IN THE SUPREME COURT OF TENNE$SEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(May 23, 1997 Session)

FILED

January 7, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

RICKY MCFARLAND,	)	
	)	
Plaintiff/Appellee,	)	
	)	
VS.	)	NO. 02S01-9702-CV-00011
	)	
CHAMPION HOME BUILDERS,	)	HENRY COUNTY CIRCUIT
	)	JUDGE JULIAN P. GUINN
Defendant/Appellant.	)	

FOR APPELLANT:
P. Allen Phillips
Jackson, Tennessee

FOR APPELLEE:
Ricky L. Boren
Jackson, Tennessee

MEMORANDUM OPINION
Mailed November _____, 1997

Members of Panel:

Janice M. Holder, Associate Justice, Supreme Court
Robert A. Lanier, Special Judge
Don R. Ash, Special Judge

AFFIRMED

Ash, Special Judge

MEMORANDUM OPINION

This worker's compensation appeal was referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) (1996 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer, Champion Home Builders, contends that: (1) the trial court erred in finding that the plaintiff had sustained a compensable injury; and (2) the trial court erred in assessing a 50 % permanent partial disability to the body as a whole. The panel finds that the judgment of the trial court should be affirmed.

STANDARD OF REVIEW

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (1996 Supp.). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Govemment of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

FACTS

The claimant, Ricky McFarland, forty-three years old at the time of trial, has a twelfth grade education with a minimal amount of college experience. Mr. McFarland worked as a common laborer for most of his career. Champion Home Builders has employed Mr. McFarland since June of 1985. In March of 1995, Mr. McFarland suffered an injury to his back while working at Champion Home Builders. Dr. Carpenter, an osteopath, examined Mr. McFarland for this injury. After this initial examination, Mr. McFarland was referred to Dr. Joe Rowland, a neurosurgeon, who performed a CAT scan which revealed a paracentral bulging disc. However, Dr. Rowland opined that the injury was not of a surgical nature and treated Mr. McFarland in a conservative manner. On August 15, 1995, Dr. Rowland performed a myelogram which revealed degenerative changes and a possible right paracentral disc at the L-4 level. On August 29, 1995, surgery was performed but a ruptured disc was not found. However, Dr. Rowland discovered an unusual configuration known as a conjoined nerve root, which is a congenital anomaly where two nerves exit from the same canal. Again Dr. Rowland treated Mr. McFarland conservatively. However, Mr. McFarland did not improve and a second surgery was performed. After the second surgery, Dr. Rowland opined that the injury was to a disc and not a conjoined

root. Further, Dr. Rowland opined that the congenital deformity could have been aggravated by trauma, but Mr. McFarland had no history of trauma. Dr. Rowland assessed a 10% permanent partial impairment rating to the body as a whole to Mr. McFarland. Further, Dr. Rowland opined that the nature of Mr. McFarland's work could aggravate the preexisting conjoined nerve root condition. On June 8, 1995, prior to the second surgery, Dr. Everett, an orthopaedic surgeon, performed a CAT scan which revealed a paracentral bulging disc and disc herniation toward the right side at the L-4 level. On August 19, 1996, Dr. Everett performed surgery for this problem. When Mr. McFarland returned to work, Champion Home Builders informed Mr. McFarland that he would be limited to light duty of no more than twenty or thirty pounds lifting for two months before he could return to normal activities without restrictions of a permanent nature.

After seeing Dr. Rowland but before the bulging disc operation, Dr. Robert J. Barnett, an orthopaedic surgeon, examined Mr. McFarland for an independent medical evaluation. Dr. Barnett noted that Mr. McFarland had a history of low back pain that had been aggravated by a lifting episode in August of 1995. Dr. Barnett opined that this lifting incident caused Mr. McFarland's injury. Upon examination, Dr. Barnett found that Mr. McFarland could touch his knees with his fingertips but he could not bend over to the degree necessary to touch his ankles. Further, Dr. Barnett found that Mr. McFarland was limited when he bent backwards and to his sides. X-rays of Mr. McFarland revealed the large operative area in which considerable amounts of bone had been taken off through the large hemilaminectomy on the right at the L-4 level. Dr. Barnett opined that Mr. McFarland had a 20% permanent partial impairment to the body as a whole and placed a thirty-pound overall weight limit restriction and a limit on repetitive lifting of not more than ten pounds. Further work restrictions include that Mr. McFarland was to avoid long periods of sitting, long periods of standing, and body movements of that nature. Dr. Barnett opined that Mr. McFarland is not a good candidate for manual labor because the back pain limited his motion.

The trial court held that Mr. McFarland's work had primarily been in the field of manual labor and Mr. McFarland suffers classic symptoms for an injury of this nature. Further the trial court held Mr. McFarland suffered a compensable injury and as a result has a 50% permanent partial disability to the body as a whole.

CAUSATION

Appellant contends the trial court erred in finding that the plaintiff had sustained a compensable injury. In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. Sec. 50-6-102(a)(5). The phrase "arising out" refers to causation. Braden v. Sears Roebuck and Co., 883 S.W.2d 496, 498 (Tenn. 1992). The causation requirement is satisfied if the injury has a rational, causal connection to the work. Id. Although causation cannot be based upon speculation or conjectural proof, Simpson v. H.D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990), absolute certainty is not required. Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937. Generally, an injury arises out of and in the course of employment if it has a rational, causal connection to the work and occurs while the employee is engaged in the duties of his employment; and any reasonable doubt as to whether an injury arose out of the employment or not is to be resolved in favor of the employee. White v. Werthan Industries, 824 S.W.2d 158, 159 (Tenn. 1992).

Mr. McFarland's congenital anomaly does not preclude him from receiving workers' compensation benefits. A prior disabling condition does not preclude a workers' compensation award where a work-related injury aggravates that pre-existing condition. Id. at 159. However, an employee is not entitled to workers' compensation benefits where the employment does not cause an actual progression or aggravation of the underlying condition but simply produces additional pain. Townsend v. State, 826 S.W.2d 434 (Tenn. 1992); Smith v. Smith's Transfer Corp., 735 S.W.2d 221 (Tenn. 1987). Dr. Barnett opined that Mr. McFarland's injuries were aggravated by the nature of his work, and Dr. Rowland's opinion was inconclusive on this matter. Further, the trial court held that Mr. McFarland's injuries were work related and the nature of his employment aggravated his condition. Therefore, after weighing the medical evidence and the trial court's finding, this panel concludes that Mr. McFarland's congenital anomaly does not preclude him from receiving workers' compensation benefits.

In the instant case, there is conflicting testimony between Dr. Rowland, who opined that no anatomical findings relate to the conjoined nerve root and Dr. Barnett, who opined that causation existed as a result of Mr. McFarland's work related lifting. Moreover, Dr. Rowland

opined that lifting and bending can irritate a conjoined nerve root. Any reasonable doubt as to causation is to be construed in Mr. McFarland's favor. White v. Werthan Industries, 824 S.W.2d 158, 159 (Tenn. 1992). It is within the sound discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). Further, while causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition. Smith v. Empire Pencil Co., 781 S.W.2d 833, 835 (Tenn. 1989). Therefore, based upon the doctors' opinions, the lay testimony of the plaintiff, and the evidence in the record, the evidence does not preponderate against the trial court's holding that the Mr. McFarland did sustain a compensable injury.

AMOUNT OF IMPAIRMENT

Appellant contends the trial court erred in assessing a 50% permanent partial disability to the body as a whole. In cases where expert medical testimony is presented by deposition and is conflicting, the appellate court is in as good a position as the trial court in reviewing and weighing testimony and determining credibility questions and questions concerning the weight of expert testimony. Landers v. Fireman's Fund, Inc., 775 S.W.2d 355, 356 (Tenn. 1989). Nevertheless, it is within the sound discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283.

Here, Dr. Rowland and Dr. Barnett both used standard means to give an impairment rating to Mr. McFarland. Though Dr. Rowland appeared to be the treating physician, Dr. Barnett had the benefit of time to see the results of treatment and the results of Mr. McFarland's surgeries. Dr. Barnett opined that the lifting Mr. McFarland did at his job caused Mr. McFarland's back injuries. Further, Dr. Barnett opined that the hemilaminectomy would cause large amounts of scar tissue limiting the movement of Mr. McFarland's back. Coupled with his observations, tests, and Mr. McFarland' history, Dr. Barnett assessed Mr. McFarland as having a 20% permanent partial impairment to the body as a whole with a thirty (30) pound lifting work restriction and a ten (10) pound repetitive lifting work restriction with no long sitting or long

standing periods. The opinion of a qualified medical expert with respect to a claimant's medical impairment is a factor which must be considered along with all other relevant facts and circumstances in determining the extent of his or her industrial disability. Pittman v. Lasco Industries, Inc., 908 S.W.2d 932 (Tenn. 1995). Moreover, Tennessee has long recognized that an employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Harlan v. McClellan, 572 S.W.2d 641 (Tenn. 1978). Further, Tennessee recognizes that the employer takes the employee with all preexisting conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the preexisting conditions. Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991).

The trial court is justified in the consideration of factors such as age, job skills, education, training, and the like, in addition to anatomical impairment. Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). The factors this panel is to consider in determining the amount of disability are the claimant's age (Jackson v. Greyhound Lines, Inc., 734 S.W.2d 617, 621 (Tenn. 1987)); his job skills, education, training, and length of disability (Employers Ins. v. Heath, 536 S.W.2d 341, 342-43 (Tenn. 1977)); job opportunities in the marketplace (Hinson v. Walmart, 654 S.W.2d 675, 677 (Tenn. 1983)); whether the claimant has returned to work (Corcoran v. Foster Auto GMC, 746 S.W.2d 452, 459 (Tenn. 1987)); the claimant's own assessment of his or her physical condition and resulting disability (Corcoran, 746 S.W.2d at 458); and whether, despite returning to work, the claimant's ability to earn wages in any form of employment (that would have been available to him in an uninjured condition) is diminished by an injury) Prost v. City of Clarksville, 688 S.W.2d 425, 427 (Tenn. 1984)).

In the instant case, Plaintiff's congenital condition makes him more susceptible to the injury he sustained. However, Champion Homes Builders gave Mr. McFarland a pre-employment physical and subsequently hired him. The trial court found that Plaintiff "suffers the somewhat classic symptoms for an injury of this nature. He wears a brace and he takes pain medication. He has lifting limitations and he avoids those instances where pain arise... This man is the classic patient who has come to live with the injury he has got and to do the best he can under the circumstances." The trial court carefully considered all the evidence including the

resulting symptoms plaintiff lives with and chose Dr. Barnett's opinion. The trial court correctly found that under Tenn. Code Ann. § 50-6-241(a)(1) (1996 Supp.) the cap of 2.5 times the impairment rating applies, as plaintiff returned to the same employer and continued to do similar work with assistance. As a result the 2.5 times the 20% impairment rating, giving plaintiff a total impairment rating of 50% to the body as a whole, is appropriate. From our independent review of the record, the evidence does not preponderate against the findings of the trial court on the award of disability.

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the defendant-appellant.

_____
Don R. Ash, Special Judge

CONCUR:

_____
Janice M. Holder, Associate Justice

_____
Robert Lanier, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

RICKY MCFARLAND,	)	HENRY CIRCUIT
	)	NO. 336
Plaintiff/Appellee,	)	
	)	Hon. Julian P. Guinn,
vs.	)	Judge
	)	
CHAMPION HOME BUILDERS,	)	NO. 02S01-9702-CV-00011
	)	
Defendant/Appellant.	)	AFFIRMED

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 Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 7th day of January, 1998.

PER CURIAM

(Holder, J., not participating)