IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 23, 2011 Session

CHEROKEE INSURANCE COMPANY, INC. v. RALPH MCNABB

Appeal from the Chancery Court for Greene County
No. 20090268 Thomas R. Frierson II, Chancellor

No. E2010-02348-WC-R3-WC-FILED-AUGUST 29, 2011

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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. Ralph McNabb ("Employee") sustained a right rotator cuff tear as the result of a motor vehicle collision while employed as a truck driver by Everhart Transportation ("Employer"). Employer was insured for workers' compensation by Cherokee Insurance Company, Inc. ("Insurer"). Employee underwent surgical repair of his right rotator cuff and was returned by Employer to a different, part-time position. Employee suffered a recurrent rotator cuff tear and thereafter retired. It is undisputed that Employee was not returned to employment at the same or greater wage than prior to his injury. Employee's treating physician and his evaluating physician both assigned him an anatomical impairment rating of 10% to the body as a whole, but with different restrictions. The trial court awarded 60% permanent partial disability ("PPD") to the body as a whole. Insurer has appealed, asserting that the award was excessive. We affirm the judgment.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which GARY R. WADE, J., and, JERRI S. BRYANT, SP. J., joined.

Robert M. Asbury, Knoxville, Tennessee, for the appellant, Cherokee Insurance Company, Inc.

John P. Dreiser, Knoxville, Tennessee, for the appellee, Ralph McNabb.

MEMORANDUM OPINION

Factual and Procedural Background

Employee has a tenth grade education, with limited reading, math and intellectual capabilities. He worked as an over-the-road truck driver for approximately 45 years. He began working for Employer in this capacity in 1997. In June 2007, Employee sustained a work-related injury to his right rotator cuff as the result of a motor vehicle collision. Employee was 64 years old at the time of his injury.[1]

Employee suffered pain and tenderness in his right shoulder, as well as restriction in his range of motion. Employee was treated by Dr. Greg Stewart, an orthopedic surgeon. Dr. Stewart performed a surgical right rotator cuff repair in October 2007. Following surgery, Employee continued to suffer pain and restricted motion in his right shoulder. According to Dr. Stewart, who testified by deposition, Employee did not progress very well.

In December 2007, Employee returned to work with Employer in a different position, at a lower wage, and on a part-time basis. Employee continued to experience pain and restricted motion in his right shoulder. In April 2008, Dr. Stewart determined that Employee had suffered a recurrent full thickness tear of the supraspinatus in his right shoulder after his return to light duty work. Employee declined further surgery, which Dr. Stewart testified was entirely reasonable given that Employee had obtained no significant benefit from the first surgery. Subsequently, Employee retired from his position with Employer. Dr. Stewart placed Employee at maximum medical improvement in May 2008 and assigned him an anatomical impairment rating of 10% to the body as a whole. Dr. Stewart restricted Employee to "no lifting greater than 30 pounds above chest level." Dr. Stewart last saw Employee in October 2009 and noted that Employee continued to suffer from pain in his shoulder.

In February 2009, Employee was evaluated by another orthopedic surgeon, Dr. William Kennedy. Dr. Kennedy, who testified by deposition, noted that Employee continued to suffer intermittent activity-related pain in his right shoulder and that Employee had not regained normal range of motion. Dr. Kennedy observed that Employee's injury had caused him to reduce and to modify his activities of pulling, reaching, or twisting with his right hand and interfered with his bathing, dressing, grooming, balance and agility, and sleeping. Dr. Kennedy further noted that an April 2008 MRI demonstrated a recurrent tear, and, on testing,

[1] While there is evidence that Employee had suffered previous work-related injuries, there is no evidence that those injuries resulted in any permanent restrictions or otherwise impeded Employee's performance of his job.

found Employee's range of motion in his right shoulder was substantially reduced. Like Dr. Stewart, Dr. Kennedy assigned Employee an anatomical impairment rating of 10% to the body as a whole. However, in contrast to Dr. Stewart, Dr. Kennedy imposed greater restrictions on Employee. These included no rapid, repeated movements with the right hand; no work with the right hand away from the body or above the chest; no climbing ladders or working at heights; no working on hands and knees or crawling; and no lifting, carrying, pushing, or pulling either more than 20 pounds occasionally or 10 pounds frequently with both hands, or more than 5 pounds occasionally with the right hand alone.

In May 2010, Employee was evaluated by vocational expert A. Bentley Hankins at the request of Employee's attorney. According to Hankins' deposition testimony, he interviewed Employee, performed a job analysis, performed educational and vocational testing, and reviewed Employee's medical records. Hankins noted that Employee was 67 years old, had an eleventh grade education, had not obtained his GED, and had worked for 45 years as a truck driver, which Hankins testified was a semi-skilled, medium-exertion job. On testing, Employee demonstrated a below average to low average IQ, basic academic skills at a fourth grade level, and reading and math at a fifth grade level. Based on his evaluation, Employee's age, and Dr. Kennedy's restrictions, Hankins testified that Employee had no transferable job skills, that those jobs available to him prior to his injury, including driving a truck, were now not available to him, and that he had no reasonable employment opportunities.

Insurer's vocational expert, Dr. Craig Colvin, testified live at trial. Dr. Colvin testified that he did not interview or test Employee; he only performed a records review. Dr. Colvin initially testified that Employee had transferable job skills and that there were approximately 4,000 to 6,000 jobs in the area within Dr. Stewart's restrictions. Dr. Colvin assigned Employee a 40% to 50% vocational impairment rating based on Dr. Stewart's restrictions and a 75% to 85% vocational impairment rating based on Dr. Kennedy's restrictions. However, when asked to consider Employee's age and limited education, Dr. Colvin testified that even with only Dr. Stewart's restrictions, Employee's vocational impairment rating was 75% to 85%. According to Dr. Colvin, considering Employee's age and education, as well as the restrictions imposed by Dr. Stewart or Dr. Kennedy, there was not really much difference between his vocational impairment rating and that of Hankins.[2]

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[2] The specific exchange between the Employee's attorney and Dr. Colvin was as follows:

Q: Now, the one thing I did not hear you tell the Chancellor, which I think is very important . . . is when we consider [the Employee]'s age of 67 years old and his education of less than high school, it is your belief that he has a 75 to 85 percent disability; correct?
A: Correct.
Q: Just so somewhere down the road in case we're before the special panel of the Tennessee

(continued...)

Employee testified at trial that he was 67 years old and had a tenth grade education. He had never received his GED. According to Employee, he was slow at learning in school. He had never used a computer and had not had training to use one. He had done some construction work and then had driven trucks for his entire work history. At the time Dr. Stewart released him, Employee still experienced tightness, pain and limited motion in his shoulder. He had trouble lifting, could not reach over his head, had pain upon lifting, and could not climb a ladder. He could perform some household chores.

The trial court found that Employee's injury was causally connected and related to his employment. The trial court further concluded that Employee did not have a meaningful return to work following his injury and, consequently, that the statutory cap of 1.5 times the Employee's anatomical impairment rating did not apply. See Tenn. Code Ann. § 50-6-241(d)(1)(A) (2008 & Supp. 2010). The trial court awarded Employee a 60% PPD to the body as a whole. Insurer has appealed, contending that the trial court erred by assigning this impairment rating rather than a rating of 40% to 50%. Employee, in turn, asserts that this appeal is frivolous.

Standard 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 the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898, 900 (Tenn. 2009). "When 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

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[2](...continued)
Supreme Court considering age, education and his restrictions of his treating physician, this man has between a 75 and 85 percent disability?
A: I said a 40 to 50 percent from the treating physician.
Q: Considering his age and education and the restriction by Doctor St[ew]art, your opinion is it's 75 to 85 percent; correct?
A: I think I said that to you in the depo.
Q: You're not changing your testimony here today; correct?
A: No, sir.
Q: So even not only in the deposition, but today it's 75 to 85 percent considering the factors required to be relevant by this Court?
A: That's true.

conclusions with regard to those issues." Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. *Excessive Award*

Insurer argues that the trial court's award of 60% PPD to the body as a whole is excessive. According to Insurer, the trial court should have awarded 40% to 50%, consistent with the restrictions imposed by Dr. Stewart and the opinion of Insurer's vocational expert, Dr. Colvin. Employee responds that Insurer misrepresents the significance of Dr. Colvin's live testimony because Dr. Colvin acknowledged that, when considering Employee's age, education, and either doctor's restrictions, Employee's vocational disability was 75% to 85%, the same figure reached by Employee's vocational expert, Hankins.

It is undisputed that Employer did not return Employee to work at the same or greater wage than prior to his injury. Tennessee Code Annotated section 50-6-241(d)(2)(A) provides as follows:

> For injuries arising on or after July 1, 2004, in cases in which the pre-injury employer did not return the injured employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability benefits that the employee may receive for body as a whole and schedule member injuries subject to subdivision (d)(1)(A) may not exceed six (6) times the medical impairment rating determined pursuant to the provisions of § 50-6-204(d)(3). The maximum permanent partial disability benefits to which the employee is entitled shall be computed utilizing the appropriate maximum number of weeks as set forth in § 50-6-207 for the type of injury sustained by the employee. In making such determinations, the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

Employee was 64 years old at the time of his injury. He did not complete high school and had limited intellectual capabilities. Virtually his entire work history had been as a truck driver. Despite surgical treatment for his rotator cuff injury, Employee had not recovered fully, and, in fact, had not progressed well and had suffered a recurrent injury. Employee

continued to suffer pain and limitation of his range of motion. Both his treating and evaluating physicians assigned Employee the same anatomical impairment rating of 10% to the body as a whole. Both imposed restrictions on Employee's activities, although the evaluating physician, Dr. Kennedy, imposed more substantial restrictions. Perhaps most telling, even Insurer's vocational expert, Dr. Colvin, conceded that considering his age, education and the restrictions placed upon him by either Dr. Stewart or Dr. Kennedy, Employee's vocational impairment was 75% to 85%. Based upon this evidence, we are unable to conclude that the trial court's award of 60% PPD to the body as a whole is excessive.

2. *Frivolous Appeal*

Employee argues that Insurer's appeal is frivolous. We agree. Tennessee Code Annotated section 50-6-225(h) provides as follows: "When a reviewing court determines pursuant to motion or sua sponte that an appeal of an employer or insurer is frivolous, or taken for purposes of delay, a penalty may be assessed by the court, without remand, against the appellant for a liquidated amount." "A frivolous appeal is one that is 'devoid of merit such that it had no reasonable chance of succeeding.'" Henderson v. SAIA, Inc., 318 S.W.3d 328, 341 (Tenn. 2010) (quoting Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 50 n. 4 (Tenn. 2004)).

In light of Dr. Colvin's testimony that Employee suffered 75% to 85% disability when considering his age, education, past work history and physical restrictions, it is difficult to envision any circumstance under which this appeal would have been successful. Therefore, we assess upon Insurer a penalty of two thousand dollars ($2,000) for this frivolous appeal.

Conclusion

The judgment of the trial court is affirmed. Costs of this appeal are taxed to the Insurer, Cherokee Insurance Company, Inc., and its surety, for which execution may issue if necessary.

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JON KERRY BLACKWOOD, Senior Judge

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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 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 of this appeal are taxed to the Insurer, Cherokee Insurance Company, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM