

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 23, 2018 Session

ZORAN ANDRIC V. COSTCO WHOLESALE MEMBERSHIP, INC.

**Appeal from the Chancery Court for Shelby County
No. CH-13-1103-3 JoeDae L. Jenkins, Chancellor**

No. W2017-01661-SC-R3-WC – Mailed July 3, 2018; Filed August 2, 2018

Zoran Andric (“Employee”) alleged he was injured in the course and scope of his employment with Costco Wholesale Membership, Inc. (“Employer”). After a hearing, the trial court found Employee suffered a compensable injury to his right foot and awarded 64 percent permanent partial disability. Employer appeals. The appeal has been referred to the Special Workers’ Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the trial court’s finding Employee suffered a compensable injury to his right foot, but we modify the award to 26 percent permanent partial disability to the right foot.

**Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries
occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Chancery Court Affirmed as Modified**

DON R. ASH, SR.J. delivered the opinion of the court, in which ROGER A. PAGE, J. and WILLIAM B. ACREE, JR., SR.J., joined.

W. Troy Hart, Knoxville, Tennessee, for the appellant, Costco Wholesale Membership, Inc.

Christopher Taylor, Memphis, Tennessee, for the appellee, Zoran Andric.

OPINION

Factual and Procedural Background

Employee, age 52 at the time of trial, graduated from high-school in Bosnia and Herzegovina. He began working for Employer in the food preparation department in 2004.¹ On May 3, 2012, Employee was injured when a rack fell onto his right foot. He initially continued working, but increasing swelling caused him to inform his supervisor and a manager of the injury. On the date of the injury, Employee was examined by Dr. Ana Palmieri who placed his foot in a non-weightbearing cast for approximately three weeks and prescribed pain medication. After cast removal, Employee was placed in a walking boot. Between June and December 2012, Employee returned to Dr. Palmieri several times due to continuing pain and swelling in his foot. He received physical therapy and was fitted for orthotic shoe inserts. When Employee returned to work in January 2013, he had ongoing pain and swelling in his foot and was assigned to a new position. Employee believed the pain in his ankle, knee, and calf stemmed from wearing the walking boot.

Dr. Palmieri testified Employee suffered a transverse fracture of the metatarsal leading to the great toe. According to Dr. Palmieri, Employee also developed “dysesthesia and hyperesthesia of the foot,” meaning “the area that had the crush injury, the soft tissue, became very, very hypersensitive.” In December 2012, x-rays showed Employee’s fracture had healed; however, he continued to experience discomfort, loss of motion, and sensory deficits. Employee also developed Achilles tendonitis, but Dr. Palmieri opined the condition was not related to the initial work injury.

On January 7, 2013, Dr. Palmieri placed the Employee at maximum medical improvement and released him to work without restrictions. He assigned a 17 percent permanent impairment rating to the great toe, which equated to 3 percent to the foot, 2 percent to the lower extremity, and 1 percent to the body. Dr. Palmieri used a diagnosis-based impairment rating and considered range of motion, fracture displacement, and hyperesthesia.

Dr. Apurva Dalal examined Employee on April 22, 2013. According to Dr. Dalal, Employee’s range of motion in his interphalangeal joint was 10 degrees of flexion and 8 degrees of extension. Although the fracture had healed, Employee suffered moderate

¹Prior to working for Employer, Employee held a number of positions for BPI Packaging, Floratine, Vision Engineering, and the Germantown United Methodist Church.

degenerative disease in the affected area. Using a range of motion impairment rating, Dr. Dalal assigned 7 percent impairment to the lower extremity and 3 percent to the body as a whole; he equated 7 percent impairment rating to the lower extremity as 10 percent impairment to the foot. He acknowledged the AMA Guidelines prefer a diagnosis-based impairment rating and a range of motion impairment rating is used when no other method is available. However, he utilized a range of motion impairment rating due to Employee's reduced range of motion and he explained the impairment rating would be the same under either method.

Dr. Claiborne Christian conducted an independent medical examination on May 19, 2015. Employee complained of pain in his right foot but had no current swelling or numbness. Upon examination, Dr. Christian found Employee had normal muscle strength and no signs of nerve damage. He had normal flexion and extension of his great toe, but a slight loss of flexion at the interphalangeal joint. Dr. Christian concluded Employee's fracture had completely healed without arthritis in his foot. Dr. Christian, like Dr. Palmieri, used a diagnosis-based impairment rating for a "first metatarsal, nondisplaced fracture," and he assigned a 3 percent lower extremity impairment rating. According to Dr. Christian, 3 percent was the "default" rating and "when you took into account physical exam findings, clinical studies, functional history, there was no change from that default rating." Dr. Christian testified Dr. Dalal used a range of motion model in calculating the impairment rating and "no other examiner found the degree of range of motion loss that Dr. Dalal did." Although the AMA Guidelines required him to provide a rating for the lower extremity, Dr. Christian testified the impairment rating to the foot "would be [] 4 percent."

The trial court found Employee suffered an injury to his foot and "no permanent injury to any other part of the body that would justify the rating to the leg or other part of the body as a whole." Finding Dr. Dalal's opinion to be "the most appropriate," and considering Employee's age, education, work history and training, the trial court awarded 64 percent permanent partial disability. Employer appeals.

Standard of Review

Review of factual issues is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. *See* Tenn. Code Ann. § 50-6-225(a)(2). Considerable deference is afforded to the trial court's findings with respect to the credibility of witnesses and the weight to be given their in-court testimony. *Richards v.*

Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). When expert medical testimony differs, it is within the trial judge’s discretion to accept the opinion of one expert over another. The reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness. *Gray v. Cullom Machine, Tool & Die*, 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

I.

Employer argues the trial court erred in apportioning Employee’s impairment to the foot rather than to the body as a whole. Employee maintains the evidence does not preponderate against the trial court’s judgment.

As noted above, the trial court found Employee suffered an injury to his right foot and noted there was “no permanent injury to any other part of the body that would justify the rating to the leg or other part of the body as a whole.” Indeed, the evidence established Employee suffered a transverse fracture of the metatarsal leading to the great toe after a rack fell on his right foot. According to Dr. Palmieri, Employee continued to have pain and swelling in his foot and developed “dysesthesia and hyperesthesia of the foot.” Dr. Dalal and Dr. Christian likewise agreed Employee suffered a fracture of the metatarsal and had pain and swelling in his foot.

In support of its argument regarding apportionment, Employer relies on *Warren v. Auto-Owners Ins. Co.*, No. W2003–02017–WC–R3–CV, 2004 WL 1392282 (Tenn. Workers’ Comp. Panel June 21, 2014), in which the employee received benefits for his lower extremity where he had a broken fifth metatarsal, pain in his right foot when he walked or stood, and decreased strength and mobility in his leg and ankle. In *Warren*, unlike here, the trial court specifically found the employee had decreased strength and mobility in the *leg* and *ankle*. In the instant case, the trial court accredited Employee’s testimony regarding pain and swelling in his foot and the medical testimony demonstrates Employee suffered a fracture to his foot. In short, the evidence does not preponderate against the trial court’s finding.

II.

Next, Employer contends the trial court erred in accepting the opinion of Dr. Dalal over the presumptively-correct opinion of MIR physician Dr. Christian. *See* Tenn. Code Ann. § 50-6-204(d)(5). Employee argues the statutory presumption was rebutted by his own testimony and Dr. Dalal's testimony.

“When a dispute as to the degree of medical impairment exists, either party may request an independent medical examiner from the administrator's registry.” Tenn. Code Ann. § 50-6-204(d)(5). “The written opinion as to the permanent impairment rating given by the independent medical examiner pursuant to this subdivision (d)(5) shall be presumed to be the accurate impairment rating; provided, however, that this presumption may be rebutted *by clear and convincing evidence to the contrary.*” *Id.*; *see Mansell v. Bridgestone Firestone North American Tire, L.L.C.*, 417 S.W.3d 393, 412-13 (Tenn. 2013) (emphasis added).

According to Dr. Christian, Employee experienced pain in his right foot but no swelling or numbness, normal flexion and extension of his great toe, a slight loss of flexion at the interphalangeal joint, and normal muscle strength with no signs of nerve damage. Dr. Christian testified Employee's fracture had healed, and he had no arthritis in his foot. Like Dr. Palmieri, Dr. Christian used a diagnosis-based impairment rating for a “first metatarsal, nondisplaced fracture diagnosis,” and he assigned a 3 percent impairment rating to the lower extremity. Dr. Christian further stated “if [he] was going to assign an impairment rating to the foot it would be 4 percent.”

Although the impairment rating assigned by Dr. Christian was entitled to the statutory presumption under section 50-6-204(d)(5), the trial court's order did not address whether such presumption was rebutted by clear and convincing evidence.² Without elaboration, the trial court found “Dr. Dalal's opinion is the most appropriate.”

Our review of the record reveals no evidence indicating Dr. Christian used an incorrect method or incorrectly interpreted the AMA Guidelines. Dr. Christian's findings and conclusions were consistent with those of the treating physician, Dr. Palmieri. Moreover, Dr. Christian, like Dr. Palmieri, used a “diagnosis-based” impairment rating as required by the AMA Guidelines. Accordingly, given the absence of findings by the trial court and the lack of clear and convincing evidence to rebut the statutory presumption,

²From the bench, the trial court discussed the medical testimony and observed it was “helpful” but “not binding” on the issue of impairment. However, the Court's oral ruling was not incorporated into its written order. *See Alexander v. JB Partners*, 380 S.W.3d 772, 777 (Tenn. Ct. App. Nov. 1, 2011) (“[A] court speaks through its orders and not through the transcript.”) (citations omitted).

we conclude the trial court erred in failing to presume the correctness of the impairment rating provided by Dr. Christian.

III.

Finally, Employer argues the trial court erred in awarding 64 percent permanent partial disability benefits. Employee contends the evidence does not preponderate against the trial court's findings.

“In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and [his or her] capacity to work at the kinds of employment available in [his or her] disabled condition.” *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). The trial court is not bound to accept physicians' opinions regarding the extent of an employee's disability, but should consider all of the evidence to decide the extent of the employee's disability. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 677 (Tenn. 1983).

In awarding 64 percent permanent partial disability, the trial court found Employee suffered “significant loss to the foot due to swelling, pain, and numbness” and noted “a decrease in jobs in th[e] market” due to his “age, training and limited education.” Although we defer to these findings, we reiterate the trial court erred in applying Dr. Dalal's impairment rating of 10 percent and in failing to apply the statutory presumption with respect to the impairment rating assigned by Dr. Christian as part of the MIR process. *See* Tenn. Code Ann. § 50-6-204(d)(5). As explained above, the 4 percent impairment rating assigned by Dr. Christian is presumptively correct absent clear and convincing evidence to the contrary. Finding none, we apply the 4 percent impairment rating and modify the award to 26 percent permanent partial disability to the right foot. We remand to the trial court for the calculation of benefits and for any further proceedings consistent with this decision.

Conclusion

The judgment of the trial court is affirmed as modified and the case is remanded to the trial court for further proceedings consistent with this opinion. Costs are taxed to Employer, for which execution may issue if necessary.

DON R. ASH, SENIOR JUDGE

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

ZORAN ANDRIC v. COSTCO WHOLESALE MEMBERSHIP INC.

**Chancery Court for Shelby County
No. CH-13-1103-3**

No. W2017-01661-SC-R3-WC – Filed August 2, 2018

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 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 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 are assessed to Employer, Costco Wholesale Membership, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM