothing to do with grip strength. And I think I'm quoting correctly from his deposition.

A. The problem with the tendons in the back of the hand is that they help in positioning and opening the hand, and, as we know, he has this deformity where when he goes to straighten his wrist, his fingers bend. The most powerful grip strength is with the wrist extended about 20 to 30 degrees. If he can't fully grip the Jamar dynamometer properly with his wrist in the most strong position, then he's going to have a decrease in grip strength, plus he has discomfort which has led to go on to have weakness because of his injury."

Q. Also, Dr. Pratt indicated that excessive cigarette smoking could be just as likely to cause his cold hands as this injury. Would you agree or disagree?

A. Well --

Q. In other words, vascular problems?

A. Yes. Excessive cigarette smoking can cause vascular problems, but it should affect both hands equally, one would think.

Q. And he also indicated that perhaps this gentleman was not using his hand enough.

A. Well, he's not using his --

Q. Hand enough.

A. Well, I agree. He's not using his hand anywhere near as much as he was before, because it's uncomfortable for him and it produces discomfort and that's one of the reasons why he has weakness as well.

Q. Doctor, you gave him some limitations and Dr. Pratt gave him none. Can you account for the reason for that?

A. No. It's just my opinion from examining him and measuring his grip strength and from listening to his story about the things that he can and cannot do. I had no reason to disbelieve the things that he told me, and therefore, I felt that he should have certain restrictions and limitations.

The testimony of the plaintiff was directed in large measure to the shortcomings of Dr. Pratt, and to his praise of Dr. Landsberg, with respect to the kinds of tests each performed. He demonstrated to the trial judge his asserted

inability to make a fist; in point of fact, counsel persuaded the trial judge to make a diagnosis based upon the purely subjective demonstration of the plaintiff. This colloquy is instructive of the point.

Your Honor, I would suggest to the Court that it [a measurement conducted by counsel] shows at least three to four inches, but he lacks even making fist.

* * *

THE COURT: . . . I'll let the record reflect it's probably about an inch-and-a-half to his index finger. It's about at a 90 degree angle, let's just say about 90 degrees and it's some inch-an-a-half up to the base of his thumb also. His index finger, I'm talking about the base of the finger it's about an inch-and-a-half gap there.

MR. FARRAR: Could Your Honor, for the record's sake, let the record reveal how far his fingers lack touching the inside of his hand?

THE COURT: An inch-and-a-half, in my opinion.

The trial judge found that the injury was confined to the plaintiff's right hand -- apparently in response to the testimony of Dr. Landsberg -- but that "I disagree with Dr. Pratt giving him a zero evaluation." He then discussed the litany of activities the plaintiff was unable to perform [carrying blocks, using a hammer, pulling heavy timbers, spray-painting, changing tires] which was seemingly confirmed by his in-court testing of the plaintiff's ability to extend his wrist. While these demonstrations, and the court's conclusions therefrom, do not approach the extrajudicial observations as reported in *Vaughn v. Shelby Williams of Tennessee, Inc.*, 813 S.W.2d 132 (Tenn. 1991), we think the trial judge inadvertently became a witness in the case as evidenced by the conclusion he announced as reproduced in the colloquy. He found that the plaintiff has a 75 percent permanent partial disability to his right hand. The defendant appeals, asserting the excessiveness of this award.

While the extent of vocational disability can be established by lay testimony, *Perkins v. Enterprise Truck Lines, Inc.*, 896 S.W.2d 123, 127 (Tenn. 1995), and the credibility of witnesses is for the trial judge to determine, *Walls v. Magnolia Truck Lines, Inc.* 622 S.W.2d 526, 528 (Tenn. 1981), we think the proof in this case falls short of establishing that the plaintiff's hand is crippled to the extent of 75%. It is not disputed (1) that the plaintiff returned to his employment; (2) that he was able to

return to work and was able to do the job that he had before; (3) and that he performs the job satisfactorily.

The treating physicians, especially Dr. Pratt, testified firmly that the plaintiff had no impairment, and his testimony that the tendons involved in the injury have nothing to do with grip strength was not essentially refuted. This point is significant since much of the record is given over to testimony about and discussion of the loss of grip strength. Dr. Landsberg opined that the plaintiff had a 15 percent impairment, most of which he attributed to loss of grip strength.

From a common-sense point of view it seems obvious that the treating physician is better advantaged to provide an in-depth opinion, if not a more accurate one, of any resulting impairment or disability than is a physician hired by the employee to evaluate his condition. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 677 (Tenn. 1991). This is not to say that the opinion of an evaluating physician has no weight; it frequently does and should be considered in conjunction with all of the evidence. In this case, the testimony of the treating physician was debunked, without elaboration. We have read the testimony carefully and conclude that we must respectfully disagree with the trial judge, as is our prerogative, *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994) concerning the weight and effect to be accorded the testimony of Dr. Pratt, a recognized specialist in the treatment of hand injuries. We find the evidence preponderates against a finding of 75% permanent partial disability to the right hand and preponderates in favor of an award of 25 percent permanent partial disability to the right hand. As modified, the judgment is affirmed with costs on appeal assessed to the appellee. The case is remanded for all appropriate purposes.

William H. Inman, Senior Judge

CONCUR:

Adolpho A. Birch, Chief Justice

William S. Russell, Special Judge

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MACON CHANCERY

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No. 2686 Below

Plaintiff/Appellee

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Hon. C. K. Smith,

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CINCINNATI CASUALTY INSURANCE

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No. 01S01-9604-CH-00063

COMPANY and NORTH CENTRAL

}

TELEPHONE COOPERATIVE,

}

AFFIRMED AS MODIFIED

Defendants/Appellants

}

AND REMANDED.

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 will be paid by the appellee for which execution may issue if necessary.

IT IS SO ORDERED on October 17, 1996.

PER CURIAM

