IN THE SUPREME COURT OF TENNESSEE
WORKER'S COMPENSATION APPEALS PANEL
KNOXVILLE, SEPTEMBER 1998 SESSION

FILED

January 26, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

JAMES CLARENCE BENNETT,	)	**Washington County Chancery**
	)	
Plaintiff-Appellee,	)	
	)	**No. 03S01-9712-CH-00144**
v.	)	
	)	**Washington County Chancery**
SNAP-ON INCORPORATED,	)	**Court No. 31483**
	)	
Defendant-Appellant.	)	**Hon. G. Richard Johnson, Chancellor**

For the Appellant:

Steven H. Trent
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For the Appellee:

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

MAILED: DECEMBER 15, 1998

Members of Panel:

E. Riley Anderson, Chief Justice
Roger E. Thayer, Special Judge
John S. McLellan, III, Special Judge

AFFIRMED McLELLAN, Special Judge

This worker's 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.

The employer, Snap-On Incorporated, has appealed from the action of the trial court in awarding the employee, James Clarence Bennett, a forty percent permanent partial disability to his right upper extremity. On appeal, the employer contends that the award of forty percent permanent partial disability to the employee's right upper extremity was excessive.

James Clarence Bennett was forty-six years of age at the time of the trial. The plaintiff has received his GED, has undergone fifty-one hours of vocational training in electrical wiring and has at times worked as a preacher. Also, the employee has had previous employment at Magnavox as a case press operator and material handler where he operated machinery and put stereo cabinets together, unloaded bricks for General Shale, and worked as an assembler on production line and door hanger for Empire Furniture. The plaintiff has not used his vocational training to earn a living and he has no problems with reading, writing, or math and is trained in reading blue prints and calipers. The plaintiff has been employed at Snap-On Incorporated for 19 years where his usual work assignment was in the square stock department where he was trained to operate several different machines.

On July 26, 1996, while the plaintiff was assisting in the unloading of PVC pipe in the employer's shipping and receiving department, it is uncontested that the plaintiff received a work related injury. At the time of the injury, the employee felt pain when he tried to catch a big and long piece of PVC pipe which was delivered for the purpose of renovating the water treatment system of the employer's facility, the injury resulting in the employee's right arm and muscles becoming swollen. The plaintiff's injury was diagnosed by Dr. Alex Williams, an orthopedic surgeon, as a "bicep tendon rupture" which Dr. Williams repaired by surgery on August 1, 1996.

The record indicates that Dr. Williams assigned the plaintiff a five percent impairment to the plaintiff's right upper extremity and placed permanent limitations for the plaintiff in that he can lift up to twenty pounds frequently and up to fifty pounds occasionally and that the plaintiff should avoid activities that require a "sudden jerking" to insure that the plaintiff avoids re-injury. Dr. Williams testified that with time the plaintiff would be able to lift one hundred pounds.

At the request of the plaintiff's attorney, Dr. Eric Roberts, who is board certified in

physical medicine and rehabilitation, agreed with Dr. Williams that the plaintiff has sustained a five percent right upper extremity impairment and assessment of permanent work restrictions. Dr. Roberts includes in his restrictions of the employee avoidance of frequent repetitive elbow movement or frequent lifting, and pushing or pulling more than twenty pounds. Dr. Roberts opines that the numbness, tingling, and pain in the employee's arm can be helped by taking breaks every twenty to thirty minutes.

After reviewing the medical reports, patient history, past work history, and employment history with the employer, Dr. Roberts performed a physical exam of the plaintiff and concluded that over time using the muscles and tendons of the right extremity that the employee would find activities more painful and have decreased functioning due to the damage to the plaintiff's bicep tendon rupture.

Dr. Archer Bishop, a board certified orthopedic surgeon, performed an independent medical evaluation and likewise agreed with the five percent rating signed by Dr. Williams but placed no restrictions on plaintiff's activities.

Plaintiff returned to work shortly after his surgery and remains employed although the plaintiff, by reason of his seniority, was able to transfer to a non-production job in preventive maintenance where he performs a wide variety of duties including the lubricating and upkeep of plant equipment.

The employee testified that he would be unable to do any of his previous jobs he had with Magnavox, General Shale, or Empire Furniture due to required lifting weight in excess of forty pounds above his head, required hitting, tugging, and pulling in assembly line work at a fast rate speed or required use of a heavy hammer. The employee further testified that since his injury, he could only run at fifty or sixty percent production rate in a "square stock utility job" as compared to a pre-injury eighty to one hundred percent production rate. In response to an argument raised by his employer, plaintiff testified that he did not turn down opportunities to work over-time in his current job as a floor inspector or heat treat operator due to being behind in his bills and needing money as a result of his injuries and that the over-time jobs are easier such as carrying a pencil and pad and checking parts. Plaintiff's superiors and direct supervisor testified that the employee was doing well in his current position and is an excellent employee. The plaintiff states that he is able to "tolerate" his present job by utilizing various devices to

allow him to move oil containers without straining his elbow and that basically, as confirmed by his direct supervisor, the job plaintiff has is fairly easy.

Plaintiff testified that since his injury, previous to which he was able to do any physical activity he wanted to including gardening, rotortilling, yard work, weed eating, mowing, and sports, that the vibration of the power mower causes pain and tingling; that he can not extend his arm fully or flex his hands; that he has sold his boat because he does not have the strength to pull his motor to latch it in place; has sold his above-ground pool because he can not use the vacuum apparatus to clean it; that his driving is limited to approximately thirty minutes at a time without tingling and pain; loss of strength to grip to open jars; loss of sleep due to arm pain; and that he was required to take over the counter medications for pain two to three times per day. Plaintiff's wife's testimony corroborates plaintiff's inability to perform or need for assistance in opening jars, re-arranging furniture, lifting, and performing yard work. The trial court noted that "...creditability just oozes from the plaintiff." The trial court found the vocational disability to be forty percent permanent partial disability to plaintiff's right upper extremity.

The case is to be reviewed de novo on appeal accompanied by a presumption of correctness of the findings of fact unless a preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225 (e) (2). Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. See *Humphrey v. Witherspoon, Inc.*, 734 S.W.2nd 315 (Tenn. 1987).

The employer contends that the trial court's award of forty percent permanent partial vocational disability to the upper right extremity is excessive. In making a 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. § 50-6-241 (a) (1).

The employee was forty-six years of age, his transferable skills are minimal, he quit school half way through the eighth grade in 1966 returning to get his GED in early 1996. The plaintiff had previously tried to get other jobs with the defendant other than the square stock job and was advised prior to receiving his GED that the employer needed someone with more education and experience. The employee testified that jobs now require computer skills which

the plaintiff does not possess. The plaintiff is permanently restricted not to push, pull, or lift using the right elbow of more than twenty pounds on frequent basis and up to fifty pounds occasionally avoiding activities that require a "sudden jerk". Dr. Roberts further restricts plaintiff from frequent repetitive elbow movement of the right upper extremity and concludes that over time certain activities requiring use of the muscles and tendons of that extremity will cause pain and decreased functioning of this extremity for the plaintiff due to his work related injury.

From our independent review of the case, we can not conclude the evidence preponderates against the findings of the trial court of forty percent permanent partial disability to plaintiff's right upper extremity and we conclude this award is appropriate.

Judgment of the trial court is affirmed with costs assessed to the appellant.

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John S. McLellan, III, Special Judge

CONCUR:

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E. Riley Anderson, Chief Justice

_____

Roger E. Thayer, Special Judge

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	) Hon. G. Richard Johnson
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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 facts 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 taxed to the appellant, Snap-On Incorporated and Steven H. Trent, surety,for which execution may issue if necessary.

01/26/99