IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(February 6, 1997 Session)

JAMES RAY SCOTT,	)	DYER CHANCERY
	)	
Plaintiff-Appellee,	)	Hon. J. Steven Stafford, Judge
	)	
	)	
Vs.	)	No. 02S01-9608-CH-00073
	)	
MA HANNA COMPANY, d/b/a COLONIAL RUBBER WORKS, INC., and RELIANCE INSURANCE COMPANY,	)	
	)	
	)	
Defendants-Appellants.	)	

For Appellants:

Mr. Ralph I. Lawson
Lawson & Lawson
306 Church Ave.
Dyersburg, Tennessee 38025-1207

For Appellee:

Mr. David M. Hardee
Hardee, Martin and Jaynes, P.A.
213 E. Lafayette
Jackson, Tennessee 38301

M E M O R A N D U M O P I N I O N

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Leonard W. Martin, Special Judge

AFFIRMED AS MODIFIED

Martin, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer questions the award of permanent partial disability benefits as being excessive. As discussed below, the panel has concluded the judgment should be modified.

The employee, Scott, is forty-seven (47) years old, and has an eighth (8th) grade education. He has farmed and worked at a cotton gin. He has no specialized skills or training. He has an I.Q. of sixty-five (65) and a severe speech impediment. He worked for the defendant employer for twenty-two (22) years. During the course of his employment, he has performed various jobs and was operating a scrubber at the time of his injury.

The employee was injured at work on June 4, 1994, when he was getting off of the scrubber and fell. He testified that he hurt his neck, back, and left shoulder. He was first seen by Doctor Michael Heck, who prescribed medication and returned him to work on light duty. He was then seen by Doctor Stewart, who returned him to regular duty with the defendant.

Doctor Riley Jones treated the plaintiff and opined that he had a 10 per cent (10%) anatomical impairment to the left upper extremity. Dr. Jones gave him no impairment rating for his back and sent him back to regular duty.

Dr. Robert Paul Christopher saw the plaintiff on July 24, 1995, for an independent medical evaluation. He opined that the plaintiff had a 10 per cent (10%) impairment to the left upper extremity, a 6 per cent (6%) impairment as a result of injury to the cervical spine, translating to a combined rating of 12 per cent (12%) to the body as a whole.

The plaintiff was also seen by Doctor Robert J. Barnett for an independent medical evaluation on February 24, 1995. Doctor Barnett rated the shoulder injury at 10 per cent (10%), the back injury at 10 per cent (10%), and gave the plaintiff a combined rating of 15 per cent (15%) disability to the body as a whole.

Ms. Ellen Ambuehl testified as a certified vocational rehabilitation counselor. She testified that the plaintiff's educational level was well below his stated eighth (8th) grade education, his I.Q. was sixty-five (65) (first percentile), that he had a low average range for dexterity, a severe deficiency in finger dexterity, a lifting ability between fifteen (15) and twenty-six (26) pounds, and that he had a severe speech impediment. She rated him at a 96 per cent (96%) occupational loss.

The plaintiff returned to duty on the scrubber, worked for approximately two (2) weeks, and then quit. He contends that he could not do the job. A physical therapist, Eddie Crocker, who treated the plaintiff, testified that the last time he saw him he did not place any physical limitations on his ability. The physical therapist had treated the plaintiff for some twenty-eight (28) scheduled visits. The plaintiff's supervisor, Donald Haley, testified that the plaintiff performed his work right up until the time he quit, and that he never made any complaints. He also testified that the employer accommodated people who had been injured, or who had some physical inability to work. The employee's safety coordinator, Larry Poteet, testified that they had accommodated a lady who had a work related accident consistent with a shoulder injury, that they had an operator with only one (1) arm, and a man who had had heart surgery. He knew that the plaintiff had returned to regular duty and then just quit. He stated that the plaintiff took his vacation time and then he called in sick several times. He also stated that the plaintiff called in several times with car trouble or unexcused absences and that they couldn't get him to come back to work. He also testified that the plaintiff could have worked right on and could be working today. It was also testified that the acting director called the plaintiff to get him to come down so they could see what his problem was and that he would not come down to talk to them. He just said he wasn't coming. He never said he wasn't able to come back, he said his car was broke down. When asked if the plaintiff ever told him that he wasn't able to do the job, his answer was, "No, he just told us he was not coming."

The panel finds that the preponderance of the evidence is that the plaintiff could have continued to perform his job with the accommodations which the employer was willing to make.

The trial court awarded permanent partial disability benefits based on 45 per cent (45%) vocational impairment to the body as a whole. Appellate review is **de novo** upon the record of the trial court, accompanied by a presumption of correctness of the findings of the trial court, unless the preponderance of the evidence is otherwise. Tenn. Code. Ann. section 50-6-225(e)(2).

There is no dispute about causation, and little difference as to anatomical impairment, with one doctor rating the plaintiff at 12 per cent (12%) permanent partial impairment to the body as a whole, and another doctor rating him at 15 per cent (15%). What is in dispute is whether or not the plaintiff could have continued to work and perform his job. The trial court made no specific finding in this regard.

In cases where an injured employee is eligible to receive any permanent partial disability benefits and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 1/2) times the medical impairment rating. In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. Section 50-6-241(a)(1).

From our assessment of the evidence, we find it preponderates against an award based on 45 per cent (45%) vocational impairment to the body as a whole, and in favor of one based on 37.5 per cent (37/5%) impairment to the body as a whole. The judgment is modified accordingly.

As modified, the judgment of the trial court is affirmed. Costs on appeal are taxed to the parties, one-half (1/2) to each.

Leonard W. Martin, Judge

CONCUR:

Lyle Reid, Associate Justice

Joe C. Loser, Jr., Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

JAMES RAY SCOTT,	)	DYER CHANCERY
	)	NO. 95-C-255
Plaintiff/Appellee,	)	
	)	Hon. J. Steven Stafford,
vs.	)	Chancellor
	)	
MA HANNA COMPANY,	)	NO. 02S01-9608-CH-00073
d/b/a COLONIAL RUBBER WORKS, INC.	)	
and RELIANCE INSURANCE COMPANY,	)	
	)	
Defendants/Appellants.	)	AFFIRMED AS MODIFIED

FILED

April 17, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

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 equally by Appellee and Appellant, for which execution may issue if necessary.

IT IS SO ORDERED this 17th day of April, 1997.

PER CURIAM

(Reid, J., not participating)