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

FILED

March 31, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

HUBERT R. SCOTT,	)	
	)	
Plaintiff/Appellee	)	SHELBY CHANCERY
	)	
v.	)	NO. 02S01-9709-CH-00077
	)	
KIMBERLY-CLARK CORPORATION,	)	HON. FLOYD PEETE, JR.,
	)	CHANCELLOR
Defendant/Appellant	)	

For the Appellant:

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

Members of Panel:

Chief Justice E. Riley Anderson
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED

BYERS, Senior Judge

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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

In this case, the trial court found that the plaintiff suffered an injury to his back during the course and scope of his employment with the defendant. The trial court awarded the plaintiff 25 percent permanent partial disability to the body as a whole for the injury to the lumbar spine. The trial court also determined that the plaintiff's claim for the alleged hernia injury was not compensable under Tenn. Code Ann. § 50-6-212(a).

The defendant appeals and says that the trial court erred in determining that the plaintiff sustained 25 percent permanent partial disability to the body as a whole. The plaintiff appeals and says that the trial court erred in determining that the hernia injury was not compensable.

We affirm the judgment of the trial court.

FACTS

The plaintiff, age 63 at the time of trial, left school when he was in the fifth grade and has no additional education or training. After leaving school, the plaintiff worked on his father's farm. Later, he joined the Air Force where he did menial jobs for three years, leaving after he was given an honorable discharge because he could not pass the required tests to be promoted to the next rank. After leaving the Air Force, the plaintiff took a job as a truck driver for two different companies.

By 1974 or 1975, the plaintiff worked as a truck driver for the defendant. The plaintiff was classified as a lumper because he not only operated the truck but he loaded and unloaded the truck unless he paid others to do the work. On September 13, 1990, the plaintiff testified that he was unloading wooden pallets from his truck when he injured his back and suffered double hernias. He immediately notified the defendant about the accident and was instructed to return to Memphis for medical care.

The plaintiff first saw Dr. George Jenkins, who upon examination referred him to Dr. James C. H. Simmons for the back problems and Dr. C. Rad Andrews for

hernia repair. For his back problems, the plaintiff was treated with physical therapy and work hardening, but he testified that these activities hurt his back even more. In 1991, the plaintiff underwent a double hernia operation. The hernias have ruptured once again and will require surgery in the future.

The plaintiff testified that he continues to have low back pain and cannot bend over for long periods of time since the accident. The plaintiff also said that he has muscle spasms which require him to sit down, that he cannot drive for long distances, and that he has difficulty lifting. Since the accident, the plaintiff has not returned to work and has accepted early retirement.

MEDICAL EVIDENCE

_____Dr. James C. H. Simmons, a neurosurgeon, first saw the plaintiff on October 1, 1990 and noted that he experienced pain in the lumbosacral region. Dr. Simmons treated the plaintiff with physical therapy and work hardening and released him in July 1991. Dr. Simmons also noted that the plaintiff said he was evaluated by two physicians who found that he had hernias. However, it was also noted that one physician did not recommend surgery and felt that the plaintiff's hernias were unrelated to his low back pain.

_____Dr. Tewfik E. Rizk, a rheumatologist, first saw the plaintiff on March 21, 1991 at the request of the plaintiff's attorney. Dr. Rizk noted that the plaintiff had sustained a back injury and hernias and ordered an EMG which revealed L5-S1 radiculopathy. Dr. Rizk also noted that the plaintiff had muscle spasms and a uniform loss of range of motion of the lumbar spine.

Dr. Rizk completed two Standard Form Medical Reports. The first Standard Form Medical Report dealt with the plaintiff's back injury and was written August 16, 1995. Dr. Rizk found that it was more probable than not that the plaintiff's spinal problems were causally related to his injury at work. Dr. Rizk determined that the plaintiff could safely lift or carry a maximum of 20 pounds; frequently lift or carry a maximum of 15 pounds; stand, walk, or sit less than six hours a day; occasionally climb, balance, kneel, crouch, or crawl; and never stoop or twist. Dr. Rizk assigned the plaintiff a ten percent permanent anatomical impairment rating to the body as a whole for the back injury.

The second Standard Form Medical Report dealt with the plaintiff's hernia injury and was written by Dr. Rizk on May 30, 1996. Dr. Rizk noted that the plaintiff said he developed hernias immediately following his work injury, that he underwent surgery, and that the hernias ruptured again for no apparent reason. Dr. Rizk determined that the plaintiff could safely lift 15 pounds, carry less than 10 pounds, walk or sit no more than six hours a day, and occasionally climb, balance, stoop, kneel, crouch, crawl, or twist. Dr. Rizk assigned the plaintiff a 15 percent permanent anatomical impairment rating to the body as a whole for the hernias (five percent for the right side and ten percent for the left side).

_____Dr. Ernest L. Cashion, a neurosurgeon, testified by deposition. Dr. Cashion examined the plaintiff on June 20, 1996 for an independent medical evaluation at the request of the defendant and reviewed his medical records and x-ray films. Dr. Cashion noted a loss of range of motion, mild spasms, and degenerative arthritis in the plaintiff's lumbar spine, recommending that the plaintiff consult a rheumatologist or arthritis specialist. Dr. Cashion found that the plaintiff had not suffered any neurological problems as a result of his work injury and therefore could not assign the plaintiff an impairment rating from a neurological standpoint. However, Dr. Cashion agreed that certain doctors might give the plaintiff a five percent impairment rating.

ANALYSIS

_____Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988).

_____The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Mfg. Co.,* 798 S.W.2d 232, 234 (Tenn. 1990). In making a determination of vocational disability, the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities,

and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). *Roberson v. Loretto Casket Co.,* 722 S.W.2d 380, 384 (Tenn. 1986).

After reviewing the record in this case, we find that the trial court's award of 25 percent vocational disability for the injury to the lumbar spine is supported by a preponderance of the evidence. The following facts, brought out by lay and expert testimony, clearly show the extent of the plaintiff's vocational disability: (1) he is 63 years old; (2) he has a fifth grade education and no job skills; (3) his back injury is permanent and prevents him from returning to work; and (4) he has an anatomical impairment rating of ten percent from Dr. Rizk.

We have also reviewed the record on the issue of whether the plaintiff can recover workers' compensation benefits for his alleged hernia injury. The medical evidence only reveals that the plaintiff told the doctors that he developed hernias immediately following his work injury, but there is no medical evidence in the record to substantiate the plaintiff's claim that the hernias actually occurred that way. In the plaintiff's own testimony, he merely stated that Dr. Jenkins was more concerned with the plaintiff's hernias than with his back injury and never stated that he developed the hernias immediately following his work injury. Therefore, we conclude that the evidence does not preponderate against the finding of the trial court that the plaintiff cannot recover for his alleged hernia injury under Tenn. Code Ann. § 50-6-212(a).

We affirm the judgment of the trial court. The cost of this appeal is taxed to the defendant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

HUBERT R. SCOTT,	)	SHELBY CHANCERY
	)	NO. 99721-2
Plaintiff/Appellee,	)	
	)	Hon. Floyd Peete, Jr.,
vs.	)	Chancellor
	)	
KIMBERLY-CLARK CORPORATION,	)	NO. 02S01-9709-CH-00077
	)	
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 31st day of March, 1998.

PER CURIAM

(Holder, J., not participating)