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

FILED

March 25, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

ROBERT E. TIMBS, Plaintiff/Appellee v. TRANSPORTATION INSURANCE COMPANY, Defendant/Appellant and SUE ANN HEAD, Director of Workers' Compensation Division, Department of Labor, Second Injury Fund, Defendant/Appellee	)	LAUDERDALE CHANCERY NO. 02S01-9802-CH-00019 HON. DEWEY C. WHITENTON, CHANCELLOR

For the Appellant:

James A. Hamilton, III
Farmer, Jones, Hamilton
& Lay, P.L.C.
P.O. Box 763
Dyersburg, TN 38023-0763

For the Appellees:

Michael W. Whitaker
P.O. Box 1024
Covington, TN 38019

John Knox Walkup
Attorney General and Reporter

Kathleen W. Stratton
Assistant Attorney General
Civil Division
425 Fifth Avenue North
2nd Floor, Cordell Hull Bldg.
Nashville, TN 37243

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

Members of Panel:

Justice Janice Holder
Senior Judge John K. Byers
Senior Judge F. Lloyd Tatum

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.

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 trial court found that the plaintiff sustained an 80 percent permanent partial disability to the body as a whole. The trial court awarded the plaintiff discretionary costs in the amount of $1,436.55 for the depositions of Dr. Jones, Dr. Deaton, and Dr. Cole. The trial court did not assess any liability against the Second Injury Fund and did not consider the plaintiff's impotency claim.[1]

We affirm the judgment of the trial court.

FACTS

The plaintiff, age 52 at the time of trial, has a ninth grade education and has work experience that includes farming, manual labor, and auto/machine mechanic work. In 1989, he went to work for Bekaert Corporation as a machine mechanic, which required him to check the machines and keep them running. The plaintiff has a prior workers' compensation award of 10 percent permanent partial disability to the body as a whole for an injury to his shoulders, arm, elbow, and neck on January 14, 1976. In this case, he alleged that three separate injuries occurred while working for Bekaert.

The plaintiff testified that he injured his neck and had a burning sensation in his low back on August 7, 1991 while pulling on a torsion shaft. He also testified that

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[1] The trial judge found the Second Injury Fund was not liable in this case. To find the Fund liable, the Court would have to find that impotency causes vocational disability. The medical evidence shows that impotency does not cause vocational disability. We, therefore, hold that the trial judge properly excluded the 20 percent permanent partial impairment from the award. Therefore, the Fund is not liable.

he lifted a skillet at home a few days later and hurt his neck. The plaintiff testified that he reported the injury to his supervisor two days after the incident. On August 12, 1991, the plaintiff saw Dr. Jones and told him that he had pain in his right shoulder as he was leaving church. On August 13, 1991, the plaintiff saw Dr. Cunningham and told him that he had a sudden onset of neck pain on a Sunday and did not mention the work injury. On August 28, 1991, he returned to Dr. Cunningham and related a work injury on August 7, 1991. On August 19, 1991, the plaintiff reported the work injury of August 7, 1991 to Bekaert by having his supervisor fill out an accident report. After this first injury, he developed high blood pressure, which he had never had before.

The plaintiff returned to full duty work on September 23, 1991, but he testified that he had left jaw, left neck, and left shoulder pain on January 30, 1992 while working on a machine. On February 3, 1992, he returned to Dr. Cunningham but did not report a work injury. The plaintiff stated that he reported this second injury to his supervisor.

The plaintiff returned to work again and alleged that he aggravated his neck injury again while pushing a tool box on March 3 or 4, 1992. When questioned, he did not recall having sustained a work injury on either date. He performed his regular job duties from May 1992 to April 5, 1993, when he left work. The plaintiff also testified that he became impotent sometime after 1991 and that he has undergone treatment for prostate problems since 1989. He and his wife have not had sexual relations in four years.

The plaintiff stated that he basically only watches TV and that he has not driven a car in four or five years because he cannot turn his neck. In 1993, he began to draw social security disability benefits because he was classified as totally disabled. Since his injuries, he has also developed depression and takes medication for it. The plaintiff testified that he does not know of any job he could do and that he could not do mechanic work.

The supervisor testified that on August 12, 1991 the plaintiff reported that he lifted a frying pain at home and injured his neck. On August 19, 1991, the supervisor filled out an accident report that the plaintiff was injured at work. The supervisor interviewed a co-worker who confirmed that the plaintiff had complained of a burning

sensation in his back. The records of the supervisor indicate knowledge of the plaintiff's continuous problems with his neck. The supervisor also testified that the plaintiff resumed full duty work in September 1991; that he was off work in February, March, and April of 1992 but did not report a work injury; and that he resumed full duty work in May 1992.

MEDICAL EVIDENCE

Dr. Riley Jones, an orthopedic surgeon, testified by deposition. Dr. Jones first saw the plaintiff on August 12, 1991. Dr. Jones testified that the plaintiff reported a work injury in the fall of 1991, but his notes do not contain such a history. Dr. Jones also saw the plaintiff on March 2, 1992 for complaints of pain in his left arm. The plaintiff did not report a March 3 or 4, 1992 work injury to Dr. Jones. Dr. Jones diagnosed tendinitis, myofascial pain, and degenerative disease of the cervical spine, spurring at C5-C6 and C6-C7, and arthritis in the lumbar spine. He believed that the plaintiff magnified his problems and that he could do light duty work without restrictions. Based on degenerative changes and continued complaints of pain, Dr. Jones opined that the plaintiff has a five percent permanent partial impairment to the body as a whole for his neck injury. He also opined that the plaintiff has a five percent permanent partial impairment for the low back injury. He attributed some of the plaintiff's problems to his work injuries.

_____Dr. David Cunningham, a neurosurgeon, also testified by deposition. On August 13, 1991, the plaintiff saw Dr. Cunningham and told him that he had a sudden onset of neck pain on a Sunday and did not mention the work injury. On August 28, 1991, he returned to Dr. Cunningham and related a work injury on August 7, 1991. Dr. Cunningham treated the plaintiff with cervical epidural cortisone injections. On August 20 or 21, 1991, Dr. Cunningham noted that the plaintiff's pain had completely resolved and released him to return to full duty work on August 23, 1991. He opined that the plaintiff had no permanent partial impairment from the August 1991 injury. On February 3, 1992, the plaintiff returned to Dr. Cunningham for pain in his left jaw, left side of his neck, and left shoulder, but he did not report a work injury. Dr. Cunningham treated him conservatively, released him to work without restrictions on February 19, 1992, and opined that he had no permanent partial impairment. In February 1993, Dr. Cunningham treated the plaintiff again and

opined that he had no permanent partial impairment. The plaintiff never reported an impotency problem to him.

Dr. Richard Cole, a chiropractor, testified by deposition. Dr. Cole has been treating the plaintiff since 1983 for complaints of headaches and back trouble. In August 1992, the plaintiff told Dr. Cole that he injured his neck at work and that he injured his neck while lifting a skillet at home on August 11, 1991. Based on x-rays of degeneration and arthritis in the cervical spine, Dr. Cole opined that the plaintiff has a permanent disability but did not give him an impairment rating. Dr. Cole believed that the plaintiff could do sedentary work but not for eight hours a day. When he saw Dr. Cole on March 4, 1992, the plaintiff did not report the aggravation of his neck injury at work on January 30, 1992 or on March 3 or 4, 1992. Dr. Cole did not treat him for back complaints until April 1993.

_____Dr. W. Jerry Deaton, a urologist, also testified by deposition. Beginning in 1989 through February 1993, Dr. Deaton treated the plaintiff for prostatic infection, inability to function sexually, prostatitis, and urinary tract infections. When he saw Dr. Deaton on April 3, 1992, the plaintiff did not report a work injury. It was on April 17, 1992 that the plaintiff told Dr. Deaton about a neck injury at work in August 1991. Though not to a reasonable degree of medical certainty, Dr. Deaton opined that the plaintiff suffers from impotency as a result of his neck injury, but he stated that the impotency would not interfere with his work activities. According to the *AMA Guides,* impotency has a 20 percent permanent partial impairment rating to the body as a whole. However, he also stated that impotency can be caused by hypertension medication, recurring infections, urological problems, prostate difficulties, and low testosterone levels. On this subject, Dr. Deaton testified: "I have characterized [the plaintiff] as [having] an organic impotence on the basis of hypertensive medicines, recurring infections and prostate difficulties plus a low serum testosterone. My association with an August injury of 1991 is on a historical basis where he confirmed what his wife had [said] on that date . . . that that's when the problems had their onset."

DISCUSSION

The defendant has raised two issues on appeal:

1. Did the evidence presented at trial preponderate against the trial court's finding that the plaintiff had sustained an eighty percent (80%) permanent partial disability to the body as a whole?

2. Did the trial court err in awarding as discretionary costs the deposition fees and court reporter expenses incurred in the taking of the medical depositions of Dr. Jerry Deaton and Dr. Richard Cole?

Permanent Partial Disability

Regarding the first alleged injury, the defendant maintains that: (1) the plaintiff's neck and shoulder pain arose either when he was leaving church or lifting a skillet, (2) the plaintiff did not report this injury to Bekaert, (3) he did not relate his problems as work related to the physicians, (4) it is undisputed that he fully recovered from his symptoms and returned to work without restrictions, and (5) Dr. Cunningham opined that he had no permanent partial impairment as a result of the alleged August 7, 1991 injury. Therefore, the preponderance of the evidence does not show that the plaintiff sustained a work injury on August 7, 1991.

Regarding the second alleged injury, the defendant maintains that: (1) the plaintiff did not relate his problems as work related to the physicians, (2) Dr. Cunningham opined that he had no permanent partial impairment as a result of the alleged January 30, 1992 injury, (3) Dr. Jones only gave a five percent permanent partial impairment for his neck injury based largely on subjective factors, pointing out that Dr. Jones found symptom magnification in the plaintiff, and (4) both physicians released him to return to work without restrictions. Therefore, the proof is that the plaintiff has either no impairment or only minimal impairment as a result of the alleged January 30, 1992 injury.

Regarding the third alleged injury, the defendant maintains that there is no proof that the plaintiff sustained an injury on March 3 or 4, 1992 because: (1) he does not recall having sustained a work injury on either date and (2) he did not report a work injury on either date when he visited Dr. Cole on March 4, 1992. Finally, the defendant submits that the trial court correctly refused to consider the plaintiff's claim for impotency because: (1) there is no competent medical proof that relates his impotency to a work related injury and (2) the alleged impotency did not affect the plaintiff's ability to work or his employability.

The plaintiff says that the following evidence supports the trial court's award of 80 percent permanent partial disability: (1) Dr. Cole's opinion that he suffered permanent impairment after treating him more than 200 times, (2) the facts that the plaintiff is uneducated, was hardworking before his injuries, and receives social security disability benefits, and (3) the trial judge's observations of the plaintiff's painful condition in the courtroom.

The trial judge made the following findings:

> While the medical testimony is conflicting, and without considering the impotency claim, the Court finds that the Defendant's doctor, Riley Jones, indicates the Plaintiff has suffered an aggravation of a preexisting condition and is not malingerer, and Dr. Richard Cole, who treated Plaintiff more than 200 times prior to his deposition, said the Plaintiff could do practically no meaningful work for eight hours as a result of his work-related injury. The Court further accredits the testimony of lay witnesses and the Court has observed the Plaintiff in and around the courtroom, which taken with the medical proof confirms that Plaintiff has suffered a permanent partial disability of 80% to the body as a whole at a compensation rate of $294.00 per week.

We find the evidence supports the judgment of the trial court and we affirm the same.

Discretionary Costs

The defendant says that the deposition costs of Dr. Deaton should not have been awarded because the impotency claim was not considered by the trial court and that the deposition costs of Dr. Cole should not have been awarded because he did not render an opinion on the permanency of the alleged 1991 or 1992 injuries. The plaintiff says that the depositions of Dr. Deaton and Dr. Cole, both treating physicians, were necessary to the preparation of his case.

We find no error in allowing these costs.

Impotency Claim

The plaintiff argues that the trial court erred in failing to award him an additional 20 percent permanent partial disability for his impotence. The plaintiff says that the *AMA Guides* and Dr. Deaton recognize impotency as disabling, that impotency contributed to his depression, and that impotency could distract him from work duties.

We answered this issue in foot note number one.

The judgment is affirmed and the cost of this appeal is taxed to the defendant.

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John K. Byers, Senior Judge

CONCUR:

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Janice Holder, Justice

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F. Lloyd Tatum, Senior Judge

[illegible]

FILED

March 25, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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 taxed to the appellant.

IT IS SO ORDERED this ____ day of ______, 1999.

PER CURIAM

J. Holder - Not participating.