IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 1998 SESSION

FILED

April 23, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

RANDALL CLYDE FOSTER,	)	
	)	
Plaintiff/Appellee,	)	Shelby Circuit
	)	
v.	)	No. 02S01-9802-CV-00013
	)	
CAROLINA FREIGHT CARRIERS CORPORATION,	)	Honorable Robert A. Lanier, Judge
	)	
	)	
Defendant/Appellant.	)	

For the Appellant:

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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

Members of Panel:

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

REVERSED AND REMANDED **TATUM, Senior Judge**

O P I N I O N

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.

Plaintiff/Appellee, Randall Clyde Foster, sustained two successive on-the-job back injuries. He was treated for both injuries by Dr. Thomas D. Weems, a neurosurgeon.

The first injury occurred on December 13, 1993, when plaintiff suffered a herniation at the L3-4 level of the spine when he lifted the door of a trailer. This action arose from the second injury that occurred on July 13, 1995, when the plaintiff sustained a herniated disc at the L4-5 level while attempting to lift a stand in a trailer. Both injuries required surgery. Dr. Weems opined that the plaintiff was anatomically impaired at 17 percent to the body as a whole after the first injury, but he rated the plaintiff's impairment to the body as a whole as only 16 percent after the second injury.

Suit was filed for workers' compensation benefits arising from the first injury on July 1, 1996. The case was settled by the parties and an order approving the workers' compensation settlement was entered in the Circuit Court of Shelby County on October 2, 1996. The order approving the settlement recited that Dr. Weems had fixed the amount of permanent partial impairment to the body as a whole at 17 percent and the settlement was based upon a 36 percent permanent partial disability to the body as a whole, for a total lump sum of $51,259.68. A certified copy of the order approving the settlement is before us.

After trial of the instant case, arising from the accident that occurred on July 13, 1995 (the second accident), the trial court entered a judgment awarding the plaintiff a recovery based upon 30 percent permanent partial disability to the body as a whole. The judgment was erroneous in several respects. It recited that the treating physician had rated the plaintiff's permanent anatomical impairment to the body as a whole resulting from the first injury at 16 percent. Actually, Dr. Weems rated the impairment to the body as a whole from the first injury at 17 percent. More importantly, the judgment recited that the plaintiff had been awarded, pursuant to the settlement of the first accident, benefits upon

the basis of 17 percent permanent partial disability to the body as a whole. According to the certified copy of the order approving the workers' compensation settlement of the first case, plaintiff was paid workers' compensation benefits on the basis of 36 percent permanent partial disability to the body as a whole.

The judgment of the trial court was also erroneous with respect to conclusions of law. The judgment provided in part as follows:

> It is the plaintiff's position that he is entitled to some benefits, unspecified, for permanent partial disability, not to exceed 2 and ½ times Dr. Weems' rating of 16%, in view of the fact that the plaintiff has returned to work with the defendant. It is the defendant's position that the plaintiff has not sustained any greater disability than he previously had and is not, therefore, entitled to any benefits for workers' compensation for permanent partial disability. In the alternative, if he is entitled to any benefits for permanent partial disability, it is the defendant's position that, pursuant to T.C.A. § 50-6-207(3)(f), the defendant is entitled to credit against that disability the 17% award previously referred to.
>
> * * *
>
> The Court finds that the plaintiff has sustained, as a result of his second accident superimposed upon the disability which existed from the first accident and all other health conditions which he had, a permanent partial disability in the amount of 30% to the body as a whole.
>
> T.C.A. § 50-6-207(3)(F) provides, in pertinent part, the following:
>
> > If an employee has previously sustained an injury compensable under this section for which a court of competent jurisdiction has awarded benefits based on percentage of disability to the body as a whole and suffers a subsequent injury not enumerated above, the injured employee shall be paid compensation for the period of temporary total disability and only for the degree of permanent disability that results from the subsequent injury. The benefits provided by this paragraph shall not be awarded in any case where benefits for a specific loss are otherwise provided in this chapter.
>
> The statute quoted above would seem relatively straight forward and would seem to entitle the defendant to credit for the prior disability award to the plaintiff. Such was the holding in Gouger vs. American Mutual Insurance Company, 548 S.W.2d 296 (Tenn. 1974). However, that case appears to have been removed from publication by the authority of the Supreme Court. Possibly this is because of the court's rulings in several other cases. It appears that this statute was ruled unconstitutional by our Supreme Court in McKamey vs. Pee Wee Mining Company, 498 S.W.2d 94 (1973). Its applicability

> to the situation such as that in this case was substantially rejected in Employers Commercial Union vs. Taylor, 531 S.W.2d 104 (Tenn. 1975), which cited the *McKamey* case, *supra*, with approval. See also Allkins vs. Thomas Furniture Company, 762 S.W.2d 557 (Tenn. 1988).
>
> It is not the place of this court to comment on the logic or soundness of the decisions of the Supreme Court. They appear to apply to this case and must be followed.
>
> The results is that the defendant is not entitled to credit for the prior award to the plaintiff.

The defendant insists that Tenn. Code Ann. § 50-6-207(3)(F) permits a recovery only for the degree of permanent disability that results from the second injury and that the trial court erred in awarding a recovery based upon the plaintiff's total disability from both injuries. The defendant reasons that since the percentage of permanent impairment as fixed by Dr. Weems is less for both injuries than for the first injury only and because the permanent partial disability rating as fixed by the trial court is less for both injuries (30 percent) than the 36 percent fixed by the settlement for the first injury only, the plaintiff has no permanent disability from the second injury.

First of all, we must observe that any confusion concerning Tenn. Code Ann. § 50-6-207(3)(F) has been recently resolved by the Supreme Court in the case of Parks v. Tennessee Municipal League Risk Management Pool, 974 S.W.2d 677, 679 (Tenn. 1998). In that case, it was held that the statute meant what it said; that is, an employee who has previously been awarded workers' compensation benefits based on a percentage of disability to the body as a whole and then suffers a subsequent injury "shall be paid compensation for the period of temporary total disability and only for the degree of permanent disability that results from the subsequent injury." Id. The holding of the trial court to the contrary is obviously erroneous.

The only two witnesses who testified in this case were the plaintiff and Dr. Weems. In spite of the disability rating given by Dr. Weems to be less after the second injury than the first, there is substantial evidence that the plaintiff suffered residual disability as a result of the second injury.

Dr. Weems testified that the herniation after the second injury was substantial in that it was on the L4-5 level, on the right side, the side opposite the previous herniation. Dr. Weems testified that shortly before the discectomy was performed at the L4-5 site, the

plaintiff had questions about prognosis. Dr. Weems testified that in response to these questions he told the plaintiff, "I had to be frank with him about the likelihood that he continue heavy lifting after two back surgeries at his age. Safe to say about half the patients can and half cannot, but we went on and planned it [the surgery]."

At another point, Dr. Weems testified that the plaintiff "had residual from his disc surgery in terms of expected degenerative changes in both the joints. I find no reason why he should be forbidden to go back to work doing the work he does despite how strenuous it is. I would agree with him that someone of his age with two back surgeries may not be able to continue; probably 50 percent can."

At no time did Dr. Weems render an opinion as to the extent of plaintiff's permanent impairment as a result of the second injury. We quote some of his testimony with regard to this:

> Q. Doctor, in your opinion, did Mr. Foster sustain a degree of permanent anatomical impairment as a result of his injury of July 13, 1995?
>
> A. Well, we don't -- we disclaim an opinion about cause/effect in our disability report. Up until just a moment ago when you asked me to make an opinion about cause/effect, one would conclude from that statement that there's a relationship. We don't include a comment on opinion about that when we send in a rating.
>
> Q. All right. What is your opinion about this gentleman's permanent anatomical impairment, Doctor?
>
> A. It's 16 percent.
>
> Q. And what is that based upon?
>
> A. It's based on looking at the "AMA Guidelines" in the Fourth Revised Edition.
>
> Q. That's "AMA Guide to Evaluation of Permanent Impairment"?
>
> A. Yes, ma'am.
>
> Q. Doctor, do you give permanent physical restrictions post-surgery like this, or do you advise a patient to do what he can and endure what he can with the pain level he has?
>
> A. The latter.
>
> * * *

> Q. So I take it by that answer, in assessing Mr. Foster in July and August of 1996 in regard to a disability rating, you don't -- you didn't do anything to try to separate out the previous injury at the L3, L4 level, you just took him as he was at that time; is that fair to say?
>
> A. That's fair to say.

The plaintiff himself testified that he was much more inhibited after the second injury. We will not burden this opinion by discussing his testimony in detail, but he testified that he is more restricted in lifting, sitting, bending, and riding. He stated that, in general, his work is not as satisfactory as it had been before the second injury. He now takes pain medication two times a day. This evidence is not contradicted.

Plaintiff testified that three weeks before trial, on December 13, 1997, plaintiff was instructed to drive and unload a truck. He told his supervisor that he could drive the truck, but that his back was bothering him that day and he could not unload it. The following Monday he was discharged with no explanation other than to contact his local union. After a meeting, a committee ruled that he should have his job back with a week's suspension. He worked a week and was laid off without explanation and, at the time of trial, he was on lay-off status. There was no defense evidence supplying further explanation of this occurrence or why he was discharged or laid off.

There is no evidence either in this Court or the trial court as to the plaintiff's permanent partial disability rating as to the second accident. The only evidence before this Court or the trial court on this point is that the plaintiff had a 16 percent permanent partial impairment rating with respect to both the first and second accidents. It appears that the trial judge thought that the plaintiff suffered permanent partial disability as a result of the second accident, since he awarded 30 percent permanent partial disability for both accidents when he erroneously thought that the plaintiff had been awarded 17 percent permanent partial disability for the first accident. Precedent requires a remand in appropriate cases in which medical testimony is insufficient to establish the degree of permanent partial impairment. City of Bolivar v. Jarrett, 751 S.W.2d 137, 139 (Tenn. 1988); Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988); Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 317-18 (Tenn. 1987); Staten v. Royal Ins. Co., 664 S.W.2d 65, 67 (Tenn. 1984); International Yarn Corp. v. Casson, 541 S.W.2d

150, 152 (Tenn. 1976); Security Ins. Co., Inc. v. Hughes, 529 S.W.2d 719, 720 (Tenn. 1975); Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 460 (Tenn. 1975); Floyd v. Tennessee Dickel Distilling Co., 463 S.W.2d 684, 687 (Tenn. 1971).

On remand, the trial court may consider any additional evidence from Dr. Weems, evidence from independent doctors based on examination or history or both. To do complete justice, should the trial court find it necessary, a neutral physician may be appointed by the court under Tenn. Code Ann. § 50-6-204(d)(5) (Supp. 1987) to rate plaintiff's anatomical disability pursuant to Tenn. Code Ann. § 50-6-204(d)(3) (Supp. 1987).

On remand, the trial court may consider the evidence already adduced and any other evidence which the parties may wish to introduce.

The judgment of the trial court is reversed, and the case is remanded for a new trial.

Costs are adjudged against the defendant.

_____
F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
JOHN K. BYERS, SENIOR JUDGE

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 defendant-appellant.

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

PER CURIAM

Holder, J. - Not participating.