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

FILED

March 30, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

DANNY MITCHELL,	)	
	)	
Plaintiff/Appellee,	)	**HENRY CIRCUIT**
	)	
VS.	)	**HON. JULIAN P. GUINN, JUDGE**
	)	
AETNA LIFE & CASUALTY INSURANCE COMPANY and DINA TOBIN, DIRECTOR OF DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR,	)	**No. 02S01-9706-CV-00053**
	)	
Defendants/Appellants.	)	

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MEMORANDUM OPINION

MEMBERS OF PANEL:

JANICE M. HOLDER, JUSTICE
HEWLITT P. TOMLIN, JR., SENIOR JUDGE
CORNELIA A. CLARK, SPECIAL JUDGE

AFFIRMED AS MODIFIED **CLARK, SPECIAL JUDGE**

This worker's compensation appeal has been referred to the special worker's

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.

Defendant Aetna Life & Casualty Insurance Company appeals from an award of the trial court based on a finding of seventy (70%) percent permanent partial disability to each arm.[1] Defendant contends that the evidence preponderates against the trial court's finding. For the reasons set forth below, we affirm the judgment of the trial court as modified.

Plaintiff began working at Atlantic Homes in 1994 as a bat molder, which required him to use an air gun and cut with a molding cutter. Plaintiff, who was thirty-one years old at trial, completed the ninth grade, is married, has two children, and has a prior vocational history which includes driving a dump truck, running a tar patching machine for the highway department, forming hoses at Plumley Rubber Company, operating a saw at a sawmill, drilling holes in table tops at Emerson Electric Company, and operating a hydraulic machine at Sanders, Inc.

In September 1995 plaintiff began experiencing severe pain in both arms from the tips of his fingers to his armpits, swelling, and numbness. He was initially seen by Dr. Terry Harrison, his family doctor, and thereafter was seen by Dr. Eugene Gulish, Dr. Sid Ray, Dr. Keith Nord, and Dr. Ronald C. Bingham. Dr. Nord diagnosed plaintiff's condition as bilateral carpal tunnel syndrome and performed surgery on each of plaintiff's hands in late 1995.

Dr. Nord assigned a twenty (20%) percent permanent disability rating to each upper extremity, for a combined impairment of twenty-four (24%) percent to the

[1]The transcript reflects that the trial judge found that plaintiff suffered a seventy (70%) percent permanent partial disability to each arm. The final judgment signed by the judge refers to seventy (70%) percent permanent partial disability to each upper extremity. However, the judgment calculation found in the order is based on disability to each arm. Plaintiff has argued for affirmance based on a finding of impairment to each upper extremity.

whole person. He determined that maximum medical improvement had been reached on January 24, 1996, and released plaintiff to return to work with permanent restrictions of no lifting greater than twenty (20) pounds with the right hand, no lifting greater than ten (10) pounds with the left hand, and no repetitive gripping or twisting with either hand.

Plaintiff returned to work on light duty. He continued to suffer elbow pain, muscle spasms in his forearms, loss of strength in his hands, and swelling. For two to three works he cleaned the cafeteria. Later he was assigned to clean mobile homes that were under construction. This involved sweeping out the trailers and moving broken pieces of sheetrock. However, he specifically was instructed not to lift anything that exceeded his lifting restrictions.

On the first day that plaintiff was assigned to the mobile home cleaning assignment, he advised his supervisor that he was having problems moving the sheetrock. He complained again the second day. His employers attempted to find another suitable job. Plaintiff stated, "You don't have anything I want to do." He contended that the mobile home cleaning job exceeded his weight restrictions and that he could not perform any other task. He was then terminated.

At the time of trial plaintiff had not successfully been reemployed. He had checked periodically with the unemployment office but had made application for work only at two grocery stores. He did not apply anywhere else because, based on his understanding of all factory work, he did not believe he could perform the job requirements. He continued to experience pain, weakness, swelling, and numbness.

Our analysis has been made very difficult by the confusion surrounding the actual finding of disability. We begin by noting the discrepancy between the trial court's oral finding that plaintiff suffered a seventy (70%) percent permanent partial

disability to each arm, and the language of the final judgment awarding seventy (70%) percent to each upper extremity.[2] The parties have compounded this confusion by arguing different positions. Plaintiff's brief refers to the upper extremities. Defendant's brief refers to the arms. As noted in Pamela Adelicia Corbin v. I.T.T. Hartford, No. 02S01-9408-CH-00055 (Tenn. Work.Comp. App., May 17, 1995):

. . .

> [W]e would like to call attention to the fact that both the legal profession and the medical profession seem to be drifting into the habit of using the terms "upper extremity" and "arm" and "lower extremity" and "leg" interchangeably. This presents serious confusion from a legal standpoint because "arm" (Tenn. Code Ann. §50-6-207(3)(A)(m)) and "leg" (Tenn. Code Ann. §50-6-207(3)(A)(O) are both scheduled members, and the statute provides for "sixty-six and two-thirds percent (66-2/3%) of the average weekly wages during two hundred (200) weeks," whereas neither "extremity" is a scheduled member, **Wells v. Sentry Ins. Co. and Modine Mfg. Co.,** 834 S.W.2d 935 (Tenn. 1992), but come under Tenn. Code Ann. §50-6-207(3)(F) which provides: "All other cases of permanent partial disability not above enumerated shall be apportioned to the body as a whole which shall have a value of four hundred (400) weeks, . . . " The distinction between a scheduled member and a non-scheduled member becomes readily apparent and this is even more troublesome when a reading of the record leads to a feeling that the doctor and/or the attorney or judge are just not properly designating, from a legal perspective, the parts of the anatomy they really mean. In any case, we must take the record as we find it.

The actual medical records from Dr. Nord reflect the following determination:

> He has reached maximum medical improvement and his permanent physical impairment according to the Guides to the Evaluation of Permanent Impairment from the AMA, using table 16, upper extremity impairment due to entrapment neuropathy of the median nerve at the wrist with moderate residual symptoms, this translates into 20% upper extremity impairment of the right upper extremity and 20% for the left upper extremity. This converts to a 12% whole person impairment using table #3 on page 20 of the Guides for combined percent impairment of 20% impairment for the whole person.[3]

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[2]A finding of seventy (70%) percent impairment to each upper extremity represents a total of ninety-one (91%) percent impairment to the upper extremity. This calculates to a fifty-five (55%) percent permanent disability to the body as a whole.

[3]Our own calculations using Table 3 and the Combined Values Chart suggest that the combined impairment is twenty-two (22%) percent to the whole person.

Close review of the judgment order reveals, however, that the calculation made there is actually based on a finding of disability to each arm (70% x 200 weeks = 140 weeks for each arm, or a total award of 280 weeks). This equates to a finding of seventy (70%) percent disability to the whole person.

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

The extent of vocational disability is a question of fact for the trial court that does not definitively depend on the medical proof regarding the percentage of anatomical disability. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 457 (Tenn. 1988). The trial court may determine the extent of vocational disability from all the evidence, including lay and expert testimony. Worthington v. Modine Manufacturing Company, 798 S.W.2d 232, 234 (Tenn. 1990). In determining vocational disability, the question is not whether the employee can return to the work performed prior to the injury, but whether the employee's earning capacity has been diminished in the open labor market. Clark v. National Union Fire Insurance Company, 774 S.W.2d 586, 588 (Tenn. 1989).

The trial court found that plaintiff was thirty-one (31) years old at trial, had a ninth grade education, and had worked most of his life in manual labor jobs. The trial court also found that plaintiff had obvious intellectual limitations and could not perform any jobs requiring contact with the public. He was unable to perform his regular production work after surgery because of continued problems with his arms. Defendant contends that plaintiff has made no real effort to secure new

employment. However, the trial court, after carefully considering plaintiff's credibility, found that plaintiff had no reasonably transferable job skills and no reasonable local employment opportunities. While the court expressed some concern about plaintiff's motivation, the court also found his case of carpel tunnel syndrome to be very severe.

The evidence in this case supports a finding of seventy (70%) percent impairment to each upper extremity, or fifty-five (55%) percent permanent partial disability to the body as a whole. The judgment is modified accordingly and affirmed as modified. Costs of appeal are taxed to the defendants/appellants.

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CORNELIA A. CLARK, SPECIAL JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
HEWLITT P. TOMLIN, JR., SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

[redacted],	) FAYETTE CIRCUIT) No. 334 Below
Appellee,	)
v.	) Hon. Julian P. Gibson,) Judge
[redacted] CORRECTIONAL CO., et al.,	) No. 02S01-9711-CV-00153
Appellant.	) AFFIRMED AS MODIFIED.

ORDER

This case is before the Court upon a motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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 assessed to the appellant.

IT IS SO ORDERED this ____ day of March, 1998.

PER CURIAM

Drowota, J. - Not participating.