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

DAVID PRATER v. MAYFIELD DAIRY FARMS, INC.

Direct Appeal from the Chancery Court for McMinn County
No. 19939 Jerri S. Bryant, Chancellor

No. E2000-03030-WC-R3-CV - Mailed - November 6, 2001
FILED: DECEMBER 11, 2001

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 trial court found the plaintiff 90 percent vocationally disabled. We affirm the judgment of the trial court but find the preponderance of the evidence indicates the plaintiff is entitled to a award of permanent total disability. We modify the judgment accordingly.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J. and ROGER E. THAYER, SP. J., joined.

Bert Bates, Cleveland, Tennessee for the appellant, David Prater.

Kent T. Jones, Chattanooga, Tennessee for the appellee, Mayfield Dairy Farms, Inc.

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

The plaintiff, age forty at the time of trial, is married with two minor children. He has a high

school education and graduated from a two-year vocational program in auto mechanics. His work history consists of work in a service station, in a machine shop, as a local delivery truck driver and in a factory. The plaintiff began working for the defendant sometime in October of 1995. While employed with the defendant, the plaintiff also worked as a part-time police officer for the City of Niota and as a reserve officer for the McMinn County Sheriff's Department.

On December 1, 1998, the plaintiff was nearing the end of his shift and was performing trash detail duties when he injured his back. The plaintiff was lifting 20 to 50 pounds of cardboard boxes at a time and placing them in a baler. He bent over to lift some boxes into the baler, experienced "excruciating pain" and blacked out. He was taken to the hospital by ambulance and kept overnight for treatment. An MRI revealed a ruptured disc, which was subsequently treated with surgery.

After surgery, the plaintiff continued to experience disabling pain in his back and leg. Despite extensive treatment for his work-related injury, the plaintiff has not been able to return to work. A post-surgical MRI revealed inoperable scarring at the surgical site. A Functional Capacity Evaluation was performed on February 23, 1999; it showed the plaintiff capable of performing sedentary work. A later Functional Capacity Evaluation performed by the same examiner showed the plaintiff incapable of even sedentary work as defined by the United States Department of Labor.

The trial court found the plaintiff suffered a work-related injury resulting in a medical impairment of 25 percent to the body as a whole and further found the plaintiff sustained a 90 percent permanent partial disability. We affirm the judgment of the trial court but find the preponderance of the evidence indicates the plaintiff is entitled to a award of permanent total disability. We modify the judgment accordingly.

Medical Evidence

Dr. Robert E. Finelli first saw the plaintiff on December 7, 1998, on referral from the physician who treated the plaintiff's work-related injury at the hospital. Dr. Finelli reviewed the plaintiff's MRI, which showed a very large extruded disc at the L-5, S-1 level on the left side. Dr. Finelli also noted the plaintiff had weakness and a positive straight leg raise. Surgery was recommended, and Dr. Finelli advised the plaintiff about the risk of pain syndrome as a post-surgical complication whenever weakness is present pre-operatively. On December 21, 1998, Dr. Finelli performed a laminectomy and removed a large free fragment of disc material that was compressing the nerve root on the plaintiff's left side. When the plaintiff's condition failed to improve after surgery, Dr. Finelli referred the plaintiff to a pain management specialist.

Dr. Finelli referred the plaintiff for the February 23, 1999, Functional Capacity Evaluation, which showed the plaintiff capable of sedentary work; he then assigned the plaintiff a 12 percent whole body impairment rating. Dr. Finelli stated in his deposition testimony that he traditionally adopts the findings of the Functional Capacity Evaluation. Dr. Finelli last saw the plaintiff in March of 1999. He was no longer treating the plaintiff when the second Functional Capacity Evaluation, which showed the plaintiff incapable of even sedentary work, was performed. Dr. Finelli was made

aware of the pain management specialists' opinions that the plaintiff was fully and permanently disabled; he responded that "you have to defer to their [the pain specialists'] evaluation as to what they feel is a reasonable impairment rating."

Dr. Stephen Lucas, a pain management specialist, diagnosed the plaintiff with severe post-laminectomy syndrome and began conservative treatment with pain medication in hopes that healing would occur. When conservative treatment failed, Dr. Lucas instituted more aggressive treatment that ranged from injections to surgical implantation of a spinal cord stimulator, stopping short of a narcotic infusion pump only because the plaintiff declined such a measure. The plaintiff did not obtain any pain relief from the treatment and began to suffer from depression. Dr. Lucas opined that the plaintiff's depression stemmed from his work-related injury. As to the plaintiff's ability to return to gainful employment, Dr. Lucas stated: "I do not believe that he can return to any kind of gainful employment."

Dr. Browder, a specialist in pain management who also has training in evaluating patients according to the AMA Guidelines, performed an independent medical examination of the plaintiff. He found the plaintiff suffered a 37 percent whole body impairment: 10 percent as a result of the herniated disc, 15 percent as a result of gait disturbance, 8 percent resulting from depression, and 9 percent as a result of sexual dysfunction. As to the plaintiff's ability to return to work, Dr. Browder stated: "within a reasonable degree of medical certainty I don't think he will ever be able to work again."

Dr. Thomas M. Koenig, an orthopedic surgeon, performed an independent medical evaluation of the plaintiff. Dr. Koenig found the plaintiff suffered a 25 percent whole body impairment: 10 percent as a result of the herniated disc and 15 percent as a result of gait disturbance. He indicated that his testing suggested possible symptom magnification or malingering. Dr. Koenig declined to assess an impairment for depression or sexual dysfunction, stating such ratings would require a psychiatrist and a urologist. Dr. Koenig made no statement regarding the plaintiff's ability to work.

Dr. Kenneth Anchor, Ph.D., a licensed clinical psychologist and a vocational disability expert, conducted a vocational and psychological evaluation of the plaintiff. Initially, Dr. Anchor reported the plaintiff 75 to 80 percent vocationally disabled from the entire United States labor market including major metropolitan areas. After receiving and reviewing reports from Drs. Browder and Lucas, Dr. Anchor found the plaintiff to be 100 percent vocationally disabled from the McMinn County labor market. He also noted that the plaintiff would not be very competitive on today's labor market and stated that "unless he were to find a very easy type of part-time job in New York City or Chicago or a [similar] large city . . . there [would not] be much likelihood for [the plaintiff] to succeed." Dr. Anchor stated that in situations involving chronic intractable pain that does not respond to treatment, it is not reasonable for the individual to hold down full-time gainful employment.[1] Finally, Dr. Anchor reported test results that were indicative of a mood disorder

[1] Dr. Anchor testified that the plaintiff's Global Assessment Functioning score was 46, which is considered seriously impaired–most employers will not employ someone whose GAF score is below 70. According to Dr. Anchor,

(major depression recurrent without psychotic features). Dr. Anchor ruled out malingering, symptom magnification, secondary gain, and other manifestations of obstructiveness on the part of the plaintiff.

Discussion

When the medical testimony is presented by deposition, as is the case here, 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). The uncontroverted medical testimony indicates the plaintiff's medical impairment rating for his back injury is 25 percent to the body as a whole. The plaintiff, however, argues the trial court erred in failing to consider the 8 percent rating attributable to his depression.

This Court has recognized two factual situations in which employees may recover workers' compensation benefits for mental disorders. First, recovery is appropriate for a mental injury by accident or occupational disease, standing alone, if the mental disorder is "caused by an identifiable, stressful, work-related event producing a sudden mental stimulus such as fright, shock or excessive unexpected anxiety." *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483 (Tenn. 1997); *Batson v. Cigna Property & Casualty Companies*, 874 S.W.2d 566, 570 (Tenn. 1994). Second, compensation for psychological disorders has been allowed when an employee sustains a compensable work-related injury by accident and thereafter experiences a mental disorder which is caused by the original compensable work-related injury. *Batson*, 874 S.W.2d at 570.

Mental injuries are to be compensated as scheduled injuries. TENN. CODE ANN. § 50-6-207(3)(A)(ii)(ff); *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441 (Tenn. 1999). However, where the injury involves more than one member of the body, one of which is scheduled and the other of which is not scheduled, benefits are allowable on the basis of a percentage of disability to the body as a whole. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996; *Continental Ins. Co. v. Pruitt*, 541 S.W.2d 594, 596 (Tenn. 1976). Such is the case here.

The preponderance of the expert testimony in this case shows the plaintiff suffers from depression stemming from his work related injury. Dr. Lucas, stated the plaintiff suffers from depression. Dr. Browder also opined the plaintiff suffers from depression and assessed an 8 percent whole body impairment rating specifically for depression. Dr. Anchor, a clinical psychologist, stated the plaintiff suffers from depression as a result of the work-related back injury. We therefore find the evidence preponderates in favor of a medical impairment of 33 percent to the body as a whole.

The plaintiff next argues that the evidence preponderates in favor of permanent total disability. Any award of permanent total disability must be in compliance with the statutory definition of total disability contained in Tennessee Code Annotated section 50-6-207(4). The statute defines permanent total disability as follows:

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a score of 46 is below an acceptable level for employers everywhere.

> When an injury not specifically provided for in this chapter as amended, totally incapacitates the employee from working at an occupation which brings him an income, such employee shall be considered "totally disabled," and for such disability compensation shall be paid as provided in subdivision (4)(A) . . . .

TENN. CODE ANN. § 50-6-207(4)(B) (Supp. 1999).

As the statute and case law make clear, the legal definition of permanent total disability does not correlate directly with the meaning of permanent and total medical disability. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). The inquiry must "focus on the employee's ability to return to gainful employment." *Davis v. Reagan*, 951 S.W.2d 766,767 (Tenn. 1997). Accordingly, "[t]he assessment of permanent total disability is based upon numerous factors, including the employee's skills and training, education, age, local job opportunities, and his capacity to work at the kinds of employment available in his disabled condition." *Robertson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Although a rating of anatomical disability by a medical expert is also one of the relevant factors, "the vocational disability is not restricted to the precise estimate of anatomical disability made by a medical witness." *Henson v. City of Lawrenceburg*, 851 S.W.2d 809, 812 (Tenn. 1993)(citation omitted). In this case, as in all workers' compensation cases, the claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

The preponderance of the lay and expert testimony establishes that the plaintiff in this case is unable to work at an occupation that generates income. The plaintiff, who was 40 years of age at the time of trial, has a high school education and training as an auto mechanic. The vocational expert, Dr. Anchor, testified the plaintiff is 100 percent disabled in the local job market. The plaintiff testified he knows of no job he could perform in his disabled condition. The medical and vocational testimony indicates the plaintiff is not qualified to return to even sedentary work. We find the evidence preponderates in favor of permanent total disability.

Benefits for permanent total disability are to be paid by the defendant until the plaintiff reaches the age of sixty-five. TENN. CODE ANN. § 50-6-207(4)(A) (Supp. 1999).

The costs of this appeal are taxed to the defendant.

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JOHN K. BYERS, SENIOR JUDGE

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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 Judgment of the Court.

Costs on appeal are taxed to the defendant, Mayfield Dairy Farms, Inc., for which execution may issue if necessary.

12/11/01