IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 22, 2010 Session

BUILDERS MUTUAL INSURANCE COMPANY v. ROBERT W. DAUGHTREY

Appeal from the Chancery Court for Hamilton County
No. 05-0794 W. Frank Brown, III, Chancellor

No. E2009-01106-WC-R3-WC - Filed August 25, 2010

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The employee alleged that he sustained a compensable injury to his left arm. His employer denied the claim, contending that the injury was not caused by the employment, and also that the employee had failed to provide notice of his injury as required by the workers' compensation statute. The trial court found that the injury was work-related, and awarded 60% permanent partial disability ("PPD") to the left arm. On appeal, the employer argues that the evidence preponderates against the trial court's findings on these issues, and that the trial court erred by failing to apply the missing witness rule as to the potential testimony of the treating physicians. We find no error, and affirm the judgment.

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

SHARON BELL, SP. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and DONALD P. HARRIS, SR. J., joined.

John T. Rice, Chattanooga, Tennessee, for the appellant, Builders Mutual Insurance Company.

Keith Grant, Dunlap, Tennessee, for the appellee, Robert W. Daughtrey.

MEMORANDUM OPINION

Factual and Procedural Background

Robert Daughtrey ("Employee") was a bricklayer. He worked off and on for David Freeman ("Employer") over the course of several years. He alleged that he sustained a compensable injury to his left arm on or about June 1, 2005. Mr. Daughtrey testified that, on that date, he was lifting a block when his left arm "locked up," and he was unable to release his grip. He testified that Mr. Freeman was present and witnessed the event. Mr. Freeman testified that he was present on June 1, but that Employee "never reported an injury to me." Employee worked for several more days, before attending a previously-scheduled appointment with Dr. Han, a neurologist, for a nerve conduction study. That test revealed carpal tunnel syndrome and ulnar nerve entrapment at the elbow. Employee was referred to Dr. Walter King, an orthopaedic surgeon. Employee saw Dr. King on June 15th. Surgery was recommended at that time. An opening occurred in Dr. King's schedule for the next day, and two surgical procedures were carried out at that time: a carpal tunnel release and an ulnar nerve transposition.

Employee continued to have strong symptoms. Dr. King performed a second surgery, consisting of a repeat carpal tunnel release and neurolysis, on March 17, 2006. A repeat nerve conduction study in August 2006 showed continuing carpal tunnel syndrome and ulnar neuropathy. Dr. Marshall Jemison performed a third, more extensive, surgical procedure in October 2007. Dr. Jemison released Employee from his care in March 2008, assigning a 10% permanent impairment to the left arm.

Neither Dr. Jemison nor Dr. King testified at trial. The medical evidence consisted of a C-32 form and narrative report from Dr. Neil Spitalny, an orthopaedic surgeon who conducted an independent medical examination ("IME") at the request of Employer, and a C-32, narrative report, and cross-examination deposition of Dr. Richard Williams, who conducted an IME at the request of Employee. Dr. Spitalny's report contains a summary of the records of Drs. Jemison and King. Dr. Williams's report contains some references to the records of those physicians.

Dr. Williams described Employee's condition as "complex upper extremity pain." He opined that it was a repetitive motion injury caused "without question" by Employee's thirty years of activity as a brick mason. He stated: "Whether the specific incident in 2005 is solely responsible for his problem is somewhat irrelevant, as I think there is legitimate causation from his repetitive heavy lifting and work as a mason. . . ." Dr. Williams found that Employee had significant losses of sensation and strength in the left hand and arm. He assigned an impairment of 48% to the left upper extremity, based upon loss of sensory and

motor function in the median and ulnar nerves. He described Employee's left arm as "essentially nonfunctional." At the time of his evaluation of Employee, Dr. Williams had seen only a limited number of medical records concerning Employee's medical history prior to June 2005. After his initial report was completed, he was provided with a summary of those records, apparently prepared by an unidentified person in the office of Employer's attorney. That information did not change his original opinions.

Dr. Spitalny had all, or nearly all, of Employee's medical records at the time he prepared his report. He noted that Employee had symptoms of left arm and hand numbness as early as 1989. Those symptoms were apparently related to a cervical spine problem.[1] In 2003 and 2004, Employee was diagnosed with carpal tunnel syndrome. He had numbness and weakness in his left hand. He saw doctors for these complaints throughout 2004 and 2005. The last such medical visit before the June 1, 2005 injury date was on May 15 of that year, when he saw Dr. Han. Dr. Spitalny's report also noted that Employee had a variety of other medical problems, including diabetes, obesity, depression and cervical and lumbar arthritis. His report does not directly reference the subject of causation. However, he marked "No" on his C-32 in response to question no. 6, which addresses causation. The document also contains the handwritten notation "DID NOT RATE because no documented injury-- multiple contributing systemic problems."

Employee was fifty-six years old. He had completed the eighth grade, and had no additional education. He had worked as a brick mason for most of his adult life. His other employment experience consisted of working as a filling station attendant in 1969 and as a mover from 1990 to 1995. He had not worked since June 15, 2005. He admitted that he had received medical treatment for neck, back and left arm problems prior to June 2005. He testified that, as of the time of the trial, the middle two fingers of his left hand "didn't want to straighten out." He had numbness and tingling in his hand, and was unable to use his left hand to steer his vehicle.

The trial court issued its decision as a written memorandum. It found that Employee had sustained a compensable injury to his left arm, and that Employer had actual notice of Employee's injury on the day it occurred, and also that attempts by Employee and his wife to contact Mr. Freeman at the time the surgery was scheduled satisfied the notice requirement. The trial court concluded that Employee had sustained a 60% PPD to the left arm. Employer has appealed, asserting that the trial court erred by giving credence to the testimony of Employee's evaluating physician, by failing to apply the missing witness rule, by finding Employer's representative and evaluating physician not credible, by finding that

[1] Employee had a cervical discectomy and fusion in March 2006, shortly after the second surgery on his arm.

Employee had satisfied the statutory notice requirement, and by failing to sustain its motion for a directed verdict. Employee contends that the award is inadequate.

Standard of Review

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Medical Evidence

In its written decision, the trial court explicitly gave "more credence to the testimony of Dr. Williams than the testimony of Dr. Spitalny." Employer argues that this finding is erroneous. In support of its argument, it points out that, at the time of his evaluation of Employee, Dr. Williams had only limited information concerning Employee's medical history before and after June 2005, and that the information provided to him after his evaluation was unreliable because it was a summary prepared by an unidentified person. Employer argues that Dr. Spitalny, in contrast, had a fairly complete medical record before he completed his evaluation. Employer also takes issue with the method used by Dr. Williams to calculate Employee's impairment.

The trial court had written reports and C-32's from both doctors, and the deposition of Dr. Williams. It did not have a deposition of Dr. Spitalny. In his deposition, Dr. Williams explained the bases of his opinion on causation, stating that Employee's condition was primarily the result of Employee's thirty years of repetitive work as a brick mason. He described the June 15, 2005 incident as "the trigger that significantly unveiled or exacerbated or allowed manifestation of this underlying problem." Dr. Williams had the opportunity to examine the additional medical records cited by Employer in support of its position, and found that they contained no medical information which changed his opinion. Dr. Williams

had accurate information concerning the nature of the medical condition of Employee's left arm, and also concerning the nature of Employee's work. These provide a sufficient basis for his conclusion. In contrast, Dr. Spitalny's opinion on the subject consists of a few handwritten phrases on his C-32 form. The issue is not addressed in his narrative report, and because he was not deposed, he provided no further explanation for his opinion that Employee's condition was not related to his employment.

Dr. Williams calculated his impairment rating based upon peripheral nerve dysfunction in Employee's left arm. Using the applicable tables in the American Medical Association Guides to the Evaluation of Permanent Impairment, Dr. Williams started with the impairment that would result from a total loss of nerve function in the forearm and hand. Dr. Williams then reduced that amount, based upon his assessment of Employee's residual function. Employer asserts that this is an incorrect application of the AMA Guides. However, Employer presented no expert medical testimony to support that contention.

Our examination of the medical evidence leads us to the conclusion that the trial court did not err by choosing to accredit the opinion of Dr. Williams, which was explained at length and subjected to cross-examination, over that of Dr. Spitalny, which was expressed in a few words scrawled into an open space on a C-32 form, and was neither explained nor subjected to cross-examination.

Missing Witness Rule

Employer argues that the trial court erred by failing to apply the missing witness rule based upon Employee's failure to present testimony from either of his treating physicians, Dr. King or Dr. Jemison. It argues that these witnesses were "uniquely under the control of [Employee] by way of the doctor client privilege." A similar argument was raised, and rejected by a previous panel, in *Williams v. Goodyear Tire & Rubber Co.*, No. W2008-00640-SC-WCM-WC, 2009 WL 2569261, at *5-6 (Tenn. Workers' Comp. Panel Aug. 20, 2009):

> Employer contends that the trial court should have applied the missing witness rule as to the potential testimony of Dr. Campbell. "Under the missing witness rule, a party is entitled to argue, and have the jury instructed, that if the other party has it peculiarly within his power to produce a witness whose testimony would naturally be favorable to him, the failure to call that witness creates an adverse inference that the testimony would not favor his contentions." *State v. Middlebrooks*, 840 S.W.2d 317, 334 (Tenn.1992). In *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 400 (Tenn. Ct. App. 2006), the Court of Appeals described the

> conditions for application of the rule: "Before the missing witness rule can be invoked, the evidence must show that '[(1)] the witness had knowledge of material facts, [(2)] that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and [(3)] that the missing witness was available to the process of the Court for trial.'" (Quoting *State v. Bigbee*, 885 S.W.2d 797, 804 (Tenn.1994)).
>
> Clearly, the first condition is met; as Employee's treating physician, Dr. Campbell had knowledge of material facts. However, there is no evidence of any relationship between Employee and Dr. Campbell other than that of doctor and patient. Employer does not cite any Tennessee cases in which that relationship alone was found sufficient to justify application [of] the missing witness rule.
>
> In addition, there is no evidence in the record that it was "peculiarly within [Employee's] power" to produce Dr. Campbell. The trial court found that the doctor was "equally available to both parties." Although there is no actual evidence on the subject, the comments of counsel during discussion of Employer's motion certainly provide some basis for the conclusion that the doctor was equally unavailable to both parties. A similar conclusion by a trial court was affirmed in *Henderson v. New York Life Ins. Co.*, 250 S.W.2d 11, 16 (Tenn. 1952). Moreover, Dr. Campbell's records were reviewed by Dr. Chung and therefore available to both parties to place into evidence, though neither did.

As in *Williams*, Employer's argument for application of the missing witness rule in this case is based solely upon the existence of a doctor-patient relationship between Employee and each of the two doctors. There is absolutely no direct or circumstantial evidence that the testimony of either doctor "would naturally incline to favor" Employee. Moreover, it is apparent that Employer had access to both doctors, because of Dr. Spitalny's extensive discussion of their records, which were undoubtedly provided to him by counsel for Employer. There was, therefore, no basis for application of the missing witness rule in this case, and the trial court correctly declined to do so.

Credibility

In its discussion of Employer's notice defense, the trial court noted that Mr. Freeman was asked whether he was present on the job site on the date of the alleged injury, but did not directly answer the question. The trial court made no additional statements concerning his

credibility. Employer argues that this implicit credibility finding was erroneous. Mr. Freeman testified in court; the trial court was in a superior position to assess his credibility. *Humphrey*, 734 S.W.2d at 315. Moreover, the trial court's observation that Mr. Freeman's answer was non-responsive is correct.

Employer also assails the trial court's decision to give greater weight to the opinion of Dr. Williams than that of Dr. Spitalny. This is essentially a restatement of Employer's argument concerning the trial court's acceptance of Dr. Williams's testimony. For the same reasons that we rejected those arguments above, we reject them here.

Notice

Employer argues that the trial court erred in finding that Employee satisfied the notice requirement, Tennessee Code Annotated section 50-6-201. This argument is misplaced for several reasons. First, the trial court determined that Mr. Freeman had actual notice of the injury on June 1, 2005, based upon its assessment of in-court testimony, a finding which is entitled to great deference on appeal. *Humphrey*, 734 S.W.2d at 315. Second, Employer concedes in its brief on appeal that notice was given "approximately 15 days [after June 1, 2005] by way of a phone call to [Employer]." That admission is supported by the testimony of Employee, his wife, and Mr. Freeman. Section 50-6-201 requires an employee to provide notice of his work injury "within thirty days" of either the accident, in the case of a traumatic injury, or of the date upon which the employee "knows or reasonably should know that [he] has suffered a work-related injury," in the case of a gradual injury. Applying either theory, the notice received by Employer on approximately June 16, 2005 satisfied the statutory requirement.

Directed Verdict

Employer filed Dr. Spitalny's C-32 after the trial, by agreement of the parties. It filed a motion for "directed verdict" at the same time. The motion was denied. We note that the a motion for a directed verdict has no place in a bench trial. *Boyer v. Heimermann*, 238 S.W.3d 249, 254 (Tenn. Ct. App. 2007). The appropriate equivalent to such a motion is a motion for involuntary dismissal pursuant to Tennessee Rule of Civil Procedure 41.02. *Id.* However, the form of the motion is not a matter of consequence in this case. The arguments put forward by Employer in support of this issue are merely restatements of the arguments previously made in support of its contention that the trial court erred by giving greater weight to the opinion of Dr. Williams than that of Dr. Spitalny. Those arguments are rejected here for the same reasons they were rejected above.

Inadequate Award

Employee argues that the trial court should have awarded 100% PPD to the left arm. It offers Dr. Williams's testimony that his arm was "nonfunctional" as the basis for that argument. In its findings, the trial court noted that one of the treating physicians had assigned a much lower impairment, and that Employee had many other medical issues "that could be part of the problem with his arm," and concluded that a 60% award was appropriate. The trial court's finding is also supported by evidence of an functional capacities evaluation, ordered by Dr. Jemison, which showed inconsistent results, and also showed substantially greater arm strength than Employee demonstrated during Dr. Williams's examination. In light of these factors, we are unable to conclude that the evidence preponderates against the trial court's finding that Employee sustained a 60% PPD to the left arm as a result of his work-related injury.

Application of Tennessee Code Annotated section 50-6-242

Employee argues that the trial court should have awarded him the maximum 200 weeks of benefits pursuant to Tennessee Code Annotated section 50-6-242(b), which provides as follows:

> (b) For those injuries that occur on or after July 1, 2004, and notwithstanding any provision of this chapter to the contrary and in appropriate cases where the employee is eligible to receive the maximum permanent partial disability award under § 50-6-241(d)(1)(B) or (d)(2), the employee may receive disability benefits not to exceed the appropriate maximum number of weeks as set forth in § 50-6-207 for the type of injury sustained by the employee. In those cases, the court or the workers' compensation specialist shall make specific documented findings, supported by clear and convincing evidence, that as of the date of the award or settlement, at least three (3) of the following facts concerning the employee are true:
> (1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;
> (2) The employee is fifty-five (55) years of age or older;
> (3) The employee has no reasonably transferable job skills from prior vocational background and training; and
> (4) The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

Employee asserts that he is eligible to receive the maximum permanent partial disability award under section 50-6-241(d)(2) because he was not returned to work by Employer.[2] According to Employee, the proof at trial demonstrated that he does not have a high school diploma or GED, that he is over age 55, and that he has no reasonably transferable job skills from prior vocational background or training. The trial court held, however, that it did not "have sufficient evidence to use Tenn. Code Ann. § 50-6-242 to escape the 'caps' provided by § 241." The evidence does not preponderate against trial court's conclusion.

Further, the language of section 242 is permissive, not mandatory, and allows for the exercise of the trial court's discretion, providing that "*in appropriate cases* where the employee is eligible to receive the maximum permanent partial disability award . . . the employee *may* receive disability benefits not to exceed the appropriate maximum number of weeks." Tenn. Code Ann. § 50-6-242(b) (emphasis added). The statute requires specific findings by clear and convincing evidence in order to exceed the statutory caps provided by section 50-6-241. *Leab v. S & H Mining Co.*, 76 S.W.3d 344, 350-51 (Tenn. 2002); *Peace v. Easy Trucking Co.*, 38 S.W.3d 526, 528 (Tenn. 2001). We do not find that the trial court erred in determining that this was not an appropriate case to award the maximum number of weeks of benefits for Employee's permanent partial disability.

Conclusion

The judgment of the trial court is affirmed in all respects. Costs are taxed to Builders Mutual Insurance Company and its surety, for which execution may issue if necessary.

_____
SHARON BELL, SPECIAL JUDGE

[2] Tennessee Code Annotated section 50-6-241(d)(2)(A) provides in pertinent part:

> For injuries arising on or after July 1, 2004, in cases in which the pre-injury employer did not return the injured 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 benefits that the employee may receive for body as a whole and schedule member injuries subject to subdivision (d)(1)(A) may not exceed six (6) times the medical impairment rating.

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Builders Mutual Insurance Company pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Builders Mutual Insurance Company and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Sharon G. Lee, J., not participating