

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 25, 2007 Session

ROY CLARDY v. TRW COMMERCIAL STEERING DIVISION

**Direct Appeal from the Criminal Court for Wilson County
No. 04-0224 J.O. Bond, Judge**

**No. M2006-01261-WC-R3-WC - Mailed - October 5, 2007
Filed - November 6, 2007**

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 a hearing and a report of findings of fact and conclusions of law. The employee, Roy Clardy, alleged that he had sustained gradual injuries to his right shoulder, right arm and thumb, and left arm. The trial court awarded 22.5% permanent partial disability to the body as a whole for the shoulder injury, 75% permanent partial disability to the right arm and 55% permanent partial disability to the left arm. The employer, TRW Commercial Steering Division (TRW), has appealed that ruling, asserting that the trial court erred by making separate awards, rather than a single award to the body as a whole; that the award is excessive; that the trial court erred in excluding portions of Mr. Clardy's discovery deposition from evidence; and that the trial court did not have jurisdiction over the subject matter. We conclude that a single award should have been made in accordance with the concurrent injury rule and modify the award to 45% permanent partial disability to the body as a whole for the combined injuries. We also hold that the trial court erred in excluding Mr. Clardy's deposition testimony. Finally, we hold that the trial court had jurisdiction over the subject matter of the case.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Criminal Court modified

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J. and RICHARD E. LADD, SP. J., joined.

Richard Lane Moore, Cookeville, Tennessee for the appellant TRW Commercial Steering Division

Debbie C. Holliman and E. Guy Holliman, Carthage, Tennessee and Branden Bellar, Gordonsville, Tennessee for the appellee, Roy Clardy

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Roy Clardy was sixty-two years old at the time of trial. He had completed the twelfth grade and served two years in the armed forces. He began working for TRW shortly after his discharge from the service in 1968, and continued his employment with TRW through the time of trial. From 1968 until approximately 2004, he operated a machine referred to as an “Allons”. This was a large machine used in the manufacture of gears. Repetitive motions of both arms were required to operate it. These machines were replaced in 2004 by machines referred to as “Daewoos”, which were somewhat easier to operate.

On December 3, 2002, Mr. Clardy consulted Dr. Michael Kioschos, an orthopaedic surgeon, with complaints of right shoulder pain and left hand pain and numbness. Dr. Kioschos reached a preliminary diagnosis of left carpal tunnel syndrome and right rotator cuff syndrome. The doctor related both of these conditions to Mr. Clardy’s work activities.

The next day, Mr. Clardy gave notice of the injuries to his employer. An initial report was prepared which refers to “right shoulder strain and possible bilateral carpal tunnel syndrome.”

Mr. Clardy returned to Dr. Kioschos on January 24, 2003. At that time, he was diagnosed as having bilateral carpal tunnel syndrome. Dr. Kioschos recommended carpal tunnel release surgery for the left hand, which was done on March 3, 2003. According to the doctor, Mr. Clardy reported improvement in his symptoms as a result of the surgery. Dr. Kioschos opined that Mr. Clardy retained a 5% impairment to the left upper extremity, and imposed no permanent restrictions on Mr. Clardy’s activities.

Mr. Clardy was referred to Dr. J. Wills Oglesby for treatment of his right shoulder. He first saw Dr. Oglesby on June 21, 2004. Dr. Oglesby’s initial impression was rotator cuff disease and degeneration of the right acromioclavicular joint as a result of repetitive use in the workplace. He ordered an MRI study, which confirmed the diagnosis. Arthroscopic surgery was performed on July 29, 2004 to repair these problems. Dr. Oglesby testified that Mr. Clardy retained an impairment of 9% to the body as a whole as a result of his right shoulder injury. He placed no permanent restrictions upon his activities.

Mr. Clardy was referred to Dr. Paul Abbey for treatment of his right arm. He first saw Dr. Abbey on August 16, 2004, and was diagnosed with instability of the carpal metacarpal joint of the right thumb, and right carpal tunnel syndrome. Over the next ten months, Dr. Abbey treated Mr. Clardy conservatively for these problems. At the request of TRW, he performed a comprehensive evaluation of Mr. Clardy’s upper extremities in January 2006. Dr. Abbey assigned impairments of 4% to the left upper extremity for carpal tunnel syndrome, and 11% to the right upper extremity for carpal tunnel syndrome and instability of the thumb. Dr. Abbey testified that these impairments, combined with the 9% impairment assigned by Dr. Oglesby for the right shoulder injury, converted

to a “whole body” impairment of 17%. Dr. Abbey did not assign any permanent restrictions. Dr. Abbey testified by deposition.

Dr. Robert Landsberg conducted an independent medical evaluation at the request of Mr. Clardy’s attorney. His deposition was placed into evidence. He assigned impairments of 9% to the body as a whole for the right shoulder injury; 13% to the left upper extremity for diminished grip strength, and diminished range of motion of the wrist and thumb; and 18% to the right upper extremity for diminished grip strength, and diminished range of motion of the wrist and thumb. These impairments combine to result in an impairment of 25% to the body as a whole. Dr. Landsberg proposed restrictions “if [Mr. Clardy] were to change jobs” of: no overhead lifting of more than five pounds; no lifting of more than fifteen pounds with the right arm outstretched; no lifting of more than twenty-five pounds with the right elbow tucked in at the side; no repetitive use of vibratory tools; and to avoid excessive or repetitive pinching or squeezing.

Dr. Landsberg explained that he used Mr. Clardy’s grip strength as a means of determining impairment in this manner: “Considering his multiple problems and the significantly decreased grip strength, I feel that this would be one of the rare instances where I would use grip strength as a reliable measure of his impairment.”

Dr. Abbey was critical of Landsberg’s use of grip strength in this case. He believed the use of grip strength in assessing Mr. Clardy’s impairment conflicted with the AMA Guides, and that the case was not sufficiently rare or unusual to justify a deviation from the Guides.

TRW also presented the deposition of Dr. James Talmage, offering him as an expert in the interpretation of the *American Medical Association Guides for the Evaluation of Permanent Impairment, Fifth Edition* (AMA Guides). Dr. Talmage participated in writing and reviewing the AMA Guides, and is an editor of two publications concerning the use of the Guides, the *AMA Guides Case Book, Second Edition*, and the *AMA Guides Newsletter*. He also was selected by the State of Tennessee Department of Labor to teach physicians how to use the Guides in order for them to be placed on the State’s Medical Impairment Rating Registry. Dr. Talmage testified that Dr. Landsberg’s use of grip strength as a measure of impairment in this case was not appropriate under the Guides.¹ According to Dr. Talmage, the pain in the left thumb and hand, pain in the right thumb and wrist and decreased range of motion in the wrists and thumbs limit performance of grip strength tests and

¹Dr. Talmage read from page 507 of the AMA Guides: “If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with other impairments only if based on unrelated etiologic or pathomechanical causes. Otherwise, the impairment ratings based on objective, anatomic findings take precedence. Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts that prevent effective application of maximal force in the region being evaluated.”

indicate they should not be used.² Dr. Talmage also testified that it would be inappropriate under the AMA Guides to combine an impairment rating for loss of grip strength and an impairment rating for loss of range of motion as Dr. Landsberg did.

Mr. Clardy missed work for two periods of time: March 3, 2003 to March 11, 2003 and July 29, 2004 to September 1, 2004. He returned to work in the same position, operating the same machines as before. He did not request, nor did TRW provide, any special accommodations to allow him to do his job. However, his son, who worked nearby, did assist Mr. Clardy occasionally with three specified tasks which occurred on an irregular basis. Mr. Clardy testified that these tasks took a few minutes each day. According to his own testimony, and payroll records, Mr. Clardy averaged forty-seven hours of work per week from September 2004 until the date of trial. Mr. Clardy testified that he was able to do his job, and was able to engage in most of the same activities of daily living as before, although some activities caused pain. He had no plans to retire.

The trial court ruled that Mr. Clardy's shoulder and arm injuries should receive separate awards. It awarded 22.5% permanent partial disability to the body as a whole for the shoulder injury, 75% permanent partial disability to the right arm for the carpal tunnel and thumb injuries, and 55% permanent partial disability to the left arm for carpal tunnel and thumb injuries.

II. ISSUES PRESENTED FOR REVIEW

TRW has appealed the ruling of the trial court and raises four issues:

- (1) Whether the trial court erred by making three separate awards, rather than a single "body as a whole" award, under the concurrent injury rule.
- (2) Whether the award, a combined total of 87.5% permanent partial disability to the body as a whole, was excessive.
- (3) Whether the trial court erred by excluding excerpts from Mr. Clardy's discovery deposition from evidence.
- (4) Whether the trial court had jurisdiction over the subject matter.

III. SCOPE OF REVIEW

The standard of review of issues 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 evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had

²According to Dr. Talmage, the loss of range of motion in the thumbs would minimally effect grip strength testing.

the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

IV. ANALYSIS

1. Concurrent Injuries

TRW contends that Tennessee Code Annotated section 50-6-207(3)(C)(Supp. 2002) applies to the injuries in this case, and the trial court should have made a single "body as a whole" award for those injuries. That award would be subject to the 2.5 multiplier "cap" applicable to whole body injuries occurring prior to July 1, 2004 pursuant to Tennessee Code Annotated section 50-6-241(a)(1)(1999).

Section 50-6-207(3)(C) provides in pertinent part: "When an employee sustains concurrent injuries resulting in concurrent disabilities, such employee shall receive compensation only for the injury that produced the longest period of disability. . . ." In Crump v. B & P Const. Co., 703 S.W.2d 140 (Tenn. 1986), the employee fractured his wrist as a result of a fall. He subsequently developed depression as a result of chronic pain and anxiety. The trial court made separate awards: 50% permanent partial disability to the arm as a result of the wrist injury, and 35% permanent partial disability to the body as a whole for the psychiatric condition. The Supreme Court held that a single award should have been made, stating:

It is our opinion that the trial judge should have taken the permanent disability attributed to the arm and applied it to the body as a whole, in conjunction with the disability caused by plaintiff's psychiatric condition.

The "concurrent injuries" in this case resulted in "concurrent disabilities." The word "concurrent" conveys the meaning of multiple injuries and multiple disabilities, acting in conjunction with each other and resulting in permanent disabilities to a scheduled member or to the body as a whole.

703 S.W.2d at 143.(citation omitted).

More recently, in Reagan v. Transcontinental Ins. Co., No. M2006-00009-WC-R3-CV, 2006 WL 3804402 (Tenn. Workers' Comp Panel July 25, 2006), a trial court made separate awards for a gradually occurring shoulder injury and carpal tunnel syndrome. The Workers' Compensation

Appeals Panel reversed on this issue, holding that section 50-6-307(3)(C) required a single “body as a whole” award encompassing both gradual injuries.

TRW’s position is supported by the language of the complaint, which does not distinguish or separate the shoulder and arm injuries or their causes.³ In addition, the parties presented the trial court with a list of stipulations prior to trial. These included a stipulation that the injury date for these injuries was December 4, 2002. The pleadings and proof are both to the effect that these gradual injuries were caused by the same activity, conducted over the same period, and manifested themselves at more or less the same time.

Mr. Clardy takes the position the single complaint and stipulation were done for the convenience of the trial court. Mr. Clardy also asserts at several points in his brief that the three injuries at issue are “separate and distinct”, but does not provide either an evidentiary or legal basis for the assertion.

We conclude that the concurrent injury rule applies in this case. The trial court should have made a single award of permanent partial disability benefits apportioned to the body as a whole, covering all of Mr. Clardy’s injuries. It is undisputed that Mr. Clardy returned to work for TRW at a wage equal to or greater than his pre-injury wage. As a result, the award of permanent partial disability benefits is subject to the limitation contained in Tennessee Code Annotated section 50-6-241(a)(1).

2. Extent of Permanent Disability

TRW contends that the award is excessive, relying on two arguments. The first of these is that, the trial court erred by accepting Dr. Landsberg’s impairment ratings for Mr. Clardy’s carpal tunnel syndrome, because those ratings were based upon grip strength measurements. TRW’s second contention is that the award was excessive in light of the fact that Mr. Clardy has continued to work at the same job, without accommodations, for over a year since his recovery from his various surgeries. Because the “cap” contained in section 50-6-241(a)(1) is applicable, the maximum award using Dr. Landsberg’s impairment rating is 62.5% permanent partial disability to the body as a whole. The maximum award based upon Dr. Abbey’s impairment rating is 42.5% to the body as a whole.

