IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE
(March 16, 1999 Session)

FILED

June 10, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

BRENDA D. ENGLAND, CUMBERLAND CIRCUIT	)	
Plaintiff-Appellee,	)	Hon. John Turnbull, Judge.
v.	)	
HICKORY SPECIALTIES, INC.,	)	No. 03S01-9807-CV-00082
Defendant-Appellant.	)	

For Appellant:

C. Douglas Dooley
Charles W. Poss
Leitner, Williams, Dooley & Napolitan
Chattanooga, Tennessee

For Appellee:

James P. Smith
Bean & Smith
Crossville, Tennessee

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

Members of Panel:

William M. Barker, Associate Justice
Howell N. Peoples, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel 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, Hickory Specialties, insists (1) the trial judge erred in relying on the testimony of Dr. Gene Turner with respect to the extent of the employee's medical impairment, (2) the trial judge erred in finding a causal connection between the employee's injury and her employment by the employer, (3) the award of permanent partial disability benefits is excessive and (4) the trial judge erred in finding that the employee did not have a meaningful return to work. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant, England, initiated this action to recover medical disability benefits allegedly due her because of a back injury. The employer denied any liability. After a trial on the merits, the trial court awarded, *inter alia*, permanent partial disability benefits based on thirty-five percent to the body as a whole. The extent of an injured worker's disability is a question of fact. Collins v. Howmet Corp., 970 S.W.2d 941 (Tenn. 1998). So is causation. We have therefore reviewed the case *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

The claimant is thirty-seven years old with a ninth grade education and experience as a waitress, at a cannery and as a vegetable packer. She began working for this employer in 1991 as a charcoal bagger.

She testified at the trial that on September 27, 1995, the plant ran out of charcoal and she was assigned to unload wood from a tractor-trailer and box it in 40-75 pound boxes, then place up to 27 of such boxes on flats. The employer insists the plant did not load any wood in the week before, during or after the date of injury.

On October 9, 1995, the claimant saw Dr. Michael Ellis, a chiropractor, who diagnosed chronic lumbosacral sprain or strain with sciatic radiculitis possibly caused by a ruptured disc at L5-S1. He opined the injury was caused at work and assessed her permanent impairment at ten percent to the whole body. She was also treated by the late Dr. Allen, a neurological surgeon. Dr. Steven Abram, who did not examine the claimant, opined from Dr. Allen's records that she had no permanent impairment. Dr. Turner, a licensed and board certified medical doctor, specializing in anesthesiology and pain medicine, conducted extensive objective testing and assessed the claimant's permanent medical impairment at seven percent from appropriate guidelines.

The employer first contends it was error for the trial judge to consider Dr. Turner's assessment because it was inconsistent with those guidelines. The doctor's testimony, however, accredited by the trial judge, was that his testimony was consistent with the guidelines. When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Combustion Engineering, Inc., 562 S.W.2d 202 (Tenn. 1978). The trial judge did not abuse his discretion by considering the testimony of Dr. Turner.

The employer next contends that it would have been impossible for the injury to have happened as the employee claims because of credible proof that the wood line was not running on the day of the injury. Even if the trial judge accepted that evidence as true, it probably means that the claimant was mistaken about the date of the injury. Nevertheless, the trial judge found the claimant's own testimony to be the more reliable. Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn.

1995). For those reasons and because of the testimony of Dr. Ellis, the trial judge did not err, as the employer contends, in finding the required causal connection between the employment and the injury.

The employer next argues that the award of permanent partial disability benefits is excessive. In making determinations as to the extent of an injured worker's permanent industrial disability, trial judges are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). At the conclusion of the trial, the trial judge made exhaustive findings, including the following, relative to the above factors:

> "With reference to the disability issue, the Court finds that the most believable proof to the Court with reference to the amount of impairment is that based upon the deposition of Dr. Turner. I find that for the following reasons. First of all, when I have reviewed these depositions, I find that there are numerous reports in the medical records of radiculopathy to the leg. Dr. Abram reports that because he could not find an objective reason for that radiculopathy, that he did not put her in a category that would allow him to give her an impairment. I think when we read the guides as a whole, as is referred to in his deposition, that the testimony of Dr. Turner with reference to impairment rating is more persuasive. This is because Dr. Abram, although he was only recently board certified at the time he gave his deposition, it was pretty obvious to the court that he is familiar with all of the aspects of the A.M.A. Guidelines, Fourth Edition, and, in fact, did not apply them, as was pointed out in cross examination. The A.M.A. Guidelines, Fourth Edition, are interpreted differently by different physicians. That is the reason that I find that Dr. Turner's impairment rating is more persuasive. Based upon the loss of motion, I think that his is also more objective than the ten percent impairment given by Dr. Ellis, the chiropractor.
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> ....
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> "Now, with her impairment rating and her background and her age and her education and her work history and the availability of jobs she is

qualified to do, how does that relate to her ... vocational disability. I find that the five times factor in this case would be appropriate, which is thirty-five percent to the body as a whole.'

The trial judge also noted, in his findings, the employees age, education and vocational background. The lay proof supports the above findings. The evidence fails to preponderate against the award of benefits based on thirty-five percent to the body as a whole.

Finally, the employer contends the trial judge erred in awarding more than two and one-half times the medical impairment rating. For injuries arising after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and 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 times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment, the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment, or, in cases where an impairment rating by any appropriate method is used and accepted by the medical community. Tenn. Code Ann. § 50-6-241(a)(1).

If the offer from the employer is not reasonable in light of the circumstances of the employee's physical disability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the medical impairment. Newton v. Scott Health Care Center; 914 S.W.2d 884 (Tenn. 1995). On the other hand, an employee will be limited to disability benefits of not more than two and one-half times the medical impairment if his refusal to return to offered work is unreasonable. Id. The resolution of what is reasonable must rest on the facts of each case and be determined thereby. Id.

The claimant's testimony, which the trial court found to be credible, was that she returned to work on March 13, 1996 and that her last day of work for the employer was June 13, 1996. She said that she began having to miss work

because her back "would swell up and start hurting and I couldn't move good." When she called in sick after a bad day on the line, she said, she was fired for not bringing in a medical excuse. Under the circumstances, we cannot say the trial judge erred in exceeding the cap of two and one-half times the medical impairment rating.

Because the evidence fails to preponderate against the findings of the trial court, the judgment is affirmed. Costs on appeal are taxed to the defendant.

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Joe C. Loser, Jr., Special Judge

CONCUR:

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William M. Barker, Associate Justice

_____

Howell N. Peoples, Special Judge

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HICKORY SPECIALTIES, INC.,	)	Hon. John Turnbull
	)	Judge
Defendant/Appellant,	)	

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, Hickory Specialties, Inc.and C. Douglas Dooley, surety, for which execution may issue if necessary.

06/10/99