IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
December 12, 2011 Session

MARY D. COLE v. MARVIN WINDOWS OF TENNESSEE

Appeal from the Circuit Court for Lauderdale County
No. 6236 Joseph H. Walker, III, Judge

No. W2010-02610-WC-R3-WC - Mailed February 16, 2012; Filed March 20, 2012

An employee sustained a compensable injury to her hand and elbow. Employee's authorized treating physician assigned an impairment rating of 1% to both her right and left arms. The employee's evaluating physician assigned 16% impairment to her right arm and 15% to her left arm. Due to the disparity between the physician's ratings, the parties selected a physician from the Medical Impairment Registry ("MIR") who assigned 5% impairment to each of the employee's arms. The trial court based its award of disability benefits on the MIR physician's rating. The employee has appealed, contending that she successfully rebutted the statutory presumption of correctness given to the MIR physician's rating. We affirm the trial court's ruling.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Trial Court Affirmed

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J. and DONALD P. HARRIS, SR. J., joined.

Christopher L. Taylor, Memphis, Tennessee, for the appellant, Mary D. Cole

Amber E. Luttrell and Hailey H. David, Jackson, Tennessee, for the appellee, Marvin Windows of Tennessee

Factual and Procedural Background

In 1999 Mrs. Mary Cole ("Employee") began working at Marvin Windows and Doors of Tennessee ("Employer") as a machine operator. Employee's various job duties involved placing window mounts into machines, lifting items and placing them into a routing machine,

hammering and stapling wood, placing styles on pallets, and moving pallets when they became full. At times, Employee was required to use a rod to remove sawdust from machines and machine parts. In July 2006, Employee began experiencing pain and numbness in both arms while performing her job duties for Employer. Employee continued to work, but she reported her injury when her pain began to disrupt her sleep. Employee filed a complaint on June 17, 2008, and the matter was tried on September 14, 2009. Employee continues to work for Employer. Employee's immediate supervisor testified at trial that she performs well, does not appear to have difficulties with her job duties, and has not complained about pain in her arms.

Employee was referred to Dr. Randy Fly, an orthopaedic surgeon. Dr. Fly suspected carpel tunnel syndrome. He ordered a nerve conduction study of Employee's right arm, which was performed on September 18, 2006. The nerve conduction study revealed severe median neuropathy of the right wrist, which Dr. Fly diagnosed as carpal tunnel syndrome. Dr. Fly also ordered a nerve conduction study of the left arm, which was performed on October 3, 2006. This nerve conduction study revealed moderately severe neuropathy in the left wrist. On January 2, 2007, Dr. Fly performed a carpal tunnel release on the right arm. On February 5, 2007, he performed a carpal tunnel release on the left arm as well as a release of the lateral epicondyle on the left elbow. On May 22, 2007, Dr. Fly performed a lateral epicondyle release on the right elbow.

Employee reported improvement after these procedures, and on July 6, 2007, Dr. Fly noted good range of motion and grip power in Employee's hands. In August 2007, Dr. Fly placed Employee at Maximum Medical Improvement ("MMI") and cleared her to return to her regular work duties. Dr. Fly was of the opinion that the employee had a 1% impairment to each arm. Dr. Fly considered both the carpal tunnel and lateral epicondyle conditions in reaching the 1% impairment rating. He did not place restrictions on Employee's activities.

In December 2007, Employee visited Dr. Apurva Dalal, an orthopaedic surgeon. Employee told Dr. Dalal that she was still experiencing pain in her elbows and hands and that she was having difficulty sleeping. Dr. Dalal found a 25% loss of sensation in median nerve distribution and weakness of thumb opposition in both of Employee's hands. Employee's test results were negative for Phalen's and Tinel's, indicating that Employee did not have ongoing compression of the nerve. Additionally, Dr. Dalal examined Employee's elbows and found tenderness in the lateral epicondyles. Dr. Dalal also found full range of motion in both elbows.

Dr. Dalal concluded that Employee had 12% impairment to the right upper extremity, 10% due to sensory loss and 2% for motor loss, relating to the carpal tunnel release. Dr.

Dalal assigned 10% impairment to the left upper extremity for carpal tunnel syndrome.[1] Dr. Dalal also assigned 5% impairment to each extremity for the lateral epicondylar release. Using the Fifth Edition of the American Medical Association Guides ("AMA Guides") combined values table, Dr. Dalal opined that the combined impairment ratings resulted in 16% impairment to Employee's right upper extremity and 15% to her left upper extremity.

The parties obtained an evaluation through Tennessee Department of Labor Medical Impairment Registry ("MIR") because of the discrepancy between the impairment ratings of Dr. Fly and Dr. Dalal. The parties selected Dr. James Warmbrod, and Dr. Warmbrod evaluated Employee on March 19, 2008. Employee told Dr. Warmbrod that she had occasional pain in her wrist and numbness in the index and middle fingers of both hands. Dr. Warmbrod found that Employee could flex each wrist without complaint of numbness or tingling and that she had full range of motion in the elbows and hands. Although a grip and pinch test showed Employee to be below average in those categories, Dr. Warmbrod did not believe Employee had given maximum effort during the test. Dr. Warmbrod did find tenderness over Employee's elbow incisions. Dr. Warmbrod opined that Employee had a 5% anatomic impairment to each arm for carpal tunnel. Dr. Warmbrod testified that he did not find any permanent impairment from the lateral epicondylar release and did not assign an impairment rating to either elbow.

The trial court found that Employee did not show by clear and convincing evidence that Dr. Warmbrod used an incorrect method or made an inappropriate interpretation of the AMA Guides that would rebut the statutory presumption of correctness of Dr. Warmbrod's rating. See Tenn. Code Ann. § 50-6-204(d)(5) (2008). Thus, the trial court applied Dr. Warmbrod's impairment rating and awarded 7.5% permanent partial disability to each arm. Employee was also awarded discretionary costs in the amount of $1,418.20 and future medical benefits. Employee has appealed, contending that the trial court erred by accepting Dr. Warmbrod's impairment rating. This appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Tenn. Sup. Ct. R. 51.

Analysis

1. *MIR Impairment Rating*

Tennessee Code Annotated section 50-6-204(d)(5) provides that the impairment rating assigned by a doctor selected through the MIR process "shall be presumed to be the accurate

[1] At different points in his deposition, Dr. Dalal testified that he had given Employee a 12% impairment rating and a 10% impairment rating for the upper level extremity carpel tunnel release.

impairment rating" unless rebutted by clear and convincing evidence. The Supreme Court has defined clear and convincing evidence as evidence "in which there is no serious or substantial doubt about the correctness of the conclusions . . . ." Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992). To rebut the presumption found in section 50-6-204(d)(5), the challenging party must provide affirmative evidence that the MIR physician used an improper method or incorrectly interpreted the AMA Guides. Tuten v. Johnson Controls, Inc., No. W2009-1426-SC-WCM-WC, 2010 WL 3363609, at *6 (Tenn. Worker's Comp. Panel Aug. 25, 2010). We review findings of fact in a workers' compensation case de novo but presume the trial court's finding is correct unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Employee contends that she presented clear and convincing evidence to rebut the statutory presumption of correctness given to Dr. Warmbrod's impairment rating. First, Employee argues that Dr. Warmbrod's report contains internal contradictions. This argument is primarily based on Dr. Dalal's testimony pointing out Dr. Warmbrod's inconsistent statements. Dr. Warmbrod stated in his report that Employee mentioned numbness and tingling in her left hand, but Dr. Warmbrod also states that Employee only had vague complaints of numbness and tingling in her index and middle fingers. Employee contends that Dr. Warmbrod later stated that Employee did not complain of any sensory defect in her fingers and that these contradictions invalidate Dr. Warmbrod's conclusions. Employer, however, points out that the allegedly contradictory statements of Dr. Warmbrod are Employee's own statements reflected in Dr. Warmbrod's report.

Dr. Warmbrod's report does contain sentences that appear contradictory when read in isolation. When these sentences are read in context, however, it is clear that they do not contradict one another. Dr. Warmbrod explained in his deposition that Employee mentioned pain and numbness in her hands and wrists at different times during the examination. Dr. Warmbrod also explained that Employee did not report having numbness or tingling in her fingers as he was preforming the physical testing portion of the examination. Employee, however, complained of having tingling and numbness in her left hand after the carpel tunnel release surgery performed in February 2007.

Dr. Warmbrod wrote in his report that "[Employee] states at this time she does have pain in her wrist sometimes. She says the surgery helped her a lot. Occasionally the index and middle finger of both hands will go numb." Employee's statements to Dr. Warmbrod clearly reference her status in March 2008 when she provided this information to Dr. Warmbrod. Later in the report Dr. Warmbrod writes that the Employee "has some vague complaints of numbness and tingling of the index and middle fingers but this is not present

all of the time." This statement in Dr. Warmbrod's report is consistent with Employee's complaints that she experienced occasional wrist pain and numbness in her fingers.

Finally, Dr. Warmbrod's statement that Employee "did not complain of any sensory defect in her fingers" is consistent with his testimony that Employee did not complain of any numbness and tingling in her fingers during Dr. Warmbrod's physical examination of Employee. After reviewing Dr. Warmbrod's report in light of his and Dr. Dalal's testimony, we conclude that Dr. Warmbrod's conclusions were not contradictory.

Employee also contends that Dr. Warmbrod's report is deficient because he did not assign an impairment rating for Employee's elbows. Specifically, Employee asserts that Dr. Warmbrod was required to assign an impairment rating due to the anatomical differences in her elbows as a result of surgery. In response, Employer asserts that Section 16.7d of the AMA Guides provides "that epicondylitis is not assigned permanent impairment unless the patient has permanent weakness of grip strength as a result of tendon rupture, surgical release of the flexor or extensor origins or medial or lateral epicondylitis, or excision of the epicondyle."

Dr. Warmbrod testified that the results of grip strength tests indicated that Employee did not give a valid effort. Dr. Warmbrod also explained that the range of motion of Employee's elbows suggested that her grip was sufficiently strong to preclude assignment of permanent impairment. Finally, Dr. Warmbrod testified that not all surgeries resulted in a permanent impairment.

Dr. Warmbrod's testimony provides sufficient factual support for his conclusion that Employee did not have an impairment of her elbows. Moreover, we note that Dr. Dalal relied in large part on Chapter 1 of the AMA Guides, which consists primarily of general statements and principles, to support his assignment of permanent impairment to Employee's elbows. Dr. Warmbrod, however, relied upon a specific section of the AMA Guides that address impairments of the elbows.

When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). The trial court accredited Dr. Warmbrod's impairment rating over Dr. Dalal's suggested impairment rating. We observe that at best, Dr. Dalal's testimony amounts to a simple disagreement with Dr. Warmbrod's conclusions. See Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008) (noting that a reviewing court may draw its own conclusions when evaluating the record and reviewing expert medical testimony contained in depositions).

Finally, Employee argues that Dr. Warmbrod did not adequately describe his reasoning for assigning Employee an anatomic impairment rating of 5% and that he should have conducted additional diagnostic testing because two years had passed since Employee's surgery. Dr. Warmbrod testified that he relied upon scenario two on page 495 of the AMA Guides when determining his rating.[2] According to Dr. Warmbrod, scenario two provides that if the patient has "normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles: A residual carpel tunnel syndrome is still present, and an impairment rating not to exceed 5% of the upper extremity may be justified." Dr. Warmbrod gave a 5% impairment rating, which is the maximum rating allowed by scenario two. In his testimony, Dr Warmbrod addressed all three scenarios on page 495 of the AMA Guides for the classification of carpal tunnel syndrome cases, and he explained why he placed Employee in scenario two. Specifically, Dr. Warmbrod testified that scenario two best fit Employee's case based upon Employee's combination of overall strength, range of motion, median nerve function, and lack of atrophy with lingering numbness and tingling.

Dr. Warmbrod discussed the specific section of the AMA Guides that he relied upon in reaching his impairment rating, and he described his findings and explained why those findings placed Employee's impairment at 5%. We are unable to discern any flaws in Dr. Warmbrod's application of the AMA Guides.

Even assuming that Dr. Warmbrod inadequately explained in his report how he arrived at his 5% impairment rating for the Employee's carpal tunnel, Employee did not

---

[2] The AMA Guides provide three scenarios for determining impairment ratings following surgical decompression surgery:

> 1. Positive clinical findings of median nerve dysfunction and electrical conduction delay(s): the impairment due to residual CTS is rated according to the sensory and/or motor deficits as described above.
>
> 2. Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles: a residual CTS is still present, and an impairment rating not to exceed 5% of the upper extremity may be justified.
>
> 3. Normal sensibility (two-point discrimination and Semmes-Weinstein monofilament testing), opposition strength, and nerve conduction studies: there is no objective basis for an impairment rating.

Gunnar B. J. Andersson and Linda Cocchiarella, American Medical Association Guides to the Evaluation of Permanent Impairment 495 (5th ed. 2000).

present any evidence that clearly and convincingly showed how that omission undermines Dr. Warmbrod's method or interpretation of the AMA Guides. Employee does not point to any evidence in the record that clearly and convincingly establishes that the AMA Guides in fact require diagnostic testing such as a nerve conduction study to determine impairment ratings in carpel tunnel syndrome cases.

After considering all the evidence Employee has presented, we are unable to conclude that the evidence offered preponderates against the trial court's finding that Employee failed to rebut the statutory presumption of correctness enjoyed by Dr. Warmbrod's rating.

Conclusion

For the reasons stated above, the judgment of the trial court is affirmed. Costs are taxed to Mary Cole and her surety, for which execution may issue if necessary.

____
Tony A. Childress, Judge

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
December 12, 2011 Session

MARY D. COLE v. MARVIN WINDOWS OF TENNESSEE

Circuit Court for Lauderdale County
No. 6236

No. W2010-02610-WC-R3-WC - Filed March 20, 2012

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 on appeal are taxed to the Appellant, Mary D. Cole, and her surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM