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

FILED

July 14, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

EDGAR YOUNG, Plaintiff/Appellee v. SONOCO PRODUCTS COMPANY Defendant/Appellant	))))))))))	MADISON CHANCERY HON. JOE C. MORRIS, CHANCELLOR NO. 02S01-9807-CH-00072

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

AFFIRMED

BYERS, Senior Judge

MEMORANDUM 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 a 40 percent permanent partial vocational disability to the body as a whole and awarded benefits accordingly.

We affirm the judgment of the trial court.

FACTS

The plaintiff, age 43 at the time of trial, has an eleventh grade education and work experience in construction followed by 21 years with this employer and its predecessor, doing factory production. At the time of the claimed injury, he was working as an Assistant Production Manager; his duties involved operating a winder. He had a prior medical history of low back and hip problems, including a dislocated hip with hip replacement surgery in 1995.

The plaintiff testified that he injured his low back at work on July 1, 1996, when he slipped on a washer that had been left on the floor and fell, which immediately caused such pain that he was unable to get up. The plant manager and his shift supervisor picked him up, put him in a chair and called an ambulance. He was taken to the Emergency Room at Jackson General Hospital, where x-rays of the thoracic and lumbar spine were obtained and revealed no acute fracture. Examination by Dr. Joseph Montgomery in the ER revealed no vertebral or paravertebral tenderness but he was tender at the upper sacral area. Sacral contusion was diagnosed and he was given Tylox 2 and excused from work for the rest of the day. He was to return to work the next day and use Motrin for pain.

The plaintiff returned to work but testified that for the next two weeks "they had me just laying in the First Aid Room, fooling with the computer a little bit . . ." He testified that during that time, his back was "really still sore . . . hard to walk . . . couldn't stand for very long." Two weeks later, while he was filling in for an absent worker, the machinery went down, he tried to restart it and his back "went out again." He talked to the Plant Production Manager and went back to the Emergency Room. At that time, a CAT scan of the lumbar spine revealed (1) focal central disc bulge at L4-5 without significant neural foraminal narrowing and slight impingement on the left L5 lateral recess, and (2) at L5-S1a very small focal central disc bulge which abuts the right S1 nerve root as well as the thecal sac.

Plaintiff saw Dr. Avila in the Emergency Room, who sent him to physical therapy and made an appointment for him to see Dr. Everett at the Bone and Joint Clinic. Dr. Everett saw plaintiff twice. On the first visit, he ordered more x-rays and prescribed a week's supply of medication. When plaintiff returned to his office at the end of the week complaining of continued pain, he was sent to Dr. Glenn Barnett.

Dr. Glenn Barnett, neurosurgeon, testified by deposition that he had been the treating physician for the plaintiff's prior hip and back problems between 1990 and 1995. He first saw the plaintiff for this injury on September 11, 1996. At that time, he complained of back pain and bilateral leg pain and some numbness in his leg, with the right leg bothering him more than the left. He reported that he could not sit or stand for any length of time because of the pain and was taking pain medication and an anti-inflammatory. He also complained of pain in his knees bilaterally and numbness in his feet.

Dr. Barnett's examination revealed some slight decreased range of motion, both on flexion and extension, positive straight leg raising on the right side at 70 degrees with back pain, and positive on the left side at about 60 degrees with back pain. Neurological examination showed that he could stand on his heels and toes and walk without real difficulty. He had 1+ knee jerk and ankle jerk levels bilaterally and no focal weakness, and sensation appeared to be intact.

Dr. Barnett thought the CAT scan done at Regional Hospital appeared to show at least a strong suggestion of a centrally herniated L5 disk that apparently had not been present in 1994, and he ordered a myelographic CAT scan, which was

performed on September 18, 1996. When this enhanced CAT scan showed no indication of need for surgical intervention, Dr. Barnett gave the plaintiff a lumbar epidural injection.

On October 9, 1996, the plaintiff returned to Dr. Barnett after having had three epidural injections with varying results, but overall not totally improved. Dr. Barnett suggested that he return to work, and the plaintiff said that he was planning to do so on October 21st. Dr. Barnett advised him that if he could not work, he might wish to try work hardening to see if he could gradually increase his tolerance. He also gave the plaintiff pain medication and a back support.

The plaintiff returned to see Dr. Barnett one last time on December 2, 1996, at which time he limped and complained that he was still hurting, primarily in his right leg - knee and lateral calf, and that he still had some numbness of his heel on the right foot. He had been in work hardening for three weeks, had had three epidurals, and told Barnett that he was not going to be able to go back to work the way he felt.

Dr. Barnett felt that he could not help the plaintiff with surgical intervention and suggested that he either make an attempt to return to work or perhaps ask the insurance company to arrange for someone else to render an independent evaluation. He diagnosed chronic degenerative disk disease at L5 and degenerative disk disease at L4 with perhaps mild aggravation of the disk disease related to the events occurring at work. He opined there were findings of degenerative disk disease on the CAT scan done at the Jackson Clinic in 1994, prior to his hip replacement, so the process had been ongoing for some time. He did not think the plaintiff had anything "of an acute nature, nothing to indicate a disk herniation or nerve root compression." He did not think the plaintiff had any permanent impairment as a result of the work injury in July 1996. He opined the plaintiff had some structural changes in his back caused by degenerative disc disease that might result in an impairment rating between three and five percent to his body as a whole, and that there may have been a little progression of that condition between 1994 and 1996. His opinion was based on reviewing the actual radiological films from 1996 and the radiology report of 1994 but not the films.

The employer sent the plaintiff to see Dr. Anthony Segal, neurosurgeon, for evaluation on January 15, 1997. Dr. Segal reviewed the medical records, although

he did not have the actual x-ray films, and conducted an examination of the plaintiff. He opined that it was "up to him to see whether he can work. I think he should be given a chance to return to work and then see whether he can do it, and I think he should be given a small impairment rating on the basis of a soft tissue injury."

The plaintiff testified that the employer then cut off his workers' compensation benefits and he therefore returned to light work, but that he could not do the work because he could not stay on his feet and had to lie down. He testified that he worked for two days, left early the third day, and on the fourth day came to work but told the production manager that there was no use in his starting and wasting their time because he would not be able to do the work. He said the supervisor replied "that would be fine because if he couldn't do any better, he needed to stay home."

The plaintiff testified that in the middle of February, 1997, he went to see Dr. Jennifer Johnson, his family doctor, at Jackson Clinic, who prescribed pain medication and referred him to Dr. James Craig, who took x-rays, administered two epidural blocks, and sent him to physical therapy for two weeks.

The plaintiff testified that his back is worse now, that it got worse after he went to work hardening, and that he now uses a cane. His daily activities are limited and he now has to pay someone to mow the yard because he is unable to do it.

The plaintiff was evaluated by Dr. Robert C. Barnett, orthopedic surgeon, on March 24, 1997, at his attorney's request. Dr. Barnett opined that

> according to the AMA Guidelines, Page 113, Table 75, he has 10% permanent physical impairment to the whole body as a result of this injury. He has medical documentation and several epidural blocks which is next to surgery. He has significant degenerative changes, even a possible herniated disc with limited motion. He is certainly not a candidate for any appreciable lifting, long standing, long sitting, or climbing.

The plaintiff was also evaluated by William M. Jenkins, Ed.D., C.R.C., Vocational Rehabilitation Consultant, on February 6, 1998, at his attorney's request. Dr. Jenkins administered a Wide Range Achievement Test, Career Ability Placement Survey, Minnesota Manual Dexterity Test, Vocational Exploration Group Chart and Functional Capacity Checklist, conducted a Diagnostic Vocational Interview and reviewed Dr. Robert Barnett's records, from all of which he opined

> within a reasonable degree of vocational certainty that absent successful vocational rehabilitation and retraining for more sedentary type activities, Mr. Young has little to no employability prospects at this time.

DISCUSSION

The defendant has raised one issue on appeal:

> Whether the evidence presented at trial preponderates against the trial court's award of a 40% permanent partial disability to plaintiff's body as a whole as a result of plaintiff's work-related accident?

Permanent Partial Disability

The defendant contends that: (1) considering the statutory factors, the evidence preponderates against an award of 40% permanent partial vocational disability, (2) the trial court favored the evidence by Dr. Robert Barnett, which was not as persuasive as that of Dr. Glenn Barnett, (3) Dr. Jenkins' testimony should be entirely discounted because he did not have all the medical records, (4) the medical evidence of Dr. Glenn Barnett preponderates in favor of the award being vacated or reduced, and (5) Mr. Young's own testimony establishes that his vocational impairment is basically non-existent. Therefore, the preponderance of the evidence does not show that the plaintiff sustained a 40% permanent partial vocational disability from his work-related injury.

The plaintiff argues that (1) Dr. Glenn Barnett assessed 3 - 5% permanent partial disability, although he would not specifically relate the impairment to the accident, (2) Dr. Jenkins' testimony is unrefuted, and (3) he is still not able to work. Therefore, considering the statutory factors, the evidence preponderates in favor of the award.

In making 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); *Roberson v. Loretto Casket Co.,* 722 S.W.2d 380, 384 (Tenn. 1986).

The plaintiff is 43 years old, and although he has a GED, he has no vocational training, and he has worked only in construction and factory work for this employer.

In this case, as in all workers' compensation cases, the claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way,* 482 S.W.2d 775, 777 (Tenn. 1972). The plaintiff testified that he must use a cane to walk, cannot stand for long periods and must lie down frequently.

The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Johnson v. Midwesco, Inc.,* 801 S.W.2d 804, 806 (Tenn. 1990). Although Dr. Glenn Barnett was the treating physician, we have reviewed his depositional testimony along with the report of evaluation by Dr. Robert Barnett. We find no reason to disturb the trial judge's reliance upon the evidence of Dr. Robert Barnett in the case.

We find the evidence does not preponderate against the judgment of the trial court, which is affirmed. The cost of this appeal is taxed to the defendant.

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John K. Byers, Senior Judge

CONCUR:

_____
Janice Holder, Justice

_____
F. Lloyd Tatum, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

EDGAR YOUNG,	)	MADISON CHANCERY
	)	NO. 52461
Plaintiff/Appellee,	)	
	)	Hon. Joe C. Morris,
vs.	)	Chancellor
	)	
SONOCO PRODUCTS COMPANY,	)	NO. 02S01-9807-CH-00072
	)	
Defendant/Appellant.	)	AFFIRMED.

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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Appellant, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED this 14th day of July, 1999.

PER CURIAM