IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
Assigned on Briefs November 30, 2000

THOMAS DANIEL WHITED v. WILSON FARMERS COOPERATIVE, ET AL.

Direct Appeal from the Criminal Court for Smith County
No. 98-130 J. O. Bond, Judge

No. M2000-00833-WC-R3-CV - Mailed - January 12, 2001
Filed - April 3, 2001

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. In this appeal, the employer insists the trial court erred in its resolution of the issues of causation, permanency, extent of permanent disability, medical expenses and discretionary costs. As discussed below, the panel has concluded the judgment should be affirmed.

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

LOSER, SP. J., delivered the opinion of the court, in which BIRCH, J. and PEOPLES, SP. J., joined.

William E. Halfacre, III, Madewell, Jared, Halfacre & Williams, Cookeville, Tennessee, for the appellants, Wilson Farmers Cooperative and Hartford Casualty Insurance.

Lena Ann Buck and Frank Buck, Buck & Buck, Smithville, Tennessee, for the appellee, Thomas Daniel Whited.

MEMORANDUM OPINION

The employee or claimant, Whited, is 18 or 19 years old with an eighth grade education, who reads at a third grade level and performs mathematics and comprehensive reading at the second grade level. On November 13, 1997, while working for the employer, Wilson Farmers Coop, he suffered a crushing injury to his left hand, when the hand was accidentally caught between a fork lift and a steel post. The manager of the Coop was an eye witness to the accident and so testified at the trial.

Whited continued to work, but has repeatedly re-injured the same hand. He has seen a number of doctors, some of whom were provided by the employer and some of whom were not.

Warren McPherson is a board certified neurosurgeon licensed in Tennessee. He saw the claimant once on December 1, 1997. Dr. McPherson's impression was a soft tissue injury to the area of the fourth knuckle, no evidence of reflex sympathetic dystrophy (RSD) involving the left upper extremity. The doctor said he would be "very surprised" if the claimant had any permanent impairment.

Douglas Ray Weikert, is a board certified orthopedic surgeon licensed in Tennessee with certifications in hand and microsurgery. Dr. Weikert first saw the claimant on June 8, 1998. The doctor's first impression was a psychological condition, conversion reaction. When he saw the claimant on July 15, after another accident at work, he noticed some localized swelling of the injured hand, but ruled out RSD and opined the claimant would retain no permanent impairment.

John McInnis is a board certified orthopedic surgeon licensed in Tennessee. Dr. McInnis first saw the claimant on February 9, 1998, when the claimant complained of pain. He continued to complain of pain in his injured hand when the doctor saw him on other occasions and after tests were ordered. Dr. McInnis continually noticed swelling and tenderness in the hand, but ruled out RSD and prescribed no restrictions.

Robert E. Ivy is an orthopedic surgeon licensed in Tennessee, with a certificate in hand surgery. Dr. Ivy performed an independent examination of the claimant on April 20, 1999 and ruled out RSD and did not assign any permanent impairment.

Richard Theodore Rutherford is a licensed practicing physician in Carthage, who saw the claimant in September 1998, prescribed pain medication and suggested he see a hand surgeon. Dr. Rutherford saw the claimant again the following month and the injured hand was swollen and very tender. He made a preliminary diagnosis of RSD. The claimant's pain, the doctor said, "seemed to be far out of degree to what I was seeing and that's very typical of RSD." Dr. Rutherford referred the claimant to Dr. Thomas Hardy, who confirmed his opinions and findings.

Thomas L. Hardy is a Tennessee licensed physician specializing in pain medicine, who first saw the claimant on April, 28, 1999. He observed that the injured left hand had decreased nail bed profusion, decreased blood flow to the hand, shiny skin on the fingers, coolness and loss of hair and that the hand was hypersensitive to light touch, pinprick and vibration. Stellate ganglion blocks failed to relieve the pain or raise the temperature in the hand. Dr. Hardy diagnosed RSD or complex regional pain syndrome.

John R. Moore is a board certified plastic surgeon, who first saw the claimant on November 11, 1998 and diagnosed RSD. Dr. Moore's testimony established that the condition was causally related to the crush injury at work and that the claimant would be left with a "significant" permanent impairment. His testimony included the following exchange:

Q. Is there any doubt in your mind that there is some permanent impairment to the arm as a whole as opposed to just the hand?

A. No. Based on involvement that I saw of objective symptoms into the forearm, I would say it goes into the arm or upper extremity.

Leon Ensalada is a board certified independent medical examiner. He is also board certified in pain management, pain medicine and forensic medicine. He describes himself as "a nationally recognized expert in the domain of reflex sympathetic dystrophy and complex regional pain syndrome." Dr. Ensalada first saw the claimant on April 13, 1998. The claimant's left hand was swollen and bruised on that occasion and he had no active range of motion in the ring, small and long fingers of that hand, but Dr. Ensalada was able to move them. Grip strength was weak in the left hand and sensation was reduced. He diagnosed left-hand pain and swelling, symptom exaggeration and pain behavior, but, significantly, declined the employer's invitation to say that Mr. Whited was malingering. The doctor opined that the claimant was not permanently impaired.

Rebecca Williams, a certified vocational evaluation specialist and certified rehabilitation counselor, saw the claimant on September 15, 1999 for four hours. Ms. Williams also reviewed the medical records of the several physicians who had treated or evaluated the claimant. She reported that the claimant is unemployable and that his vocational disability is 100 percent.

The claimant testified that his pain involved not only his hand, but his arm, neck and head. The trial judge observed that the claimant's hand was swollen on the day of trial and found him to be a credible witness.

Upon the above summarized evidence, the trial judge found that the claimant suffered an injury by accident arising out of and in the course of employment, resulting in 100 percent permanent partial disability to the arm, and awarded unauthorized medical expenses of $8,313.55 and discretionary costs of $2,933.00. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991). Extent of vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 917 (Tenn. 1999).

Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987), because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173 (Tenn. 1999).

The appellant concedes the claimant suffered a hand injury at work, but contends the proof fails to establish that he developed RSD because Dr. Ensalada, the self-proclaimed nationally

recognized expert in medical evaluations, and other physicians approved by the employer, did not diagnose it. The employer contends the trial court should have ignored the testimony of Drs. Rutherford, Moore and Hardy because they are not nationally recognized experts. Where, as here, the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, 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 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983). We cannot say the trial court abused its discretion by choosing to reject the opinions of the employer's medical experts in favor of the employee's experts. Neither can we say the evidence preponderates against the trial court's finding of the required causal connection, particularly in light of the trial court's finding that the claimant, who testified in person, was a credible witness.

In addition, the employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the pre-existing conditions. Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991).

The appellant next contends the employee's award should be limited to a percentage of the hand rather than the arm. The argument ignores the testimony of the claimant and the above quoted testimony of Dr. Moore. From their testimony, coupled with the persuasive testimony of the vocational expert, we cannot say the evidence preponderates against an award based on 100 percent to the arm.

The appellant next contends the trial court erred in awarding unauthorized medical expenses. When a covered employee suffers an injury by accident arising out of and in the course of his employment, his employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Such care includes medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members and other apparatus, nursing services or psychological services as ordered by the attending physician, dental care, and hospitalization. The only limitation as to the amount of the employer's liability for such care is such charges as prevail for similar treatment in the community where the injured employee resides. Tenn. Code Ann. § 50-6-204(a). The employer is required to designate a group of three or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee has the privilege of selecting the treating physician or operating surgeon. Tenn. Code Ann. § 50-6-204(a)(4).

In the present case, the employer complied with the requirement that it provide a list of three physicians from whom the employee could choose a treating physician. The physicians to whom the employee was referred, however, were unable to diagnose or treat his condition. In such circumstances, we would hold that the employee is justified in engaging a physician of his own choosing. This employee chose Dr. Rutherford, who referred him to Drs. Moore and Hardy. The

trial judge did not err in awarding their fees. The evidence fails to preponderate against the trial court's finding that they were reasonable and necessary.

The appellant finally contends the trial court erred in awarding discretionary costs of $2,933.00, because the employee's injury is not compensable. Having concluded otherwise, we cannot say the trial court abused its discretion by awarding discretionary costs.

For the above reasons, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants.

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JOE C. LOSER, JR., SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon motion fore review filed by the appellant, Wilson Farmers Cooperative, pursuant to Tenn. Code. Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeal 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 motion for review is well-taken and should be denied; 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 are taxed to the appellant, Wilson Farmers Cooperative, and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Birch, J., not participating