IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 23, 2009 Session

PAUL HAGY v. RANDSTAD STAFFING SERVICES, L.P. ET AL.

Direct Appeal from the Circuit Court for Williamson County
No. II-01500 Robbie T. Beal, Judge

No. M2009-00960-WC-R3-WC - Mailed - January 20, 2010
Filed - February 22, 2010

The employee filed a workers' compensation claim for neck and lower back injuries sustained while setting up a conference room during a temporary job assignment. The trial court found that both injuries were work-related, assigned a six percent impairment to the neck and a five percent impairment to the back, and applied a multiplier of 2.5. Both the employee and the employer filed appeals, which have been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3). The judgment of the trial court is affirmed.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Trial Court Affirmed

GARY R. WADE, J., delivered the opinion of the court, in which JON KERRY BLACKWOOD and WALTER C. KURTZ, SR. JJ., joined.

Donald Andrew Saulters, Nashville, Tennessee, for the appellant, Paul Hagy.

Cole B. Stinson, Knoxville, Tennessee, for the appellees, Randstad Staffing Services, L.P. and Ward North America, Inc.

MEMORANDUM OPINION

Facts and Procedural Background

Paul Hagy (the "Employee"), who was thirty-nine years old at the time of trial, received a bachelor's degree in music from the University of North Texas in 1994. After graduation, he worked primarily as a session and touring musician in the Nashville area, but supplemented his income through temporary employment agencies. Randstad Staffing Services, L.P. (the "Employer"), provided the Employee with intermittent work over the

course of four years. The majority of the assignments involved manual labor.

On August 24, 1999, the Employee was assigned by the Employer to a job at the Southern Baptist Convention in Brentwood. During the course of setting up a conference room at the convention, the Employee sustained injuries to his neck and lower back. The Employee experienced the neck and back pain simultaneously, but the pain in his neck was initially more pronounced. After reporting the injury to the Employer, he was referred to Dr. Thomas J. O'Brien, an orthopedic physician, for treatment.

At trial, the Employee testified that he first saw Dr. O'Brien some ten days after the injuries. He recalled complaining that he was suffering from pain in his neck and back, but noticed that the doctor "seemed very busy and rushed" during this initial appointment. While the patient history form completed by the Employee included "neck, shoulder, and back pain" as the reasons for the visit, Dr. O'Brien's medical records, including the C-32 form, made no reference to any complaints about lower back symptoms.

Dr. O'Brien ordered an MRI scan, and upon reviewing the results, discovered that the Employee had suffered a C5-6 right paracentral (cervical) disc herniation. He prescribed medication and an exercise program, and while the possibility of surgery was discussed, he understood that the Employee sought to avoid that if possible. Dr. O'Brien released the Employee from his care on February 28, 2000, nearly six months after initiating treatment. He assigned a five percent permanent anatomical impairment to the body as a whole for the neck injury, using the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment ("AMA Guides"). On August 21, 2000, however, the Employee returned to Dr. O'Brien, complaining of lower back and leg pain. Dr. O'Brien made a diagnosis of lumbar radiculopathy, but opined that it was "not related to the work incident and [wa]s a separate condition."

Because the Employee was unhappy with Dr. O'Brien's care, he sought treatment from Dr. Paul Thomas at the Bone and Joint Clinic in Franklin. On July 19, 2001, the Employee filled out a patient interview form, listing neck, back, arm, and leg pain as reasons for the visit. When Dr. Thomas confirmed the herniated disc at C5-6 and also diagnosed lumbar degenerative disc disease, he referred the Employee to Dr. Michael McNamara. Several days later, Dr. McNamara examined the Employee and found a decreased range of motion in the lumbar spine and neck. During his next office visit on October 28, 2002, the Employee complained of "neck and shoulder discomfort, low back tightness, pain and spasms." Dr. McNamara recommended physical therapy for the degenerative disc disease of the lumbar spine. The Employee testified that he received therapy in December of 2002, but stated that the Employer declined to pay for it. In April of 2005, Dr. McNamara again prescribed physical therapy for the back and neck pain. While undergoing therapy during the

spring and summer of 2005, the Employee identified back, leg, neck, and arm symptoms as the reasons for his treatment. The Employer agreed to pay for the 2005 therapy.

Dr. McNamara, who testified by deposition, expressed the view that both the neck and lower back injuries were causally connected to the work-related incident in August of 1999. Using the Fifth Edition of the AMA Guides, he assigned five percent permanent anatomical impairment ratings for both the neck and lower back injuries. When asked what "objectively qualified" the Employee for this impairment rating, Dr. McNamara replied, "Continued pain. Just subjective complaints of pain. There's not a great deal of objective findings." When pressed for further information, however, Dr. McNamara articulated criteria in the AMA Guides that warranted the five percent impairment rating, namely, "significant muscle spasm at the time of examination, loss of range of motion, nonverifiable radicular complaints, no objective findings, no alteration of structural integrity, and no significant radiculopathy." He admitted that his impairment rating was based upon his last examination of the Employee in 2005, and further commented, "If you're rating him based on the office notes up to '05, the answer is he can carry a 5 percent rating. If you're rating him now, he may not. It's . . . possible he does not. . . . I have not seen him for . . . over three years now."

On January 26, 2007, Dr. David Gaw conducted an Independent Medical Exam ("IME") at the request of the Employee's attorney. In a deposition taken for proof, Dr. Gaw concluded that both the cervical and lumbar conditions were caused or aggravated by the Employee's work injuries, attributing the lower back problems to the degenerative lumbar disc disease. Pursuant to the Fifth Edition of the AMA Guides, Dr. Gaw assigned a seven percent permanent impairment to the body as a whole for the neck injury. He found "*no* evidence of *permanent physical impairment*," however, to the lumbar spine. Dr. Gaw explained that the Employee exhibited good movement of the lower back and did not have any muscle spasms or radicular complaints. When asked by the Employee's counsel whether there was a reasonable basis for Dr. McNamara's assessment of a five percent impairment rating for the lumbar spine, he answered in the affirmative, agreeing that "certainly it's a judgment call of whether to place a person in Category 1 or 2."[1] Dr. Gaw also agreed that symptoms warranting a five percent impairment rating, such as radicular complaints and muscle spasms, "can wax and wane," and that it was possible to exhibit such symptoms during one physical exam and not another.

The Employee testified that prior to his injuries, the Employer regularly telephoned him when jobs were available. He stated that the calls stopped after he reported the incident

[1] "Category 1 or 2" refers to Table 15-3 of the AMA Guides, which is used to assess impairment ratings for lumbar spine injuries. Category I corresponds to an impairment rating of zero percent, while Category II corresponds to an impairment rating of between five and eight percent.

in Brentwood. He further testified that he telephoned the Employer six or seven times following the injuries to inquire about the availability of work, but that each time the response was that "they didn't have anything for me." The Employee then sought work through another temporary agency, Kelly Services, but his initial assignment required lifting heavy boxes, which he was unable to do. He stated that he had missed out on opportunities to earn income through temporary jobs because of his injuries. He claimed that he had made several efforts to find full-time employment outside the music industry, had attended career transition seminars, had networked with friends via the internet, and yet had been unsuccessful in his efforts to find work outside of the music industry. The Employee testified that since the injuries, his income had been derived solely from his work as a guitarist. He also asserted that his neck and back injuries had even affected his career in music, explaining that "[s]tanding and sitting, as I normally do with the music stuff, aggravates my neck and back. Having a guitar strapped around my neck or sitting in the studio, you know, having to reach over [to] alter my equipment, makes my neck tighten up or my low back sore. That eventually goes down into my arms, and I get numbness in my fingers." He complained that when he was engaged in studio work, he was frequently unable to transport his equipment, often having to pay someone else to do so. The Employee further testified that the injury had negatively affected his level of activities in his day-to-day life. He stated that he woke up with soreness and stiffness in his neck and was sometimes affected by "stabbing pains in the middle of my back," which in turn resulted in pain to his arms and numbness in his fingers. He testified that he regularly woke up during the night with "burning pain" in his legs, had difficultly in walking or standing for long periods of time, and was limited to five minutes in "[s]omething as simple as walking in the mall with my wife."

The Employee's wife, Missy Hagy, corroborated the Employee's claims, recalling that while the couple used to work out frequently together, this was no longer possible because of his injuries. She stated that his injuries also affected "simple things like going on vacation, walking around the park, or walking around the mall," requiring him to stop and rest because of back pain. She further contended that the Employee was no longer able to engage in other activities, such as playing basketball or helping with certain household chores.

The trial court first concluded that the neck injury, which the parties agree was work-related, warranted an anatomical impairment rating of six percent. After determining that the lower back injury was reported to Dr. O'Brien at the same time as the neck injury, the trial court awarded a five percent anatomical impairment rating for that injury, specifically accrediting the Employee's testimony as to the causal connection of the lower back injury to the employment. The trial court also observed that the depositions of Dr. McNamara and Dr. Gaw corroborated the testimony of the Employee in that regard.

Although concluding that the Employee did not have a meaningful return to work because he "was not allowed to return to work by the Employer at his pre-injury wage," the trial judge applied a 2.5 multiplier, explaining, "I just don't see the vocational disability being severe enough to go beyond that amount." The ultimate award, therefore, was 15 percent vocational disability for the neck injury and 12.5 percent vocational disability for the lower back injury. The combination of the award for the cervical spine and lumbar injuries totaled $17,715.50.

Both the Employee and Employer appealed. The Employee argues that the trial court erred by capping the multiplier at 2.5 rather than the maximum of 6, which is available under Tennessee Code Annotated section 50-6-241(b) (2008 & Supp. 2009) upon a finding that the Employee did not have a meaningful return to work. The Employer argues that the trial court erred by finding a five percent impairment rating for the lower back injury because (1) Dr. McNamara failed to follow the protocol provided by the AMA Guides; (2) the Employee's independent medical examiner, Dr. Gaw, testified that there was no permanent impairment to the lower back; and (3) the support for the impairment rating was based upon lay testimony.

Standard of Review

In Tennessee workers' compensation cases, review of a trial court's findings of fact is de novo, accompanied by a presumption of correctness of the finding, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). "This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions." Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991) (citing Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 675 (Tenn. 1991)). When the trial court has seen and heard in-court testimony, we must give considerable deference to its factual findings as to credibility or its assessment as to the weight to be given to that testimony. Trosper v. Armstrong Wood Prods., 273 S.W.3d 598, 604 (Tenn. 2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). The same deference need not be afforded findings based upon documentary evidence, such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). On questions of law, our standard of review is de novo with no presumption of correctness. Wilhelm, 235 S.W.3d at 126 (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)). "Although workers' compensation law must be construed liberally in favor of an injured employee, it is the employee's burden to prove causation by a preponderance of the evidence." Crew v. First Source Furniture Group, 259 S.W.3d 656, 664 (Tenn. 2008).

Analysis

I. Application of 2.5 Multiplier

The Employee first contends that the trial court erroneously capped his award at 2.5

times the impairment rating even after explicitly finding that he did not have a meaningful return to work. He argues that the trial court incorrectly applied Tennessee Code Annotated section 50-6-241(a), rather than section 50-6-241(b), and insists that if an employee does not have a meaningful return to work, then the larger cap in section 50-6-241(b) applies. Further, the Employee asserts that the award of 2.5 times the impairment rating was inconsistent with the proof at trial.

For most injuries occurring on or after August 1, 1999, and prior to July 1, 2004, "where an injured employee is eligible to receive any permanent partial disability benefits . . . and the pre-injury employer returns the employee at a wage equal to or greater than the wage the employee was receiving at the time of injury," the maximum benefits are capped at 2.5 times the medical impairment rating. Tenn. Code Ann. § 50-6-241(a)(1). Tennessee courts use the concept of a "meaningful return to work" in order to determine whether the statutory cap on benefits should apply. Tryon v. Saturn Corp., 254 S.W.3d 321, 328 (Tenn. 2008). The inquiry into whether an employee has had a meaningful return to work after his or her injury involves an assessment as to "the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work." Id. In cases where there is no meaningful return to work, "the maximum permanent partial disability award that the employee may receive is six (6) times the medical impairment rating." Tenn. Code Ann. § 50-6-241(b) (emphasis added).

In determining whether to apply a multiplier to a permanent partial disability award under either section 50-6-241(a) or section 50-6-241(b), a court "shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(a)(1), (b). The statute unambiguously affords trial courts a wide latitude of discretion in determining the appropriate multiplier. Our charge is to apply the statute according to its plain meaning. Overstreet v. TRW Commercial Steering Div., 256 S.W.3d 626, 630 (Tenn. 2008) (quoting Eastman Chem. Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004) (internal quotations omitted)). Because the statute is permissive, rather than mandatory, a trial court's determination that an employee did not have a meaningful return to work does not mandate that it apply the larger cap in section 50-6-241(b), or even use any multiplier at all.

The Employee first contends that the trial court erroneously applied Tennessee Code Annotated section 50-6-241(a) instead of 50-6-241(b). There is simply no support for this argument in the record. The trial court made a specific finding in its order that the Employee "was not allowed to return to work by the employer at his pre-injury wage and therefore [the] award is not capped at two and one-half times the respective impairment ratings." While properly observing that it was "not confined to the 2.5 cap" and had the authority to use a

multiplier "up to six," the trial court nevertheless concluded that the facts of the case warranted the application of a multiplier of 2.5.

The Employee also contends that the evidence adduced at trial does not support the trial court's limitation of the award to a 2.5 multiplier. As evidenced by the transcript, however, the trial court carefully weighed a number of the factors set forth in Tennessee Code Annotated section 50-6-241(b) in determining the appropriate multiplier to apply to the Employee's impairment rating. While acknowledging that the Employee was unable to engage in the same type of temporary work as he had before the injury, the trial court pointed out that the Employee possessed a college degree, which inferentially added value to his marketability. Further, the trial court observed that the Employee's primary occupation both before and after the injury was as a musician, and that the nature of his injury was such that he still had other avenues of employment available. The trial judge compared the Employee's situation to a "clear-cut case" in which the maximum multiplier of six would likely apply, such as "somebody that works for General Motors or Saturn . . . for 20 years, high school degree, . . . injured on the job and can no longer perform their job," concluding the Employee's vocational disability to be less severe. Because, the trial court conscientiously considered and applied the factors found in Tennessee Code Annotated section 50-6-241(b) in determining that the multiplier should not exceed 2.5 times the impairment ratings for the neck and back injuries, the limitation of the award to two and one-half times the anatomical impairment rating, in our view, was not erroneous.

II. Application of Impairment Rating to Back Injury

The Employer argues that the preponderance of medical proof supports a finding of zero impairment as to the lumbar spine injury for the following reasons: (1) Dr. McNamara's impairment rating failed to correctly adhere to the AMA Guides; (2) Dr. Gaw's examination, which was more recent in time, found no basis for a five percent permanent impairment rating; and (3) lay testimony should not have been used in determining the impairment rating.

Dr. McNamara assessed a five percent disability rating to the Employee's lumbar spine injury. Dr. Gaw found none. "When there is conflicting medical testimony, the trial judge must choose which view to accredit." Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 644 (Tenn. 2008). When weighing conflicting medical testimony, trial courts should 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, 803 S.W.2d at 676. Because all of the medical proof in this case was taken by deposition, "we may make our own assessment of the evidence to determine where the preponderance of the evidence lies." Cloyd, 274 S.W.3d at 644.

The Employer first asserts that Dr. McNamara did not follow the protocol of the AMA Guides because he failed to elucidate "objective" criteria in support of five percent impairment rating he assigned to the back injury. The applicable provision of the workers' compensation statute states that in cases covered by the AMA Guides, "a physician . . . who is permitted to give expert testimony in a Tennessee court of law and who has provided medical treatment to an employee or who has examined or evaluated an employee seeking workers' compensation benefits shall utilize" them. Tenn. Code Ann. § 50-6-204(d)(3)(A) (2008 & Supp. 2009).

During his deposition, Dr. McNamara was initially unable to remember whether a five percent impairment rating fell under Diagnosis Related Estimate ("DRE") Category I or II, because he did not have a copy of the AMA Guides before him to reference. He did, however, identify objective criteria exhibited by the Employee during his last office visit, including muscle spasm and loss of range of motion. Moreover, the AMA Guides do not require a doctor to rely solely upon objective findings in determining the impairment rating. To the contrary, Table 15-3 of the AMA Guides includes the following as findings that a doctor may use in rating a lumbar spine injury: "nonverifiable radicular complaints, defined as complaints of radicular pain without objective findings; no alteration of structural integrity and no significant radiculopathy." AMA Guides (5th ed.), Table 15-3 (emphasis added). Dr. McNamara relied upon these criteria in his assessment of the injury. The record demonstrates that Dr. McNamara utilized and complied with the AMA Guides; "[n]othing more is required by our workers' compensation law." See Stewart v. Kenco Group, Inc., No. E2008-00167-WC-R3-WC, 2009 WL 348523, at *4 (Tenn. Workers Comp. Panel Feb. 12, 2009) (finding that, despite unfamiliarity with AMA Guidelines and initial hesitance to quantify employee's impairment rating, doctor adequately complied with the AMA Guides as required by statute).

The Employer next argues that the trial court erred by not accrediting Dr. Gaw's impairment rating of zero for the back injury, because his examination was more recent in time than Dr. McNamara's examination. In determining whether the evidence preponderates against the trial court's finding, we look to the Orman factors for guidance. The main distinction between the conflicting impairment ratings in this case appears to be the timing of the two doctors' evaluations, which would implicate the second Orman factor – the circumstances surrounding the doctors' respective evaluations. Orman, 803 S.W.2d at 676.

Although Dr. Gaw's examination of the Employee in January of 2007 was indeed more recent in time than Dr. McNamara's assessment some twenty-one months earlier, the timing of Dr. Gaw's examination is not dispositive, and a number of other circumstances weigh in favor of accepting Dr. McNamara's rating. Dr. McNamara was the Employee's treating physician for the lower back injury from 2001 to 2005, whereas Dr. Gaw examined

the Employee only once. Moreover, Dr. Gaw acknowledged in his deposition that there was a "reasonable basis" for Dr. McNamara's assessment of a five percent impairment rating to the lumbar spine. He further conceded that the decision to choose a DRE Category I or II was a "judgment call," admitting that the loss of motion and radicular pain observed by Dr. McNamara at the time he last treated the Employee were symptoms that could "wax and wane." Based upon these circumstances, we cannot say that the trial court erred in choosing Dr. McNamara's impairment rating of five percent over Dr. Gaw's rating of zero.

Finally, the Employer claims that the Employee's credibility as a witness is "irrelevant" to the determination of the extent of his disability. This argument is without merit. Both the Employee and his wife testified as to the extent of his injuries and the limitation on his activities, both at work and otherwise. It is well-established that consideration of lay testimony in the determination of causation or the limitations in physical ability is entirely appropriate. See, e.g., Trosper, 273 S.W.3d at 604; Glisson, 185 S.W.3d at 354.

While reasonable minds could differ as to the choice of the impairment rating for the Employee's lower back injury, the evidence does not preponderate against the trial court's finding of five percent. Our "workers' compensation law must be construed liberally in favor of an injured employee." Crew, 259 S.W.3d at 664. The trial court acted within its discretionary authority by awarding permanent disability for the lumbar spine injury.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed one-half to the Employee, Paul Hagy, and one-half to the Employer, Randstad Staffing Services, L.P., for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

PAUL HAGY v. RANDSTAD STAFFING SERVICES, L.P.

Circuit Court for Williamson County
No. II-01500

No. M2009-00960-WC-R3-WC - February 22, 2010

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 taxed one-half to the Employee, Paul Hagy, and one-half to the Employer, Randstad Staffing Services, L.P., for which execution may issue if necessary.

PER CURIAM