As outlined above, Dr. Landsberg based his impairment rating for Mr. Clardy’s carpal tunnel syndrome on grip strength measurements. TRW contends that this approach is not permitted by the AMA Guides. Drs. Landsberg, Abbey and Talmage all expressed opinions on the subject. In its bench ruling, the trial court specifically ruled that Dr. Landsberg’s method was proper. All three doctors testified by deposition. We are, therefore, able to draw our own conclusions regarding the weight to be given to that testimony. Bohan, supra; Krick, supra; Elmore, supra. Differences of

³Paragraph 2 of the Complaint states: “[Mr. Clardy] was performing his job and while doing so, suffered cumulative injuries to his right shoulder...right arm...and left arm...”

opinion between physicians concerning anatomical impairment are subject to the same type of review as other fact questions involving expert witnesses. Crow v. Batesville Casket Co., Inc., No. M2005-2627-WC-R3-CV, 2007 WL 171802 (Tenn. Workers' Comp. Panel January 23, 2007).

The AMA Guides provide that “[d]ecreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (e.g. thumb amputation) that prevent effective application of maximal force in the region being evaluated.” AMA Guides, p. 507 (Emphasis in original). It was not disputed that Mr. Clardy had decreased motion and pain in his hands. Additionally, all three doctors agreed that the AMA Guides permit the use of grip strength to assess impairment for carpal tunnel syndrome only in unusual circumstances. Having reviewed all of the medical evidence and lay testimony concerning Mr. Clardy’s carpal tunnel syndrome, we are not persuaded that the facts of this case are particularly unusual or exceptional. Dr. Landsberg testified that if he had not used grip strength in assessing Mr. Clardy’s impairment for carpal tunnel syndrome, he would have arrived at an impairment of 18% to the body as a whole for the injuries sustained by him. The impairment ratings from his treating physicians, Dr. Abbey and Dr. Oglesby, combine to equal 17%. After carefully reviewing the depositions of these physicians, we find Mr. Clardy sustained an impairment of 18% to the body as a result of his injuries. Considering that anatomical impairment along with Mr. Clardy’s age, education, prior work history and his job performance subsequent to his return to work, we find that Mr. Clardy has sustained a permanent partial disability of 45% to the body as a whole.

3. Exclusion of Deposition Testimony

As part of its proof at trial, TRW sought to read portions of Mr. Clardy’s discovery deposition into evidence. Mr. Clardy objected, arguing that the deposition was inadmissible hearsay, and could only be used for cross-examination. The trial court sustained the objection, but permitted an offer of proof. Rule 32.01(2) of the Tennessee Rules of Civil Procedure states in pertinent part: “The deposition of a party...may be used by an adverse party for any purpose.” This language is not ambiguous. The trial court’s ruling directly conflicts with Rule 32.01(2), and was erroneous. While Mr. Clardy’s testimony at trial covered the same subject matter in the deposition excerpts, and was generally consistent with his deposition testimony, some of the excluded evidence may have affected the outcome of the trial. For example, in the deposition, Mr. Clardy testified that the problems with his wrists, hands and right shoulder all occurred about the same time and that he reported all three injuries together. At trial, Mr. Clardy denied reporting the three injuries at the same time and testified he did not recall his deposition testimony. Our conclusion that these were concurrent injuries renders the trial court’s error harmless. A previous panel of this Court addressed the identical issue, and reached the same conclusion, in a case which arose in the same trial court. See, Shoulders v. TRW Commercial Steering Div., No. M2006-00300-WC-R3-CV, 2007 WL 1096887 (Tenn. Workers’ Comp. Panel April 3, 2007).

4. Subject Matter Jurisdiction

This case was filed and heard in the Criminal Court of Wilson County. The 2004 amendments to the workers' compensation statute removed the jurisdiction of criminal courts over workers' compensation cases. The change was made by amending Tennessee Code Annotated section 50-6-225(a). This was done in section 16 of Chapter 962, 2004 Public Acts. Section 51 of the same act states that Section 16 "shall apply to accidents or injuries occurring on or after January 1, 2005." The parties stipulated that the date of injury was December 4, 2002. Therefore, the trial court had jurisdiction over the subject matter of this case according to the plain language of the statute.

V. CONCLUSION

The judgment of the trial court is modified to a single award of 45% permanent partial disability to the body as a whole. Costs of this appeal are assessed one-half to TRW and one-half Roy Clardy, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JUNE 25, 2007 SESSION

ROY CLARDY v. TRW COMMERCIAL STEERING DIVISION

**Criminal Court for Wilson County
No. 04-0224**

No. M2006-01261-WC-R3-WC - Filed - November 6, 2007

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 appeals 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 assessed one-half to TRW and one-half to Roy Clardy, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM