IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
(April 26, 2000 Session)

JAMES C. BARBRA V. CLARENDON NATIONAL INSURANCE COMPANY

Direct Appeal from the Circuit Court for Blount County
No. L-11824 D. Kelly Thomas, Judge

No. E1999-00232-WC-R3-CV - Mailed August 16, 2000
FILED SEPTEMBER 19, 2000

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The appellant, Clarendon National Insurance Company, is the workers' compensation insurance carrier for United Marine Corporation (hereafter "the employer"). The issue is whether an award of 62-1/2 percent partial disability to the body as a whole is excessive in light of the medical and vocational testimony. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed.

Peoples, Sp. J., delivered the opinion of the court, in which Barker, J., and Terry L. Lafferty, Sr. J., joined.

James P. Catalano, Knoxville, Tennessee, for the appellant, Clarendon National Insurance Company.

J. Anthony Farmer, Knoxville, Tennessee, for the appellee, James C. Barbara

OPINION

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 finding, 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 courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

In October 1997, James C. Barbra was employed by United Marine Corporation as a gel coater and taper in the boat building process. On October 20, 1997, he injured his lower back. He was treated by Dr. Mark Thomas, an orthopedic surgeon, who performed a laminectomy and discectomy on January 27, 1998. Dr. Thomas performed a second surgery on March 19, 1998 to explore the nerve root and related residual problems from the first surgery. On July 21, 1998, Dr. Thomas placed Mr. Barbra at maximum medical improvement, released him to return to work and assigned a permanent impairment rating of 15 percent to the body as a whole. On July 21, 1998, Mr. Barbra returned to work and two weeks later he was promoted from gel coat taper to Team Leader and given a ten percent pay increase. In December 1998, he was promoted to Senior Team Leader and given a five percent pay increase. On June 1, 1998, Mr. Barbara was seen for evaluation by Dr. William Kennedy who assigned an impairment rating of 27 percent to the body as a whole.

The employer argues:

(1) That the findings and testimony of Dr. Mark Thomas should be given more weight because he was the treating physician.

(2) That the conclusions of Dr. Julian Nadolsky, vocational expert, are not supported by the facts.

(3) That Mr. Barbra has returned to work and received two promotions and two pay increases and an award of two and one-half times the medical impairment is excessive.

(4) That the award should be reduced because Mr. Barbra would have received less of an award if he had been found to be permanently and totally disabled because
   (a) T.C.A. § 50-6-207(4)(a)(i) limits the amount to 260 weeks for injuries after age 60 and 62.5 percent of 260 weeks would be 162.5 weeks; and
   (b) if Mr. Barbra had been awarded total disability, the employer would be entitled to offset that amount by the "amount of any old age insurance benefit payments attributable to employer contributions which the employee may receive under the Social Security . . ." T.C.A. § 50-7-307(4)(a)(i).

Mr. Barbra is age 64. He quit school in the eighth grade to work for his father digging wells. He has worked as an attendant at a gasoline station, served in the United States Army where he drove a M-84 Motor Carriage, worked as a carpenter, installed commercial refrigerators, and worked for the United Marine Corporation as a boat stringer installer and then in the tape and gel coat department. Dr. Mark Thomas testified that Mr. Barbra is now confined to sedentary or light occupations that provide an opportunity to alternate sitting and standing. As a result of the injury, Mr. Barbra now has a condition known as "foot drop" which is permanent and requires the use of an ankle/foot orthosis to allow him to walk with a more normal gait. A Functional Capacity Examination indicated that Mr. Barbra can lift seven pounds frequently and fifteen pounds occasionally from waist to shoulder level, and push/pull ten pounds frequently and twenty pounds occasionally, but his ability to carry is negligible and he should avoid climbing, squatting, and bending.

Mr. Barbra testified that he often stumbles because of the foot drop, even when he is wearing the brace. He built his own house before the injury, but testified he is now unable to climb a ladder to paint it. Activities he previously engaged in that are limited or prevented by the injury include (1) yard work with a Weed Eater because he lives on a hillside, (2) operating the clutch on his tractor, (3) carrying a tree stand into the woods to hunt, and (4) sitting to fish. He testified he is not able to perform carpentry or any other jobs he previously could do before the injury.

Charles Danny Welshan, Director of Operations for United Marine Corporation, testified that Mr. Barbra does not now have the physical ability to perform his former job,

but his expertise and knowledge are valuable in teaching other employees and overseeing the quality of the work. For this reason, the position of Senior Team Leader was created for Mr. Barbra.

Should the findings and testimony of Dr. Mark Thomas be given more weight because he was the treating physician?

The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990). However, when the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

In this case, the trial court commented that the testimony of the evaluating physician "did aid the Court in seeing that there were other ways to evaluate this case and still operate within the Guides. And had I not had the benefit of Dr. Kennedy's testimony I wouldn't have known that." Dr. Kennedy is a board certified orthopedic surgeon and is, also, board certified by the American Board of Independent Medical Examiners, with particular training in using the *American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition.* His practice is focused on the evaluation of patients for independent medical examinations. In his testimony, Dr. Kennedy explained why he used a different model in the A.M.A. *Guides* instead of the D.R.E. model used by Dr. Thomas in assessing the percentage of impairment sustained by Mr. Barbra. Dr. Thomas did not address the merits of his basis for his impairment rating. In considering the credentials of Dr. Kennedy and the other evidence in this case, we are unable to find that the trial court erred in finding that Mr. Barbra has permanent medical impairment of 25 percent to the body as a whole.

Should the conclusions of the employee's vocational expert not be considered because they are hypothetical and not supported by the evidence?

Mr. Barbra has returned to work and received two promotions. The employer asserts that Dr. Julian Nadolsky's opinion that Mr. Barbra would be one hundred percent disabled if he should lose his existing job is not supported by the evidence, and should not have been considered by the trial court. Dr. Nadolsky also testified that Mr. Barbara would be eliminated from 85 percent of all jobs in the local labor market. No other vocational expert testified. The trial court awarded only 62.5 percent. We are unable to find that the trial court gave the opinions of this expert more weight than that to which they were entitled.

Should the award be less than two and one-half times the medical impairment because the employee returned to work and received two promotions?

The extent of vocation disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. T.C.A. § 50-6-241(c); *Worthington v.*

Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). In making determinations of vocational disability, the court must 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. T.C.A. § 50-6-241(c); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Mr. Barbra is age 64, has an eighth grade education, cannot physically perform previously held jobs, and has his present job with a boat manufacturer solely because of his knowledge and ability to teach other employees. The employer offered no proof that Mr. Barbra has the knowledge, skills or ability to perform other work. We find the trial court did not err in awarding two and one-half times the medical impairment rating.

Should the award be reduced because potentially inconsistent awards could result?

The employer argues that a potentially inconsistent result has occurred because Mr. Barbra would have received a smaller award if he had been found to be permanently and totally disabled, and the employer allowed the social security offsets. In other words, more is less.

It is argued that T.C.A. § 50-6-207(4)(A)(i) limits injured workers over age 60 to 260 weeks of benefits, therefore 62.5 percent of 260 weeks would equate to 162.5 weeks of benefits for Mr. Barbra instead of the 250 weeks awarded by the trial court. Citing *Vogel v. Wells Fargo Guard Service*, 937 S.W.2d 856 (Tenn. 1996). The contention is that the employer would pay more in benefits to a worker who is only partially disabled as opposed to one who is totally disabled. Counsel misconstrues *Vogel*. It did not address T.C.A. § 50-6-207(3)(F) which provides, in part: "All other cases of permanent

partial disability not above enumerated shall be apportioned to the body as a whole, which shall have a value of 400 weeks . . .” Thus, the basis for apportioning injuries to the body as a whole is set at 400 weeks by 207(3)(F), but the maximum weekly benefits to be paid to an employee who is injured after age 60 is capped at 260 weeks by 207(4)(A)(i). There is no possibility of inconsistent awards. Mr. Barbra’s award is based on 400 weeks, not 260 weeks as argued by the employer.

Conclusion

We find the contentions of the appellant, Clarendon National Insurance Company, to be without merit and affirm the judgment of the trial court. This case is remanded for any appropriate proceedings. Costs of the appeal are assessed to the Appellant.

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JUDGMENT

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 Judgement of the Court.

Costs on appeal are taxed to the appellant, Clerendon National Insurance Company, for which execution may issue if necessary.

09/19/00