IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
December 18, 2001 Session

LARRY PATTERSON v. PREMIER MEDICAL GROUP, P. C., ET AL.

Direct Appeal from the Circuit Court for Houston County
No. 1258 Allen Wallace, Judge

No. M2001-01380-WC-R3-CV - Mailed - March 26, 2002
Filed - June 3, 2002

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 appellants contend (1) the trial court erred in awarding disability benefits in light of the appellee's refusal to undergo carpal tunnel release surgery, (2) the trial judge erred in admitting into evidence and considering testimony of a vocational expert called by the appellee, and (3) the trial judge erred in awarding permanent total disability benefits for a scheduled injury. As discussed below, the panel has concluded the award of permanent partial disability benefits should be modified to one based on 100 percent to both arms.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JAMES WEATHERFORD, SR. J., joined.

D. Andrew Saulters, Nashville, Tennessee, for the appellants, Premier Medical Group, P. C., and CNA Insurance Company

Stanley A. Davis, Nashville, Tennessee, for the appellee, Larry Patterson

MEMORANDUM OPINION

The employee or claimant, Larry Patterson, is 48 years old with less than an eighth grade education and experience as an unskilled laborer. He has trouble reading and writing. In 1990 he was surgically treated for right carpal tunnel syndrome. When asked what problems, if any, he had with that surgery, he replied, "Well, I had quite a bit of problems with it, because when I first got

home after surgery and stuff, I thought I was going to die with it. You know, I turned sick and was throwing up and everything else and stuff."

At the time of the present injury, he was working as a handyman for the employer, Premier Medical Group. He gradually developed carpal tunnel syndrome. After he sued for workers' compensation benefits, the employer and its insurer offered corrective surgery, which the claimant refused because of his previous experience.

Two board certified orthopedic surgeons, Dr. Steve Salyers and Dr. Walter Wheelhouse, estimated his permanent clinical impairment to be 28 percent to the right and 20 percent to the left arm. A vocational expert, John Tierney, opined the claimant is 100 percent vocationally disabled. Tierney's opinion is based in part on information compiled by an associate, who was unavailable to testify at trial. Another vocational expert, Patsy Bramlett, estimated the claimant's disability to be 27 percent.

Upon the above summarized evidence, the trial court awarded disability benefits payable until age 65 years. 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). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

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 employer and its insurer contend benefits should be denied because of the claimant's refusal to undergo corrective carpal tunnel surgery. 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. Tenn. Code Ann. § 50-6-204(a)(4)(A). The injured employee is required to accept the medical benefits provided by the employer. Tenn. Code Ann. § 50-6-204. If an employee's incapacity to work may be reduced or removed by an operation offered him by the employer, and if such treatment is of a simple character not involving serious suffering or danger to the employee, and if the employee unreasonably refuses such treatment, compensation may be suspended during such refusal, Hughes v. All Weather Insulation Co., 216 Tenn. 722, 394 S.W.2d

638 (1965), but a reasonable refusal to undergo surgery will not result in a suspension or denial of compensation benefits. Mazanec v. Aetna Ins. Co., 491 S.W.2d 616, 617 (Tenn. 1973). The issue here is whether the claimant's refusal to accept carpal tunnel release surgery was reasonable. In determining whether the refusal was reasonable, the trial court should consider the viewpoint of the claimant as well as the physician, for the determination depends upon (1) an objective appraisal of the gravity of the surgery, the risk involved, and the probability of success, and (2) an appraisal of the sincerity of the fears of the surgery expressed by the employee. Id. While there is medical evidence that the chance for successful surgical procedures is high in the claimant's case, the trial court was impressed with the claimant's sincere fear of the procedures, in light of his past experience. So were both physicians, who did not blame him for refusing surgery under the circumstances. From our independent examination of the record, we cannot say the evidence preponderates against the trial court's finding that Mr. Patterson's refusal was reasonable. The first issue is resolved in favor of the appellee.

The appellants next contend the trial court erred in admitting into evidence the opinion of a vocational expert who never met the claimant. No objection was made in the trial court and no authority is cited for the argument before this tribunal. The issue is resolved in favor of the appellee.

Finally, the claimant contends the trial court erred in awarding permanent total disability benefits for an injury to two scheduled members. The medical experts diagnosed bilateral carpal tunnel syndrome and right ulnar neuropathy at the wrist. Our independent examination of the record reveals no medical evidence of an injury to any body member except the two arms.

Compensable disabilities are divided into four separate classifications: (1) temporary total disability, (2) temporary partial disability, (3) permanent partial disability and (4) permanent total disability. Tenn. Code Ann. § 50-6-207. Each class of disability is separate and distinct and separately compensated for by different methods.

The weekly compensation rate for an injured employee's permanent partial disability is an amount equal to sixty-six and two-thirds percent of the employee's average weekly wage for the number of weeks established by a statutory schedule of the various members of the body. Tenn. Code Ann. § 50-6-207(3)(A)(ii). The scheduled members and number of weeks for which disability benefits are payable are as follows:

Thumb, 60 weeks; first, or index, finger, 35 weeks; second finger, 30 weeks; third finger, 20 weeks; fourth finger, 15 weeks.

The first phalange of a thumb or finger is considered equal to one-half of such thumb or finger, and disability benefits are payable accordingly, but if more than one phalange is lost, it is considered as the loss of the whole thumb or finger. If all or part of more than one finger on a hand is lost, benefits may not be payable for a greater period than that allowed for the loss of the hand.

Great toe, 30 weeks; any other toe, 10 weeks.

The first phalange of a toe is treated as one-half of such toe. More than one phalange of a toe is treated as the whole toe.

Hand, 150 weeks; arm, 200 weeks; foot, 125 weeks; leg, 200 weeks.

If an arm is amputated above the wrist joint, or a whole leg above the ankle joint, it is considered a loss of the whole arm or leg.

Eye, 100 weeks; hearing in both ears, 150 weeks; one eye and one leg, 350 weeks; one eye and one arm, 350 weeks; one eye and one hand, 325 weeks; one eye and one foot, 300 weeks; both arms, other than at the shoulder, 400 weeks; both hands, 400 weeks; both legs, 400 weeks; one arm and the other hand, 400 weeks; one hand and one foot, 400 weeks; one leg and one hand, 400 weeks; one arm and one leg, 400 weeks; one arm and one foot, 400 weeks; both eyes, both arms at the shoulder, use of the whole body, use of mental faculties, 400 weeks.

If the injury causes a permanent loss of part but not all of the use of a scheduled member, and if such loss is not specifically provided for in the schedule, benefits are computed by applying the percentage of loss to the total loss benefit contained in the schedule. Where a covered employee suffers permanent disability to both arms, it is proper to determine the claimant's disability to each arm separately, then average those two disabilities to arrive at a single disability for the scheduled injury of "loss of two arms other than at the shoulder," then apply that percentage to 400 weeks. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(w); see also Drennon v. General Electric Company, 897 S.W.2d 243, 247 (Tenn. 1994).

Where a worker's only injury is to a scheduled member, he may receive only the amount of compensation provided by the schedule for his permanent disability. Genesco, Inc. v. Creamer, 584 S.W.2d 191, 193-94 (Tenn. 1979). Such injuries are exclusively controlled by the statutory schedule. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 185 (Tenn. 1999). Although the claimant complains of pain in the neck and shoulder, the medical proof is that his permanent work related injury is to both arms.

When an injury, not otherwise specifically provided for in the Workers' Compensation Act, totally incapacitates a covered employee from working at an occupation which produces an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B). In the case of permanent total disability, a covered injured employee will receive, as disability benefits, sixty-six and two-thirds percent of the wages received at the time of the injury, subject to the maximum weekly benefit and minimum weekly benefit, but not beyond the employee's sixty-fifth birthday, provided, that with respect to disabilities resulting from injuries which occur after age sixty, regardless of the age of the employee, permanent total disability benefits are payable for a period of 260 weeks. Such compensation payments are reduced by the amount of any old age insurance benefit payments attributable to employer contributions which the employee may receive under the Social Security Act, U.S.C., title 42, subchapter II, as amended. Tenn. Code Ann. § 50-6-207(4)(A)(i).

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. McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995). The trial court found from a consideration of the appropriate factors that the claimant was permanently and totally disabled. The evidence does not otherwise preponderate. The award of benefits to age 65, however, overlooks the rule that an injury to both arms is "otherwise specifically provided for in the Act," thus exclusively controlled by the schedule which provides for a maximum of 400 weeks.

For the above reasons, the judgment of the trial court is modified by limiting the payment of permanent disability benefits to a period of 400 weeks, but otherwise affirmed. Costs on appeal are taxed one-half to the appellants and one-half to the appellee.

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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 one-half by the appellants, Premier Medical Group, P.C., et al and one-half to the appellee, Larry Patterson, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM