IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, MAY 1999 SESSION

FILED

August 27, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

ROBERT JONES	)	CUMBERLAND CIRCUIT
	)	
Plaintiff/Appellee	)	
	)	
V.	)	Hon. John J. Maddux,
	)	Jr., Circuit Judge
LIBERTY MUTUAL INSURANCE	)	
COMPANY	)	
	)	
Defendant/Appellant	)	No. 03S01-9806-CV-00057

For the Appellant:

David H. Dunaway
100 South Fifth St.
P.O. Box 231
Lafollette, Tenn. 37766

For the Appellee:

Joe M. Looney
156 Rector Avenue
P.O. Box 1250
Crossville, Tenn. 38557

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

Members of Panel:

Frank F. Drowota III, Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED. THAYER, Special 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 to the Supreme Court of findings of fact and conclusions of law.

The insurance carrier, Liberty Mutual Insurance Company, has appealed the trial court's award of 60% permanent partial disability to the body as a whole. Since the award did not result in invoking any provision of the second injury fund statute, T.C.A. § 50-6-208, the case against the state fund was dismissed.

The trial commenced on August 16, 1996 and continued through several hearings until a final hearing on March 6, 1998. While there were many issues at the trial stage, the appeal only involves two issues. The insurance company contends (1) the evidence preponderates against the award of 60% permanent disability and (2) the evidence preponderates against the trial court's ruling that the employee was entitled to temporary total disability benefits up to December 1, 1997.

We have carefully examined the lengthy record and are of the opinion the judgment entered below should be affirmed.

The employee, Robert Jones, sustained a work-related back injury on July 20, 1994 when he fell from standing on a five gallon barrel or drum. At the date of the initial hearing, he testified he was 40 years of age, had a G.E.D. certificate and had received some vocational training. He contends he sustained physical and mental injuries as a result of the accident.

Prior to the accident in July 1994, plaintiff had received several warnings concerning unexcused absences from work and was eventually terminated after the accident during March or April 1995. He told the trial court he had missed several days work due to doctor visits and upon returning to work was told he did not have authority to be absent and he was terminated. He stated he had not worked since the termination and that he was not able to work; that he still endured a lot of pain and felt he was 100% disabled.

His testimony also indicates that after the accident in question, he became separated and divorced from his wife, lost his house due to a fire and was caring for his two small children.

Numerous expert medical witnesses testified. With respect to his physical injury claim, the trial court heard the deposition testimony of Dr. William Kennedy, an orthopedic surgeon, Dr. William K. Bailey, a physical rehabilitation medicine physician and the medical report of Dr. Mark T. McQuain, also a physical rehabilitation medicine physician.

Dr. Kennedy was an evaluating doctor and was of the opinion plaintiff had sustained a back strain. He found degenerative disc disease with trauma. He opined plaintiff had a 8% medical impairment and felt restrictions should be imposed on bending, stooping, etc. Dr. Bailey's testimony was in conflict with Dr. Kennedy's assessment. He treated plaintiff on several occasions and diagnosed him as having a back strain but gave no permanent impairment and released him to return to work without any restrictions. Dr. McQuain's medical report indicated a 5% medical impairment, 2 ½% due to pre-existing degenerative joint changes and 2 ½% due to injury sustained in July 1994 accident.

In connection with the claim for mental injury, the trial court heard the oral and deposition testimony of Dr. Jerry B. Lemler, a psychiatrist, the deposition testimony of Dr. Chris D. Houser, a psychiatrist, and the deposition testimony of Dr. James W. Varner, also a psychiatrist.

Dr. Lemler did not treat plaintiff but made several evaluation examinations. He originally opined plaintiff was suffering from major depression and alcohol abuse and that his impairment was 50% to the whole body. After the passage of some period of time, he re-examined plaintiff, determined his alcohol problem had been resolved and reduced his estimate of disability to 37.5% impairment, being moderate impairment under AMA guidelines.

Dr. Houser treated plaintiff for some period of time and diagnosed he was suffering from major depression. He was also of the opinion that the work-related injury was a major contributing factor to his mental problems. During his first deposition, he opined the mental injury was not permanent if he received proper psychiatric treatment but admitted he was not able to work at that time (July 1997). He testified that he was 55-75% impaired and after proper treatment, the impairment should be reduced to 10-20%. In testifying by a second deposition some period of time later, he felt the impairment was still in the 10-20% range (mild impairment) and

when he was asked about the permanency of same, he replied "It would be hard to say permanent, but at least at this point I would say persistent." Near the end of this deposition he was asked if the permanency of impairment was more likely than not, he answered in the affirmative.

Dr. Varner, an evaluating doctor, was of the opinion there was no evidence of depression, no permanent impairment, employee Jones could return to work and that any current symptoms were not work-related but due to his separation from his wife and financial difficulties.

The trial court also heard the oral testimony of Dr. Norman Hankins, a vocational consultant, who opined plaintiff had 100% vocational disability based on Dr. Lemler's assessment and about 66% vocational disability by Dr. Houser's assessment.

In rendering a decision of 60% disability to the body as a whole, the trial judge specifically found plaintiff's return to work was not meaningful in the sense of the multiplier statute, T.C.A. § 50-6-241(a)(1), and therefore the 2 ½ times cap of the award did not apply.

On appeal the case is to be reviewed de novo accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The rule is that if there is conflicting medical testimony, the trial judge has discretion to conclude that the opinion of a particular expert should be accepted over that of another expert and that one expert's testimony contains a more probable explanation than another expert's testimony. *Thomas v. Aetna Life & Cas. Co.,* 812 S.W.2d 278 (Tenn. 1991).

In making this choice between conflicting opinions, the trial court is allowed 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, 676 (Tenn. 1991).

Conflicting evidence was presented with respect to both issues raised by the insurance company. As to the 60% award of disability, evidence was presented as to the physical injury finding no permanent impairment, a 2 ½% impairment and 8%

impairment. With regard to the mental injury, evidence ranged from no impairment, 10-20% impairment and 37.5% impairment. A combination of the two injuries would range from no impairment to 45.5% impairment.

The trial judge chose to accept the testimony that permanent impairment existed and fixed the award at 60%. This award was a great deal less than plaintiff's claim of total disability and not in excess of the six times cap imposed by the provisions of the multiplier statute. We cannot say the evidence preponderates against the court's finding of disability.

In connection with the issue of temporary total disability, the court fixed this recovery to stop on December 1, 1997. Defendant contends the award should not go beyond July 29, 1997.

Temporary total disability benefits end when the employee becomes able to work at any employment permitted by the nature of his/her injuries or has attained maximum recovery. *Lock v. National Union Fire Ins. Co. of Pittsburg, Pa.,* 809 S.W.2d 483 (Tenn. 1991).

In giving testimony concerning the physical injury, Dr. Bailey testified plaintiff reached maximum improvement on October 24, 1994. Dr. Kennedy did not specifically address this question and Dr. McQuain's reported indicated maximum improvement was attained upon his May 1, 1996 examination.

As to the claim for the mental injury, Dr. Lemler fixed maximum medical improvement on May 20, 1997. Dr. Houser, the treating psychiatrist, stated in his first deposition he had not reached maximum improvement as of the date of the deposition testimony, July 29, 1997, and that it would be "in the range of 6 months to a year" before reaching this point in his recovery. At the date of the second deposition on February 3, 1998, he testified plaintiff still remained unable to work.

The evidence does not preponderate against the finding of the trial court on this issue.

The judgment is affirmed. Costs of the appeal are taxed to the defendant.

_____

Roger E. Thayer, Special Judge

CONCUR:

_____
Frank F. Drowota III, Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED

August 27, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

ROBERT JONES CIRCUIT	)	CUMBERLAND) No. 95-697
Plaintiff-Appellee,	)	
	)	No. 03S01-9806-CV-00057
v.	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	Hon. John J. Maddux, Jr. Circuit 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 defendant, Liberty Mutual Insurance Company and Joe M. Looney, surety, for which execution may issue if necessary.

08/27/99