IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, JUNE 1998 SESSION

SCOTT M. SHULTZ	)	HAMBLEN CIRCUIT
	)	
Plaintiff/Appellee	)	
	)	
V.	)	Hon. Kendall Lawson,
	)	Circuit Judge
BANEBERRY GOLF COURSE and	)	
UNITED STATES FIDELITY &	)	
GUARANTY COMPANY	)	
	)	
Defendants/Appellants	)	No. 03S01-9707-CV-00133

For the Appellants:

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For the Appellee:

James M. Davis
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M E M O R A N D U M O P I N I O N

Members of Panel:

William M. Barker, Justice
Joe C. Loser, Special Judge
Roger E. Thayer, Special Judge

AFFIRMED. THAYER, Special Judge

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.

The employer, Baneberry Golf Course, and insurance carrier, U.S.F.&G. Company, have appealed from a judgment entered by the trial court awarding the employee, Scott M. Shultz, 50% permanent partial disability benefits to the body as a whole. The appeal presents issues concerning whether the court was in error in (1) awarding 50% disability, (2) exceeding the 2 ½ multiplier provisions set forth in T.C.A. § 50-6-241, (3) awarding certain unauthorized medical expenses and (4) awarding certain discretionary costs.

Plaintiff was 32 years of age and left school before completing the 12th grade. He does not have a G.E.D. certificate and his work experience has been in the construction industry where he has been a general laborer. He was employed by the defendant golf course as a maintenance worker which required him to operate a large mower and a weedeater about the golf course.

On August 23, 1995 while mowing, he noticed the mower deck had jumped its track. He stopped the tractor and squatted down to lift the deck up. As he lifted, he felt a sharp pain in his back and fell to the ground. A co-worker saw him and helped get him back to the shop and on to the hospital emergency room.

He testified he worked some period of time after the accident although it was painful; that he was laid off in October or November due to the seasonable nature of his work; that he was furnished a list of physicians and went to see Dr. Kevin Bailey during October, 1995.

The record indicates Dr. Bailey ordered an M.R.I. examination and the report showed a large central and right ruptured disc at the lowest disc level and a smaller herniation at the level above that. Dr. Bailey, a physical medicine specialist, did not believe surgery was necessary but referred him to Dr. Bishop, an orthopedic surgeon practicing in the same group, for a second opinion. Dr. Bailey gave a 7% medical impairment for his condition. Dr. Bishop recommended surgery and this was performed during March 1996. Plaintiff was eventually released to return to work on

June 10, 1996. He worked one day and stopped because of the pain he was encountering while working.

Plaintiff was later examined by two other orthopedic surgeons for evaluation purposes and was also examined by two vocational assessment witnesses.

At the trial below, he testified he had never had any problems with his back prior to this accident; that he still suffered a great deal of pain in his back and leg although surgery did seem to help for awhile; he said he was in pain most all of the time and could not sleep at night and that he could not work at any of the different jobs he had performed in the past.

A co-worker and a female companion living with him testified orally and agreed that he had no problems with his back prior to the incident in question.

All of the expert medical testimony and the vocational assessment testimony was presented by deposition.

Dr. Archer Bishop Jr., an orthopedic surgeon, testified surgery indicated "a ruptured disk with a large fragment at that lowest disk space on the right." He said this would have been at the L5-S1 level and he did not attempt to do anything at the L4-5 level and the changes there were due to the aging process and not his employment. He released plaintiff to return to work with restrictions of avoiding repetitive bending, stooping, etc. and not to lift more than 50 pounds. He opined he had an 8% medical impairment and said he still complained of pain on the last visit on June 25, 1996.

Dr. Gilbert Hyde, an orthopedic surgeon, testified he examined plaintiff on July 12, 1996 for evaluation purposes; that he reviewed the medical records of Dr. Bailey and Dr. Bishop and he was of the opinion the incident at work caused both ruptured discs as indicated on the M.R.I. report; that he felt plaintiff had a 21% medical impairment and should avoid repetitive bending, stooping, etc. and should avoid lifting over 30 pounds.

Dr. William J. Gutch, an orthopedic surgeon, also examined plaintiff for evaluation purposes. His examination was on August 8, 1996; he reviewed the medical records of Dr. Bailey and Dr. Bishop and the M.R.I. report and was of the opinion the incident at work caused both ruptured discs; he gave a 20% medical impairment and said plaintiff should not be lifting over 25-30 pounds, etc.

Dr. Norman Hankins, a vocational assessment consultant, testified he examined plaintiff and found his I.Q. to be 72 and that this would classify him as a slow learner. He said he could do simple reading but he would not qualify in a job as a salesperson or for doing clerical work. He fixed his vocational disability at 65-75%.

Dr. Rodney Caldwell, also a vocational assessment consultant, found his reading to be on an 11th grade level and math on a 4th grade level. He fixed his vocational disability at 50-55% considering the restrictions imposed by Drs. Gutch and Hyde but only 30-35% under restrictions imposed by Dr. Bishop.

Upon hearing this evidence, the trial court took the issues under advisement and later issued a detailed memorandum opinion covering the various issues in the case. In resolving the dispute, the court found the medical impairment to be 20% and fixed his legal disability at 50% to the body as a whole.

The case is to be reviewed de novo on appeal accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The first two issues can be considered together since they relate to the computation of the award of permanent partial disability. Defendants contend the trial court was in error in not accepting the 7% or 8% impairment given by Dr. Bailey or Dr. Bishop and then applying the 2 ½ multiplier which would cap the award at about 20%. First, we must note under the proof that the 2 ½ multiplier would not apply regardless of the finding of medical impairment. T.C.A. § 50-6-241 does not and cannot define all circumstances which might arise in determining whether there has or has not been a "return to work" within the meaning of the statute.

In a case of this nature, the court must assess the peculiar facts of the case and construe the statute to determine its application. The mere return to work at the same or greater wage does not automatically trigger the 2 ½ times multiplier. The intent of the legislature in passing this act was to encourage employers to return employees to work upon their recovery from an injury so that the employment relationship would continue on a regular basis.

If the court determines the "return to work" was meaningful in the sense of the statute, then the award is capped under subsection (a)(1). On the other hand, if the court determines the circumstances of the "return to work" were not meaningful, then

the award would be subject to a cap of six times the medical impairment under subsection (b).

In the present case the employee returned to work one day and left employment because of his physical condition which he testified prevented him from performing his duties as a maintenance worker. Therefore, we are of the opinion the return to work was not meaningful in the sense of the statutory wording, and that subsection (b) would limit the award to six times the medical impairment.

With reference to the trial court's finding of 20% medical impairment, the record displays a conflict of opinions varying from 7% to 21% impairment and also some conflict as to whether the second ruptured disc was work-related.

If there is conflicting medical testimony, the trial judge has discretion to conclude that the opinion of a particular expert should be accepted over that of another expert and that one expert's testimony contains a more probable explanation than another expert's testimony. *Thomas v. Aetna Life & Cas. Co.,* 812 S.W.2d 278 (Tenn. 1991).

While a treating doctor's testimony is entitled to considerable weight, the trial court is not bound by the testimony of any expert witness. *Orman v. Williams-Sonoma, Inc.,* 803 S.W.2d 672, 676 (Tenn. 1991); *Johnson v. Midwesco, Inc.,* 801 S.W.2d 804, 806 (Tenn. 1990).

The trial judge indicated in his memorandum opinion that he gave lesser weight to the testimony of Dr. Bailey because he did not seem to diagnose the problem correctly and lesser weight to the testimony of Dr. Bishop because he was in the same medical group as Dr. Bailey and because he did not appear to document findings about the patient as carefully as Drs. Gutch and Hyde.

From our independent review of the case, we cannot conclude the evidence preponderates against the findings of the trial court on the medical impairment rating. The award of 50% disability is well within the cap imposed by T.C.A. § 50-6-241(b).

An issue exists as to whether the trial judge was in error in allowing certain unauthorized medical expenses as part of the recovery. One bill was a statement dated April 14, 1997 from Hamblen Radiology Associates in the sum of $54.00. The statement indicated it was a balance carried forward as of January 12, 1997. The other bill was a form letter dated April 15, 1997 from Morristown-Hamblen Hospital in

the sum of $205.35. It did not indicate when the service was rendered or what the charges were for.

When asked about these bills, plaintiff testified he received the bills shortly before the trial on May 1, 1997 and that the charges were for treatment he had received for a nighttime visit to the emergency room. On cross-examination he admitted he had not been referred to the emergency room on this occasion by any designated physician but said they were not available to treat him during the nighttime.

Defendants concede T.C.A. § 50-6-204(g)(1) permits an injured employee in an emergency to incur unauthorized medical expenses to be charged to the employer [not to exceed $300.00] but contend plaintiff's visit was not an emergency. We respectfully disagree. Plaintiff testified it was necessary to seek treatment. Defendant offered no evidence to the contrary. We find the circumstances sufficient to qualify under this statutory exception to the general rule that a designated physician shall provide the medical care.

Defendants also contend there was no evidence to establish the medical expenses were reasonable and necessary. While the employee generally has this burden of proof, we are of the opinion the general rule has no application to these expenses. At the beginning of the trial when the trial court was asking about matters not in dispute, counsel for plaintiff stated all medical expenses had been paid except these two bills. Counsel for defendants replied, "I don't think there's a problem with any incurred medical expenses." We find this relieved plaintiff of this burden of proof.

A final issue deals with the question of whether the court was in error in awarding as part of discretionary costs, the deposition fee of Dr. Gutch ($500.), Dr. Hyde ($500.) and Dr. Hankins ($250.) and the court reporter's charges for taking and transcribing these depositions. Defendants contend the charges for the depositions are not allowable as these witnesses were not treating physicians and their testimony was not reasonable nor necessary. The motion for allowance of discretionary costs was filed under T.C.A. § 50-6-226(c) and Rule 54, T.R.Civ.P. To some extent we agree with this argument. The statute is generally restricted to charges of treating doctors but Rule 54.04 is not so restricted. This rule gives trial courts discretion to

award all costs for (1) reasonable and necessary court reporter expenses, (2) reasonable and necessary expert witness fees for depositions or trials, and (3) guardian ad litem fees. Travel expenses are excluded.

It is quite evident to us that the testimony of these witnesses was accepted by the trial court over other conflicting expert testimony. We find these costs to be reasonable and necessary to plaintiff's award of disability and recovery of benefits under Rule 54.

The judgment entered in the trial court is affirmed in all respects.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
William M. Barker, Justice

_____
Joe C. Loser, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED

September 23, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

SCOTT M. SHULTZ,	)	HAMBLEN CIRCUIT
	)	No. 95-CV-477
Plaintiff-Appellee,	)	
	)	
	)	No. 03S01-9707-CV-00133
v.	)	
	)	
	)	Hon. Kendall Lawson
BANEBERRY GOLF COURSE and UNITED STATES FIDELITY & GUARANTY COMPANY	)	Judge.
	)	
	)	
Defendants-Appellants,	)	

JUDGMENT ORDER

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 defendants/appellants, Baneberry Golf and Resort and USF&G and Surety,Thomas Kilday for which execution may issue if necessary.

09/23/98