IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
September 29, 1997

ROBERT LARRY JONES,	) Chester County Chancery
	) No. 8942
Plaintiff,	)
	) No. 02S01-9706-CH-00055
v.	)
	) Hon. Joe C. Morris, Judge
MAGNETEK CENTURY ELECTRIC, INC. and ITT HARTFORD,	)
	)
Defendants.	)
	)

For Plaintiff:

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Tatum, Tatum & Weinman
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Henderson, TN 38340

For Defendants:

Stephen R. Butler and
Frank S. Cantrell
Jackson, Shields, Yeiser & Cantrell
262 German Oak Dr.
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MEMORANDUM OPINION

Members of Panel:

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

MODIFIED IN PART, REVERSED
IN PART and AFFIRMED IN PART TOMLIN, 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 of findings of fact and conclusions of law. In

this appeal, the employer, Magnetek Century Electric, Inc., ("defendant") contends that the trial court erred in awarding permanent partial disability benefits on the basis of forty-nine percent (49%) disability to the body as a whole as well as in commuting the award to a lump sum. The panel finds that the award should be modified to one based on twelve and one half percent (12 ½%) disability to the body as a whole and that the trial court abused its discretion in making a lump sum award.

In May, 1994, Robert Larry Jones ("plaintiff") was working for defendant when a work tool weighing approximately 45 pounds struck plaintiff on the right ankle and cut it. He was taken to the emergency room where the wound was treated and his Achilles tendon was sewn up. As a result of this injury, plaintiff developed a condition known as a Deep Vein Thrombosis in the right leg. This is a blockage of the flow of blood through a deep vein. The emergency room physician referred plaintiff to Dr. Warren Ramer, who treated him from July, 1994 through the time of trial in November, 1996.

At the time Dr. Ramer began treating plaintiff, there was edema (for our purposes-swelling) of the lower right leg and ankle. Over the months that followed, plaintiff's condition continued to improve, although his condition at times fluctuated during this period of treatment. In other words, the swelling in plaintiff's leg was more pronounced at some times than it was at others. Plaintiff wore an elastic sock and took medication for the purpose of controlling the swelling in his leg.

In October, 1995, at the request of defendant, plaintiff became a patient of Dr. Jessie Davis, a specialist in general vascular surgery in Memphis. Dr. Davis was requested to treat as well as evaluate plaintiff's condition. Dr. Davis' tests revealed a blockage in plaintiff's right leg beginning about three inches below the knee and extending upward about three inches above the knee.

Thereafter, both Dr. Davis and Dr. Ramer continued to treat plaintiff jointly and cooperatively, with Dr. Ramer seeing plaintiff about once a month in order to monitor his condition and medication, and Dr. Davis every two or three months to evaluate the status of plaintiff's leg.

Dr. Ramer deferred the assignment of any permanent impairment rating to Dr. Davis, the vascular specialist. Dr. Davis last saw plaintiff on April 16, 1996. In Dr.

Davis' deposition taken for trial, he voiced the opinion that plaintiff suffered a five percent (5%) permanent partial impairment. In addition, Dr. Davis voiced the opinion that plaintiff suffered transient edema, which placed him within Class 1 of the AMA guidelines for Impairment of the Lower Extremity due to Peripheral Vascular Disease.

At the request of his counsel, plaintiff was seen by Dr. James Shull, a general surgeon, for the purpose of performing an independent evaluation of plaintiff's injury and condition. Dr. Shull saw plaintiff only once-on April 15, 1996, the same day that Dr. Davis saw plaintiff for the last time, and the day on which Dr. Davis based his disability evaluation. Dr. Shull reviewed the medical records of the treating physicians and took a history of the injury from plaintiff. Dr. Shull testified by deposition that he found pitting edema (significant swelling) in plaintiff's right ankle and foot with chronic venous stasis dermatitis. This in simple terms is the discoloration of the body caused by the leakage of blood underneath the skin. It was Dr. Shull's opinion that plaintiff's condition fell within Class 3 of the AMA guidelines and assessed a forty percent (40%) permanent impairment to the right leg as a result of his injury. Class 3 impairment is signified by "marked edema that is only partialy controlled by elastic supports."

We are constrained to note that notwithstanding the fact that the examinations by Drs. Shull and Davis took place on the same day, Dr. Davis noted that there was no edema present and described the discoloration as "slight hyper-pigmentation", whereas Dr. Shull found pitting edema in plaintiff's right ankle and foot and described the discoloration as chronic venous stasis dermatitis. These contrasting findings emphasize the wide variation of diagnosis between these respected physicians.

At time of trial, plaintiff was 55 years of age and had an eighth grade education. His work history prior to being employed by defendant involved mostly physical labor. Following the accident and plaintiff's return to work, he has been employed in a different capacity inasmuch as he can no longer perform the task required by his former assignment. Primarily he is not able to stand for long periods of time. Plaintiff testified that although he had returned to many of the activities he enjoyed prior to his injury, his present condition nonetheless required him to limit the time that he devoted to these activities. Plaintiff further testified that he retumed to his employment by defendant at a

higher hourly wage rate than his rate of compensation prior to his injury. Plaintiff states that nonetheless he has earned less money because he has not been able to get in as much overtime as he did prior to his injury due to the severity of his injury.

The trial court found that plaintiff suffered a disability in the amount of forty-nine percent (49%) to the body as a whole as a result of the injury. Our scope of review on appeal 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. T.C.A. § 50-6-225(e)(2) (Supp. 1997). 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, 922 (Tenn. 1995).

I. Vocational Disability.

A. Anatomical Impairment.

In this case the court is faced with conflicting evaluations by two medical experts. As we have stated in prior cases, where medical testimony is by deposition, this panel "is able to weigh the testimony in the same manner as the trial judge and may determine the weight to be given thereto." Coffey v. City of Knoxville, 866 S.W.2d 516, 519 (Tenn. 1993). Dr. Davis, a board certified vascular surgeon and plaintiff's treating physician, gave plaintiff a five percent (5%) impairment rating. Dr. Shull, a general surgeon, who saw plaintiff on only one occasion, gave plaintiff a forty percent (40%) impairment rating.

Dr. Shull found that plaintiff's condition placed him in a Class 3 impairment, while Dr. Davis found that plaintiff's injury was a Class 1 impairment. In our opinion the impairment rating given by Dr. Davis, utilizing Table 14 of the AMA guidelines, more closely reflects the medical evidence in the record regarding plaintiff's injury. The medical records of Drs. Ramer and Davis clearly demonstrate that plaintiff's edema was transient, i.e., worse at times than at other times. In addition, Dr. Davis saw plaintiff on six occasions over a period of slightly more than six months, while Dr. Shull saw plaintiff on only one occasion.

The basic conflict which we have to resolve is ascertaining which medical

opinion, setting forth their respective anatomical ratings, is the more credible based upon the evidence. It is clearly apparent that the chancellor relied upon the anatomical impairment rating of forty percent (40%) given by Dr. Shull. As we have noted previously, Dr. Davis and Dr. Ramer were treating physicians, working in tandem, while Dr. Shull saw plaintiff only once for the purpose of evaluation. Under our case law, it is permissible to give greater weight to the testimony of a treating physician than an evaluating physician. See Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 677 (Tenn. 1991). In our opinion, the record clearly supports the evaluation of Dr. Davis that plaintiff suffered from transient edema, which under the AMA guidelines is a Class 1 impairment. In regard to the swelling, Dr. Ramer's records reflect the following on the various dates stated: 1994: July 8, "marked swelling"; August 9, "less swollen"; October 4, "not as swollen"; November 16, "leg looks good"; December 12, "edematous" (swollen); 1995: January 27, "much less swollen"; April 28, "less swollen"; May 30, "minimally swollen"; June 28, "remains minimally swollen"; December 18, "not swollen"; 1996: January 19, "minimally swollen"; February 20, "not swollen"; April 24, "not swollen"; May 21, "minimally swollen"; July 23, "really not swollen"; August 20, "no edema."

Dr. Davis' records reflect as follows: 1995: November 7, "mild edema"; 1996: January 16, "no edema"; April 16, "no edema." Although repetitious, we note that Dr. Shull's only examination was April 16, 1996, and he noted pitting edema to describe the condition of plaintiff's leg. In our opinion, the preponderance of the medical evidence compels us that the trial court erred in not following Dr. Davis' anatomical rating of five percent (5%).

B. The Statutory Cap.

Defendant contends that the statutory cap as spelled out in T.C.A. § 50-6-241(a)(1) applies. This statute states in pertinent part that where "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 ½) times the medical impairment rating." Applying this cap to the impairment rating given by Dr.

Davis, plaintiff would have a maximum vocational disability of twelve and one-half percent (12 ½%) to the body as a whole.

Plaintiff challenges whether T.C.A. § 50-6-241(a)(1) should be applied when an employee returns to work at a higher pay-rate per hour, but works fewer hours due to a reduction in the overtime that he worked before his injury. The record reflects that prior to his injury plaintiff worked approximately ten hours overtime per week. In the months following his injury, plaintiff has only worked a total of three overtime hours. Based upon this, plaintiff contends that his total income has been reduced by his injury, notwithstanding his being paid a higher hourly rate.

The supreme court has said that "[t]he fact that a worker's income has declined is relevant to the determination of vocational disability. The statute allows the Court to consider this factor by allowing an increase in an award for such an employee." Brown v. Campbell County Bd. of Educ., 915 S.W.2d 407, 417 (Tenn. 1995). Notwithstanding, if the cap of two and one-half times applies to this case, the court may not increase the award of vocational disability beyond the statutory maximum. Our supreme court has resolved this issue in the unpublished case of Mace v. Saturn Corp., No. 01S01-9504-CH-00056, 1996 WL 73827 (Tenn. 1996). The court said:

> The claimant argues [50-6-241(a)(1)] is inapplicable because, although he has returned to work at the same hourly wage as before the injury, he is not able to earn as much because his condition prohibits him from working overtime. We respectfully disagree. Our interpretation of the statute is that where an employee is compensated according to an hourly wage, his employer is entitled to the protection of the statute if it returns the employee to work after an injury at the same hourly wage the employee was earning before the injury.
>
> Id. at *2.

This contention of plaintiff is without merit.

II. Lump Sum.

Whether or not to award a lump sum is governed by T.C.A. § 50-6-229(a) (Supp. 1997). This statute states in part that "the trial court shall consider whether the commutation will be in the best interest of the employee, and such court shall also consider the ability of the employee to wisely manage and control the commuted award

irrespective of whether there exist special needs." In Henson v. City of Lawrenceburg, 851 S.W.2d 809, 814 (Tenn. 1993), our supreme court stated that "[l]ump-sum awards are an exception to the general purposes of our workers' compensation law, and as such, commutation should occur only in exceptional circumstances, and not as a matter of course." In the case before us, plaintiff's only reason for his stated need for a lump-sum award was because of the debt on his credit cards which was accruing interest. There is nothing in the record concerning the ability of plaintiff to handle these funds. In our opinion, this evidence is insufficient to support commutation of plaintiff's disability to lump-sum. This issue is resolved in favor of defendant.

Accordingly, the judgment of the trial court pertaining to the amount of vocational disability is modified to twelve and one-half percent (12 ½%). That portion of the judgment awarding a lump-sum compensation is reversed.

The judgment is otherwise affirmed. Costs in this cause on appeal are taxed to plaintiff, for which execution may issue if necessary.

_____
HEWITT P. TOMLIN, JR., SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
CORNELIA A. CLARK, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

ROBERT LARRY JONES,	)	CHESTER CHANCERY
	)	No. 8942 Below
Plaintiff/Appellee,	)	
	)	Hon. Joe C. Morris,
v.	)	Judge.
	)	
	)	No. 02S01-9706-CH-00055
MAGNETEK CENTURY ELECTRIC INC. and ITT HARTFORD,	)	
	)	
Appellant.	)	MODIFIED IN PART;
	)	REVERSED IN PART; and
	)	AFFIRMED IN PART.

JUDGMENT ORDER

This case is before the Court upon 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 appellee.

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

PER CURIAM

Holder, J. - Not participating.