IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 26, 2001 Session

BILLY RICHARD KEITH v. CINCINNATI INSURANCE COMPANY, ET AL.

Direct Appeal from the General Sessions Court for Warren County
No. 6810-GSWC Larry Ross, Judge

No. M2000-02955-WC-R3-CV - Mailed - September 6, 2001
Filed - October 9, 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-appellant contends (1) the award of permanent partial disability benefits based on 30 percent to the body as a whole and 20 percent to the leg violates Tenn. Code Ann. §50-6-207(3)(C)[1] and (2) the conditional award of permanent partial disability benefits based on 40 percent to the body as a whole is excessive. As discussed below, the panel has concluded the separate awards to a scheduled member and the body as a whole should be vacated and the conditional award of permanent partial disability benefits based on 40 percent to the body as a whole affirmed.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the General Sessions Court vacated in part, affirmed in part.

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J., and HAMILTON V. GAYDEN, JR., SP. J., joined.

Michael Lee Parsons, Nashville, Tennessee, for the appellant, Carrier Corporation.

William Joseph Butler and Frank D. Farrar, Lafayette, Tennessee, for the appellee, Billy Richard Keith.

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[1] (C) When an employee sustains concurrent injuries resulting in concurrent disabilities, such employee shall receive compensation only for the injury which produced the longest period of disability, but this section shall not affect liability for the concurrent loss of more than one (1) member, for which members' compensations are provided in the specific schedule and in subdivision (4)(B). In all cases the permanent and total loss of the use of a member shall be considered as equivalent to the loss of that member, but in such cases the compensation in and by the schedule provided shall be in lieu of all other compensation.

MEMORANDUM OPINION

At the time of the trial on August 4, 2000, the employee or claimant, Billy Richard Keith, was forty-one years old with an eleventh grade education and experience as a laundry specialist and laborer. On September 2, 1997, while working as a welder for Carrier Corporation, he tripped and fell, injuring his right knee and left shoulder. He was referred to Dr. Rodger J. Zwemer, Jr. for treatment of his knee injury and to Dr. Roderick Andrew Vaughn for treatment of his shoulder injury.

Dr. Zwemer diagnosed a torn anterior cruciate ligament and torn medial meniscus, both of which were surgically repaired. After follow-up care, the doctor estimated the claimant's permanent medical impairment to be 7 percent to the right lower extremity, from the knee injury and consequent surgery. Some permanent restrictions were imposed.

Dr. Vaughn diagnosed rotator cuff syndrome superimposed on preexisting degenerative arthritis, for which he performed both open and arthroscopic surgery. Dr. Vaughn estimated the claimant's permanent medical impairment from the shoulder injury and consequent surgery to be 6 percent to the left upper extremity or 4 percent to the body as a whole and prescribed lifting, pulling and pushing restrictions.

Dr. C. R. Dyer, who did not treat the claimant, estimated his permanent medical impairment from the shoulder injuries to be 21 percent to the left upper extremity. Dr. Dyer also prescribed permanent restrictions.

The claimant's own testimony, corroborated by his wife, was that he is unable to perform any of his former jobs requiring heavy lifting, kneeling and squatting. He has returned to work at Carrier at the same or greater wage, as a small press operator.

Upon the above summarized evidence, the trial court awarded, inter alia, permanent partial disability benefits based on 30 percent to the body as a whole and 20 percent to the right leg or, alternatively, forty percent to the body as a whole. Appellate review of findings 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 the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). 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, because it is the trial court that 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, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). The extent of an injured worker's vocational

disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999).

The appellant's first argument is that the trial court erred in making separate awards to the body as a whole and to a scheduled member, the leg. Where a worker's only injury is to a scheduled member, the worker may receive only the amount of compensation provided by the schedule for permanent disability. See Genesco, Inc. v. Creamer, 584 S.W.2d 191, 193-94 (Tenn. 1979) and its progeny. Such injuries are exclusively controlled by the statutory schedule. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 185 (Tenn. 1999). In all other cases of permanent partial disability, benefits are payable according to the percentage of disability to the body as a whole, which is valued at 400 weeks. Tenn. Code Ann. § 50-6-207(3)(F); See also Kerr v. Magic Chef, 793 S.W.2d 927 (Tenn. 1990)[2]. The shoulder is not a scheduled member. Advo, Inc. v. Phillips, 989 S.W.2d 693, 695 (Tenn. 1998). Neither is an upper extremity. Wells v. Sentry Ins. Co. and Modine Mfg. Co., 834 S.W.2d 935, 937 (Tenn. 1992). Accordingly, the award of permanent partial disability benefits to both the body as a whole and the leg is vacated.

The appellant next argues the alternative award based on 40 percent to the body as a whole is excessive and that the maximum allowable award is one based on two and one-half times Dr. Vaughn's medical impairment rating of 4 percent to the body as a whole for the shoulder injury.[3] For injuries arising after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the 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 award that the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. Tenn. Code Ann. § 50-6-241(a)(1).

The argument fails in the present case, however, because Dr. Vaughn considered only the effect of the injured worker's shoulder injury. Our examination of the record fails to reveal any expert opinion of the claimant's permanent whole body impairment when both injuries are considered. The record does reveal, on the other hand, that the claimant will suffer permanent restrictions and limitations for both injuries.

A medical or anatomic impairment rating is not always indispensable to a trial court's finding

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[2] In an unpublished opinion, King v. Yasuda Fire & Marine Ins. Co., No. 01S01-9802-GS-00039 (Tenn. Sp. Wks. Comp. App. Panel October 19, 1999, motion for a review den'd by Sup. Ct. February 18, 2000), a panel at Nashville affirmed separate awards to the body as a whole and a scheduled member, but did not address the concurrent injury rule set forth in Tenn. Code Ann. §§ 50-6-207(3)(C) and (F) or overturn published opinions construing the sections as prohibiting such separate awards for concurrent injuries.

[3] The only expert medical opinion in the record of an impairment rating to the whole body is Dr. Vaughn's opinion, which is 4 percent, for the shoulder injury. However the parties agreed in their briefs that Dr. Dyer's opinion of 21 percent to the upper extremity translates to 13 percent to the body as a whole, according to AMA Guides.

of a permanent vocational impairment; anatomic impairment is distinct from the ultimate issue of vocational disability; and a medical expert's characterization of a condition as chronic and the placement of permanent medical restrictions is sufficient to prove permanency. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998), citing Hill v. Royal Ins. Co., 937 S.W.2d 873, 876 (Tenn. 1996). We extend that rule to cases such as this one, where there is no medical impairment rating for the combined effect of concurrent injuries.

In this case, the claimant is medically restricted in his ability to kneel, climb, squat and lift. While Mr. Keith has returned to work for the employer, the proof reflects that he is no longer qualified, because of those restrictions, for many jobs he could perform before the injury. Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Id at 208 (Tenn. 1998). From a fair consideration of those elements, to the extent they were established by the proof, and from our independent examination of the record, we are not persuaded the evidence preponderates against an award based on 40 percent permanent partial disability to the body as a whole. The award is consequently affirmed.

Costs are taxed to the appellants.

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JOE C. LOSER, JR.

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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 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 the appellants, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM